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# Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern

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*Brudney, Schiavoni, and Merritt address an important debate dividing lawyers and political scientists: To what extent do extradoctrinal factors such as political party, gender, and professional experience influence judicial decisionmaking? They analyze an area of law, decisions interpreting the National Labor Relations Act, that has long been characterized by assertions of judicial bias. By including every federal court of appeals decision applying the Act over a seven year period, and controlling for both deference to the administrative agency and differences among issues arising under the Act, the authors are able to identify previously undetected influences on judicial decisionmaking. These include a strong interaction between gender and political party, the influence of prior experience representing management clients under the Act, and associations based on race, religion, and educational background. At the same time, the authors place those influences in context, suggesting the complex interweaving of doctrine and personal background in shaping judicial decisions.*

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## INTRODUCTION

> "What chance has labor, the laborers, for fair play when the whole history of jurisprudence has been against the laborer?"[1]

Seventy years ago, Felix Frankfurter and Nathan Greene expressed the widely held view that federal courts were far from neutral in their approach to labor-management disputes.[2] Although Congress enacted two major labor protection statutes in the 1930s,[3] federal appellate judges in the ensuing decades have been accused of undermining statutory protections for various forms of concerted activity. Such critiques rest on the claim—at times openly stated by legal scholars—that federal courts are systematically opposed to workers' interests in unionization and collective action.[4] There is some empirical evidence to support the assertion that, in the aggregate, federal courts of appeals have been unusually chary of the statutory rights asserted by workers and their unions.[5] Yet this assertion of persistent

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[1] Samuel Gompers, Debate (1903), *quoted in* 1 THE GREEN BAG 306, 314 (2d ser. 1998).

[2] *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 200–05 (1930). Labor leaders viewed courts as the enemy of workers well before 1930. *See* Bernard D. Meltzer, *The Brandeis—Gompers Debate on "Incorporation" of Labor Unions*, 1 THE GREEN BAG 299, 313–15 (2d ser. 1998) (reporting text of 1903 debate between Louis Brandeis and Samuel Gompers on the legal accountability of labor unions, in which Gompers intoned that courts had consistently "transgress[ed] upon the rights of wage earners"). More recently, legal scholars other than Frankfurter and Greene have reached the same conclusion. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 33, 52–53, 151–52, 199–201 (1991) (describing federal judges' opposition to worker interests in late 19th century); *see generally* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937 (1994).

[3] Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932); National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935).

[4] *See, e.g.*, CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, 239–41, 319–21 (1985); Julius Getman, *Of Labor Law and Birdsong*, 30 CONN. L. REV. 1345, 1349–50 (1998); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 293–336 (1978); George Schatzki, *It's Simple: Judges Don't Like Labor Unions*, 30 CONN. L. REV. 1365, 1366–70 (1998).

[5] *See* RONDAL GENE DOWNING, THE FEDERAL COURTS AND LABOR RELATIONS POLICY, 1936–1954: A STUDY OF JUDICIAL DECISION MAKING 137–38 (1956) (Ph.D. dissertation, University of Illinois) (reporting that National Labor Relations Board orders were fully enforced in 63.3% of all unfair labor practice cases between 1936 and 1954, compared with full judicial enforcement for 80% of orders issued by Securities and Exchange Commission, 70% of orders issued by Federal Trade Commission, and 66% of orders issued by Federal Power Commission); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal*

result-oriented jurisprudence conflicts with the traditional legal process belief that judicial decisions are shaped by more or less objectively discernible factors such as the plain meaning of statutory text, the intent of the legislature, and the controlling weight of agency or court precedent.[6]

Disagreement about how judicial attitudes affect labor law decisionmaking by federal appellate courts is at the core of a broader debate that tends to pit the legal profession against political scientists. Judges and many legal scholars recognize that appellate courts have considerable discretion in deciding particular cases, but they emphasize the importance of language, precedent, and logical reasoning in cabining the exercise of such discretion.[7] By contrast, many political scientists accept the formal limits imposed by law and judicial custom, but they emphasize the role of judges' policy preferences within these relatively soft constraints.[8] In recent years,

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*Administrative Law*, 1990 DUKE L.J. 984, 1013–22 (reporting that in 1984–1985, the National Labor Relations Board had a lower affirmance rate in the courts of appeals (75%) than other agencies that also act almost exclusively through adjudication and have a similarly high volume of cases, i.e. the Immigration and Naturalization Service (83% of orders fully affirmed) and the Merit Systems Protection Board (90% of orders fully affirmed)).

[6] *See* Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOYOLA L.A. L. REV. 993, 996–97 (1993); Patricia M. Wald, *Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1, 10–11 (1984); *see generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 403–576 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[7] *See* Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 982–88 (1993); Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 388–95 (1983); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634–35 (1995); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736 (1987). While legal realists, public choice theorists, and proponents of critical legal theory qualify as a diverse chorus of dissenters within the legal community, the legal process perspective—based on reasoned elaboration of objective doctrine and rules—remains the dominent lawyerly explanation for judicial decisionmaking. *See generally* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995).

[8] *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 64–65 (1993); Gregory A. Caldeira, Book Review, 88 AM. POL. SCI. REV. 485, 485 (1994) (reviewing SEGAL & SPAETH, *supra*) ("I can think of no political scientists who would take plain meaning, intent of the framers, and precedent as good explanations of what the justices do in making decisions"); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 42 (1997); John M. Scheb II et al., *Ideology, Role Orientations, and Behavior in State Courts of Last Resort*, 19 AM. POL. Q. 324, 324 (1991) (stating that "[t]here is little doubt among students of the judicial process that ideology, in the sense of liberalism versus conservativism, is a significant predictor of judicial behavior"). Law professors as well as political scientists have expressed similar views with specific reference to intermediate appellate courts. *See* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 57–65 (1997); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO

scholars using complex quantitative techniques have sought to identify connections between biographical background factors that allegedly shape judges' policy preferences and the decisions reached by those judges.[9] While the studies have produced nothing approaching consensus, scholars have often identified the political party of the appointing President as important in helping to predict judicial decisions.[10] The evidence regarding the explanatory value of other social background factors has been at best mixed or inconclusive.[11]

Relying on a database of unprecedented richness, our study offers new insights into both of these debates. We have identified every appellate court decision that reviewed an adjudication by the National Labor Relations Board (NLRB or Board) involving liability or relief during a recent seven year period. We coded all individual issues within the cases that reflect court determinations on liability or relief. We also identified the federal judges who participated on the court of appeals panels and how they voted with respect to each issue. The result is over 2,000 substantive labor law issues on which appellate courts either affirmed or reversed the Board, giving rise to more than 6,000 judicial votes. Further, for each of the 223 participating appellate court judges, we coded a broad range of biographical factors that reflect personal attributes, educational preparation, and pre-judicial political and professional experience. Using logistic regression and related statistical analyses, we are able to focus on which social background factors are significantly more likely to predict judicial votes supporting, or rejecting, the union's legal position in the courts of appeals.

Our study of judicial behavior includes numerous distinctive strengths. The database of all 1,224 decisions issued during a seven year period allows us to analyze a full universe of cases including unanimous unpublished affirmances, as well as an intermediate subset of decisions that were published in the *Federal Reporter* and a smaller grouping of divisive cases that present close, controversial issues—reversals and nonunanimous affirmances. Most prior studies of judicial behavior have focused on published decisions or divisive cases,[12] in part because

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ST. L.J. 1635 (1998); Richard L. Revesz, *Environmental Regulation, Ideology and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997); Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals 1955–1986*, 43 W. POL. Q. 317, 320 (1990).

[9] *See infra* Part I.

[10] *See infra* Part I.A.3.

[11] *See infra* Part I.A.2.

[12] *See, e.g.*, Kevin L. Lyles, *Presidential Expectations and Judicial Performance Revisited: Law and Politics in the Federal District Courts, 1960–1992*, 26 PRESIDENTIAL STUDIES Q. 447 (1996) (examining cases that receive a full written opinion and have precedential value); Songer & Davis, *supra* note 8 (examining published opinions); C. Neal Tate, *Personal Attribute Models*

it is extremely difficult to track down nondivisive cases that are unpublished.[13] Further, a database that codes for issue outcomes can account for important complexities within cases. Issue-specific analysis allows for distinctions between single-issue and multi-issue cases; it reflects the presence of mixed results within a single case;[14] and it facilitates recognition of substantive areas of law that generate unusual levels of conflict between the Board and the appellate courts.[15] Once again, most prior studies have focused on case outcomes while omitting issue-specific discussion.

In addition, we build on this database through the use of logistic regression equations incorporating a broad range of social background factors as independent variables. This statistical analysis enables us to isolate the significance of each particular background factor while controlling for other effects and then to assess the magnitude of those factors that are statistically significant. Many earlier studies either utilized bivariate comparisons that did not control for other variables or else employed a less reliable type of regression analysis.[16] Finally, in assessing which social background variables are significantly related to judges' positions for or against the union, we specifically control for the outcome before the NLRB and for the effects of being in a particular court of appeals. To the extent that prior studies have failed to address the effects of judicial deference to agency determinations, or of sharp variations in circuit court cultures, they have overlooked important constraints on the behavior of individual appellate judges.

The results we report are surprising in some respects. We found that college

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*of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355, 356 (1981) (examining nonunanimous decisions); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals 1961–64*, 60 AM. POL. SCI. REV. 374 (1966) [hereinafter *Voting Behavior*] (examining unanimous reversals and nonunanimous decisions).

[13] *See* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 944 (1989) (discussing widespread circuit court practices that limit distribution and avoid indexing of unpublished opinions); Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 547–48 (1997) (observing that restricted publication lowers the cost of legal research precisely because unpublished opinions *are* inaccessible).

[14] A case is classified as a reversal if the outcome below was not fully affirmed or enforced. In a case involving six issues, the party prevailing below may win four issues while losing two. Issue-specific analysis reflects the affirmed outcomes as well as the reversed ones.

[15] *See, e.g.*, *infra* note 152 and accompanying text (discussing disproportionately high reversal rate where Board held that employer violated section 8(a)(5) of the NLRA).

[16] *See infra* note 25 (discussing studies based on bivariate analysis and studies based on stepwise regression).

background and prior experience representing management in NLRA matters were significantly associated with a judge's stance toward unions' claims. Judges who graduated from elite colleges were significantly more likely to reject the union's position in the courts of appeals than judges who graduated from less prestigious schools. Conversely, judges who had represented management in NLRA matters before joining the bench were significantly more likely to *support* union claims than judges who lacked that professional experience. We also found that elected office experience, law school background, age, religion, and race reliably predicted votes under some circumstances.

We identified important effects as well that are related to political party, gender, and year of appointment. Democratic men, Democratic women, and Republican women all were significantly more likely than Republican men to support the union's position in most analyses. At the same time, more recent appointees from both parties were significantly less likely to support the union's position, a finding that may carry special weight when contemplating the future direction of NLRA law.

The persistent impact of various social background factors indicates the inadequacy of a purely doctrinal explanation for appellate court decisions, at least in the labor relations area. Although our findings are subject to some qualifications, they strongly suggest that specific attributes and experiences do influence judicial approaches to substantive law issues. Insofar as such factors are affecting either judicial attitudes or judicial reliance on reasoned analysis, this raises important questions regarding the training and education of judges, the self-awareness of these judicial actors, and the appropriate response from scholars who subscribe to the traditional doctrinal approach.

Part I of the Article briefly describes current scholarly debates over the value of judicial attributes in helping to explain court decisions. Part I also identifies some key hypotheses we set out to explore with respect to judicial decisions in the labor relations area. Part II sets forth the methods used in our study, including how we coded issues and judges, and the different ways in which we assess the importance of our findings. Part III presents our findings, while Part IV discusses them and places them in the context of other studies. Part IV also considers some of the limitations on our results and identifies possible areas for further analysis.

## I. CASELAW OUTCOMES AND JUDICIAL ATTRIBUTES

This study analyzes appellate judges' voting patterns in a particular substantive law area over a recent seven year period. A proper understanding of the results requires a brief overview of the judicial behavior model we apply. While recognizing that the model has limitations, we believe that as used here it can shed light on the decisionmaking process of federal judges.

## A. *The Social Background Approach*

Empirical research into judicial behavior acknowledges the relevance of case-specific facts and legal precedent, but posits that judges' personal traits, their educational training, and their pre-judicial activities can help explain court decisions.[17] In particular, a number of social scientists contend that pre-court life experiences play a prominent role in shaping the personal values and policy preferences of judges, and that such biographical factors can be useful in predicting judicial decisions.[18] Among the potentially relevant biographical factors, personal traits include a judge's race, gender, religion, and age. Educational preparation includes the prestige or rank of the college and law school from which a judge graduated, the educational institution's geographic region, and whether the institution was public or private. Pre-judicial professional experience covers factors such as whether an individual held elected office or a state court judgeship prior to becoming a federal judge, the nature of the judge's previous law practice, and the political party of the appointing President, which is used as a proxy for the judge's own ideological orientation.

### 1. *General Concerns*

The social background model has drawn criticism from a number of quarters. It is accused of undervaluing legal doctrine, in particular of failing to appreciate how judges develop that doctrine primarily through reasoned elaboration of language and precedent in written decisions, not through subconscious infiltration of life experiences.[19] In addition, the model is said to overlook an important life experience for all judges—their adaptation to the role of a judge. A central aspect of the judicial role involves earning respect from attorneys, fellow judges, and one's own law clerks through impartial analysis that eschews personal value choices.[20] A further

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[17] *See, e.g.*, Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277 (1988); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–1988*, 35 AM. J. POL. SCI. 460 (1991); *see generally* S. Sidney Ulmer, *Are Social Background Models Time-Bound?*, 80 AM. POL. SCI. REV. 957 (1986).

[18] *See* Aliotta, *supra* note 17; HENRY R. GLICK, COURTS, POLITICS AND JUSTICE 313 (3d ed. 1993); *see generally* BAUM, *supra* note 8, at 63 (discussing relationship between judges' career experiences and their orientation toward legal versus policy perspectives).

[19] *See* Abrahamson, *supra* note 7, at 987–88; Edward L. Rubin, *Law And and the Methodology of Law*, 1997 WIS. L. REV. 521, 545–46 (1997); Shapiro, *supra* note 7, at 737; *see generally* BAUM, *supra* note 8, at 17–19 (discussing a typology of possible goals for judges).

[20] *See* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM xxiii, 184–85 (1981); Kozinski, *supra* note 6, at 994; James L. Oakes, *On the Craft and*

aspect of that role at the appellate court level involves the influence of fellow panel members. An appellate court judge may be inclined to defer to a colleague with recognized expertise in the subject matter area;[21] she may feel constrained to follow precedent by the prospect of whistleblowing from a politically opposed member of the panel;[22] she may forego voting for her own policy preferences in order to be on the winning side of a decision;[23] or she may moderate her initial views as part of a collegial process that yields a mutually acceptable judgment.[24]

Apart from slighting the importance of legal doctrine and the judicial role, the social background model suffers from internal difficulties. Some statistical techniques used to quantify the importance of personal, educational, and professional experiences have been criticized as incomplete or distortive.[25] Certain

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*Philosophy of Judging*, 80 MICH. L. REV. 579, 588 (1982).

[21] *See* Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 103 (1989) (contending that appellate court judges use stare decisis as a form of "expertise-trading," in which they defer to colleagues with specialized knowledge); *see also* Terry Bowen, *Consensual Norms and the Freshman Effect on the United States Supreme Court*, 76 SOC. SCI. Q. 222, 229 (1995) (contending that newly appointed Justices experience difficulty adjusting to their new duties and responsibilities, and they write significantly fewer opinions than their senior colleagues during this freshman period); Eloise C. Snyder, *The Supreme Court as a Small Group*, 36 SOC. FORCES 232, 237 (1958) (arguing that the "freshman effect" includes tendency of new Justices to vote with a centrist bloc, and to join liberal or conservative blocs only later in their judicial careers). A number of scholars have questioned or doubted the existence of such a freshman effect on the Supreme Court. *See, e.g.*, Edward V. Heck & Melinda Gann Hall, *Bloc Voting and the Freshman Justice Revisited*, 43 J. POL. 854 (1981); Albert P. Melone, *Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy*, 74 JUDICATURE 6 (1990); John M. Scheb II & Lee W. Ailshie, *Justice Sandra Day O'Connor and the "Freshman Effect,"* 69 JUDICATURE 9 (1985).

[22] *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 YALE L.J. 2155, 2173–75 (1998).

[23] *See* George, *supra* note 8, at 1686–88; *see also* Revesz, *supra* note 8, at 1732–34, 1751–56 (finding some support for the hypothesis that an appellate court judge adjusts her views to avoid writing a dissent).

[24] *See* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358–61 (1998).

[25] *See* JAROL B. MANHEIM & RICHARD C. RICH, EMPIRICAL POLITICAL ANALYSIS: RESEARCH METHODS IN POLITICAL SCIENCE 280–81 (1991) (describing bivariate comparisons as useful but unsophisticated in not controlling for other variables that might affect the relationship); WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 401 (3d ed. 1997) (criticizing stepwise regression for failing to recognize that the order in which independent variables are inserted will affect findings of significance); PETER KENNEDY, A GUIDE TO ECONOMETRICS 52 (3d ed. 1992) (same); Michael S. Lewis-Beck, *Stepwise Regression: A Caution*, 5 POL. METHODOLOGY 213, 234–235 (1978) (same).

For examples of judicial behavior studies that relied on bivariate comparisons, see Robert A.

social background variables also may differ substantially in importance depending on the distinct era or time frame of a court's operation.[26] Further, at least one often-invoked variable—the political affiliation of the judge or the appointing President—may have limited explanatory value to the extent it is less a cause of judicial attitudes than a reflection of policy preferences already formed.[27]

More generally, social background factors can be both causes and indicators of judicial voting patterns, with some factors more causally linked than others. Scholars relying on the social background approach have struggled with this issue and have yet to formulate a consistent theory that identifies when background factors are influential causes—as opposed to reflective indicators—of judicial behavior.[28] At a minimum, judges' social background variables do not mechanically translate into judicial policy preferences when considering their potential impact or influence on the decisionmaking process; the relationship seems too complex and

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Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298 (1993); Lyles, *supra* note 12. For examples of judicial behavior studies that relied on stepwise regression, see Tate, *supra* note 12; S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947–1956 Terms*, 17 AM. J. POL. SCI. 622 (1973).

[26] *See* ROBERT A. CARP & C.K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 34–36 (1983) (finding that Democratic district court judges decided issues very similarly to Republican appointees between 1953 and 1969, but then became markedly more liberal in their decisions between 1969 and 1977); Ulmer, *supra* note 17, at 961–64 (finding that father's government service has no effect on judge's attitude towards government as litigant from 1903-1935 but significant positive effect from 1936-1968).

[27] *See* SEGAL & SPAETH, *supra* note 8, at 232 (discussing reciprocal linkages between party affiliation and judicial attitudes); Malcolm M. Feeley, *Another Look at the "Party Variable" in Judicial Decision-Making: An Analysis of the Michigan Supreme Court*, 4 POLITY 91, 101–03 (1971) (contending that party affiliation may be simply an organizing or summarizing variable in accounting for voting differences among judges). Presidential selection of appellate court judges has been overwhelmingly partisan for more than half a century. Such consistency reflects, at least in part, an effort by each President to assure a relatively homogeneous public policy cohort. *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 355 (1997) (reporting that, except for Truman and Carter appointees, over 90% of court of appeals judges came from President's own party); *see also* Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 240 (1999) (suggesting that convergence of judicial votes and partisan policy views is likely a result of the fact that "the same life experiences that channel a judge's choice of political parties also guide her judicial decisionmaking").

[28] *See* BAUM, *supra* note 8, at 131–43 (discussing tensions between economically and psychologically grounded approaches to judicial behavior, and suggesting that economic perspective tends to focus on coherence—as exemplified by successful prediction—while psychological perspective tends to address comprehensiveness by probing more deeply into sources of behavior).

indirect to be identified as simply causal.

Given the range of concerns raised, it is understandable that empirical analyses based on the social background approach have yielded mixed results. A thorough examination of empirical studies applying the social background model is beyond the scope of this Article. We will, however, review social science results directed at the possible influence on judicial decisionmaking of one personal attribute, gender, and one pre-judicial experience, political party affiliation. Prior studies addressing these two variables are reasonably representative of the larger literature. Moreover, because the two variables figure prominently in our own study, these prior results help set the stage for the findings and discussion that follow.

### 2. *Gender and Judicial Outcomes*

Numerous studies have found no significant relationship between a judge's gender and his or her voting behavior.[29] There are, however, several studies that support a connection between gender and judicial voting behavior.[30] Inasmuch as

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[29] *See, e.g.*, Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 276–77 (1995) (finding that the gender of a judge does not influence outcomes regarding federal civil rights and prisoner rights issues filed in three federal district courts); John Gruhl et al., *Women as Policy Makers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308 (1981) (finding that, except for the treatment of female offenders, gender of municipal trial court judge had no significant influence on rate of criminal convictions or length of sentences); Gerard S. Gryski & Eleanor C. Main, *Social Backgrounds as Predictors of Votes on State Courts of Last Resort: The Case of Sex Discrimination*, 39 W. POL. Q. 528, 531–32, 536 (1986) (finding that gender of state supreme court judges did not significantly influence outcome in sex discrimination cases); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, 14 SOC. SCI. J. 77, 86 (1977) (finding that gender of judge had no effect on judge's approach to sentencing); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1453–54 (1998) (finding no significant difference between rates at which male and female federal district judges declared the federal sentencing guidelines unconstitutional).

[30] *See* David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232 (1987) (finding that female state supreme court judges were significantly more likely to exhibit extreme voting patterns—i.e. voting more liberally or more conservatively than the majority—than to conform to majority pattern of voting); Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131–32 (1993) (finding that female appellate court judges were significantly more supportive of employment discrimination claimants than their male counterparts, although there were no significant gender-related differences in obscenity or criminal procedure (search & seizure) cases); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 608 (1985) (finding that female district court judges were significantly more likely to defer to government agency decisions than male

studies vary in terms of the types of judges being investigated (trial versus appellate, state versus federal), the types of issues being analyzed (civil versus criminal, economic rights versus personal rights), the types of outcomes being measured (liberal versus conservative, voting with majority versus voting as outsider), and the percentage of women on the bench (*de minimis* numbers versus a more sizeable group of colleagues), it is difficult to speak with confidence of general patterns in these results.

Still, it is noteworthy that many of the studies finding no gender-related effects involved trial court judges and were completed by the mid-1980s.[31] Two studies addressing federal appellate court judges, and based on more recent periods of decisionmaking, found that gender did correlate with judicial voting behavior in the employment discrimination area though not in others.[32] Moreover, the studies conducted and reported to date have involved relatively low numbers of female judges.[33] This is to be expected inasmuch as many of the studies were completed at a time when few women had been appointed to the bench.[34] As the number of

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judges); Nancy Crowe, Gender and the Courts: A Look at the Diversification of the Federal Bench, (Nov. 14–15, 1997) (unpublished paper delivered at Conference on the Scientific Study of Judicial Politics, on file with authors) (finding that female appellate court judges were significantly more likely to vote for plaintiffs in sex discrimination cases than male judges, and that the effect of gender was larger for Republican judges than Democrats).

[31] *See, e.g.*, Ashenfelter et al., *supra* note 29; Gruhl et al., *supra* note 29; Kritzer & Uhlman, *supra* note 29. *But see* Sisk et al., *supra* note 29 (studying trial court judges but conducted over a more recent period).

[32] *See* Davis et al., *supra* note 30; Crowe, *supra* note 30, at 13 (observing that further research is needed on whether female appellate court judges are more likely to support plaintiffs in other kinds of civil cases).

[33] *See, e.g.*, Ashenfelter et al., *supra* note 29, at 275–76 (including 47 total judges, very few female); Gruhl et al., *supra* note 29, at 314 (including seven female judges); Walker & Barrow, *supra* note 30, at 602 (including 12 female judges). *But cf.* Sisk et al., *supra* note 29, at 1403, 1453 (including 28 female judges out of 294 total); Davis et al., *supra* note 30, at 131 (including 16 female judges out of 204 total in employment discrimination cases).

[34] Prior to 1977, U.S. Presidents had appointed a total of eight female Article III judges. President Carter appointed 40 women to the federal district court and appellate court bench between 1977 and 1980; President Reagan added 31 between 1981 and 1988; and President Bush appointed 36 between 1989 and 1992. *See* Amy Singer, *Numbers Too Big to Ignore*, THE AMERICAN LAWYER, Mar. 1999, at 5, 6. Women were similarly underrepresented on state courts during this period. *See* Beverly Blair Cook, *Women Judges: A Preface to Their History*, 14 GOLDEN GATE U. L. REV. 573 (1984), *reprinted as Women Judges in the Opportunity Structure*, *in* WOMEN, THE COURTS AND EQUALITY 143, 143 (Laura L. Crites & Winifred L. Hepperle eds., 1987) (reporting that in 1985 women held only 7% of the attorney judgeships in state and federal courts, despite being 16% of the attorneys in practice and 40% of all law students); Beverly Blair Cook, *The Path to the Bench: Ambitions and Attitudes of Women in the Law*, TRIAL, Aug. 1983,

female judges increases, larger sample sizes may yield more reliable results.[35]

When considering why a judge's gender might influence decisional outcomes, two distinct explanatory approaches have emerged. One approach draws on the "different voice" theory of psychologist Carol Gilligan.[36] Relying on a range of behavioral studies and literary insights, Gilligan posits that men and women make decisions differently because they differ in their basic self-definition and in the way they view the world.[37] She maintains that women tend to concentrate on social relationships and on taking responsibility; by defining themselves in terms of a larger community, women are more likely to be community-oriented when reaching moral decisions.[38] By contrast, men tend to define themselves as autonomous individual achievers, and to focus more on individual rights and the application of rules when they make moral decisions.[39] Some legal scholars have built on this "different voice" theory to suggest that female judges may depart more frequently from the traditional legal approach that emphasizes individual rights, procedural fairness, and the application of appropriate legal rules.[40] Whether directly or obliquely expressed,[41] this feminine approach to judging would modify the traditional orientation by infusing more reliance on community values, substantive fairness, and social context into decisional outcomes.[42]

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at 49, 50 (reporting that in 1982, women held 5.3% of state court trial judgeships and 5.5% of state court appellate judgeships, though 12% of practicing attorneys were female).

[35] It may also be the case that the small number of women appointed to the federal bench did not vote differently than male judges, or did not begin to do so until joined by a "critical mass" of female colleagues. *See infra* notes 43–46 and accompanying text (discussing voting behavior by female legislators).

[36] *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

[37] *See id.* at 5–23.

[38] *See id.* at 17–23, 32, 173–74.

[39] *See id.* at 32, 173–74; *see also* Suzanna Sherry, *The Gender of Judges*, 4 LAW & INEQ. J. 159, 163 (1986).

[40] *See* Sherry, *supra* note 39; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 578–91 (1986); *see also* Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 893 (1989) (discussing differences between male and female legal reasoning); *see generally* Davis et al., *supra* note 30, at 129–30.

[41] *Compare* Sherry, *supra* note 40, at 543–44 (expressed directly), *with* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 30 (1997) (expressed more obliquely).

[42] *See* Davis et al., *supra* note 30, at 130. *But cf.* Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891 (1995) (rejecting on empirical and normative grounds the proposition that female judges can or should decide cases in a distinctly feminine

In contrast to the psychological approach, an alternative explanation for gender-based influence on judicial decisions invokes the distinctive social and professional experiences of the current generation of female judges. Some recent studies examining gender differences in the context of legislative behavior have found that female legislators take more liberal positions than males, at least on certain issues.[43] One hypothesis is that because women do not have the same political career opportunities as men, they may feel freer to vote in ways that are not conventional or popular.[44] Other scholars have suggested that female legislators behave differently than males once they reach a critical mass within their legislature,[45] and that such differences may persist until legislatures as institutions are able to assimilate the newly elected cohort of female members.[46]

Like their counterparts in the legislative arena, women ascending to the federal appellate bench between 1977 and 1992 have followed atypical career paths and faced unusual challenges.[47] It may be that their experiences as relative outsiders in

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fashion).

[43] *See, e.g.*, SUE THOMAS, HOW WOMEN LEGISLATE 63 (1994) (reporting a gender gap in voting by legislators on a range of substantive issues during late 1980s); Susan Welch, *Are Women More Liberal Than Men in the U.S. Congress?*, 10 LEGIS. STUD. Q. 125, 126 (1985); Sue Thomas, *Voting Patterns in the California Assembly: The Role of Gender*, 9(4) WOMEN & POL. 43, 51 (1989) (finding that female legislators are more supportive of women's issues than male legislators).

[44] *See* Welch, *supra* note 43, at 127–28; *see generally* Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AMER. J. SOC. 965 (1977) (discussing how group structures shape particular patterns of male-female interaction when females are "tokens" in a male-dominated group).

[45] *See, e.g.*, THOMAS, *supra* note 43, at 94 (finding that in states with higher percentages (over 20%) of female legislators, women gave higher priority to women's and family issues than men did; in states with less than 10% female legislators, women were as uninterested as men in these kinds of issues); Michelle A. Saint-Germain, *Does Their Difference Make a Difference? The Impact of Women on Public Policy in the Arizona Legislature*, 70 SOC. SCI. Q. 956, 961–63 (1989) (finding that female legislators' support for legislation addressing areas of traditional concern to women increased as their proportional presence in the legislature increased).

[46] *Cf.* Welch, *supra* note 43, at 131 (finding that while female legislators in U.S. House of Representatives take more liberal voting positions than males, this difference is decreasing over time); *see generally* Beth Reingold, *Conflict and Cooperation: Legislative Strategies and Concepts of Power Among Female and Male Legislators*, 58 J. POL. 464 (1996) (examining gender-based techniques to accomplish legislative goals among female legislators in Arizona and California).

[47] *See* Elliot E. Slotnick, *The Paths to the Federal Bench: Gender, Race and Judicial Recruitment Variation*, 67 JUDICATURE 371, 375–83 (1984) (finding that female judges appointed by Carter and confirmed in 1979–1980 were in aggregate less wealthy, less likely to be born within circuit, younger, less likely to come from private practice, more likely to have attended and

the legal profession have helped shape independent or distinctively empathetic perspectives with regard to one or more doctrinal areas of federal law.[48] Perhaps women also vote in distinctive ways as their proportional presence on the courts of appeals increases. Such explanations, while not as comprehensive as the "different voice" theory, may be more relevant when examining judicial behavior in particular subject matter areas and within particular time frames.

### 3. *Political Party Affiliation and Judicial Outcomes*

Since the early 1960s, political party affiliation has emerged as the background factor most often found to be a significant predictor of judicial voting. Two early studies of federal courts of appeals decisions concluded that a judge's party affiliation was the background characteristic with the strongest direct link to voting behavior.[49] In both the 1960s and the early 1970s, political party was a significant predictor in various doctrinal fields including labor-management relations.[50]

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excelled at an elite law school, more likely to have had prior judicial experience, and less likely to have been politically active than their male counterparts); Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 139–40 (1987) (finding that Reagan-appointed female judges were younger, less likely to come from private practice, less likely to have been politically active, and more likely to have had judicial experience and experience as a government attorney than male appointees of President Reagan); Elaine Martin, *Women on the Bench: A Different Voice?*, 77 JUDICATURE 126, 128 (1993) (suggesting that the first generation of female judges, by virtue of their drive to succeed in an area of profession previously closed to women, may possess more independence and unconventionality than women in legal profession as a whole); Elaine Martin, *Men and Women on the Bench, Vive la Difference*, 73 JUDICATURE 204, 208 (1990) (concluding that Carter-appointed female judges experience more conflict between parental and career roles than their male colleagues, and that most of these women had to overcome sex discrimination as well as sex-role conflict in order to pursue their legal careers).

[48] *See, e.g.*, Crowe, *supra* note 30 (reporting that female appellate court judges demonstrated distinctive sympathy for employment discrimination claimants); Davis et al., *supra* note 30 (same); Walker & Barrow, *supra* note 30 (reporting that female district court judges displayed distinctive sympathy for government position).

[49] *See* Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 496 (1975) [hereinafter *Voting Behavior Revisited*]; Goldman, *Voting Behavior*, *supra* note 12, at 380–81; *see also* Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 845–48 (1961) (finding party affiliation an important explanatory factor in study of state and federal judges who sit on courts of last resort).

[50] *See* Goldman, *Voting Behavior Revisited*, *supra* note 49, at 496–97 (finding significant party-related voting differences in areas of labor relations, injured persons, criminal procedure, and civil liberties); Goldman, *Voting Behavior*, *supra* note 12, at 379–81 (finding significant party-related voting differences in labor cases and private economic cases though not for criminal law or civil liberties cases); Nagel, *supra* note 49, at 844–46 (finding significant party-related voting

Democratic judges were significantly more likely to vote with the union or employees than their Republican counterparts.[51] More recent studies tend to confirm that the political party of the judge or the appointing President makes a difference in a number of discrete subject matter areas.[52] While one can identify notable exceptions to this trend,[53] the bulk of the studies have concluded that judges affiliated with the Democratic party or appointed by a Democratic President are more likely to adopt liberal patterns of voting.[54]

There are, however, some intriguing complexities to the empirical findings in this area. Given that over 90% of the federal appellate judges appointed are members of the same party as the President who appointed them,[55] one might

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differences in cases involving employee injury, business regulation, and unemployment compensation).

[51] *See* Goldman, *Voting Behavior*, *supra* note 12, at 380–81; Goldman, *Voting Behavior Revisited*, *supra* note 49, at 496–97; Nagel, *supra* note 49, at 845.

[52] *See, e.g.*, Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 300 (1993) (finding significant party-related voting differences in areas of criminal justice, civil rights and liberties, and labor and economic relations); Gryski & Main, *supra* note 29, at 534 (finding significant party-related voting differences on sex discrimination cases); Crowe, *supra* note 30 (same); George, *supra* note 8, at 1678–86 (finding significant party-related voting differences on wide range of issues); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 51–54 (1986) [hereinafter *Reagan Appointments*] (finding significant party-related voting differences in civil rights and civil liberties cases); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 164, 169–71 (1983) [hereinafter *Carter Appointments*] (finding significant party-related voting differences in criminal cases and sex or race discrimination cases); Songer & Davis, *supra* note 8, at 317 (finding significant party-related voting differences on cases involving labor relations, criminal law, First Amendment, and civil rights issues).

[53] *See, e.g.*, HOWARD, *supra* note 20, at 182–83, 186 (finding that the predictive power of party indicators across multiple fields was negligible and indirect); Sisk et al., *supra* note 29, at 1466 (finding no significant variance between district judges appointed by Republican and Democratic Presidents regarding decisions on constitutional validity of federal sentencing guidelines); Ashenfelter et al., *supra* note 29, at 281 (finding no difference between district court judges appointed by Republican and Democratic Presidents in their treatment of civil rights cases); Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 977–79 (1992) (finding political party of appointing President not to be a significant determinant of federal appellate judge behavior in obscenity cases).

[54] *See* sources cited *supra* notes 51–52; Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206, 1219–21 (1997); Tate, *supra* note 12, at 362–63.

[55] *See* GOLDMAN, *supra* note 27, at 355–57 (reporting the "over 90%" figure for all Presidents from Eisenhower to Reagan, except for Carter who was at 82%). Eisenhower appointed

expect that a judge's political party affiliation and the affiliation of the appointing President would be virtually interchangeable variables. In fact, however, one recent study of appellate court judges found that a judge's political party affiliation was significant while the party of the appointing President lacked comparable explanatory power.[56] Moreover, many studies that analyze party of the appointing President examine judicial appointments of individual Presidents.[57] Over the past 50 years, some Presidents have placed greater emphasis than others on appointing judges who would promote their favored social policies.[58] Further, each President has accorded higher priority to some policies than others during his tenure. For these and other reasons, the political saliency of a particular legal subject matter area may vary considerably over the course of several decades.[59]

A separate feature of the empirical work addressing political party influence is that most studies have focused either on highly divisive or controversial cases[60] or else on published decisions,[61] which must meet some standard of policy or

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three Democrats, Kennedy and Johnson a total of two Republicans, Nixon and Ford a total of four Democrats, Carter four Republicans, and Reagan no Democrats to the courts of appeals. Carter also appointed six judges with no party affiliation; his total of 10 is what brings him below 90%. *See id.* at 355.

[56] *See* Songer & Davis, *supra* note 8, at 323–24; *see also* Tate, *supra* note 12, at 362–63 (finding political affiliation of judge more important than party of appointing President, though each had explanatory value).

[57] *See, e.g.*, Carp et al., *supra* note 52; Gottschall, *Reagan Appointments*, *supra* note 52; Gottschall, *Carter Appointments*, *supra* note 52.

[58] *See, e.g.*, Lyles, *supra* note 12, at 453–54, 464–65 (reporting that Johnson and Reagan more regularly appointed judges with an eye toward promotion of their social policies); Carp et al., *supra* note 52, at 301–02 (presenting four-part test to determine whether a President is successful in securing an ideologically reflective judicial cohort, and arguing that President Bush was able to use all four factors to create a highly conservative impact on the federal judiciary).

[59] For instance, the abortion rights issue would not have figured at all in Kennedy, Johnson, or even Nixon appointments to the courts of appeals, but it did figure prominently in the appointments of Reagan, Bush, and Clinton. For discussion of the declining political popularity of labor relations issues, see *infra* Part IV.A. *See also* Lawrence Baum, *Comparing the Policy Positions of Supreme Court Justices from Different Periods*, 42 W. POL. Q. 509, 512, 516 (1989) (examining non-comparability of votes on civil liberties issues between Burger Court and period from 1946 to 1969, and suggesting that more "conservative" votes in recent period may reflect in part the need to decide closer, more difficult cases).

[60] *See, e.g.*, Brace & Hall, *supra* note 54, at 1208 (examining death penalty cases); George, *supra* note 8, at 1669–70 (examining en banc decisions of a circuit court); Goldman, *Voting Behavior*, *supra* note 12, at 375 (examining reversals and nonunanimous affirmances); Nagel, *supra* note 49, at 843 (examining nonunanimous cases); Tate, *supra* note 12, at 355 (examining nonunanimous Supreme Court decisions).

[61] *See, e.g.*, Carp et al., *supra* note 52, at 298 (examining published district court decisions);

precedential value.[62] Inclusion of unpublished decisions may affect the importance assigned to the political affiliation factor if, as is often asserted, these additional cases are so routinely governed by precedent that there is less opportunity to inject politically based policy preferences.[63] Examining the significance of political affiliation across a database that includes all unpublished decisions will allow for further analysis of this possible effect.

### B. *Applying the Social Background Approach*

Notwithstanding the range of criticisms and questions engendered by empirical analysis of judicial behavior, many social scientists and legal academics continue to explore social background models. This ongoing interest stems in part from a recognition that neither a formal legal model nor a raw attitudinal model can adequately explain or account for the complex and subtle evolution of judicial decisions. Beyond the trial court stage, a mutual decision to litigate often signifies that each side is armed with plausible arguments based on plain meaning, doctrine, and precedent.[64] Judicial resolution of such competing contentions seems to draw upon influences that are distinct from purely legal principles.

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Gryski & Main, *supra* note 29, at 529 (examining published state supreme court decisions); Songer & Davis, *supra* note 8, at 321 (examining published appellate court decisions); *see also* Lyles, *supra* note 12, at 447 (examining district court decisions that have precedential value).

[62] *See* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 16 (1996) (reporting that less than five percent of district court decisions are published, and that such decisions "tend to be policy judgments with greater political consequence than their unpublished counterparts"); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C. R.-C.L. L. REV. 99, 104 (1999) (reporting recommendation by Judicial Conference of the United States that circuit courts should publish only decisions that have obvious precedential value).

[63] *See* Ashenfelter et al., *supra* note 29, at 258–60, 281; *see generally* Daniel R. Pinello, *Linking Party to Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 237–38 (1999) (concluding that judicial behavior scholars may be overemphasizing the significance of party identification when their statistical models omit the vast majority of appellate court output); Wald, *supra* note 27, at 246 (suggesting that unpublished decisions, which are "usually short and uncontroversial," are less likely to reflect partisan judicial decisionmaking). *But cf.* ROWLAND & CARP, *supra* note 62, at 21, 121–35 (finding that party identification is linked to judicial behavior for unpublished judgments as well as published decisions).

[64] *See* Edwards *supra* note 7, at 390–91 (estimating that in half the cases presented to his appellate court, each party advances at least one colorable legal argument for its side); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 190–91 (1986) (maintaining that in appellate court litigation, unclear cases—with textual uncertainty and credible contextual arguments for both sides—outnumber the clear cases).

If the legal model paints an incomplete picture, the ideological or attitudinal model appears too blunt. Assuming *arguendo* that judges have policy preferences and allow their preferences to affect their judicial behavior, it is extremely unlikely that these preferences will be equally intense among different judges or across different subject matter areas for the same judge.[65] It also is doubtful that these preferences will produce "liberal" or "conservative" results that can be reliably compared across an extended time period in which other factors do not remain constant.[66] Rather than focusing primarily on a compacted category of ideology, social background models presume that a range of personal and professional experiences may influence judicial behavior in specific time periods and with respect to particular subject matter areas.[67]

Continued interest in the social background approach also reflects a pragmatic desire to build a better mousetrap, to design a study that can integrate biographical factors more effectively with both doctrinal and ideological considerations. One way to address this practical challenge is to add depth and nuance to the substantive legal area being analyzed. A more refined classification of issues within each case should foster greater precision when attempting to link specific judicial attributes to decisional outcomes. A further response involves limiting the analyzed cases to a relatively confined time frame and measuring results in a manner that is less subjective and changeable than whether the decision is "liberal" or "conservative."

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[65] *See* BAUM, *supra* note 8, at 16–19 (identifying a range of professional, policy, and personal goals that affect judges' behavior on an individual basis); BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167–77 (1921) (discussing effects on decisionmaking of a judge's complex set of predilections, prejudices, emotions, habits, and convictions); Tate, *supra* note 12, at 355 (criticizing as too rough the reliance on general predictors of judicial attitudes); *see generally* Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 653–55 (1932).

[66] *See* Baum, *supra* note 59, at 512, 516 (discussing problems of noncomparability based on evolving complexity of civil liberties issues); Sisk et al., *supra* note 29, at 1393–94 (discussing problems of noncomparability associated with longitudinal studies of judicial behavior on criminal law issues); *see generally* Peter J. VonKoppen & Jan Ten Kate, *Individual Differences in Judicial Behavior: Personal Characteristics and Private Law Decisionmaking*, 18 L. & SOC'Y REV. 225, 226–27 (1984) (describing difficulty of ensuring comparability among different cases heard by different judges); John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 472–73 (1988) (same).

[67] Judges as well as academics have recognized the explanatory potential of this more refined social background approach. *See* Edwards, *supra* note 24, at 1351 (suggesting that age, past job experience, years on the bench, and other demographic and socioeconomic factors may help explain judicial outcomes); Wald, *supra* note 27, at 252 & n.65 (contending that as the federal judiciary becomes more diverse, factors such as race, religion, age, and socioeconomic background "will prove to have stronger influences on decisionmaking and thus become better indicators of voting behavior").

Establishing a narrower longitudinal database and an objective assessment of results may help minimize problems of comparability that are inherent when analyzing cases that emerge from individual fact patterns and are decided by judges at different stages of their distinct life experiences.

As explained further in Part II, our study seeks to apply social background factors in a manner that is at once appropriately cautious and suitably elaborate. By coding Board and judicial outcomes for each substantive labor law issue within a case, we are able to compare judicial behavior across categories that may be both doctrinal and ideological. This in turn enables us to assess how different judicial attributes relate to particular types of unlawful conduct under the NLRA. Moreover, by abjuring the use of "liberal" or "conservative" when identifying outcomes, we avoid the many difficult judgment calls that would arise in the labor law area, such as whether employees who charge their union with violating its duty of fair representation are pursuing a liberal result, or whether a bargaining order remedy that temporarily compromises employee free choice is a conservative outcome.

The coding design adopted in this study allows us to explore a wide range of hypotheses. Some involve traditionally debated questions, such as whether a judge's race, religion, gender, age, or partisan political affiliation are related to her pattern of voting on ostensibly doctrinal matters. Others relate to the special character of the NLRA as an ideologically charged statute. Do judges react differently to Board determinations that favor an employer as opposed to a union? Do judicial responses diverge when the employer's misconduct infringes upon individual employee rights as opposed to interfering with bargaining-related action initiated by the union? Are judges who represented corporate or business clients before joining the bench more likely to favor employer positions in the courts? Finally, the study's design allows us to ask questions that relate to the NLRA as representative of a generation of aging New Deal-era statutes. Are judges appointed by earlier Presidents from both political parties significantly more prone to support union positions in the courts than more recent appointees? If so, to what extent does this variation reflect a change in the political saliency of NLRA issues? Do judges who represented management in NLRA matters come to the bench with a special appreciation for the statute and its goals? Could such a perspective lead these judges to respond distinctively to labor law issues in general, or to certain types of issues?

## II. METHOD

### A. *The Data Set of Labor Law Issues*

Our study is based on all 1,224 appellate cases reviewing unfair labor practice (ULP) claims issued by the federal courts of appeals between October 28, 1986, and November 2, 1993. The seven year period is recent enough to reflect both the current composition of the appellate bench and contemporaneous judicial attitudes

toward the National Labor Relations Act.[68] In addition, a period of this length insures that the population of decisions is not unduly influenced by events or disputes that arose with special intensity in a particular year.

We were able to identify the full universe of ULP decisions rendered during this period because the National Labor Relations Board is a party to every ULP appeal and the Appellate Division in the Board's Office of General Counsel compiles monthly lists of those closed appeals.[69] Board personnel generously provided these lists for research purposes.

Almost one quarter (22.9%) of the 1,224 appellate decisions reversed, remanded, or modified a Board order; we analyzed all 280 of these "reversals" using a detailed issue coding approach.[70] Of the remaining 944 cases that wholly enforced or affirmed a Board order ("affirmances"), we analyzed a stratified random sample of 275 cases.[71] We then weighted these sampled affirmances to reflect their presence in the full population.[72] Unless otherwise specified, all of our analyses

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[68] When Brudney began this project in 1993, it was the most recent period for which data were available; because of its comprehensiveness and detail, the database required several years to build.

[69] By contrast, centrally compiled records are not available for cases arising under federal statutes that authorize litigation by private parties, such as Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1994) or the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (1994).

[70] The ULP issue codes are set forth in Appendix A. Law student research assistants coded each appellate decision based on a close reading of the opinion supplemented by review of Board opinions when necessary. Brudney reviewed all coding and suggested revisions on approximately 10–15% of the issue codes. He met regularly with the research assistants to resolve any differences and to discuss whether new codes should be added. Data collection proceeded first on the 280 reversals and then on the 275 affirmances described *infra*. Brudney also rechecked all coding decisions at the completion of data collection. Thus, while no coding scheme that relies on analytic judgments can be error-proof, various steps were taken to ensure quality control. *See generally* James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 965–88 (1996) (describing data-gathering process for determining case outcomes and issue-specific results within cases).

[71] Affirmances were chosen using simple random sampling within each fiscal year (October 1 to September 30). There were eight separate periods from which samples were randomly chosen; the eighth group included affirmed or enforced cases between October 1 and November 2, 1993. Allocations of the total sample size of 275 to each year were proportional to the number of affirmed or enforced cases in that year. This stratified approach to sampling substantially reduces the chance that a disproportionate number of cases were chosen from a narrow time period that would not adequately reflect the entire seven year context.

[72] Because we analyzed about 30% of the affirmances, each affirmance in our database represents about 3.4 affirmances in the full population. Assigning each sampled affirmance a weight close to 3.4 permits analyses modeled on the full population, but without giving reversals

incorporate this weighting.

Our study is especially rigorous in focusing on decided issues, rather than cases as a whole. The 1,224 decisions we analyzed include more than 2,000 issues on which the appellate courts either affirmed or reversed results reached by the Board. Because each appellate court decision on an issue reflects participation by a three-judge panel,[73] our data set includes over 6,500 judicial participations on NLRA issues. Each "judicial participation" consists of a single judge's vote on a particular issue in a case appealed from the Board.

In this Article, we address the three major categories of ULP issues arising under the NLRA: claims that an employer has committed an unfair labor practice under section 8(a);[74] allegations that a union has committed an unfair labor practice under section 8(b);[75] and disputes under section 10(c) over the nature and scope of relief against employers found liable for section 8(a) violations.[76] We omitted from our analyses about 450 judicial participations involving procedural, jurisdictional, or constitutional issues. Although these issues arose in ULP cases, they involved doctrinal rules distinct from the substantive labor matters we analyze here.[77]

We eliminated just two other types of judicial participations from our analyses. First, we omitted votes from three summarily affirmed cases for which we could not identify the participating judges.[78] Second, we eliminated 572 votes by district court

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an undue role. To achieve greater precision, we calculated weights by year.

[73] We coded one en banc panel decision during this seven year period. The case, however, involved only procedural issues and was omitted from our analyses for that reason.

[74] 29 U.S.C. § 158(a) (1994). In a small number of cases, unions or employees charge employer misconduct under section 8(f), 29 U.S.C. § 158(f) (1994). Although we coded those claims separately, allowing the possibility of separate exploration, we grouped them with section 8(a) claims for the analyses in this Article.

[75] 29 U.S.C. § 158(b) (1994). A small number of claims against unions were filed under section 8(e) of the Act, 29 U.S.C. § 158(e) (1994). We combined the latter claims with the analogous, and much more numerous, section 8(b) claims for the analyses in this Article. *Cf. supra* note 74 (discussing similar grouping of section 8(a) and section 8(f) claims against employers).

[76] 29 U.S.C. § 160(c) (1994).

[77] Similarly, we omitted a handful of section 10(c) issues involving the scope and content of relief against a union, as well as a small number of issues on which employees prevailed against both an employer and a union. Each of these de minimis issue categories would have required a classification at odds with the major categories described above.

[78] About 85% of the reversals and 45% of the affirmances in our data set were published. *See infra* note 126 and accompanying text. We located some unpublished decisions on-line and obtained the others through the generosity of Board attorneys. Two reversals and 34 affirmances in our database generated no recoverable opinions. For these cases, Brudney identified issues by reviewing the initial Board decision; attorney briefs on appeal (kept on file at the Board library in Washington, D.C.); and, for the reversals, the Board decision on remand. For the two reversals and

judges sitting by designation on circuit court panels.[79] These judges do not regularly perform appellate review, and they are likely to have had very little exposure to review of NLRB determinations.[80] Although we plan to compare district and appellate court judges in a later phase of this project, our current analyses focus on differences among courts of appeals judges.[81] With these omissions, our database consists of 5,463 votes by appellate judges on unfair labor practice claims arising under the NLRA.

Within this universe of all substantive NLRA issues, we also identified two subgroups that have been the focus of most other judicial behavior studies. The first consists of all issues in cases that the courts of appeals authorized for publication in the *Federal Reporter*. These published cases, a rough proxy for what the circuits themselves consider important, included just over one-half of the 5,463 votes in our database. The second subgroup comprises all votes on issues reversed by the appellate courts, plus votes on affirmed issues that have more than one panel opinion, either a dissent or a separate concurrence. These divisive issues cover one-fifth of all judicial participations.[82]

Our database is unprecedented in its scope, encompassing all appellate

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31 of the 34 summary affirmances, we were able to identify the participating judges as well.

[79] *See* 28 U.S.C. § 292(a) (1994) (authorizing chief circuit court judge to assign district court judges within circuit to participate on appellate court panels "whenever the business of that court so requires").

[80] *See generally* Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal? An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 379–81 (1995) (discussing concern that district court judges have less expertise regarding appellate practice than circuit court judges). Because NLRB determinations are appealed directly to the courts of appeals, district court judges have little occasion to become familiar with substantive law issues under the NLRA.

[81] We repeated the multivariate analyses described in Part III *infra* for our full population of judges, adding a control variable designating the district court judges. We had to omit some background factors (such as religion) from these test equations because those values were missing for the district judges. *See infra* Appendix A. Still, the test equations included nine background variables as well as all of our control variables. District judge status was not significant in any of our analyses.

Our data set included some participations by appellate judges on senior status. We included these participations in the current analyses because those judges, like their active colleagues, are familiar with appellate practice and have had exposure to the NLRA.

[82] As we explain below, there are shortcomings to analyses conducted on both of these subgroups. *See infra* text in paragraph that follows note 130. We include them because they allow us to highlight decisionmaking processes in the most controversial cases and because previous scholars have focused on categories like these. Indeed, one of the unique strengths of our database is that we are able to analyze votes both within all decided cases and within more controversial vote categories—as well as to illustrate some shortcomings of the latter analyses.

decisions during a seven year time period, all issues within those cases, and subgroups of important or controversial opinions. There are, however, some limitations to the data set worth noting. Most obviously, we could not analyze the large number of ULP charges that are disposed of before reaching the Board or that do not generate an appeal.[83] This limitation does not fundamentally affect our study because we seek to explain the behavior of appellate judges in NLRA cases, not to track the success or failure of all NLRA claims.[84] Still, strategic decisions by litigants affect the mix of cases presented to the appellate courts.[85] That mix, in turn, may affect the decisions judges make. We cannot predict the reaction of judges to a hypothetical universe of all ULP claims; we can only describe the reaction of judges to the cases actually reaching them.

Further, decisions by judges during the seven years we studied probably differ from those by judges during other decades. The larger economic environment may substantially affect both the number of ULP charges filed and the Board's disposition of those issues. Board members in different administrations may feel varying pressures to respond to congressional oversight or to maintain the approval of Presidents who hold the power of reappointment.[86] The appellate courts and Board, finally, engage in an ongoing dialogue while interpreting the NLRA. A high affirmance rate on particular issues during one period may conceal an earlier period

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[83] The early dispositions occur through dismissal or withdrawal at a preliminary stage, informal settlement prior to trial, or formal resolution before the case is tried or appealed to the Board. *See* William N. Cooke et al., *The Determinants of NLRB Decision-Making Revisited*, 48 INDUS. & LAB. REL. REV. 237, 238 (1995) (stating that the Board decided only about 2.5% of all ULP cases closed in fiscal year 1990); 55 NLRB ANN. REP. 157 (1990) (showing that out of more than 32,000 unfair labor practice cases closed in 1990 fiscal year, fewer than 1,100 reached stage of a Board order); 54 NLRB ANN. REP. 211 (1989) (showing numbers for 1989 fiscal year: Nearly 30,000 cases closed; fewer than 1,100 reached stage of Board order).

[84] *Cf.* Revesz, *supra* note 8, at 1723–24 (arguing that settlement does not cause selection bias when the "central purpose of [a] work is not to determine the probability that a challenger will prevail . . . [but] to determine, from the universe of litigated cases, whether differences in votes across judges can be explained by ideological factors.") (emphasis omitted).

[85] *See* Brudney, *supra* note 70, at 973–76 (arguing that employers or unions may often appeal from the Board's liability determinations in order to extend the litigation process in cases they do not expect to win, and that routine affirmances in such cases may mask the full extent of Board-court disagreements). *Cf.* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 468–69, 492–503 (1999) (illustrating that an analysis of one database showed that appellate courts were more likely to overturn death sentences in states in which prosecutors aggressively sought the death penalty at trial).

[86] *See generally* Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1094 (1985) (describing pattern of mutually adaptive adjustment among Board members, their staff, and the constituents that litigate before the agency).

of judicial hostility; the Board may have abandoned interpretive efforts supporting unions only after repeated judicial expressions of skepticism or repudiation.[87] For all of these reasons, we do not describe a static pattern of judicial decisions. Instead, we explore one segment of a continuous, evolving design.[88]

## B. *Dependent Variable*

Our dependent variable in all analyses is whether a judge voted for the union on a specific issue in a given case. In coding this variable, we distinguished carefully among subsections of the statute. If the Board ruled that an employer had committed an unfair labor practice under section 8(a), then a judicial vote to affirm constituted a vote for the union. Conversely, if the Board rejected section 8(a) liability against an employer, a vote to reverse qualified as a pro-union vote. Similarly, if the Board held a union liable for an unfair labor practice under section

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[87] *See, e.g.*, Cincinnati Newspaper Guild, Local 9 v. NLRB, 938 F.2d 284, 288–89 (D.C. Cir. 1991) (affirming Board decision that employer's wage proposal did not constitute bad faith bargaining under section 8(a)(5), and observing that the Board, after numerous reversals, "now seems to have accepted the courts' repeated teaching that an employer's bargaining position is not itself bad faith but only evidence of bad faith, so that a finding of bad faith bargaining must be bolstered by additional evidence"). Only once in the seven year period we studied was the Board reversed on a bad faith bargaining issue. Further, in approximately one-half of the cases where the Board was affirmed on this issue, it held in favor of the employer—that frequency of pro-employer judgments was higher than for any other issue under section 8(a). Accordingly, it would seem that Board-court harmony on the bad faith bargaining issue signifies judicial triumph over an earlier Board position supportive of the union, rather than mere judicial deference to the agency.

[88] The affirmance rate during the period we studied was relatively high, but still fits comfortably into the general pattern of fluctuating success enjoyed by the Board over the past 35 years. Data taken from the Board's Annual Reports indicate that from 1960–1992, the percentage of Board orders enforced in full was 66.9%. The rate of success varied widely: It was below 60% in the 1960s, rose to 72% in the early 1970s, declined slightly to 65% in the early 1980s, and was above 75% from 1985–1992. The highest success rate was achieved during the period under study here; this was also a period relatively less affected by partisan divisions in terms of Presidential appointments to the Board versus the courts. *See* 25 NLRB ANN. REP., tbl.19 (1960) through 57 NLRB ANN. REP., tbl.19 (1992). Presidents Reagan and Bush appointed all 11 Board members who served from January 1985 to December 1992; Reagan made nine appointments while Bush appointed two new members and made two reappointments. *See* listing of Board members at 273 NLRB iii (1984–1985) through 309 NLRB iii (1992). Those Presidents also helped shape the appellate bench: Over 50% of the judicial votes in our study were cast by Reagan or Bush appointees. Still, the overall preponderance of Republican votes on substantive issues (*see infra* Table I, reporting two-thirds of votes being cast by Republican appointees), which reflects that Republicans controlled the White House for most of the 30 year period preceding 1992, has allowed for the development of partisan-related differences between results sought by unions and outcomes handed down by the appellate courts.

8(b), a judicial vote to reverse constituted a vote for the union; if the Board rejected union liability, then a vote to affirm qualified as an endorsement of the union's position. Finally, if the Board granted the relief requested under section 10(c) against an employer, a vote to affirm constituted a vote for the union. If the Board denied the relief, a vote to reverse qualified as a vote for the union.

When coding the dependent variable, we also accounted for concurring and dissenting opinions. We coded a dissenting vote on a particular issue as a vote to do the opposite of what the majority had decided. We counted concurring votes as votes to follow the majority, although we also noted the fact of these concurrences to identify issues as divisive for purposes of analysis.[89] The dependent variable for each judicial participation, in sum, represents an individual judge's vote for or against the union on a single issue in a particular case.

### C. *Independent Variables: Judicial Background Factors*

Our independent variables reflect more than a dozen demographic, educational, and professional characteristics of each judge.[90] We obtained basic demographic and educational information from standard biographies addressing the federal judiciary,[91] supplemented by biographical files available at the Federal Judicial Center (FJC) library in Washington, D.C.,[92] and questionnaires submitted to the Senate Judiciary Committee by nominees as part of their confirmation process.[93]

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[89] Of the reversed cases, 19% included one or more separate opinions: These consisted of 13 concurrences, 26 dissents, and 21 opinions styled as concurrence-and-dissent. Of the analyzed affirmed cases, 5% involved one or more separate opinions, consisting of five concurrences, eight dissents, and four opinions styled as concurrence-and-dissent.

[90] Our basic coding scheme for these variables appears in Appendix A. Although we used this scheme to generate some 60 variables, our current analyses focus on the variables described in text. Some omitted variables were combined to produce included variables; others were omitted because they proved of lesser interest, encompassed too many missing values, or produced collinearity problems.

[91] *See generally* ALMANAC OF THE FEDERAL JUDICIARY (Christine Housen ed. 1997); 9 THE AMERICAN BENCH: JUDGES OF THE NATION (Jeanie J. Clapp ed. 1997); 3 FEDERAL JUDICIARY ALMANAC (W. Stuart Dornette and Robert R. Cross eds. 1987).

[92] The FJC library has biographical files on every federal appellate court judge who has served since the Constitution. FJC personnel generously furnish access to these files for academic research purposes. Most judges in our data set who were appointed before 1982 filled out a detailed biographical form devised by the FJC. Judges reported on their professional experience and family background in greater depth than is available from the standard biographies referred to *supra* in note 91. This detailed self-reporting by judges became much less frequent by the mid-1980s.

[93] Beginning in 1978, the Senate Judiciary Committee required each nominee to the federal

For more extensive information on pre-judicial professional experience, we relied on the FJC files and the Judiciary Committee questionnaires, augmented by information from Martindale-Hubbell directories and a variety of searches run on Lexis and Westlaw.[94] Through these sources, as well as some additional reviews directed at particular background factors,[95] we were able to obtain complete information on almost all demographic, educational, and professional background factors.[96]

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appellate bench to complete a questionnaire addressing professional experience as well as personal background. From 1987 to 1992, these completed questionnaires were included in the Committee's official hearing record for all judges. Prior to 1987, they were not part of an official public record but copies of various judges' completed questionnaires are retained by the National Archives, the Department of Justice, individual political science scholars, and public interest groups that monitor the confirmation process. We were able to obtain questionnaires on all judges in our data set through these sources. Questionnaires obtained from the Department of Justice through a Freedom of Information Act request were redacted or incomplete in some respects. We are grateful for the cooperation and generosity of Elliot Slotnick at The Ohio State University, Sheldon Goldman at the University of Massachusetts (Amherst), Gary Zuk at Auburn University, Nan Aron at the Alliance for Justice, and numerous personnel at the National Archives and the Department of Justice.

[94] Judges who completed the FJC biographical form listed all firms they had worked for, as well as the types of practice in which they had engaged (e.g., tax, labor, general litigation). Judges who completed the Judiciary Committee questionnaire listed past employers, reported the general character of their practice, identified typical clients, and described ten important litigated cases in which they had been personally involved. Some judges provided information through both sources; virtually every judge completed one of the two forms. To round out information obtained from these sources, especially with respect to a judge's NLRA or workplace law experience and corporate law background, we examined Martindale-Hubbell volumes (which are available back to the 1930s) and several databases available in Lexis or Westlaw.

[95] For minority judges' professional and personal background, we examined a number of specialized sources. *See* GERALDINE SEGAL, BLACKS IN THE LAW: PHILADELPHIA AND THE NATION (1983); WHO'S WHO AMONG BLACK AMERICANS (7th ed. 1992–1993); JUDICIAL ADMIN. DIV., ABA, DIRECTORY OF MINORITY JUDGES IN THE UNITED STATES (1994). For religious background of judges who had not self-identified through a source listed in notes 91–93 *supra*, we relied on various editions of *Who's Who in America* and *Judges of the United States*, and on a comprehensive electronic database addressed to judicial background of appellate court judges. *See* Gary Zuk et al., *A Multi-User Data Base on the Attributes of U.S. Appeals Court Judges, 1801-1994* [Computer file] First ICPSR version (1997).

[96] After extensive research, we lacked information for only a small number of judges on three variables: religious background (11 judges), college attended (3 judges), and experience representing corporate or business clients (6 judges). We also were unable to obtain Astin selectivity scores, *see infra* note 104 and accompanying text, for the colleges attended by 5 judges in our study. Three judges, finally, belonged to religions (i.e., Morman or Bahai) that did not fit comfortably into our major religious groupings of Catholic, Jewish, and Protestant. For the multivariate analyses described below, we replaced the missing and undefined values on these

The first independent variable in our analyses designates whether each judge was appointed by a Republican or Democratic President. As in previous studies of judicial attitudes, we rely upon this variable as a proxy for the judge's own political inclinations.[97] We also coded the year that each judge was appointed to the bench. This variable allowed us to determine whether judges appointed earlier in the century (regardless of political party) differed from more recent appointees.

We coded four basic demographic variables: age, gender, religion, and race. Age, a continuous variable, reflects the age of each judge at the time a vote was rendered.[98] A dichotomous variable indicates each judge's gender. Another dichotomous variable signals whether a judge was Catholic or Jewish, comparing those judges to the predominant category of Protestant judges.[99]

During the years we studied, the appellate bench included only a small number of Asian or Latino judges.[100] Creating distinct variables for each of these small categories would have been misleading. Preliminary analyses, however, showed that the Asian and Latino judges in our population voted in similar patterns, both before and after controlling for other variables, and that these patterns differed significantly from both African American and White judges.[101] We thus created two

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three variables with the mean for that variable and created dummy variables denoting judges with those missing values. None of the three dummies representing missing values were significant so we omitted those dummies from the analyses and retained the substituted means for missing values.

[97] *See supra* notes 49–63 and accompanying text.

[98] Thus, a judge who was 50 years old in 1986 was given that age for votes rendered in 1986, the age of 51 for votes rendered the following year, etc. Coding the variable in this manner allowed us to track precisely any relationships between age and votes to favor or disfavor unions.

[99] Preliminary analyses showed that Catholic and Jewish judges voted similarly (and differently from Protestant judges) once we controlled for other variables. Because these coefficients behaved so similarly in multivariate analyses, we combined them into a single Catholic/Jewish category to streamline the number of independent variables. Grouping these religions also reflects the relative outsider status of Catholics and Jews compared to the majoritarian Protestants.

[100] We recorded votes by only 2 Asian judges and 5 Latinos. No Latina women contributed votes to our database. Nor were there any votes by Native Americans or Pacific Islanders.

[101] White judges voted in favor of the union 76% of the time, while African American judges cast pro-union votes 82% of the time. Latino judges favored the union in just 54% of their participations, while Asian judges favored the union in 47% of their votes. Preliminary multivariate analyses, using dummy variables for Asian, African American, and Latino judges, showed significant negative coefficients for the Asian and Latino categories and significant positive coefficients for the African American category.

Recent scholarship has stressed the importance of recognizing differences among racial minority groups, rather than grouping them in a single "minority" category. *See, e.g.*, Barbara F. Reskin & Irene Padavic, *Sex, Race, and Ethnic Inequality in United States Workplaces*, *in*

dichotomous variables denoting race: One for African American judges and one for the combined category of Asian and Latino judges.[102] White judges constitute the reference category for both groups.[103]

Two variables designate each judge's educational background. The first, college selectivity, reports the selectivity score calculated by educational sociologist Alexander Astin for the judge's undergraduate institution.[104] The second variable

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HANDBOOK OF THE SOCIOLOGY OF GENDER 343–74 (Janet Saltzman Chafetz ed. 1999); Barbara F. Reskin & Camille Z. Charles, *Now You See 'Em, Now You Don't: Race, Ethnicity, and Gender in Labor Market Research*, *in* LATINAS AND AFRICAN AMERICAN WOMEN AT WORK 380–407 (Irene Browne ed. 1999). Rather than making a priori decisions about racial differences, we examined our data to make appropriate racial groupings. Other research, however, supports our finding that Latino/a and Asian workers differ from both White and African American workers in their experience with—and perhaps attitudes toward—unions. *See, e.g.*, Gregory DeFreitas, *Unionization Among Racial and Ethnic Minorities*, 46 INDUS. & LAB. REL. REV. 284, 298–300 (1993) (discussing differences in unionization among White, African American, Latino/a, and Asian workers); Ronnie Silverblatt & Robert J. Amann, *Race, Ethnicity, Union Attitudes, and Voting Predilections*, 30 INDUS. REL. 271, 277 (1991) (reporting that, in a study of southern Florida workers, African American workers expressed more favorable attitudes than Whites toward unions, while Latino workers expressed the least favorable attitudes). *But see* DeFreitas, *supra*, at 293 (citing some evidence that both African American and Latino/a workers hold more favorable attitudes toward unions than do Whites).

[102] There were 13 African American judges contributing a total of 348 votes to our database; this number was sufficient to create a distinct variable for those judges. Because our database included votes by only one nonwhite female judge (an African American), we could not create interaction terms between our race and gender variables to examine possible sex/race differences.

[103] Even with the combined category of Asian and Latino judges, one should exercise caution in interpreting those coefficients. These judges contributed relatively few votes (125) to the database and may constitute the smallest distinct group of votes examined here.

[104] *See* ALEXANDER W. ASTIN, WHO GOES WHERE TO COLLEGE? 57–83 (1965). Scholars frequently rely upon the Astin scale to measure college prestige. *See, e.g.*, Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 ASIAN L.J. 7, 23 (1996); Lowell L. Hargens & Warren O. Hagstrom, *Scientific Consensus and Academic Status Attainment Patterns*, 55 SOC. EDUC. 183, 185 (1982); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 222 n.75 (1997).

Astin estimated selectivity based on multiple factors assessed in 1962; he divided the number of highly able students who wanted to enroll at each institution by the number of freshmen admitted to the school. The colleges our appellate judges attended had Astin scores ranging from a low of 37 to a high of 78.

While a ranking system based on a narrow band of years raises some concern, the early 1960s is an especially meaningful point in time for our judicial population. Of the 223 judges in our study, over half graduated from college between 1943 and 1962 while only 29 graduated after 1962. Moreover, academic reputation changes slowly over time. *See, e.g.*, Kathryn T. Theus, *Academic Reputations: The Process of Formation and Decay*, 19 PUB. REL. REV. 277, 283 (1993)

indicates whether the judge graduated from one of fifteen elite law schools.[105]

We also included seven variables reporting the professional experience of each judge before appointment to the court of appeals. One variable identifies whether a judge ever held elected office, a second indicates whether the judge served in a high-level (*i.e.*, policy-related) nonelective government position, and a third denotes prior judicial experience. All three of these variables include both state and federal positions.[106] A fourth variable in this series denotes whether a judge had substantial experience as a law professor prior to appointment.[107] We coded judges as positive for any of these variables that applied; they are not mutually exclusive.

With respect to private practice experience, we created three variables distinguishing distinct varieties of corporate, labor, and workplace law experience. One variable designates judges who had any experience representing management in NLRA matters.[108] A second denotes judges who had experience on workplace-

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(discussing how prior reputation, and the "myths" surrounding an institution, shape the public's perception of what the institution can achieve).

[105] The 15 schools in the elite group have first-rate reputations developed over an extended time period prior to 1980: Harvard, Yale, Berkeley, Chicago, Columbia, Cornell, Duke, Michigan, NYU, Northwestern, Pennsylvania, Stanford, Texas, UCLA, and Virginia. *See The Cartter Report on the Leading Schools of Education, Law, and Business*, CHANGE, Feb. 1977, at 44, 46 (based on faculty reputation and educational attractiveness). One could dicker over the precise schools selected for any list of the top 15, *see, e.g.*, Diana Fossum, *Law Professors: A Profile of the Teaching Branch of the Profession*, 1980 AM. B. FOUND. RES. J. 501, 507 (1980) (identifying top schools based on which schools had produced the most law professors and substituting Georgetown, Iowa, and Wisconsin for Cornell, Duke, and UCLA in the above list), but the differences would not affect our analyses. Indeed, almost half of the judges who graduated from schools in our "elite" category obtained their degrees from Harvard or Yale, schools that surely would make any listing of elite law schools.

The Cartter rankings compiled during the mid seventies reflect law school reputation when the vast majority of our judges attended law school. The rankings also offer an appropriate index for judges graduating during an earlier period; law school reputation, like the reputation of undergraduate colleges, changes slowly over time. *See* Richard Schmalbeck, *The Durability of Law School Reputation*, 48 J. LEGAL EDUC. 568, 572 (1998) (finding that reputations of elite law schools have been remarkably stable over past 25 years).

[106] The elected offices and nonelective policy positions include only those in the executive or legislative branches; elected and appointed judicial positions are included with the variable for judicial experience.

[107] We identified such experience on the basis of judicial biographies, supplemented by reference to the annual *AALS Directory of Law Teachers* from 1923 to 1992. Judges with substantial law teaching experience include 31 judges who were employed full-time as law professors for any period before joining the appellate bench, as well as 18 judges who served for at least three years as adjunct professors at a law school before becoming appellate judges.

[108] Thirty-four judges had this experience. They included 24 judges whose NLRA experience was solely on behalf of management, 9 who also had experience representing the government or

related matters other than those arising under the NLRA, as well as judges with NLRA experience not involving management.[109] The third marks judges who represented corporations or business clients but did not have either NLRA or other workplace law experience. These three variables are mutually exclusive; the reference category for all three is judges with no corporate, NLRA management, or workplace law experience.

Finally, our independent variables include two interaction terms essential to interpret the other variables. We identified these interactions through extensive exploration of the database as well as theoretical considerations. First, we discovered an interaction between gender and political party. As we explain further below, female judges tend to favor unions more often than male judges do, and Democratic appointees tend to register pro-union votes more often than their Republican colleagues. Democratic women, however, do not differ significantly from Democratic men on this score, while the difference between Republican women and Republican men is substantial. Including a female/Democrat interaction term allowed us to explicate more fully this relationship between gender and political party.

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unions on NLRA matters, and 1 who also had substantial law professor experience. These judges contributed 752 votes to our database, about 14% of all votes. We chose management experience as the criterion for our primary NLRA variable because judges with that background constituted more than two-thirds (69%) of all judges with any NLRA experience. We were also particularly interested in identifying the reaction of judges with this potentially partisan background to the Board decisions in our database, which overwhelmingly favored unions.

Although management experience provides the unifying theme for this category, we also performed some supplemental analyses in which we separated judges with exclusively management experience from those with a mixture of management and other (union, government, and/or academic) experience related to the NLRA. *See infra* notes 212–15 and accompanying text.

[109] Judges with these other workplace experiences contributed 1,537 votes, or about 28% of the total, to our database. More than three-quarters (78%) of these votes came from judges with no NLRA experience. The latter judges had handled federal workplace laws other than the NLRA (such as equal employment opportunity, safety and health, or employee benefits) or state laws addressing comparable matters (and including public employee labor relations). Smaller percentages of the votes in this "other workplace law" category came from judges with experience representing unions under the NLRA (15%); government experience related to the NLRA (3%), or academic experience teaching NLRA matters (5%). None of the judges in this category had any experience representing management under the NLRA; votes from any judges who combined management experience with other types of workplace law are included in our "nlra management" variable.

Although we grouped judges with these somewhat diverse experiences together for our primary analyses, we separated them in some supplemental analyses. We report below on the effects of pure union, pure government, or pure academic experience in NLRA matters. *See infra* notes 150, 158, 161, 162, 165 & 179. We also probed the effects of pure workplace (no NLRA) experience. *See infra* note 198 and accompanying text.

Similarly, we identified an important interaction between judges with NLRA management experience and the NLRB's disposition of an issue (a control variable discussed below). In most analyses, judges with NLRA management experience did not differ significantly from other judges when they reviewed Board decisions favoring the union; all judges were very likely to favor the union under these circumstances. When the Board voted in favor of an employer, however, judges with NLRA management experience were significantly more likely than their colleagues to reverse the Board and vote for the union. Once again, an interaction term helped us illuminate this relationship.[110]

### D. *Control Variables: Board Outcomes, Statutory Sections, and Circuits*

As discussed above, we propose a "social background" model of judicial behavior falling between the raw attitudinalism embraced by some political scientists and the legal process perspective preferred by many legal academics. Consistent with this view, we recognize that the characteristics of individual judges will not completely predict judicial votes on NLRA (or other) matters.

We could not control directly for doctrine in our analyses, but we included several variables signaling the doctrinal and litigation context in which each judge rendered decisions. Most notably, we controlled for the Board's outcome on each issue in our database. Paralleling our dependent variable, we recorded this variable as either "for" or "against" the union.[111] This variable allowed us to control for

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[110] We did not attempt to explore panel effects in these analyses. Although we recognize the potential importance of panel effects (*see supra* notes 20–24 and accompanying text), and we intend to examine the ways in which panel members may have influenced one another in later work, it is essential first to explore individual judges' votes. Panel effects are quite complex; if they exist, they may operate along party, gender, professional experience, or other lines. Understanding the first-order effects of these variables, therefore, is fundamental before attempting to build a model that includes panel effects.

Omission of panel influences is unlikely to affect the results presented here. We analyzed almost 5,500 votes cast on more than 1,100 panels. In a database this large, panel effects are likely to approach random distribution. A particular Democratic judge, for example, would have sat with various combinations of Democrats and Republicans over time; men likewise would have sat on all male and mixed gender panels. Exploration of panel effects might reveal that some of the associations we detected were particularly likely to emerge in certain contexts. It is possible, for example, that Democrats were most likely to cast pro-union votes when another Democrat was on the panel or that men were more likely to support the union when a woman sat on the panel. The significant first-order effects we identify, however, would be unlikely to disappear. It still would be true that Democrats were significantly more likely than Republicans to support the union and that Republican women were more likely than Republican men to vote in that direction.

[111] Pro-union Board outcomes were determinations of "liability" on issues under section 8(a); determinations of "no liability" on issues arising under section 8(b), and determinations of "relief

perhaps the most important doctrinal influence on a judge's vote: Deference to the administrative agency.[112]

Second, we distinguished claims arising under five different sections of the NLRA.[113] These statutory section controls allowed us to isolate important differences among varying types of NLRA claims and to control for some doctrinal differences among the categories.

The largest of our issue categories, and the one we use as our reference category for multivariate analyses, includes claims arising under sections 8(a)(1) and 8(a)(3) of the Act. Section 8(a)(1) claims allege employer interference with employee organizing campaigns or attempts to secure a fair representation election, generally through threats, interrogations, or the conferral of improper benefits. Section 8(a)(3) claims allege employer discrimination against union members or supporters, usually arising out of terminations, layoffs, or failures to recall or rehire. Claims under these two sections focus primarily on the right of workers to organize under the NLRA in order to achieve union representation, and they typically involve employer actions directed against individual employees.

Our next largest issue category includes claims arising under section 8(a)(5) of the Act. These claims allege an employer's failure to bargain in good faith with a recognized union.[114] They thus invoke the Act's protection of the collective bargaining process, and they almost always implicate employer conduct directed against the union as an entity.[115]

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granted" with respect to issues under section 10(c). Pro-employer outcomes were the opposite in each instance. While individual employee interests were identical to union interests with respect to section 8(a) and 10(c) issues, employee interests and union interests often diverged when a section 8(b) issue was involved. The union might be charged with unlawful conduct by individual employees under section 8(b)(1); in those instances, we considered employee and employer interests to be aligned against the union.

[112] The Board has exclusive jurisdiction to adjudicate complaints by unions, employers, or individual employees alleging conduct in violation of the NLRA. *See* 29 U.S.C. § 160(b) (1994). Board decisions are subject to direct review by the federal courts of appeals. *See* 29 U.S.C. § 160(f) (1994).

[113] Our coding scheme distinguished a far larger number of subcategories, but we grouped issues under their major statutory headings for these analyses. For further discussion of the categories described here, see Brudney, *supra* note 70, at 980–88.

[114] The section 8(a)(5) claims include some "technical" violations of the section in which the employer sought to challenge the Board's certification of the union based on either the scope of the bargaining unit or alleged union misconduct during the election campaign. Because the Board's certification of election results under section 9(c) is not a final order, employers typically test the validity of a certification by refusing to bargain with the union. This produces a violation of section 8(a)(5) that is appealable to the courts. *See* Brudney, *supra* note 70, at 981 & n.125.

[115] Examples of such bargaining-related employer misconduct include the refusal to provide relevant information requested by the union during negotiations, the refusal to bargain on certain

A third issue category consists of a very small group of other section 8(a) claims brought against employers, including claims of employer domination of labor organizations and alleged retaliation for filing a charge with the Labor Board. The fourth category combines all claims maintained against unions under section 8(b) of the statute. Our final issue category includes all questions of relief against employers litigated under section 10(c).

In addition to these controls for Board outcome and statutory sections, we created variables denoting each circuit. The circuit variables controlled for possible differences in the nature of controversies arising within each circuit; in litigation strategies (including forum shopping) that might affect the caseload reaching each court;[116] and in the overall ideology of the court on which each judge served.[117] In multivariate analyses, we used the Sixth Circuit as our reference category for these circuit variables.[118]

Our final control variable reports the year in which each vote was rendered. Although we examined votes occurring over a compact, seven year period, this variable allowed us to control for any judicial trends for or against union positions within that period.

### E. *Analyses*

Our analyses proceed in three stages. First, we explore judicial votes across the full database of all issues decided in all cases. After reporting means for our dependent variable, each of the independent variables, and all of the control variables in this full database, we estimate a logistic regression equation with judicial votes for (or against) the union as our dependent variable.[119] This

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"mandatory" subjects such as wages and benefits, and the unilateral modification of employment terms and conditions while a collective bargaining agreement is in force.

[116] Parties appealing a final order from the NLRB may seek review in the circuit where the unfair labor practice allegedly occurred, in a circuit where the aggrieved party resides or transacts business, or in the D.C. Circuit. *See* 29 U.S.C. § 160(f) (1994).

[117] Circuit ideology may reflect an aggregation of judicial characteristics in a particular circuit as well as the ways in which different doctrines or precedents are applied to specific factual situations and any differences in legal precedents among the circuits.

[118] We chose the Sixth Circuit as our reference category because bivariate analyses identified that court as the median or middle court on both Board outcomes (for/against the union) reaching the court and decisions (for/against the union) rendered by the judges. The Sixth Circuit also supplied more votes in our "all case" category than any other circuit.

[119] Logistic regression is the appropriate multivariate technique for our analyses because our dependent variable (a vote for or against the union) is dichotomous. Instead of positing a direct relationship between the independent and dependent variables, the logistic regression method models the probability of an event—how likely the event is to occur. Thus, in our analysis we

multivariate analysis allows us to assess the relationship between each independent variable (such as political party) and the dependent variable (a vote for the union), while controlling simultaneously for other variables in the equation. Because of heteroscedasticity in the database, we use the Huber/White correction to obtain robust estimates of standard error.[120] Using these robust standard errors, we report whether coefficients for each independent variable are significant or approach significance.[121]

The sign of each significant coefficient in the regression equation indicates the direction of that variable's effect. A variable with a significant positive coefficient enhances the probability that a judge will vote for the union, while a variable with a significant negative coefficient signals that a judge with that characteristic is more likely to vote against the union. The magnitude of each coefficient, however, is difficult to interpret because of the logistic form of our regression equation; unlike ordinary least squares regression, the coefficients in our logistic regression equation do not represent the impact of a one-unit change in the independent variable on the dependent variable.

To aid interpretation of the coefficients, we conclude the first stage of our

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investigate judicial attributes that may impact the probability that a judge will vote for or against the union position. *See* JOHN H. ALDRICH & FORREST D. NELSON, LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS 9–35 (1984); GREENE, *supra* note 25, at 873–76. For further discussion of multivariate techniques generally, see JANET BUTTOLPH JOHNSON & RICHARD A. JOSLYN, POLITICAL SCIENCE RESEARCH METHODS 389–401 (3d ed. 1995) (explaining multiple regression analyses); R. MARK SIRKIN, STATISTICS FOR THE SOCIAL SCIENCES 446–67 (1995) (same). We used STATA version six software for all of our multivariate analyses.

[120] *See* DAMODAR N. GUJARATI, BASIC ECONOMETRICS 61–63 (3d ed. 1995) (explaining heteroscedasticity); STATACORP, STATA USER'S GUIDE: RELEASE 6.0, at 256–60 (1999) (explaining the Huber/White correction to obtain robust standard errors).

[121] We follow the common social science convention of designating results with a p-value of .05 or less as "significant." *See* HUBERT M. BLALOCK, SOCIAL STATISTICS 161 (2d rev. ed. 1979); IVY LEE & MINAKO MAYKOVICH, STATISTICS: A TOOL FOR UNDERSTANDING SOCIETY 281–82 (1995); DAVID MOORE, STATISTICS: CONCEPTS AND CONTROVERSIES 507 (4th ed. 1997). A result that is significant at the .05 level has no more than a 5% probability of occurring through random error in sampling or coding.

We designate results with a p-value of .10 or less as "approaching significance." These results have no more than a one-in-ten chance of stemming from random errors. Social scientists sometimes treat such results as identifying relationships that are suggestive or at least that warrant further exploration. *See* MOORE, *supra*, at 414–20; SIRKIN, *supra* note 119, at 195–96. This is particularly true if the results form a consistent pattern with other results that approach or achieve significance. Based on findings in previous studies, we arguably could have reported some of these results as "significant" (i.e., reaching the conventional .05 level) under one-tailed tests of significance. We adopted the conservative approach, however, of treating none of our hypotheses as directional.

analysis by calculating the marginal effect of each variable with a significant regression coefficient.[122] These marginal effects illustrate the extent to which each variable is associated with a change in the likelihood that a judge will vote in favor of the union. The marginal effects assume a baseline of a judge with the predominant (modal) characteristic for each bivariate variable and the mean value for each continuous variable. We refer to this baseline judge as a "profile judge" and, using the marginal effects, compare judges with other characteristics to that profile.[123]

In the second stage of our analyses, we examine separately the voting patterns under four of the statutory subsections used as controls in our main equation.[124] We report means for all variables within each of these subcategories, comparing them to means within the full universe of issues. We then estimate separate regression equations for issues arising under each of the statutory subsections. The dependent and independent variables in these equations are identical to the ones in our first equation except that we do not control for the statutory subsections. These individual analyses of the statutory subcategories allow us to explore differences in the impact of judicial background factors when judges confront diverse sections of

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[122] In addition to calculating marginal effects for each of the judicial attribute variables that approached or achieved significance, we compute those effects for illustrative control variables.

[123] We calculate the marginal effects by first using our regression equation to compute the probability that a "profile judge" (one holding the modal value for bivariate variables and the mean value for continuous variables) would vote in favor of the union. We then enter that value, Z, into the equation: Prob=1 / (1 + $e^{-z}$). Prob is the probability that a profile judge would vote for the union. This probability becomes the baseline for our marginal effects table.

We then calculate a series of values for Z and Prob, changing a single characteristic of the profile judge for each calculation. For example, we first change the value for Democratic appointment from its modal value (0=Republican) to the nonmodal value (1=Democrat) while retaining the profile values for all other variables. For two continuous variables (college selectivity and year of appointment), we altered the value from the mean to the high. For the third continuous variable, age, we used a "high" of 76, which was the oldest age of a judge fitting other aspects of the profile. We report these probabilities in the marginal effects table, comparing them to the baseline probability. While we refer to this procedure as calculating "marginal effects," it actually combines a number of procedures: Calculating predicted probabilities given a set of values for the independent variables, and computing the marginal effects on the probability of an event (first differences). *See* GREENE, *supra* note 25, at 876–79; GARY KING, UNIFYING POLITICAL METHODOLOGY: THE LIKELIHOOD THEORY OF STATISTICAL INFERENCE 107 (1994); TIM FUTING LIAO, INTERPRETING PROBABILITY MODELS: LOGIT, PROBIT, AND OTHER GENERALIZED LINEAR MODELS 10–21 (1994).

[124] The four statutory categories we examine are sections 8(a)(1) and (3), 8(a)(5), 8(b), and 10(c). The number of cases in the "other" miscellaneous category of section 8(a) claims was too small to support independent analysis. We also calculate means and estimate a regression equation for a combined category of all section 8(a) claims, reporting those results in Appendix B.

the statute.[125]

In the final stage of our analyses, we recombine all issues into a single equation but we focus on the two subgroups of votes that might have been more disputed than the full universe of judicial participations. The first of these subgroups consists of all issues included in cases published in the *Federal Reporter*. These cases constitute decisions that the judges themselves considered worthy of publication and full precedential value. Issues from published cases constitute just over half (54%) of all issues in our database.[126] As we explain further below, these results must be interpreted with caution because varying circuit practices and other factors affect publication rates.[127] Still, analyses of this subgroup allow us to determine whether judicial attributes play a greater—or different—role in published decisions than in unreported ones.

The second category of "controversial" issues we examine includes all judges' votes on issues in which either the court of appeals reversed the NLRB or an appellate judge wrote a separate opinion. This category, in other words, consists of issues on which at least one judge disagreed publicly with either another judge or the Board.[128] The fact of disagreement signals the possibility of a more sharply contested issue. The issues falling in this "divisive" category constitute 20% of the

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[125] We did not consider selection bias a problem when estimating regression equations for each of the statutory sections because judges do not choose the issues that appear before them. *See infra* note 130. We do, however, interpret the equation results cautiously, recognizing that they summarize behavior with respect to individual sections of the statute rather than the statute as a whole.

[126] Decisions reversing the Board were more likely to be published than affirmances. Of the reversed cases included in our analyses, 85% appeared in the *Federal Reporter*. Similarly, 84% of the reversed issues appeared in cases published in the *Federal Reporter*. Only 45% of the analyzed affirmances were published; 48% of the affirmed issues in our database appeared in the *Federal Reporter*.

[127] Each circuit has different publication practices; publication rates vary widely among the circuits. *See* Colker, *supra* note 62, at 104–05 (identifying disparate circuit court practices); *see generally* Shuldberg, *supra* note 13; Peter Siegelman & John J. Donahue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990); Elizabeth M. Horton, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691 (1995). For this reason, our circuit controls are especially important in the analysis of reported opinions. Even these controls, however, cannot correct entirely for the bias created by substantial circuit differences in publication rates.

[128] Issues appear in this category only if disagreement arose over that particular issue; we do not include other issues from the same case if the court unanimously affirmed those issues. It is appropriate to define this category by issue, even though we define the first controversial category by case, because this category focuses on disagreement (which arises by issue) rather than publication (which can occur only by case).

issues in our full "all case" analysis.[129]

For each of these categories of controversial votes, we report means for each variable and compare those means to the full population means. We then estimate regression equations for both the published case and divisive issue categories, again comparing those results to the equation estimated for all issues in all cases.[130] Finally, we calculate marginal effects for variables producing significant coefficients in the analysis of divisive issues. Once again, this technique allows us to give greater meaning to the logistic regression coefficients.

We analyze these two categories of controverted issues to test the possibility that social background factors play a different or larger role in contentious or divided cases. We recognize, however, that neither category perfectly represents the universe of contested issues. Some issues in published opinions are no more controversial than those in unpublished decisions. Varying practices among the circuits also mean that an opinion published in one circuit might escape publication in a neighboring court. Similarly, panel composition may affect votes to reverse, dissent, or concur. A panel including two Republican appointees and one Democrat might produce a sharp dissent from the Democrat, qualifying the disputed issue for inclusion in our divisive category, while a panel of three Republicans would yield a unanimous affirmance on the same issue, omitting it from the divisive analysis.

We discuss some of these caveats in greater detail below, while also illustrating the utility of comparing these two categories of controversial votes to the full universe of judicial participations. Our database is especially rich because it allows us to analyze both all issues and smaller subsets of contested votes. The analyses

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[129] The divisive category includes 746 votes on unanimously reversed issues; 142 votes on reversed issues that generated a concurrence or dissent; and 218 votes from affirmed issues that generated a concurrence or dissent.

[130] In analyses of both the published case and divisive issue categories, we must be concerned with the possibility of selection bias. *See generally* Richard A. Berk, *An Introduction to Sample Selection Bias in Sociological Data*, 48 AM. SOC. REV. 386 (1983). For issues appearing in published cases, we avoided the problem of selection bias by estimating the equation within the full population and using a series of interaction terms to isolate effects for issues in published cases. Table VII reports only the coefficients reflecting effects in published cases; results for the full equation are available from the authors. Because this technique uses information from both published and unpublished opinions, it avoids the distorting effect that censoring can have on the calculation of standard error. Most social science studies are unable to adopt this approach because information about the dependent variable is missing for censored cases. We were fortunate in having an exceptionally complete database.

We were unable to adopt this approach for divisive issues, because the interaction terms predicted too many outcomes completely. We estimate this equation solely for the subset of divisive issues, aware that this technique carries some risk of selection bias. As discussed further below, we interpret coefficients from this equation cautiously and in combination with results from our other equations.

that follow draw upon these distinctive strengths.

## III. RESULTS

### A. *Analyses of All Issues in All Cases*

Our full data set includes 5,463 issue-specific votes by appellate judges. Table I reports the means for our dependent variable (a vote for the union), as well as for all independent and control variables in this "all case/all issue" universe. As the table reflects, 76% of the appellate votes favored the union.[131] Democratic appointees cast 34% of all votes, judges who had held elected office cast 22%, women cast 11%, and judges with NLRA management experience cast 14%. On average, issues were decided by judges who were sixty years old at the time of decision and who were appointed in the early months of 1980.[132]

The righthand column of Table I, which lists means for control variables, shows that 88% of the votes arose out of Board decisions for the union,[133] that 45% of the issues arose under sections 8(a)(1) or (3) of the statute, and that Sixth Circuit judges decided more issues than judges in any other circuit. The high preponderance of section 8(a) issues, 81% of the total, reflects the fact that the NLRA's primary thrust is to protect union organizing and collective bargaining activities from unlawful interference by employers.

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[131] The dependent variable, like most of the other variables in Table I, is a dichotomous variable. For these variables, the "mean" is equivalent to the percentage of votes reflecting the characteristic for which that variable is coded "1." We have named the variables to reflect those codes so that the table means can be read directly as percentages.

[132] For continuous variables, namely age, year of appointment, and college selectivity, the means in Table I represent the mean or average value of the variable. These values are not necessarily the same as the mean value for all judges appearing in the database, because judges contributed varying numbers of votes. The means in Table I and similar tables, in other words, are based on votes rather than judges.

[133] The Board's pro-union bottom line is not surprising given that it settles, dismisses, or withdraws over 90% of all charges, *see supra* note 83, leaving only strong cases for adjudication, and that the overwhelming majority of cases adjudicated involve the employer as respondent. Employers, moreover, often litigate liability determinations to the courts of appeals in order to gain strategic advantages (especially delay) even if their case is weak on the merits. *See* Brudney, *supra* note 70, at 973–78.

**Table I: Means for All Variables**
**All Issues in All Cases (N=5,463)**

| Variable | Mean | Variable | Mean |
|---|---|---|---|
| **Judicial Vote for Union** | .76 | **Control Variables** | |
| **Judicial Characteristics** | | Board for Union | .88 |
| Democratic Appointee | .34 | Section 8(a)(1) & (3) | .45 |
| Year Appointed | 80.01 | Section 8(a)(5) | .34 |
| Age | 60.25 | Other Section 8(a) | .02 |
| Female | .11 | Section 8(b) | .08 |
| Female/Dem. Interaction | .07 | Section 10(c) | .11 |
| African American | .06 | D. C. Circuit | .14 |
| Latino or Asian | .02 | First Circuit | .01 |
| Catholic or Jewish | .47 | Second Circuit | .09 |
| College Selectivity | 61.36 | Third Circuit | .10 |
| Elite Law School | .57 | Fourth Circuit | .06 |
| Elected Office | .22 | Fifth Circuit | .05 |
| Nonelective Position | .73 | Sixth Circuit | .19 |
| Prior Judicial Experience | .57 | Seventh Circuit | .10 |
| Legal Academic | .27 | Eighth Circuit | .05 |
| Workplace Law Experience | .28 | Ninth Circuit | .13 |
| Corporate Law Experience | .48 | Tenth Circuit | .03 |
| NLRA Management Exp. | .14 | Eleventh Circuit | .04 |
| NLRA Mgmt./Bd. Interact. | .12 | Year of Decision | 89.83 |

Table II reports the results of our logistic regression equation for votes favoring the union. Most of our control variables, notably, are significant in the equation. Judges were significantly more likely to vote for the union when the Board had reached the same result. They were less likely to favor the union when litigants presented claims under sections 8(a)(5), 8(b), 10(c), or the miscellaneous section 8(a) category than when parties sought review of issues arising under sections 8(a)(1) and (3), our reference category (and the statute's basic protections for

**Table II: Logistic Regression for Supporting the Union**
**All Issues in All Cases (N=5,463)**

| | Coefficient | Robust Std. Err. | Signif. |
|---|---|---|---|
| **Judicial Characteristics** | | | |
| Democratic Appointee | .68 *** | .15 | .000 |
| Year Appointed | -.02 * | .01 | .065 |
| Age | -.02 *** | .01 | .010 |
| Female | .90 *** | .32 | .005 |
| Female/Dem. Interaction | -1.14 *** | .40 | .005 |
| African American | -.09 | .24 | .713 |
| Latino or Asian | -1.08 *** | .32 | .001 |
| Catholic or Jewish | .12 | .12 | .323 |
| College Selectivity | -.02 *** | .01 | .000 |
| Elite Law School | -.03 | .12 | .807 |
| Elected Office | .21 * | .12 | .090 |
| Nonelective Position | -.16 | .13 | .205 |
| Prior Judicial Experience | -.04 | .11 | .715 |
| Legal Academic | .09 | .13 | .477 |
| Workplace Law Experience | -.30 | .20 | .142 |
| Corporate Law Experience | -.25 | .18 | .163 |
| NLRA Management Experience | .80 ** | .38 | .037 |
| NLRA Mgmt./Board Interaction | -1.02 *** | .39 | .009 |
| **Control Variables** | | | |
| Board for Union | 3.06 *** | .19 | .000 |
| Section 8(a)(5) | -.20 * | .11 | .064 |
| Other Section 8(a) | -1.44 *** | .32 | .000 |
| Section 8(b) | -1.40 *** | .23 | .000 |
| Section 10(c) | -.92 *** | .14 | .000 |
| D.C. Circuit | .10 | .20 | .608 |
| First Circuit | -.06 | .43 | .899 |
| Second Circuit | .60 *** | .22 | .006 |
| Third Circuit | .80 *** | .23 | .001 |
| Fourth Circuit | -.61 *** | .22 | .005 |
| Fifth Circuit | -.88 *** | .22 | .000 |
| Seventh Circuit | .25 | .20 | .214 |
| Eighth Circuit | -.41 * | .22 | .059 |
| Ninth Circuit | .73 *** | .20 | .000 |
| Tenth Circuit | .62 * | .34 | .068 |
| Eleventh Circuit | -.01 | .33 | .978 |
| Year of Decision | -.01 | .03 | .619 |
| **Constant** | 4.41 * | 2.33 | .059 |
| **Pseudo $R^2$** | .25 *** | | .000 |

*** p ≤ .01, ** p ≤ .05, * p ≤ .10

**Table III: Marginal Effects for Significant Variables**
**All Issues in All Cases**

| | Probability of Vote for Union | Marginal Effect |
|---|---|---|
| **Profile Judge** | .80 | |
| **Judicial Characteristics** | | |
| Male Democratic Appointee | .89 | .09 |
| Most Recent Year Appointed | .76 | -.04 |
| Older Age (76) | .74 | -.06 |
| Female Republican Appointee | .91 | .11 |
| Female Democratic Appointee | .86 | .06 |
| Latino or Asian | .58 | -.22 |
| Most Selective College | .74 | -.06 |
| Elected Office | .83 | .03 |
| NLRA Mgmt. Exp./Board for Employer | .35 | -.45 |
| NLRA Mgmt. Exp./Board for Union | .81 | .01 |
| **Control Variables** | | |
| Board for Employer | .16 | -.64 |
| Section 8(a)(5) | .77 | -.03 |
| Section 8(b) | .50 | -.30 |
| Section 10(c) | .62 | -.18 |
| Fifth Circuit | .63 | -.17 |
| Ninth Circuit | .89 | .09 |

organizing behavior).[134] Judges on the Second, Third, Ninth, and Tenth Circuits were all more likely than judges on the Sixth Circuit to vote for the union, while judges on the Fourth, Fifth, and Eighth Circuits were more likely to reject the union.[135]

Table III, which reports the marginal effects for variables with significant coefficients in Table II helps illustrate the magnitude of these control variable

[134] As Table II reflects, the coefficients for section 8(b), 10(c), and miscellaneous 8(a) claims are strongly significant, while the coefficient for section 8(a)(5) claims approaches significance.

[135] The coefficients for the Eighth and Tenth Circuits approached significance, while those for the other circuits noted in text were significant. The nonsignificant coefficients for the D.C., First, Seventh, and Eleventh Circuits indicate that judges on those circuits did not differ significantly from Sixth Circuit judges in their votes.

effects.[136] Table III begins by reporting that a "profile judge," one with the most common values for each of our variables, had an 80% probability of voting for the union. This profile judge was, inter alia, a white male Republican appointee sitting on the Sixth Circuit and reviewing a section 8(a)(1) or (3) claim that the Board had decided in the union's favor.[137] If the Board had voted for the employer, the probability of this judge favoring the union dropped dramatically—to just 16%. Similarly, if the profile judge considered a section 8(b) claim, rather than the more prevalent section 8(a)(1) or (3) claim, the predicted probability of supporting the union dropped to 50%.[138] And, if the profile judge sat in the Fifth Circuit, rather than our reference category of the Sixth, the predicted probability of supporting the union would drop to 63%. Agency deference, substantive issue mix, and circuit culture clearly matter in predicting judicial votes.

A number of judicial attributes, however, also make a significant difference in predicting outcomes. As indicated in Table II, judges appointed by Democratic Presidents were significantly more likely to support the union than were their Republican colleagues. Older judges and judges who had graduated from more selective colleges were significantly more likely to reject the union's claims.[139] Judges who had held elective office appeared more likely to support the union, although this result merely approached significance. Conversely, judges appointed in more recent years seemed more likely to reject the union; this result also

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[136] The table reports marginal effects for all judicial attribute variables that approached or achieved significance, as well as for illustrative control variables.

[137] Similarly, the profile judge was appointed in 1980, was about 60 years old at the time of decision, was Protestant, attended a fairly selective college and an elite law school, had held a nonelective government position as well as a previous judicial appointment, and had practiced corporate law but without handling NLRA or workplace matters. We used corporate law as the modal value for private practice experience because it was the most common form of that experience. The profile judge, of course, is an arbitrary concept. We could construct any other hypothetical profile (such as a female Republican appointee with workplace law experience) and test the marginal effect of each variable against that profile. The baseline we adopt is a particularly useful one for comparing the magnitude of coefficients in the regression equation because it comes closest to reflecting the typical judge in our data set.

[138] If the profile judge reviewed a section 8(b) claim on which the Board had ruled for the employer—a more common pattern with section 8(b) claims—the probability of supporting the union would fall even further, to just five percent. Note, however, that we obtained this probability by recomputing the probability for a profile judge reviewing this type of case. The marginal effects reflected in Table III cannot simply be combined; the probability for each pattern of characteristics must be computed separately.

[139] According to our equation, Asian and Latino judges were also more likely than their White colleagues to reject the union. As noted above, however, we view this coefficient with considerable caution because of the small number of Asian and Latino judges in the population. *See supra* notes 100–03 and accompanying text.

approached significance.[140]

The trend toward increased opposition to union positions in recent appointees holds for both Republican and Democratic judges. We repeated our regression equation for the separate populations of Republican and Democratic appointees. The coefficient for year appointed was negative in both equations, indicating that more recent appointees were less likely to support the union. The result was significant in the equation for Republican appointees (-.03, p=.041); in the smaller population of Democratic appointees, it did not quite approach significance (-.04, p=.145).[141]

We can illustrate this effect by calculating probabilities similar to the ones reported in Table III. A male judge appointed in 1961, the first year of the Kennedy Administration, had a predicted probability of supporting the union of 92%.[142] For a judge appointed the previous year, the last year of Eisenhower's Administration, we calculated an 86% probability of supporting the union. Moving forward twenty years, a male judge appointed in 1980 (one of President Carter's last appointments) showed an 89% probability of supporting the union. A judge appointed the following year by President Reagan displayed an 80% probability of supporting the union. For both Democrats and Republicans, in other words, the probability of supporting the union's legal position dropped by 3 to 6 percentage points when we compared recent appointees to more senior ones.[143] The probability of support

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[140] Age and year of appointment are negatively correlated; more recent appointees are younger, on average, than are judges with longer tenure. The variables, however, were not too highly correlated to include in the same equation. The significance of both coefficients is particularly intriguing here. The pattern suggests that older judges, on average, were more likely to reject the union, even when we controlled for their relatively early years of appointment. Judges appointed more recently were also more likely to reject the union, even when we controlled for their relatively young ages. Both advanced age and recent appointment seem to correspond with anti-union votes.

[141] Full results for this supplemental analysis are available from the authors.

[142] The judges who contributed votes to our database were appointed by Presidents Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, Reagan, and Bush. Thus, 1961 was the earliest year for a Democratic appointment. We use male judges for these comparisons because the most senior female judge in our database was not appointed until 1979. Other than year of appointment and party of the appointing President, we use the profile characteristics for these comparisons.

[143] For Republicans, the effect would be even more extreme if we compared the earliest possible year of appointment (1954) with the most recent year of appointment (1992). Our equation predicts that a profile judge appointed in 1954 (by Republican Eisenhower) had an 88% probability of supporting the union. A judge appointed in 1992 (by Republican Bush) had a 76% probability of supporting the union—a twelve-point drop. These figures probably are accurate in depicting the increased opposition toward unions of the 1980s. We focus on the more moderate comparisons in text, however, because the Republican appointees spanned a much greater range (1954–1992) than the Democrats (1961–1980).

among recent Democratic appointments, in fact, is not much higher than that of early Republican appointees.[144]

At least for this population of all votes in all cases, however, the difference between Democratic and Republican appointees does not seem to be either increasing or decreasing over time. Recently appointed Democrats and recently appointed Republicans both are less likely to support the union than their more senior colleagues of the same party. The partisan gap, however, appears fairly constant once one controls for year of appointment.[145]

Tables II and III also reveal that gender makes a difference in NLRA cases—but only for Republican appointees. The coefficients in Table II for Democratic appointees, women, and the interaction of those two terms are all significant. Taken together, the coefficients indicate that Democratic men and women both are more likely than Republican men to vote in favor of the union, but that Democratic men and women do not differ significantly among themselves.[146] Republican women, on the other hand, are significantly more likely than Republican men to support the union. The votes of Republican women, in fact, are at least as pro-union as those of Democratic men or women.[147]

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[144] The latter two groups, however, still differ significantly in their likelihood of casting pro-union votes. We repeated our regression equation for a population of votes restricted to early Republican appointees (those named to the bench by Eisenhower, Nixon, or Ford) and recent Democratic appointees (those named by Carter). We omitted from this equation variables (such as female and African American) that would have correlated perfectly with one of the two categories. In this pared equation, comparing early Republican appointees to recent Democratic ones, the coefficient for Democratic appointment was still positive and significant ($p=.021$).

[145] We tested this possibility by creating an interaction term for Democratic appointment and year of appointment; the interaction was not significant. We also created separate regression equations for judges appointed before and after 1976. In both groups, Democratic appointees were significantly more likely than their Republican peers to support the union's position and the magnitude of this effect (as measured through marginal effects) was comparable.

[146] The Female-Democratic interaction term allows us to compare Democratic men, Democratic women, and Republican women to the reference category of Republican men. To obtain the result for Democratic men, we look just at the coefficient for Democratic appointment. That coefficient is significant and positive, indicating that men appointed by Democrats are more likely to support the union than are men appointed by Republicans.

To obtain the result for women appointed by Democrats, we must look at the coefficients for Democratic appointment, being female, and the interaction between the two. The first two of these coefficients are significant and positive, while the final one is significant and negative. In fact, the third coefficient almost exactly cancels out the second one. This leaves the first coefficient, which is the one for being a Democratic appointee. Thus, the results for Democratic women are comparable to those for Democratic men; their "femaleness" does not enhance any pro-union tendencies already conveyed by their political leanings.

[147] To obtain results for Republican women, we need to look only at the coefficient for being

Table III clarifies these results by showing the marginal effects for each of these variables. Switching the profile judge from a Republican to a Democrat (but retaining the profile judge's maleness) raises the predicted probability of voting for the union from 80% to 89%, an increase of 9 percentage points. Switching the profile judge from a male Republican to a female Democrat similarly raises the predicted probability of a pro-union vote from 80% to 86%.[148] And changing the profile judge from a male Republican to a female Republican increases the probability of voting for the union to 91%.

Tables II and III, finally, reveal that judges with NLRA management experience were significantly more likely than their colleagues to vote for the union—but only in cases in which the Board had issued a decision for the employer. When the Board supported the union, most judges showed a high probability of voting for the union as well. As Table III illustrates, a profile judge had an 80% likelihood of supporting the union when the Board had reached a pro-union result. That same judge, with NLRA management experience instead of nonworkplace corporate experience, had an 81% probability of supporting the union, a nonsignificant difference.[149]

The gap grew, however, when we examined appeals from pro-employer determinations. Judges with no NLRA management experience showed only a 16% probability of supporting the union when the Board had voted for the employer. A judge with most of the same profile characteristics, but NLRA management experience, registered a 35% probability of supporting the union under these circumstances. When holding other characteristics constant in our judicial profile, in other words, a judge with NLRA management experience was more than twice as likely as a judge without that experience to reverse a pro-employer Board outcome and support the union.[150]

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female. Republican women are female, but they are not Democrats. Thus, we can ignore both the coefficient for being a Democrat and for the interaction of that status with being female. The coefficient for being female is significant and positive, showing that Republican women are significantly more likely than Republican men to vote for the union.

[148] This increase is lower than the rise for male Democrats, but the difference is not significant. Male and female Democrats were similar in their proclivity to favor the union when compared to male Republicans.

[149] One can reach the same conclusion by interpreting the coefficients in Table II. When the Board supported the union, a judge with NLRA management experience would show the effects of the NLRA, Board outcome, and NLRA/Board coefficients. The NLRA management coefficient is significant and positive, while the NLRA/Board interaction is significant and negative. The two coefficients also are of similar magnitude, canceling one another out. This leaves only the Board outcome coefficient, indicating that judges with NLRA management experience—just like all other judges—were significantly more likely to support the union when the Board had done so.

[150] The same result is apparent from the coefficients reported in Table II. To consider the case

## B. *Statutory Subsections*

We turn now to examination of the role of judicial attributes in predicting pro-union votes under four different sections of the statute: sections 8(a)(1) and (3), section 8(a)(5), section 8(b), and section 10(c). In Appendix B, we provide analyses for a fifth grouping of statutory issues, all votes cast under section 8(a).[151]

Table IV reproduces the means for all variables (except the statutory section controls) in our full population and compares those means to means within each statutory section subpopulation. The table also identifies notable variations in frequency, indicating when the mean for a variable within one issue category differed significantly from the mean for votes falling outside that category. As our initial regression equation suggested, outcomes vary widely by statutory section. Judicial votes on section 8(a)(5), section 8(b), and section 10(c) issues all are less

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of a judge with NLRA management experience reviewing a pro-employer determination, one looks only at the coefficient for NLRA management experience. This coefficient is significant and positive, indicating that these judges were significantly more likely than their colleagues to reverse the Board when the Board had voted for the union.

As Table II shows, judges with other types of labor or workplace law experience were neither more nor less likely than their colleagues to support the union. When we broke this variable into separate components, we found that the very small number of judges whose only NLRA experience was in government (*see* note 109 *supra*) resembled their colleagues with management experience. That is, judges with NLRA government experience were significantly more likely than other judges to vote for the union when the Board had found for the employer. Judges whose only NLRA experience was in the classroom, conversely, showed some tendency to reject union positions—but this result only approached significance. Judges with exclusively union experience and judges with non-NLRA workplace law experience did not differ significantly from their colleagues in our analysis of all issues in all cases.

[151] As Appendix B reveals, this grouping offers results similar to those we obtained in our initial regression equation for all issues in all cases: (1) Democratic appointees and Republican women were significantly more likely to favor the union after controlling for other factors. (2) Older judges, Latino or Asian judges, and graduates of more selective colleges were less likely to support the union's legal position. (3) Judges with NLRA management experience, finally, were significantly more likely than their colleagues to vindicate the union when the Board had voted for the employer.

The resemblance of these findings to our analysis of all issues in all cases is not surprising; issues arising under section 8(a) account for 81% of the votes in our database.

**Table IV: Means by Statutory Sections in All Cases**

| Variable | All | 8(a)(1)/(3) | 8(a)(5) | 8(b) | 10(c) |
|---|---|---|---|---|---|
| **Judicial Vote for Union** | .76 | .85*** | .79** | .22*** | .70*** |
| **Judicial Characteristics** | | | | | |
| Democratic Appointee | .34 | .35 | .32 | .45*** | .31 |
| Year Appointed | 80.01 | 79.96 | 80.11 | 79.70 | 80.27 |
| Age | 60.25 | 60.29 | 60.13 | 60.30 | 60.24 |
| Female | .11 | .11 | .10 | .12 | .13 |
| Female/Dem. Interact. | .07 | .07 | .06 | .09 | .10 |
| African American | .06 | .06 | .06 | .05 | .07 |
| Latino or Asian | .02 | .01*** | .02 | .10*** | .01 |
| Catholic or Jewish | .47 | .43*** | .47 | .62*** | .46 |
| College Selectivity | 61.36 | 60.78** | 61.90* | 61.70 | 61.65 |
| Elite Law School | .57 | .58 | .55 | .60 | .58 |
| Elected Office | .22 | .23 | .21 | .16* | .21 |
| Nonelective Position | .73 | .71* | .75* | .72 | .73 |
| Prior Judicial Exp. | .57 | .57 | .57 | .46*** | .61 |
| Legal Academic | .27 | .27 | .27 | .30 | .29 |
| Workplace Law Exp. | .28 | .28 | .26 | .31 | .29 |
| Corporate Law Exp. | .48 | .48 | .49 | .39** | .52 |
| NLRA Mgmt. Exp. | .14 | .14 | .13 | .20** | .09** |
| NLRA Mgmt./Bd. Int. | .12 | .14*** | .13 | .01*** | .09 |
| **Control Variables** | | | | | |
| Board for Union | .88 | .97*** | .92*** | .16*** | .94*** |
| D.C. Circuit | .14 | .13 | .14 | .15 | .17 |
| First Circuit | .01 | .01 | .01 | .02 | .00 |
| Second Circuit | .09 | .10 | .07 | .05** | .10 |
| Third Circuit | .10 | .11 | .09 | .14 | .10 |
| Fourth Circuit | .06 | .06 | .06 | .05 | .04 |
| Fifth Circuit | .05 | .05 | .06 | .02*** | .04 |
| Sixth Circuit | .19 | .23*** | .15*** | .06*** | .26*** |
| Seventh Circuit | .10 | .08** | .15*** | .02*** | .08 |
| Eighth Circuit | .05 | .05 | .04 | .06 | .05 |
| Ninth Circuit | .13 | .07*** | .13 | .43*** | .14 |
| Tenth Circuit | .03 | .04 | .04** | .00** | .02 |
| Eleventh Circuit | .04 | .05** | .05 | .00** | .00*** |
| Year of Decision | 89.83 | 89.85 | 89.91 | 89.11*** | 90.01 |
| N | 5,463 | 2,451 | 1,872 | 430 | 623 |

***p ≤ .01, ** p ≤ .05, *p ≤ .10

likely to favor the union than are votes on section 8(a)(1) and (3) issues.[152] The difference is most dramatic with respect to section 8(b) issues, which involve allegations of misconduct by unions. Judges supported the union on just 22% of these appealed issues, while they favored the union on 70% of section 10(c) remedial issues, 79% of section 8(a)(5) bargaining issues, and 85% of section 8(a)(1) and (3) issues.

Differences of this magnitude in judicial outcomes reflect in large part the posture of issues appealed to the courts. Table IV demonstrates that the Board's result also differed substantially among the statutory sections. The Board favored the union in only 16% of the section 8(b) issues appealed to the courts.[153] Most of the issues falling in that category, in other words, involved union appeals of Board determinations adverse to them. Section 8(a)(1) and (3) claims, on the other hand, displayed an exceptionally high proportion of pro-union outcomes.[154] Most of those appeals were filed by disappointed employers.

Table IV also reveals that the mix of NLRA issues differs somewhat among the circuits. The Ninth Circuit handled a disproportionate number of the section 8(b) claims, deciding 43% of all issues falling in that category. The Sixth Circuit heard unusually high percentages of section 8(a)(1) or (3) and section 10(c) claims, deciding about one quarter of the issues filed in both of those categories. And the Seventh Circuit's docket included a disproportionate percentage of section 8(a)(5) claims.

These differences may reflect forum shopping by litigants, variations in underlying behavior, or both. Unions may tend to appeal adverse section 8(b) findings to the relatively liberal Ninth Circuit; alternatively, West Coast unions may generate a disproportionate number of section 8(b) challenges. The high percentage of section 8(a)(1) and (3) claims in the Sixth Circuit, together with the remedial issues accompanying those claims, may reflect concentrated organizing in some or

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[152] In an earlier study based on the same database, we reported a significant difference in reversal rates with respect to Board findings of employer liability under section 8(a)(5) and sections 8(a)(1) and (3). *See* Brudney, *supra* note 70, at 981–82. In that study, we distinguished among substantive violations found by the Board under 8(a)(5), technical violations of that section (discussed *supra* at note 114), violations of 8(a)(1), and violations of 8(a)(3). The reversal rates with respect to Board determinations of liability in the first two categories were, respectively, 15.9% and 15.6%, while reversal rates for determinations of liability in the last two categories were just 12.0% and 12.4%. *See* Brudney, *supra* note 70, at 981–82.

[153] This figure, of course, does not reflect the full universe of Board findings on section 8(b) issues; it reflects only issues appealed to the courts.

[154] Once again, it would be hasty to conclude from the mean in Table IV that the Board decides 97% of all 8(a)(1) and (3) claims for the union. The high percentage of pro-union outcomes appearing on the appellate docket may stem partly from a greater propensity of employers to appeal adverse decisions.

all of the states within that circuit. Whatever the reasons for these differences, it is important to note that they exist—and that they may have some impact on our analyses of judicial attributes. As Table IV shows, the uneven distribution of issues among the circuits affects the judicial attributes within each of those statutory categories. The problem is especially acute for section 8(b) appeals, which were concentrated so heavily in one circuit. Each of the other categories, however, includes a disproportionate number of judges with at least one of the attributes under study.

With these caveats in mind, we turn to Table V, which compares our regression equation for each statutory category to the results from our regression for all issues (Table II).[155] The table suggests that judicial attributes differ in their correlation with outcomes depending upon the type of claim under review.[156] Democratic appointees, for example, were significantly more likely to support the union in both categories of section 8(a) claims, but political background did not correlate with a judge's vote on section 8(b) or section 10(c) claims. Indeed, the coefficient for Democratic appointment in the equation for section 10(c) was negative and relatively large (p=.147). Political affiliation, therefore, appears to be a better predictor for outcomes on substantive issues involving alleged employer misconduct than for remedial issues or claims alleging misconduct by the union.

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[155] To conserve space, we report only regression coefficients, designating those that reached or approached significance. Standard errors for all equations in Table V, as for the equation reported in Table I, used the Huber/White correction for heteroscedasticity. *See supra* note 120 and accompanying text. Robust standard errors and precise p-levels are available upon request.

For section 8(b) and 10(c) claims, which embraced smaller populations, we had to drop several variables from the regression equation. These omitted variables either were collinear with other variables or completely predicted the outcome. We mark these omitted variables with a "#" sign in Table V.

Most of the omitted variables were circuit variables, but we had to drop the NLRA/Board interaction from the equation for section 10(c). Because of the small number of pro-employer decisions from the Board in this category, the interaction term completely predicted outcomes. That is, in each case in which the Board voted for the employer under section 10(c), judges with NLRA management experience voted to reverse and offer relief to the union. We discuss this result further in note 160 *infra*.

[156] When comparing coefficients across the four equations, one must remember that the populations vary in size. The number of 8(b) and 10(c) claims is much smaller than the number of 8(a)(1) and (3) or 8(a)(5) claims. It is correspondingly more difficult for coefficients in the former categories to achieve significance. In comparing coefficients, we thus consider the coefficient's magnitude and sign, as well as its p-value.

**Table V: Logistic Regression for Supporting the Union Regression Coefficients for Statutory Sections**

| | All | 8(a)(1)/(3) | 8(a)(5) | 8(b) | 10(c) |
|---|---|---|---|---|---|
| **Judicial Characteristics** | | | | | |
| Democratic Appt. | .68 *** | 1.03 *** | .72 *** | .48 | -.62 |
| Year Appointed | -.02 * | -.01 | -.02 | -.03 | -.09 ** |
| Age | -.02 *** | -.01 | -.03 * | .01 | -.08 *** |
| Female | .90 *** | 1.33 *** | .55 | 2.73 ** | -.64 |
| Female/Dem. Int. | -1.14 *** | -1.62 ** | -.54 | -3.92 ** | 1.29 |
| African American | -.09 | -.59 | -.38 | 1.78 * | .82 |
| Latino or Asian | -1.08 *** | -.32 | -1.32 ** | -3.17 ** | .12 |
| Catholic or Jewish | .12 | -.21 | .14 | 1.78 *** | .40 |
| College Selectivity | -.02 *** | -.04 *** | -.02 * | .00 | -.02 |
| Elite Law School | -.03 | .28 | -.55 *** | .45 | -.46 |
| Elected Office | .21 * | .34 * | -.13 | .43 | .47 |
| Nonelective Posit. | -.16 | -.14 | -.16 | -.18 | -.07 |
| Prior Judicial Exp. | -.04 | -.08 | -.21 | -.40 | .12 |
| Legal Academic | .09 | -.09 | .12 | -.08 | .77 ** |
| Wrkplc. Law Exp. | -.30 | -.54 | -.29 | 1.57 | -.35 |
| Corp. Law Exp. | -.25 | -.49 | -.27 | 2.06 ** | -.19 |
| NLRA Mgmt. Exp. | .80 ** | 1.55 | 1.55 ** | .88 | -.04 |
| NLRA Mgmt./Bd. Interaction | -1.02 *** | -2.09 | -1.60 ** | -.51 | # |
| **Control Variables** | | | | | |
| Board for Union | 3.06 *** | 3.03 *** | 3.17 *** | 3.23 *** | 2.24*** |
| D.C. Circuit | .10 | .15 | -.50 | 2.07 *** | .40 |
| First Circuit | -.06 | .60 | 1.35 | # | # |
| Second Circuit | .60 *** | 1.03 *** | 2.13 *** | -1.34 | -1.15 ** |
| Third Circuit | .80 *** | .60 | 2.51 *** | 1.22 | .38 |
| Fourth Circuit | -.61 *** | -1.08 *** | -.27 | 1.58 | .73 |
| Fifth Circuit | -.88 *** | -1.65 *** | .14 | -.56 | -.94 |
| Seventh Circuit | .25 | .38 | .19 | # | -.72 |
| Eighth Circuit | -.41 * | -.75 ** | -.16 | # | -.38 |
| Ninth Circuit | .73 *** | .25 | 1.46 *** | .21 | 1.99*** |
| Tenth Circuit | .62 * | .87 | .27 | # | 1.52 |
| Eleventh Circuit | -.01 | -.07 | -.02 | # | # |
| Year of Decision | -.01 | -.03 | -.01 | -.22 | .07 |
| **Constant** | 4.41 * | 5.72 | 4.37 | 15.61 | 6.11 |
| **Pseudo $R^2$** | .25 *** | .15 *** | .25 *** | .36 *** | .17*** |
| **N** | 5,463 | 2,451 | 1,872 | 430 | 623 |

*** $p \leq .01$, ** $p \leq .05$, * $p \leq .10$, # variable omitted due to collinearity or perfect prediction

The regression results for section 8(a)(1) and (3) claims are most similar to the results for all issues in all cases, a pattern that reflects at least in part the dominance of these claims in the full population. The coefficients for NLRA management experience and its associated interaction, however, are not significant in the 8(a)(1) and (3) equation. This difference may reflect the relative ease most judges feel when reviewing section 8(a)(1) and (3) claims against employers. These allegations raise the most common type of NLRA complaint: That an employer threatened, bribed, interrogated, or discharged individual workers to impair an organizational campaign or union election. These complaints also are analogous to claims of discrimination, bribery, or intimidation arising in other areas of public law.[157] Experience interpreting the NLRA may matter less when reviewing section 8(a)(1) and (3) claims.[158]

Section 8(a)(5) claims, on the other hand, raise issues more distinct from other fields of appellate practice. These allegations focus on employer misconduct directed at the union rather than at individual employees. They involve complaints that the collective bargaining process is being undermined or subverted, including charges that an employer refused to provide requested information, engaged in surface bargaining, or improperly withdrew recognition of the bargaining unit. To understand and assess these claims, judges must be comfortable both with the protected nature of group action and with the complex dynamics generated by a clash between two collective entities, the union and the employer. There also are fewer analogues elsewhere in public law to claims that center on the paradigm of group action.

With this background, it is noteworthy that the results for our section 8(a)(5) equation differ substantially from those for the other equations. The coefficients in Table V suggest that older judges and graduates of elite law schools were especially

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[157] *See* 26 AM. JUR. 2d *Elections* §§ 374–85 (1996) (discussing the range of political election misconduct analogous to section 8(a)(1) that is prohibited by federal or state law, including electioneering, bribery, illegal advertising, and voter intimidation); Price Waterhouse v. Hopkins, 490 U.S. 228, 239–52 (1989) (plurality opinion) (addressing mixed motive discriminatory conduct issue analogous to section 8(a)(3)); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977) (same).

[158] As in our analysis of all issues, the variable for judges holding other types of NLRA or workplace law experience did not achieve significance in our examination of section 8(a)(1) and (3) votes. The judges within this category who obtained their NLRA experience solely within government, however, were significantly more likely than other judges to support the union—regardless of the Board's outcome below. Judges whose only NLRA experience was academic, conversely, showed some tendency to reject the union. As in our analysis of all issues, *supra* note 150, this coefficient approached significance. Separate variables for the larger numbers of judges with union-side NLRA experience or non-NLRA experience were not significant in this equation.

hostile to unions asserting claims under section 8(a)(5).[159] Republican women showed no significant hostility toward unions under section 8(a)(5), but their absence of support is notable when contrasted with the backing they exhibited for unions under sections 8(a)(1) and (3), as well as under section 8(b). Similarly, while Democratic appointees (both male and female) were significantly more likely than their Republican colleagues to support unions under section 8(a)(5), the difference was not as strong as under sections 8(a)(1) and (3).

Conversely, judges with NLRA management experience displayed the largest pro-union difference from their colleagues under section 8(a)(5). When the Board rejected a union's 8(a)(5) bargaining claim, judges with NLRA management experience were especially likely to reverse and protect the union's position.[160] This pattern supports the hypothesis that section 8(a)(5) claims present particular challenges to the bench. Judges who supported the union under other sections of the statute appeared less likely to register that support under section 8(a)(5), while judges with the most experience interpreting and litigating under the statute showed a special propensity to protect union interests.[161]

Votes premised on section 8(b), the statutory section protecting employers and individuals from union misconduct, also displayed an interesting set of correlations with judicial attributes. Democratic men and women did not differ from Republican men on these claims, but Republican women were significantly more likely than the other three groups to favor the union when claims were filed against it. Catholic and Jewish judges likewise were significantly more likely than their Protestant counterparts to take the union's side under section 8(b), as were judges with corporate practice experience.[162] African American judges also appeared more

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[159] Graduates of selective colleges tended to vote against unions in this context as well, but that tendency was more consistent with their responses under other sections of the statute. The coefficient for Latino and Asian judges also was negative and significant in this equation. The small number of Latino and Asian judges in the population, however, counsels caution in interpreting the result.

[160] The coefficients for judges with NLRA management experience also were positive in the equations for section 8(a)(1) and (3), as well as for section 8(b), but they did not attain significance in these equations. In the equation for section 10(c), we had to omit the NLRA/Board interaction because it perfectly predicted outcome. Judges with NLRA experience, in other words, always voted for the union when the Board rejected the union's claim under section 10(c). The effect thus is consistent with the positive (and sometimes significant) coefficients in the other equations. Only a small number of claims, however, fit this pattern under section 10(c).

[161] Our variable for other workplace law experience did not attain significance in our analysis of section 8(a)(5) claims. Nor did any of the components of that variable (i.e., judges with union, government, or academic NLRA experience, as well as judges with non-NLRA workplace law experience) attain significance.

[162] When we subdivided our other workplace law experience variable, we discovered that

likely to support unions under section 8(b), although this effect merely approached significance.[163]

In the section 10(c) category, year of appointment, age, and experience as a legal academic all played especially strong roles in predicting outcomes. Both recent appointees and older judges were especially likely to vote against broad remedies favoring unions.[164] Experience as a legal academic, conversely, showed a strong positive correlation with votes for the union. This effect, notably, did not appear in any of the other statutory categories or in our analysis of all issues in all cases. Former academics may be especially open to granting more expansive relief, or they may be more sophisticated in thinking about broad remedial measures.[165]

The votes for the four statutory sections thus showed substantial variation. Judicial attributes help predict outcomes under all four sections, but the effects are not uniform. Instead, the impact of social background factors appears highly contextual, with factors assuming importance for some issues but not others.[166]

### C. *Controversial Votes*

We turn, finally, to two sets of judicial participations that may contain a higher percentage of controverted votes than the groups analyzed earlier: Votes on all issues in cases published in the *Federal Reporter* ("published cases") and all votes on issues that provoked some disagreement among judges or between the court and

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judges with union, but not management, NLRA experience also were significantly more likely to support the union under section 8(b). Additional subgroups within this workplace law experience variable did not produce significant coefficients.

[163] Latino and Asian judges were more likely than their White or African American colleagues to reject union claims under section 8(b), but we interpret this coefficient cautiously because of the small number of these judges in the population.

[164] Although these effects point in opposite directions, they are consistent. The coefficients mean that older judges were significantly more likely than their younger colleagues to vote against unions on remedial issues, even after controlling for factors (like an earlier year of appointment) that might have made them more favorable to the relief. Recent appointees likewise disfavored unions under section 10(c), even after controlling for factors (such as their relative youth) that might have made them more sympathetic to remedial claims.

[165] None of our variables for NLRA or workplace law experience, including subcategories of the latter variable, produced significant coefficients in the analysis of section 10(c).

[166] Some judicial attributes, on the other hand, never showed a significant association with outcomes after controlling for other variables. Previous appointment to a nonelective government position and prior judicial experience failed to generate significant coefficients in our analysis of any of the statutory sections, as well as in the all-case analysis. Nor were these two variables significant in the two analyses of controversial cases we report in the next section. The variable for other workplace law experience was not significant in any of our equations, but its components sometimes achieved significance.

the Board ("divisive issues"). Table VI summarizes the means for all variables in the published and divisive categories and compares those means to the means in the full population of all votes (Table I).

Table VI reveals that the published and divisive votes differ in important ways from the full population of all votes.[167] Although 76% of all votes supported the union, just 68% of votes in published cases were pro-union, and only 26% of votes in divisive cases endorsed the union. The mix of statutory sections in each controversial category differs significantly from that in the full population—and the two categories differ from one another as well.[168] The circuits also varied widely in the percentage of votes they contributed to the full population and each of the controversial subpopulations.[169] The circuit mix, in turn, affected the presence of judicial attributes in both controversial categories, especially the published cases.

Given these differences, we must exercise caution when interpreting results from the published case or divisive issue categories. The results accurately reflect the votes included within those categories, and may help identify characteristics that are especially important in predicting votes in controversial cases, but these results do not necessarily generalize to all votes in all cases. Instead, at least some of the results may be a function of which issues were selected into the categories for analysis.

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[167] Once again, within each category we mark means that differed significantly from means for votes falling outside that category.

[168] Both published cases and divisive issues contain significantly fewer votes on section 8(a)(1) or (3) issues than appear in the full population. The published cases include a high proportion of section 8(a)(5) and section 8(b) claims, while the divisive votes contain a high percentage of section 10(c) issues and a lower percentage of section 8(a)(5) issues.

[169] The D.C., Fifth, and Eighth Circuits contributed more votes to both controversial categories than to the full population, while the Third and Ninth Circuits generated proportionally fewer votes in the controversial categories. The First and Seventh Circuits contributed a disproportionate number of votes in published cases, while the Second Circuit was less prominent in that category. The Tenth and Eleventh Circuits were underrepresented among divisive issues. The Fourth and Sixth Circuits, finally, were underrepresented among published cases and overrepresented among divisive issues.

**Table VI: Means for all Variables**
**Controversial Votes and All Votes**

| Variable | All | Published | Divisive |
|---|---|---|---|
| **Judicial Vote for Union** | .76 | .68 *** | .26 *** |
| **Judicial Characteristics** | | | |
| Democratic Appointee | .34 | .34 | .31 * |
| Year Appointed | 80.01 | 80.02 | 80.22 |
| Age | 60.25 | 59.88 * | 60.45 |
| Female | .11 | .11 | .10 |
| Female/Democratic Interaction | .07 | .09 *** | .08 |
| African American | .06 | .06 | .07 |
| Latino or Asian | .02 | .02 | .02 |
| Catholic or Jewish | .47 | .49 *** | .45 |
| College Selectivity | 61.36 | 62.23 *** | 62.49 *** |
| Elite Law School | .57 | .61 *** | .59 |
| Elected Office | .22 | .20 * | .22 |
| Nonelective Position | .73 | .74 | .72 |
| Prior Judicial Experience | .57 | .50 *** | .54 |
| Legal Academic | .27 | .30 ** | .26 |
| Workplace Law Experience | .28 | .29 | .28 |
| Corporate Law Experience | .48 | .48 | .50 |
| NLRA Management Experience | .14 | .13 * | .14 |
| NLRA Mgmt./Board Interaction | .12 | .11 ** | .11 |
| **Control Variables** | | | |
| Board for Union | .88 | .87 ** | .88 |
| Section 8(a)(1) or (3) | .45 | .38 *** | .40 *** |
| Section 8(a)(5) | .34 | .38 *** | .30 ** |
| Other Section 8(a) | .02 | .02 | .04 *** |
| Section 8(b) | .08 | .10 *** | .08 |
| Section 10(c) | .11 | .12 | .18 *** |
| D.C. Circuit | .14 | .19 *** | .17 ** |
| First Circuit | .01 | .02 *** | .01 |
| Second Circuit | .09 | .07 *** | .08 |
| Third Circuit | .10 | .06 *** | .06 *** |
| Fourth Circuit | .06 | .05 ** | .08 *** |
| Fifth Circuit | .05 | .06 * | .09 *** |
| Sixth Circuit | .19 | .15 *** | .23 *** |
| Seventh Circuit | .10 | .16 *** | .10 |
| Eighth Circuit | .05 | .07 *** | .07 * |
| Ninth Circuit | .13 | .11 *** | .08 *** |
| Tenth Circuit | .03 | .03 | .02 *** |
| Eleventh Circuit | .04 | .04 | .02 ** |
| Year of Decision | 89.83 | 89.81 | 89.87 |
| N | 5,463 | 2,938 | 1,106 |

*** $p \leq .01$, ** $p \leq .05$, * $p \leq .10$

Table VII reports the results of our regression equations for supporting the union within both the published case and divisive issue categories. For convenience, we compare the regression coefficients in those equations with the coefficients from the same equation applied to all issues in all cases (Table II).[170]

Appointees of Democratic Presidents were significantly more likely than their Republican colleagues to support the union on issues arising in published cases. Surprisingly, however, this result did not hold for the divisive category of issues. That category contains a disproportionate number of section 10(c) remedial claims, which our previous analysis shows provoked less partisan difference. In addition, the category includes fewer Democratic appointees than does the full population of votes. Supplemental analyses revealed that this partisan effect is concentrated among more senior judges: The divisive category contains significantly fewer votes by early Democratic appointees and correspondingly more votes by early Republican appointees.[171] The category thus encompasses more votes by the most pro-union Republicans and fewer votes by the most pro-union Democrats.[172] The composition of the category thus accounts, at least in part, for the failure of political party to show a significant association with outcome in this equation.

The coefficient for year of appointment was negative and approached significance among published cases, just as in our analysis of all cases. Once again, this trend toward appointment of judges with less union sympathy held for both Republicans and Democrats. We repeated our regression for published cases within the separate populations of Republican and Democratic appointees. The coefficient for year of appointment was negative in both equations—achieving significance in the first analysis and approaching significance in the second.[173]

Year of appointment failed to reach significance in our analysis of divisive issues, although the coefficient had the same sign and magnitude as in the analyses of all cases and published cases. The year of decision, however, was negative and significant in our divisive category, providing a different type of evidence that judicial attitudes in recent years may be moving away from pro-union

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[170] As with Table V, we omit standard errors and p-values; full results are available from the authors. As with all other regression equations, we used the Huber/White correction to estimate robust standard errors. *See supra* note 120 and accompanying text.

[171] Early Democratic appointees (prior to 1976) contributed 5.14% of the votes in the divisive issue category, but 8.33% of the votes on other issues (p=.004). Early Republican appointees (again, prior to 1976) cast 16.19% of the divisive votes, but 13.53% of other votes (p=.091). We used this same dividing line when analyzing partisan effects among all issues in all cases. *See supra* note 145 and accompanying text.

[172] *See supra* notes 140–44 and accompanying text.

[173] For Republican appointees, p=.034; for Democratic appointees, p=.071.

**Table VII: Logistic Regression Coefficients for Supporting the Union Controversial Votes and All Votes**

| | All | Published | Divisive |
|---|---|---|---|
| **Judicial Characteristics** | | | |
| Democratic Appointee | .68 *** | .49 ** | -.10 |
| Year Appointed | -.02 * | -.02 * | -.02 |
| Age | -.02 *** | -.01 | -.00 |
| Female | .90 *** | 1.15 *** | 2.75 *** |
| Female/Democratic Interaction | -1.14 *** | -.99 ** | -2.33 *** |
| African American | -.09 | .14 | 2.19 *** |
| Latino or Asian | -1.08 *** | -.36 | # |
| Catholic or Jewish | .12 | .18 | 1.22 *** |
| College Selectivity | -.02 *** | -.02 ** | -.03 ** |
| Elite Law School | -.03 | .32 ** | 1.00 *** |
| Elected Office | .21 * | .06 | .75 ** |
| Nonelective Position | -.16 | -.15 | .25 |
| Prior Judicial Experience | -.04 | .01 | -.28 |
| Legal Academic | .09 | -.00 | .17 |
| Workplace Law Experience | -.30 | .04 | .51 |
| Corporate Law Experience | -.25 | -.07 | .65 |
| NLRA Management Experience | .80 ** | .93 ** | 1.27 ** |
| NLRA Mgmt./Board Interaction | -1.02 *** | -1.18 ** | |
| **Control Variables** | | | |
| Board for Union | 3.06 *** | 2.34 *** | -4.39 *** |
| Section 8(a)(5) | -.20 * | -.15 | -.78 ** |
| Other Section 8(a) | -1.44 *** | -1.57 *** | .72 |
| Section 8(b) | -1.40 *** | -.88 *** | -.85 |
| Section 10(c) | -.92 *** | -.81 *** | -.86 *** |
| D.C. Circuit | .10 | .16 | -1.97 *** |
| First Circuit | -.06 | # | -1.85 *** |
| Second Circuit | .60 *** | -.01 | -.99 * |
| Third Circuit | .80 *** | -.12 | -.76 |
| Fourth Circuit | -.61 *** | .13 | -.63 |
| Fifth Circuit | -.88 *** | -.86 *** | -4.09 *** |
| Seventh Circuit | .25 | .86 *** | -.17 |
| Eighth Circuit | -.41 * | .21 | .25 |
| Ninth Circuit | .73 *** | .88 *** | -2.14 *** |
| Tenth Circuit | .62 * | # | -1.09 * |
| Eleventh Circuit | -.01 | -.13 | # |
| Year of Decision | -.01 | -.04 | -.15 ** |
| **Constant** | 4.41 * | 6.05 ** | 18.63 *** |
| **Pseudo $R^2$** | .25 *** | .17 *** | .34 *** |
| **N** | 5,463 | 2,938 | 1,106 |

*** p ≤ .01, ** p ≤ .05, *p ≤ .10, # variable omitted due to collinearity or perfect prediction

interpretations of the NLRA.[174]

Gender was significant in both categories of controversial cases, but the effect once again was limited to Republican women. In published cases, as in all cases, Republican women matched Democratic men and women in their support for unions, with all three categories differing significantly from Republican men. By contrast, for divisive issues, Republican women were significantly more supportive of the union than were Republican men, while Democratic women (like Democratic men) did not differ significantly from Republican men.[175] Table VIII illustrates this pattern on divisive issues through predicted probabilities: A male Republican judge (the profile judge) registered a 22% probability of supporting the union in this divisive category. For Democratic men and women, the predicted probabilities were 21% and 28% respectively—both nonsignificant differences. For a Republican woman, however, the probability of voting in the union's favor was an overwhelming 82%.

African American judges, as well as Catholic or Jewish judges, were significantly more likely to support the union in the divisive vote category, although neither of these effects appeared in our analysis of all cases or published cases. Like the pattern for Republican women, the effect appears to stem from these judges' votes in 8(b) cases.[176]

Within both categories of controversial votes, judges who attended more selective colleges were less likely than their colleagues to support the union. Indeed, this result is one of the most consistent we identified—across categories of substantive issues as well as controversial votes. Graduates of elite law schools, conversely, were more likely to vote for the union in both published cases and divisive issues. The latter results are somewhat surprising, given the significant negative coefficient for graduates of elite law schools in our regression equation for section 8(a)(5) issues, as well as the failure of this coefficient to achieve significance in our regression for all votes.[177] The novel results for elite law graduates may stem

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[174] Increased rejection of the union's position might also reflect previous victories by the union combined with a tendency to press an ever more favorable position. That explanation seems less likely in this context, however, given that all appointments to the NLRB were by Republican Presidents during the years we studied. *See supra* note 88.

[175] This effect is similar to the one we identified in our analysis of section 8(b) above. *See supra* text following note 161.

[176] We had to omit the variable for Latino and Asian judges from our analysis of divisive issues because the variable completely predicted the outcome. The coefficient for these judges failed to attain significance in our analysis of published cases. These two effects reinforce our cautions about interpreting race effects for such a small category of judges.

[177] Indeed, a bivariate analysis of all votes reveals no significant difference between graduates of elite law schools and other judges. Graduates of elite law schools favored the union in 75.51% of their votes; other judges supported the union in 76.71% of their votes (p=.488).

**Table VIII: Marginal Effects for Significant Variables Divisive Issues**

| | Probability of Vote for Union | Marginal Effect |
|---|---|---|
| **Profile Judge** | .22 | |
| **Judicial Characteristics** | | |
| Male Democratic Appointee | .21 | -.01 |
| Most Recent Year Appointed | .18 | -.04 |
| Older Age (76) | .23 | .01 |
| Female Republican Appointee | .82 | .60 |
| Female Democratic Appointee | .28 | .06 |
| African American | .72 | .50 |
| Catholic or Jewish | .49 | .27 |
| Most Selective College | .15 | -.07 |
| Non-Elite Law School | .10 | -.12 |
| Elected Office | .40 | .18 |
| NLRA Management Experience | .35 | .13 |
| **Control Variables** | | |
| Board for Employer | .96 | .74 |
| Section 8(a)(5) | .12 | -.10 |
| Section 8(b) | .11 | -.11 |
| Section 10(c) | .11 | -.11 |
| D.C. Circuit | .04 | -.18 |
| Fifth Circuit | .00 | -.22 |
| Ninth Circuit | .03 | -.19 |

from the way in which issues were selected for the controversial case categories, rather than from a genuine pro-union bias among those graduates.[178] At the very

[178] Although elite law graduates and other judges supported the union at a virtually identical rate, *see supra* note 177, elite law graduates contributed a higher percentage of their pro-union votes to both controversial case categories. The published cases include 52.09% of the pro-union votes cast by elite law graduates, but only 42.23% of pro-union votes cast by graduates of other law schools (p=.000). Similarly, the divisive issue category includes 8.17% of pro-union votes cast by elite law graduates and just 5.29% of pro-union votes cast by other judges (p=.007).

These effects may occur because graduates of elite law schools sit on circuits that encourage publication of a higher percentage of unanimous affirmances (which overwhelmingly support the union in our database), because they sit on panels that decide to publish more of those affirmances,

least, the results illustrate that the predictive power of judicial attributes varies considerably depending on the subset of votes chosen for analysis.

Judges who had held elected office were significantly more likely to support the union on divisive issues. For a profile judge, experience as an elected official almost doubled the probability of supporting the union, from 22% to 40%. This effect is similar to one we obtained in our analysis of all cases, as well as in our separate analysis of section 8(a)(1) and (3) claims.

In published cases, judges with NLRA management experience displayed the same tendency we noted in our analysis of all issues in all cases: They did not differ significantly from their colleagues when the Board had voted for the union, but they were significantly more likely than their colleagues to support the union when the Board had decided for the employer.

In the divisive issue category, the impact of NLRA management experience was even stronger. In this subgroup, the interaction between NLRA experience and Board outcome was insignificant and we omitted it from the equation. As Table VII shows, the coefficient for NLRA management experience was significant and positive under these circumstances. On divisive issues, in other words, judges with NLRA management experience were significantly more likely than other judges to support the union, regardless of the Board's outcome. As Table VIII illustrates, when the Board had decided in the union's favor (the profile case), NLRA management experience raised the probability of a pro-union vote from 22% to 35%. Similarly, when the Board had decided in the employer's favor, NLRA management experience raised the likelihood of a pro-union judicial vote from 96% to 98%.[179]

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because they participate in more reversals and split decisions, or because of some other unidentified mechanism. Whatever the underlying cause, the significance of the positive coefficient for elite law graduates in both regressions for controversial cases may reflect overinclusion of these judges' pro-union votes rather than a true tendency to favor the union once we controlled for other factors.

[179] The last probability, which combines two different deviations from the profile, does not appear in Table VIII; we calculated it separately. This probability, like the profile probability attached to a pro-employer Board decision, is so high because of the way we defined divisive issues. The category includes only issues on which a judge either disagreed with the Board or with another judge. When the Board supported the employer, almost all judicial votes in the divisive category were for the union.

Judges with other types of labor or workplace law experience were not significantly more likely to support the union on divisive issues, either when those experiences were combined in a single category (reflected in Table VII) or when they were separated. Results for published issues were similar, except that judges with experience representing unions in NLRA matters were significantly more likely than their colleagues to support the union in these cases.

### D. *Comparing Controversial and Noncontroversial Cases*

Our database is distinctive in allowing examination of all decided cases as well as subsets of more controversial issues. Comparing these analyses yields three important lessons beyond the specifics reported above.

First, contrasting results for the full database with those for the subsets of controversial issues reveals the dangers of relying exclusively on one type of analysis. If we had analyzed only published cases or divisive votes, we would have underplayed the impact of some variables (such as political party) while overstating the effect of others (such as race or graduation from an elite law school). On the other hand, if we had limited our analysis to all votes in all cases, we might have missed some significant associations. A combination of both analyses, together with examination of individual statutory sections, offers the best avenue for exploring the relationship between judicial attributes and outcomes.

Second, our multifaceted analysis confirms that judicial attributes play a larger role in controversial cases than in less disputed ones. In our regression equation for divisive issues, the 17 variables reflecting judicial attributes explained between 7.88% and 9.77% of the variance in outcomes.[180] Those variables, moreover, accounted for about one-quarter of the total variance explained by our equation.[181] In the regression analysis for all cases, on the other hand, the same judicial attributes explained no more than 2.55% of the variance in outcome and only one-tenth of the explained variance.[182] Judicial attributes thus were considerably more successful in

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[180] The pseudo $R^2$ statistic, reported at the bottom of each of our regression equations, denotes the percentage of variance in the outcome explained by the variables in the equation. Social scientists recognize a variety of problems with this statistic, and it should not be used to assess "goodness of fit" in any absolute sense. *See* KING, *supra* note 123, at 24 n.7. The pseudo $R^2$ statistic can, however, be used to compare models with the same dependent and independent variables. In that context, it can illustrate the relative amount of variance explained by the same variables in different equations. *See* ALDRICH & NELSON, *supra* note 119, at 55–59; GUJARATI, *supra* note 120, at 561; MARIJA J. NORUSIS, SPSS PROFESSIONAL STATISTICS 7.5, at 47–49 (1997).

To assess the contribution of the judicial attribute variables, we entered those variables into the equation both before and after our control variables, checking the pseudo $R^2$ at each stage. When we entered the attribute variables into the equation first, the attributes explained 9.77% of the variance in votes for the union. When we entered the attribute variables after the control variables, the attributes explained 7.88% of that variance.

[181] As Table VII reports, our full regression equation for divisive issues explained 34% of the variance in those outcomes.

[182] When we entered the judicial attribute variables into this equation first, they explained 2.55% of the variance. When we introduced those variables after the control variables, the attribute variables explained 2.48% of the variance. As Table I reflects, the full equation explained 25% of the variance in judicial votes.

predicting outcomes on divisive issues than on nondivisive issues.[183]

Finally, however, our analyses reveal that judicial attributes do play some role even across the full spectrum of decided cases. Personal or professional experiences may exert greater influence in the controversial cases, those cases pushing the frontiers of precedent. The associations between judicial background and outcome, however, do not disappear when one examines all appellate decisions. More than half a dozen personal attributes—including political party, gender, year of appointment, age, college selectivity, experience in elected office, and NLRA management experience—show a modest but significant association with pro-union votes. Our research is unique in documenting these relationships even in a caseload that includes a large number of unanimous, and apparently noncontroversial, affirmances.

## IV. DISCUSSION

The results set forth above point in a number of different directions and invite a range of possible explanations. We have chosen to focus on certain key elements of our reported data. In addition to summarizing these key elements, we set forth various hypotheses to help explain our results, relate our findings to other studies of judicial behavior, and identify follow-up research that might further develop the explanatory accounts we have advanced.

### A. *The Declining Political Saliency of Union Issues*

Political party of the appointing President was highly significant in most of our analyses. Our research is consistent with previous findings that Democratic appointees are more likely, on average, to support union claims than their Republican counterparts.[184] The association between political party and outcome was particularly robust in our analysis of all issues in all cases (Table II).[185] Political

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[183] The predictive power of judicial attributes in published cases fell in between the role of those attributes among all cases and their role on divisive issues. When we entered judicial attributes first into the equation for published cases, they explained 2.49% of the variance in published votes. Similarly, when the attribute variables entered the equation after controls, they explained 2.48% of the variance. Given that the full equation explained 17% of the variance in published outcomes, judicial attributes accounted for one-seventh of the overall explained variance in the published case setting.

[184] *See, e.g.*, Goldman, *Voting Behavior*, *supra* note 12; Goldman, *Voting Behavior Revisited*, *supra* note 49; Gottschall, *Reagan Appointments*, *supra* note 52; Songer and Davis, *supra* note 8; *see also* Carp et al., *supra* note 52 (discussing study of Bush appointees to district courts and appellate courts).

[185] This robust relationship also holds for the core substantive issues involving employer

party matters, even across a universe that includes unpublished decisions and unanimous affirmances.[186]

Political party was not monolithic, however; it did not predict votes under all circumstances. The variable showed no significant association with outcomes for issues involving union misconduct or remedial matters (Table V), nor was it significant in our regression for divisive issues (Table VII).[187] Future research in labor law as well as in other fields should continue to distinguish the particular issues for which political party predicts outcome from those in which it shows no significant association with judicial results.

At the same time, we uncovered considerable evidence that the political saliency of union issues is declining on a bipartisan basis. More recent appointees from both parties were more likely to reject the union's legal position than judges appointed in an earlier era. This relationship emerged in several analyses of all judges (Tables II, V, VII) as well as in separate regressions for Republican and Democratic appointees. A male judge appointed by President Eisenhower had a 14% probability of rejecting the union in our regression for all issues in all cases. A Republican appointed by President Reagan had a 20% probability of voting that way, meaning the appointee was nearly 50% more likely to reject the union's legal position. Similarly, a Kennedy appointee had only an 8% probability of voting against the union. For a Carter appointee, that probability increased by more than one-third to 11%.[188]

The sharp bipartisan drop in judicial support for union legal positions may well be a by-product of both the declining popularity of unions and the diminished political visibility of the NLRA as a statute. For several decades up until the early 1970s, union-management relations in the private sector commanded the public's interest, required politicians' attention, and gave rise to high profile legal disputes. Since the mid-1970s, however, there has been a notable decline in the Supreme Court's attention to NLRA cases.[189] During this same period, private sector union

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misconduct under section 8(a) (Table V).

[186] Indeed, political party matters when we analyze unpublished cases alone. We reran our regression equation for all issues in unpublished cases and found that party of the appointing President was as robustly significant in that equation as in our equation for all cases (p=.001). Even in unpublished cases, Democratic appointees are significantly more likely to support the union than Republican appointees.

[187] As noted above, the latter effect may be linked to the high percentage of section 10(c) remedial claims, and correspondingly low percentage of section 8(a) claims, in the divisive category.

[188] *See supra* notes 142–43 and accompanying text. We reported above probabilities that each judge would support the union's legal position. In this discussion, we invert the probabilities to focus on the likelihood that each judge would reject the union position.

[189] *See* Brudney, *supra* note 70, at 960–65 (discussing the sharp decline in the number of

density has fallen precipitously,[190] and the general public's perception of unions as beneficial institutions also has dramatically declined.[191] Moreover, as other public policy issues have risen to the forefront of public, political, and judicial debate, NLRA law has been relegated to the margins of today's ideological equation. Presidents, Senators, party organizations, and interest groups that are involved in the judicial appointments process tend to focus on other aspects of federal jurisdiction such as civil rights, criminal law, or "judicial activism."[192] Given the public's skeptical view of unions and the low saliency of NLRA issues, it is not surprising that both Democratic and Republican appointees have become less favorably disposed toward union legal positions in this area of the law.[193]

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Supreme Court full opinions on NLRA issues, in the Court's "grant rate" on NLRA certiorari petitions, and in NLRA petitions as a percentage of all paid certiorari petitions).

[190] The proportion of the private nonagricultural workforce represented by unions was as high as 35% in the 1950s, but fell to 20% by 1980 and to 11.2% in 1993. *See* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS FACTFINDING REPORT 24 (1994); Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 9–10 & n.23 (1993).

[191] Gallup Poll results indicate that the general public's confidence in organized labor has declined steadily since 1977. *See* Leslie McAneny & David W. Moore, *American Confidence in Public Institutions Rises*, GALLUP POLL MONTHLY, May 1995, at 11, 11–13 (reporting that the percentage of public expressing "great deal of confidence" or "quite a lot of confidence" in labor unions has declined from 39% in 1977, to 30% in 1984, and to 26% in 1995); Frank Newport, *Confidence in Institutions: Small Business and the Military Generate Most Confidence in Americans*, GALLUP POLL MONTHLY, Aug. 1997, at 21, 24 (reporting public's confidence in organized labor has further eroded to 23% by 1997).

[192] Confirmation hearings in the 1980s and early 1990s featured frequent reference to these subject areas. *See, e.g.*, *Confirmation Hearings on Appointments to the Federal Judiciary Before the Senate Comm. on the Judiciary*, 101st Cong. 5–6, 11–16 (1991) (setting forth senatorial questions and responses from 11th Circuit nominee Joel F. Durbina, Sept. 11, 1990); *id.* at 624–27 (presenting senatorial questions and responses from 8th Circuit nominee James B. Loken, Oct. 5, 1990); *Confirmation of Appointments to the Federal Judiciary and the Department of Justice Before the Senate Comm. on the Judiciary*, 100th Cong. 160–72 (1989) (setting forth senatorial questions and responses from D.C. Circuit nominee David B. Sentelle, Apr. 1, 1987); *id.* at 422–33 (presenting senatorial questions and responses from 7th Circuit nominee Michael S. Kanne, Apr. 28, 1987).

[193] As a general matter, appellate court judges may be selected in a less predictably ideological manner than Supreme Court Justices. Home state Senators from both parties exercise considerable influence, either by promoting or opposing individual nominees or by relying on the "blue slip" veto procedure operated by the Senate Judiciary Committee. *See* GOLDMAN, *supra* note 27, at 131–34, 173, 209–11 (discussing importance of home state Senator role); *id.* at 11–12 (describing blue slip veto procedure, whereby home state Senators from either party could effectively kill a nominee's chances by marking "objection" on the blue slip sent to them by counsel for the Senate Judiciary Committee); *see also* CHARLES H. SHELDON & LINDA S. MAULE,

A particularly dramatic illustration of the declining political saliency of labor relations law emerges from our analysis of divisive issues. When we limited this analysis to votes on divisive issues by Carter, Reagan, and Bush appointees, we found that Carter appointees were significantly *less* likely to favor the union than their colleagues appointed by Reagan or Bush (p=.023). The result may stem partly from the issues selected into this category for analysis; it does not hold for our analysis of all cases, in which Carter appointees were significantly more likely than Reagan or Bush appointees to support the union (p=.007). The fact that the effect could occur at all, however, suggests that partisan differences on at least some labor law issues may be declining.[194] The unusual partisan alignment on NLRA issues may also suggest that positions on these issues were relatively unimportant in the Carter, Reagan, and Bush appointment processes.

Even without these surprising results from the divisive analysis, the bipartisan movement away from pro-union legal positions is clear. It seems that Democratic appointees may have shifted, on average, from strong sympathy for union positions

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CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 184–85 (1997); KEVIN L. LYLES, THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS 58–59 (1997) (describing origins and history of the blue slip procedure). Because such senatorial influence often stems from a personal friendship, professional association, or other nonpolicy relationship with a nominee or potential nominee, it may temper the ideological nature of appellate judge appointments. Home state senator influence began to wane after 1978, but it remains important. *See* GOLDMAN, *supra* note 27, at 263 (discussing modification of blue slip veto by Senate Judiciary Committee Chairman Kennedy in 1979); LYLES, *supra*, at 59 (contending that blue slip "remains a potential and valuable tool" to enhance Senators' negotiating position on judicial nominees).

Since the mid-1970s, circuit court appointments have been increasingly affected by presidentially established nominating commissions and advisory committees. *See* GOLDMAN, *supra* note 27, at 238 (discussing Carter's creation of United States Circuit Judge Nominating Commission in 1977); *id.* at 260, 264 (discussing Carter Administration's emphasis on merit selection and downplay of political party considerations); *id.* at 292, 300, 358 (discussing Reagan's creation of Federal Judicial Committee chaired by White House counsel). While these commissions and committees emphasized technical qualifications, diversity of backgrounds, and scholarly perspective, ideology came to play a more prominent role in appellate judge appointments, especially during the 1980s. *See* GOLDMAN, *supra* note 27, at 296–319 (discussing importance of policy and ideology in the Reagan Administration selection of appellate judges); LYLES, *supra*, at 136–42 (same). *See also* ROWLAND & CARP, *supra* note 62, at 36–37 (reporting increase in partisan voting differences among district court judges with respect to civil rights and civil liberties issues during early and mid-1980s). Labor relations evidently was not one of the ideological litmus test issues with respect to selection of this more recent generation of appointees.

[194] Full results from these supplemental analyses are available from the authors. Other research may point in the same direction. *See* ROWLAND & CARP, *supra* note 62, at 40, 44–45 (reporting on lack of partisan voting differences among district court judges in 1980s with respect to labor law cases pitting union member against union or Secretary of Labor against employer).

toward greater neutrality or indifference, while Republican appointees have moved in the aggregate from cautious acceptance toward skepticism or resistance. The combined impact of these two directional results has meant substantially less support for union legal positions among more recent appointees from both parties.

### B. *The NLRA as an Aging Specialized Statute*

The one variable related to professional background that was robustly and consistently significant in our equations was experience as a management-side attorney in NLRA matters.[195] These results are especially striking. The thirty-four appellate court judges who represented management in NLRA cases before joining the bench were significantly more likely to *support* union legal positions in the courts of appeals than their counterparts, almost all of whom were judges with no NLRA experience of any kind.[196] In our analyses of all issues in all cases, of section 8(a)(5) claims in those cases, and of published cases, the effects emerged when the Board had ruled in favor of the employer; judges with NLRA management experience were significantly more likely than their colleagues to reverse the Board's determination and support the union. On divisive issues, judges with NLRA management experience were significantly more likely to support the union regardless of the Board's position.[197] As our marginal effect calculations reveal, a history working for management on NLRA matters more than doubled the probability that a judge would reverse a pro-employer determination in our analysis of all issues (Table III) and increased the odds of a pro-union affirmance by almost two-thirds in the analysis of divisive issues (Table VIII).

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[195] *See supra* Tables II, V, VII (reporting NLRA management-side experience as significant for all issues in all cases, for section 8(a)(5) issues in those cases, for all issues in published cases, and for all divisive issues).

[196] As explained above, *see supra* note 109 and accompanying text, judges with NLRA management-side experience cast 14% of the votes in our database. Judges with other types of workplace law experience contributed another 28% of the votes. A small fraction of the latter group had acquired NLRA experience in a non-management setting. Overall, judges with pure union, government, or academic experience on NLRA matters cast only 6% of the votes in our database.

[197] Our remaining three analyses also suggested substantial pro-union support from judges with NLRA management experience. In the section 8(a)(1) and (3) equation, as well as in the section 8(b) equation, the coefficients for NLRA management experience pointed in the same direction as in our other analyses, but did not achieve significance. In our analysis of 10(c) remedial claims, the NLRA and Board interaction perfectly predicted outcome so we had to omit the variable from the equation. Although the number of votes was quite small, judges with NLRA experience always voted for the union when the Board rejected the union's claim under this section. *See supra* note 160.

The significance of this "NLRA management" variable stands out even more sharply when contrasted with our findings on two other variables that measure private practice experience. The variable designating judges with other types of workplace law experience did not achieve significance in any of our equations. When we broke this variable into subcategories, the component denoting judges with pure workplace (non-NLRA) experience again was not significant in any equation.[198] Similarly, judges who represented corporations or business clients without handling any labor or workplace matters registered no significant pro-union support in most of our equations (Tables II, VII).[199] Experience representing employers on NLRA matters inclined judges to support union claims in a way that experience in other areas of workplace law or on behalf of business clients in other areas of law did not.[200]

A possible explanation for the noteworthy effects of NLRA management experience stems from the distinctive nature of the NLRA itself. This New Deal era statute rests on two legal paradigms that have become anomalous in our contemporary legal culture. The first involves the primacy accorded to group action.

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[198] Indeed, when we varied our equations to use NLRA management experience as the reference category for professional experience, we found that judges with experience handling non-NLRA workplace matters were significantly more likely than judges with NLRA management experience to *reject* union claims in analyses of all issues and divisive issues. The coefficient approached significance (p=.091) in our analysis of all issues and reached significance (p=.039) in the analysis of divisive issues. Full results of these supplemental analyses are available from the authors. Using NLRA management as the reference category in these analyses meant that we could compare the effects of NLRA management experience directly with the effects of several other types of practice experience. In our main equations (reported in Tables I–VIII) we compare NLRA management experience, other workplace experience, and pure corporate experience to a reference category of judges who lacked any of these practice histories. *See* text following notes 108–109 *supra*.

[199] When we varied our equations to use NLRA management experience as the reference category, *see supra* note 198, these judges with pure corporate experience were more likely than judges with NLRA management experience to reject union claims on divisive issues. The coefficient for pure corporate experience approached significance (p=.075) in this equation.

[200] Interestingly, judges with pure corporate experience were more likely than their colleagues to support the union on section 8(b) claims (Table V). When we repeated this equation with NLRA management experience as the reference category, moreover, we confirmed that judges with pure corporate experience were significantly more likely than their NLRA management colleagues to support the union on that subset of issues. Despite their overall support for collective bargaining and unions, judges with NLRA management experience may have found section 8(b) claims (in which the union is the alleged wrongdoer) less sympathetic. Judges with general corporate law experience, conversely, may have been more inclined to support the union when it appeared as a defendant organization, particularly because many section 8(b) claims are brought by individual employees.

The Act's emphasis on protecting collective bargaining and other concerted mutual aid activity by workers entails a subordination of traditional individualistic perspectives. Statutory recognition of collectively bargained terms and conditions of employment means that individuals give up their freedom to negotiate their own job conditions.[201] The enforceability of such recognition means—again departing from traditional contract law—that employers are required to bargain in good faith with a collectively constituted entity rather than with individual employees.[202] While the creation of collectively defined rights and responsibilities was part of a larger federal policy that extended to other aspects of the economy as part of the New Deal,[203] this policy perspective has all but disappeared in recent decades. Starting in 1963, Congress's approach to regulating the workplace has made individual rights and choices preeminent, not subordinate.[204] In the ensuing four decades, statutory support for collective determination of working conditions has become a minor undercurrent amidst the rising tide of federal laws that offer rights and protections to employees on an individual and individually enforceable basis.

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[201] *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 337–39 (1944); *see generally* Brudney, *supra* note 70, at 950–52 (discussing legislative history support for majority rule as the best protection for individual rights); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELY J. EMP. & LAB. L. 1, 6–9 (1999) (discussing industrial pluralists' belief in workers' exercise of power through groups, at the expense of individual rights).

[202] *See* 29 U.S.C. § 158(a)(5), 158(d) (1994); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684–85 (1944) (finding violation of section 8(1) by employer that deals directly with employees rather than with union as bargaining agent); Wings & Wheels, Inc., 139 NLRB 578, 581–82 (1962), *enforced*, 324 F.2d 495, 496 (3d Cir. 1963) (finding violation of section 8(a)(5) because employer dealt with employees in lieu of union).

[203] *See, e.g.*, National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933) (embracing collective action by businesses to set prices and control production); Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31 (1933); Pub. L. No. 75-430, 52 Stat. 31 (1938) (sanctioning collective action by farmers and agricultural processors; allowing the former to receive a federal subsidy for crops *not* grown and allowing the latter to fix prices through marketing agreements exempted from antitrust laws).

[204] For laws establishing the individual's right to equal treatment in the workplace, see, for example, Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1994)); Title VII of 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1994); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634 (1994). For laws establishing the individual's right to minimum standards in the workplace, see, for example, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (1994); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461 (1994); Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (1994); Worker Adjustment and Retraining Notification Act of 1988 (WARN), 29 U.S.C. §§ 2101–2109 (1994); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (1994).

The second anomalous aspect of the NLRA is its furtherance of anticompetitive and interventionist policy goals. By protecting unions in their effort to remove wages from competition, the Act promotes the cartelization of labor markets.[205] This approach runs counter to basic norms of our legal system, norms that oppose restraints on private competition and accept the efficiency of markets as a means of maximizing consumer and public welfare.[206] Although there are sound reasons favoring such an "inefficient" labor policy,[207] those reasons resonated more in an earlier era than they do today, when the sanctity of the market process presumes that any regulatory intervention is suspect.[208] Industry-wide deregulation at home and intense product competition abroad have sapped unions' ability to control, or in some cases even substantially influence, wages or job security in the private

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[205] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 353–56 (5th ed. 1998); Estreicher, *supra* note 190, at 12–15.

[206] *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1994) (prohibiting combinations in restraint of trade); Robinson-Patman Anti-Discrimination Act, Pub. L. No. 74-692, 49 Stat. 1526 (codified at 15 U.S.C. §§ 13, 13a, 13b, 21a (1994)) (prohibiting price discrimination in commerce); Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (1994) (mandating that financial institutions disclose certain information to consumers so that inter alia the informed use of credit will strengthen competition among financial institutions); *see generally* POSNER, *supra* note 205, at 35–289 (contending that the common law is best understood as a system of doctrines for inducing people to behave efficiently in their social and economic interactions). *But cf.* Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 481–82, 490 (1992) (contending that union gains taken from a firm's monopoly profits should not reduce overall consumer welfare).

[207] *See, e.g.*, PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 72–78 (1990) (discussing the inherent imperfections of labor markets—informational, psychological, and structural—that call for government intervention and regulation); POSNER, *supra* note 205, at 353–54 (discussing "free-rider" problems that justify federal policy favoring certain protections for union organizing and bargaining efforts).

[208] A striking illustration is the Supreme Court's unwillingness in recent years to view the free-rider rationale that underlies protection for collective bargaining as a basis for limiting individual employees' freedom to refrain from associating with private sector unions or their activities. *See, e.g.*, Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435, 451–53 (1984) (holding that objecting bargaining unit members may not be charged for union expenditures to organize additional employees or to litigate contract issues that do not directly affect bargaining unit members); Patternmakers' League of North America v. NLRB, 473 U.S. 95, 104–14 (1985) (holding that union may not fine members who resign during strike in violation of union constitution); *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519–22 (1991) (in public employment setting, holding that objecting bargaining unit members may not be charged for union lobbying that improves terms and conditions of employment outside the collective bargaining setting); *see generally* Schiller, *supra* note 201, at 64–69, 72 (discussing Supreme Court support for individual employees' assertion of a "right to refrain" against their union).

sector.[209] As union power and visibility have declined, the anticompetitive thrust of NLRA union protections has become harder to reconcile with the predominantly procompetition aspirations of federal law.

Given the distinctive nature of basic policies and history underlying the NLRA, the impact of management-side NLRA experience may signify that familiarity with the Act breeds greater respect for its protective doctrinal scope—even if the familiarity is developed while representing employer interests. Attorneys who perform substantial work representing management before the Labor Board and the courts come to understand the Act's practical realities and modest policy goals.[210] These attorneys may be better prepared to breathe life into NLRA purposes and priorities as an interpretive matter once they are separated from a client-based ideological perspective.[211]

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[209] *See* Estreicher, *supra* note 190, at 13; Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 62–67 (1993).

[210] It is particularly noteworthy that the pro-union effect of management-side experience was significant for the subcategory of section 8(a)(5) claims (Table V). These claims, involving bargaining-related misconduct by employers, embody what is most distinctive about NLRA purposes. Accordingly, it seems reasonable to infer that judges familiar with the unusual nature of policy objectives promoting the collective bargaining process are especially prepared to support the union's position on such claims.

As explained above, the greater likelihood of support for union positions is linked to pro-employer Board outcomes in our analyses of all issues in all cases and published cases (Tables II, VII). This effect is due, in part, to the fact that most judges in those cases favored the union when the Board had done so. The appearance of significant effects is more difficult when there is little variation in outcome. In addition, judges with NLRA management experience may have perceived a Board made up exclusively of Reagan and Bush appointees, *see supra* note 88, as especially suspect when it ruled against the union; in such instances, the Act's purposes were more likely to be shortchanged.

[211] A slightly different version of this hypothesis might assert that judges with management experience were "captured" by the Act based on their years of litigation before the Board. The vibrancy of their own private practice depended to some extent on how energetically the Act was enforced, and these attorneys may have developed a more expansive attitude toward the Act's protections, an attitude they then carried forward as judges. This hypothesis assumes that management attorneys who ascend to the bench view the Act and its enforcement as fundamentally nonthreatening to unionized industry. *See, e.g.*, MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 86–87 (1955) (suggesting that as a regulatory scheme becomes more "mature," the agency functions less as a policeman and more as an industrial manager); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1714 (1975) (discussing how agencies and regulated industries have formed special relationships built on a desire to avoid conflicts and seek compromise); *see generally* PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES (1981) (exploring ways in which regulatory agencies act to protect the industries they regulate). The "capture" hypothesis, however, is merely a variation of our "familiarity breeds respect" hypothesis.

To explore this hypothesis further, we divided our NLRA management variable into two subvariables: one representing judges whose only NLRA experience was on behalf of employers and the other denoting judges who combined management representation with NLRA work in other settings (including government jobs, academia, and representation of unions). The variable representing judges with pure management experience was not significant in any of our equations, although it comprised about two-thirds of the votes from our original NLRA management variable. The variable designating judges with a mixture of management and other experiences was strongly significant in several equations, following precisely the pattern of our original NLRA management variable. That is, judges with both management and other NLRA experience were significantly more likely than their colleagues to support the union on section 8(a)(5) claims, as well as in our analyses of all issues and published issues, when the Board had ruled for the employer. On divisive issues, these judges were significantly more likely than others to favor the union regardless of the Board's outcome.[212]

Put differently, judges who combined management-side practice with additional experience applying the NLRA were most likely to support union positions in the courts of appeals.[213] These judges, in fact, more consistently supported union positions than did judges with a purely partisan history of representing unions under the statute.[214] At the same time, judges whose only NLRA experience derived from representing employers showed no identifiable tendency to favor their former clients.[215] Thus, breadth of experience predicted

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[212] Full results of these supplemental analyses are available from the authors. In general, the coefficients for our "mixed NLRA experience" variable were larger and more significant than the coefficients for the original NLRA management variable, although the latter variable included twice as many votes.

[213] Typically, these judges spent a considerable amount of time (5–20 years) with a private firm in which an important part of their practice involved labor relations work. Their acquisition of NLRA experience in government or academic settings generally occurred over a shorter time period, either at the start of their career or after a number of years of private practice. On average, these judges also had more substantial NLRA practice experience than the judges in the "pure management" group.

[214] A variable designating judges with pure union-side experience was significant in our analyses of section 8(b) claims and published cases (which contained a disproportionate number of those claims). *See supra* notes 162, 179. The tendency of judges who had represented unions to identify with the union in cases charging union misconduct is not surprising. It is more surprising that these judges, unlike their colleagues with a mixture of management and other types of NLRA experience, did not favor the union position for section 8(a)(5) claims, for claims on all divisive issues, or for claims on all issues in all cases.

[215] Indeed, the failure of this variable to attain significance in any of our equations, when compared with the occasional significance of partisan union experience, could be characterized

union support among judges with a history of management-side practice, while judges with pure management-side backgrounds transcended their "partisan" roots.

Our hypothesis that "familiarity breeds doctrinal respect" is not the only possible explanation for these robustly significant findings. Attorneys who have represented management on NLRA matters may become skeptical over time as to the persuasiveness of their clients' legal positions. Employers sometimes pursue appeals—or force the Board to seek enforcement against them—for strategic reasons unrelated to the merits of the case.[216] Employer attorneys who have litigated enough such appeals may adopt a more jaundiced view toward them from the neutral perspective of the bench. Suspicion of management's appellate litigation strategies, however, would not explain why these judges were particularly likely to support the union when the *employer's* position had prevailed below.[217] Nor does client skepticism explain why former union attorneys, who were also privy to partisan litigation strategies, remained significantly more supportive than other judges of some union claims.

Alternatively, judges with substantial management-side experience may have become more skeptical of the Board's determinations. These judges, after all, gained their management experience before that Board. The ones who proved most active in supporting union positions also acquired NLRA experience in other contexts, including with the Board's General Counsel. As repeat players in the Board process, sometimes from a variety of perspectives, these judges had ample opportunity to develop doubts about the Board's own invincibility. This explanation fits particularly well with the willingness of these judges to overturn certain Board decisions; in most contexts, judges with NLRA management experience differed from their colleagues only when favoring the union required reversing the Board.[218]

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as an implicit form of "pro-union" sympathy. In this context, the failure to support positions taken by one's former client can be interpreted as recognition that the Act's purposes favor unionization and collective bargaining. That recognition, notably, was obtained even while representing clients who tended to contest union efforts in these areas.

[216] *See* Brudney, *supra* note 70, at 974–75 (discussing employers' interest in extending the litigation process in cases they do not expect to win, in order to chill employee organizing efforts or diminish the prospects for negotiation of first contracts).

[217] Former management attorneys, of course, might remain dubious of employers' positions before the Board, even when the Board endorsed those positions. This might be particularly true during an era of Republican Board control.

[218] Bivariate comparisons also reveal that all judges with NLRA management experience were significantly more likely than their colleagues to overturn Board determinations for the employer. Judges with management experience voted to reverse those determinations 27% of the time; other judges cast 16% of their votes that way ($p=.035$). Judges with a mixture of management and other types of NLRA experience manifested this tendency even more dramatically. These judges voted to overturn pro-employer determinations 53% of the time,

Even these skepticism hypotheses, however, are consistent with our theory that familiarity with the specialized nature of NLRA policy and practice contributes to a sympathetic judicial perspective regarding the Act's basic protections. Skepticism, after all, merely conveys doubt. A judge must still have a positive reason to embrace the position offered by the union rather than the one offered by the employer or Board. The robust association between NLRA management-side experience and support for union legal positions strongly signals an educative effect from exposure to the Act's historically grounded support for group action and anticompetitive economic objectives. That educative power is apparent in its effects on judges with exclusively management experience, who never exhibited a significant tendency to favor legal positions offered by their former clients; in its concentrated force among judges with the most extensive and diverse NLRA experience; and in the willingness of these judges to overturn Board positions when necessary to further the objectives they perceived in the Act. Management experience thus seems to foster appreciation for labor law doctrine.[219]

Such appreciation for the anomalous objectives of the NLRA bears some resemblance to the expertise that the Court of Appeals for the Federal Circuit applies to the resolution of patent controversies. Patent law, like the NLRA, rests on a specialized statutory scheme and includes anticompetitive features that are not widely embraced in the current legal climate.[220] Before Congress vested exclusive jurisdiction to hear patent appeals in the Federal Circuit,[221] some litigants perceived

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compared to 15% of votes from other judges (p=.000). Our regression equations, with significant coefficients for the Board/NLRA management interaction, demonstrate that this difference persisted even after controlling for other factors.

[219] Our variables, of course, can only measure external events like supporting the union's legal position or reversing the Board. We cannot know what judges were thinking when they pursued those ends. We believe, however, that doctrine does play a substantial role in shaping legal outcomes. It seems reasonable to infer that the pro-union tendencies of judges with NLRA management experience stem from their long exposure to the Act, its purposes, and its doctrine—rather than from a more reflexive tendency to side with one's former adversaries.

[220] In the intermediate run, patent protection aims to foster both innovation and competition. In return for a limited period of monopolistic use, patentees disclose the basis of their invention to the public. That disclosure enables competitors to build upon the patentee's discovery, often producing a competing and superior product even before the patent term has expired. *See generally* ERNST BAINBRIDGE LIPSCOMB III, LIPSCOMB'S WALKER ON PATENTS § 1.8 (3d ed. 1984). Similarly, unionization and collective bargaining can be said to strengthen, rather than impair, the marketplace: A strong workforce is essential both for production and consumption. *See generally* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1986). The immediate claims of patentees and unions, however, often appear anticompetitive as they are presented before the courts.

[221] Creation of the Court of Appeals for the Federal Circuit was a central component of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended

the regional courts of appeals as resisting patentees' interests and as helping to shape public perceptions that the monopolistic aspects of patent law were harmful to our competitive economic system.[222] A number of patent law scholars have concluded that the new specialized court, staffed by judges with some expertise in patent law, is interpreting the statutory scheme to increase the law's protection for patentees.[223] There is no consensus as to whether the court's greater sensitivity to inventors' interests is sound public policy.[224] Specialized knowledge of Congress's goals and priorities, however, seems to have facilitated interpretations more sympathetic to these underlying legislative priorities—just as familiarity with the

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in scattered sections of 28 U.S.C.). The provision governing the court's jurisdiction over patent appeals appears in 28 U.S.C. §§ 1295(a)(1), 1338 (1994).

[222] *See* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 6–7 & nn.37–38, 46 (1989) (citing congressional hearings and statements from congressional supporters); Pauline Newman, *The Sixth Abraham Pomerantz Lecture: Commentary on the Paper by Professor Dreyfuss*, 61 BROOK. L. REV. 53, 55–57 (1995) (confirming that an important aspect of argument favoring Federal Circuit's creation was need to protect patentees' interests more effectively than regional courts of appeals had done); *see also* Lawrence Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 LAW & SOC'Y REV. 823, 842–45 (1977) [hereinafter *Judicial Specialization*] (concluding that between 1952 and 1975, standards of patentability became more lenient in the CCPA than in generalist Article III courts). The major public justifications offered by proponents of the new Court of Appeals for the Federal Circuit involved the need to eliminate severe regional conflict by replacing forum shopping with a single appellate body that would produce greater expertise as well as a uniform application of patent law. *See* Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?*, 74 JUDICATURE 217, 223 (1991); Dreyfuss, *supra*, at 6–7; Robert Desmond, Comment, *Nothing Seems "Obvious" to the Court of Appeals for the Federal Circuit: The Federal Circuit, Unchecked by the Supreme Court, Transforms the Standard of Obviousness Under the Patent Law*, 26 LOYOLA L.A. L. REV. 455, 460 (1993); *see generally* Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992).

[223] *See* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 334 (1991); Desmond, *supra* note 222, at 473–83; Dreyfuss, *supra* note 222, at 16–20; Allan N. Littman, *Restoring the Balance of Our Patent System*, 37 IDEA 545, 552–53 (1997). The Court of Appeals for the Federal Circuit was created by merging the Court of Customs and Patent Appeals with the Court of Claims. Although judges on the latter court had no special expertise in patent law, judges from the former tribunal resolved primarily patent controversies. Some of them had also practiced patent law before joining the court. *See* Dreyfuss, *supra* note 222, at 5 n.29. Once on the Court of Appeals for the Federal Circuit, of course, all judges had the opportunity to delve deeply into patent law.

[224] *Compare* Dreyfuss, *supra* note 222, at 25–30 (contending that Federal Circuit's pro-patent bias may be overstated but in any event is a healthy public policy change), *with* Desmond, *supra* note 222, at 483–87 (contending that Federal Circuit's imposition of its own policy preferences, effectively superseding authority of Supreme Court and Federal Rules of Civil Procedure, is an unhealthy development).

goals of the NLRA, even when gained through management representation, seems to enhance judges' understanding of the Act's policies to facilitate and protect collective bargaining.[225]

### C. *Education, Elected Office Experience, Religion, and Race*

Status of undergraduate institution is among the most powerful explanatory factors to emerge from our regression equations. Judges who attended more elite colleges were significantly more likely to reject the union's position in almost all of our analyses.[226] In our examination of all cases, judges who attended the most selective colleges were 30% more likely to reject the union than were judges who attended a college of average selectivity (Table III).[227] The effect was similar for the most divisive issues. On those claims, judges who had attended average colleges had a 22% probability of supporting the union. For judges who had attended the most elite colleges, the likelihood fell by almost one-third, to 15% (Table VIII).

Social science scholars have long recognized that college selectivity reflects socioeconomic background: Students who attend the most elite colleges are raised, on average, in more privileged economic circumstances than students who enroll at less selective institutions.[228] This connection may have become somewhat more

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[225] The analogy between appointment to the Federal Circuit and possession of management-side NLRA experience is not, of course, on all fours. A key distinction is that judges appointed to a specialized court are obligated to view their docket through a narrowing lens, in order to fulfill the congressional policies set forth when the court was created. Moreover, in this instance, the judges initially appointed to the Federal Circuit came primarily from the Court of Customs and Patent Appeals, where they had already established precedents favorable to patent owners. *See* Baum, *Judicial Specialization*, *supra* note 222. We are not advocating creation of a specialized NLRA appellate court; indeed, we recognize that there are pitfalls to such an approach. *See infra* note 266 and accompanying text. We present the patent law analogy, however, to support our hypothesis that appellate court appointees who come to the bench with a deeper understanding of the purposes accompanying a complex and unusual statutory scheme may apply that scheme in a more sympathetic manner than judges who lack such familiarity or experience.

[226] The only exceptions were our analyses of section 8(b) and section 10(c) claims (Table V).

[227] Table III reports the probabilities that judges with selected characteristics would support the union's legal position. For this comparison, we invert those probabilities to focus on the likelihood that a judge would reject the union's claims. The profile judge in Table III displayed a 20% probability of rejecting the union's position; a judge who had attended one of the most selective colleges registered a 26% probability of reaching that result, an increase of about 30%.

[228] *See, e.g.*, James C. Hearn, *Pathways to Attendance at the Elite Colleges*, *in* THE HIGH STATUS TRACK: STUDIES OF ELITE SCHOOLS AND STRATIFICATION 121, 130–33 (1990) [hereinafter THE HIGH STATUS TRACK] (demonstrating link between attendance at elite colleges and high family income as well as higher parental education levels); Paul William Kingston & Lionel S. Lewis, *Undergraduates at Elite Institutions: The Best, the Brightest, and the Richest*, *in* THE HIGH

attenuated with the greater availability of student financial aid.[229] Nonetheless, it remains true as a general matter—and was certainly true during the period when most of the judges in our database were undergraduates.[230] The pervasive negative association between college selectivity and pro-union votes in our analyses most likely reflects these socioeconomic differences. Judges who emerged from blue collar settings, or from a milieu that included more frequent contact with unions, may in the aggregate have been socialized to support the underdog or to be sympathetically inclined toward unions' legal claims. Familiarity with unions and sympathy for employees' status may be more prevalent among judges who grew up as "outsiders" in socioeconomic terms.[231]

The status of law school attended also predicted outcomes in some of our analyses, but this variable pointed in two different directions. In our analysis of section 8(a)(5) issues, graduates of elite law schools, like their colleagues from selective colleges, were significantly more likely to *oppose* the union's legal position. Conversely, in our analyses of published cases and divisive issues, elite law graduates were significantly more likely to *support* the union's position.

The latter associations fit perceptions of elite law school faculties—and their

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STATUS TRACK, *supra*, at 105, 106–13 (discussing persistence into 1980s of the connection between high family income and attendance at highly selective private institutions); Raymond Mulligan, *Socio-Economic Background and College Enrollment*, 16 AM. SOCIOL. REV. 188, 188 (1951) (reviewing literature linking students' higher socioeconomic status to attendance at more elite undergraduate institutions).

[229] *See* ELIZABETH A. DUFFY & IDANA GOLDBERG, CRAFTING A CLASS: COLLEGE ADMISSIONS AND FINANCIAL AID, 1955–1994, 169–204 (1998) (discussing development of need-based federal and institution-specific aid programs from 1960s to 1990s, and observing that beginning in 1970s, need-based programs shifted from enabling students to attend college to giving them a choice among institutions with large cost differentials); *id.* at 205–27 (discussing growth of merit aid programs in 1980s and 1990s, and observing that such programs often supplement or complement aid to financially disadvantaged students); *see also* Richard Farnum, *Prestige in the Ivy League: Democratization and Discrimination at Penn and Columbia, 1890–1970*, *in* THE HIGH STATUS TRACK, *supra* note 228, at 75, 95–96 (discussing gradual movement among Ivy League colleges toward a more heterogeneous or diverse student body after World War II).

[230] *See supra* note 104 (explaining that over half of the 223 appellate court judges in our study graduated from college between 1943 and 1962, and only 29 graduated since 1962).

[231] Professor Goldman in his study of court of appeals decisions between 1961 and 1964 found that college status did not significantly affect judicial behavior on labor law issues. *See* Goldman, *Voting Behavior*, *supra* note 12, at 382. Goldman's study omitted all unanimous affirmances, and his data set covered only a three-year period. *See id.* at 375. Moreover, Goldman does not indicate how he distinguished among elite and nonelite colleges; it does not appear that he used the Astin scale. *See id.*

graduates—as ideologically liberal and inclined to government regulation.[232] We, however, view the contrary coefficient in the 8(a)(5) analysis as more telling. As explained above, the significant positive coefficient for elite law graduates in our regression for published cases almost certainly stems from the propensity of these judges to publish more routine pro-union affirmances than other judges do.[233] The positive result for divisive issues similarly may be an artifact of selection. Section 8(a)(5), on the other hand, is perhaps the most nuanced area of government regulation included within the NLRA—and the anti-union tendencies of elite law graduates are pronounced in this equation.[234]

This negative association, like the more global links between college selectivity and judicial votes, might reflect socioeconomic background. Law school status is less emphatically related to socioeconomic class than is college status, but some connection persists.[235] Alternatively, elite law schools may ground lawyers in an individual rights perspective that is less compatible with empathy for collective

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[232] *See* Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1652 (1993) (asserting that "[t]he faculties of the leading American law schools are now substantially to the left of the judiciary . . . and of the public at large; and they are moderately to the left of the practicing legal profession"); Sisk et al., *supra* note 29, at 1463 (describing elite law school faculties as identified with liberal causes and attitudes); Joan Chalmers Williams, *At the Fusion of Horizons: Incommensurability and the Public Interest*, 20 VT. L. REV. 625, 628–29 (1996) (describing Yale Law School as an "epicenter of liberalism" during the New Deal period, with many professors holding important positions in Washington and the Dean promoting a new role for emerging lawyers as "public counsel," defined in opposition to the business class).

[233] *See supra* note 178 and accompanying text.

[234] Other studies of judicial behavior have generally found that law school status is not significantly related to voting patterns by federal judges. *See, e.g.*, Ashenfelter et al., *supra* note 29, at 265, 274–76, 281 (district court judges in civil rights and prisoner rights cases); Sisk et al., *supra* note 29, at 1464 (district court judges in cases challenging constitutionality of sentencing guidelines); Tate, *supra* note 12, at 360–61 (Supreme Court Justices in civil rights and economics cases). *But cf.* Stuart S. Nagel, *Multiple Correlation of Judicial Backgrounds and Decisions*, 2 FLA. ST. U. L. REV. 258, 267, 270 (1974) (finding that judges who attended low-tuition law schools (as opposed to high-tuition schools) were more likely to favor prosecution over defense in criminal cases).

[235] *See* SEYMOUR WARKOV & JOSEPH ZELAN, LAWYERS IN THE MAKING 57–58 (1965) (reporting from 1961 data that primary emphasis in law school admissions is on achievement factors, though socioeconomic status appears to influence admission when talent is held constant); Charles L. Cappell & Ronald M. Pipkin, *The Inside Tracks: Status Distinctions in Allocations to Elite Law Schools*, *in* THE HIGH STATUS TRACK, *supra* note 228, at 211, 225 (reporting from 1975 data that "academic credentials are by far the most important factor" in shaping attendance at elite law schools, but that high socioeconomic status also influences patterns of law school attendance); LINDA F. WIGHTMAN, LEGAL EDUCATION AT THE CLOSE OF THE TWENTIETH CENTURY 20–44 (1995) (reporting from 1991 data that academic achievement remains primary component in law school admissions, though socioeconomic status continues to play a role).

bargaining claims under section 8(a)(5).[236]

Apart from educational background, judges who held elected office before joining the federal bench were more likely to support union legal positions than their counterparts who lacked this professional political experience. This result was significant in our analysis of divisive issues (Table VII); it approached significance in the analysis of all issues and for claims under sections 8(a)(1) and (3) (Tables II, V).

The significance of this variable, like that of the education variables, may be rooted in socioeconomic factors. Although elected officials come from a variety of backgrounds, the electoral process exposes them to the issues and concerns of working class voters. Judges who successfully appealed to a range of constituents may have come to understand the concerns of those constituents and to appreciate the economic or "lunch bucket" issues that animate union agendas.[237] Alternatively, perhaps these judges possessed such appreciation for other reasons and their sensitivity was part of what prompted them to seek elected office in the first instance. The significance of electoral experience in some of our equations, especially the analysis of section 8(a)(1) and (3) claims, might also signal the strong attachment veterans of elected office have to democratic institutions. Those beliefs might incline these judges to identify with the democratic values embodied in union organizing and representation efforts.

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[236] *See supra* text following note 158 (explaining distinctive nature of section 8(a)(5) claims). Elite law schools have shifted their ideological perspectives over the past several decades, *see* ELEANOR KERLOW, POISONED IVY: HOW EGOS, IDEOLOGY AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL 1–9, 125 (1994) (describing Harvard Law School as constantly shifting in its political orientation over past 50 years) and differ in important ways from one another, *see* Ted Gest, *Special Report; Cover Story; Best Graduate Schools*, U.S. NEWS & WORLD REP., Apr. 29, 1991, at 77, 77 (identifying Harvard and Stanford law schools as having "liberal leanings" and University of Chicago law school as possessing "a conservative bent"). Still, elite faculties that embrace liberal or egalitarian values on the left, as well as free market or libertarian values on the right, may share an attachment to individual rather than collective rights.

[237] Other studies of judicial behavior have identified a connection between elected office experience and a propensity to vote with the majority. *See* Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POLITICS 54, 57–58 (1990) (finding that higher levels of consensus are present on an elected court with respect to highly salient issues of public policy); S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices*, 32 J. POLITICS 580, 588, 597 (1970) (finding that Justices with a political parent were significantly more likely to vote with majority). Although Goldman in his earlier studies of federal appellate judges did not find significant effects from background in electoral politics, the variables he used differed from our "elected office experience." *See Voting Behavior*, *supra* note 12, at 382 (variable was having held appointed (non-judicial) or elective office prior to becoming federal judge); *Voting Behavior Revisited*, *supra* note 49, at 499 (variable was experience as a candidate for elected public office).

Finally, our results include significance in a more limited context for the demographic variables of religion and race.[238] Catholic and Jewish judges were significantly more likely than their colleagues to support the union both on section 8(b) claims and divisive issues (Tables V, VII). It seems plausible to infer that Catholic or Jewish affiliation is a rough proxy for social class among the instant population. In the middle decades of the twentieth century, Catholic and Jewish families were more likely than their Protestant counterparts to be working class in economic status and social perspective.[239] A number of other studies of judicial behavior have found such religious background to be a significant explanatory variable with respect to particular areas of federal law.[240]

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[238] Age was also significant for all issues in all cases and for two issue categories within all cases. Older judges were more likely to rule against the union on bargaining-related claims under section 8(a)(5), and also more likely to oppose the granting of broad relief under section 10(c). An earlier study of appellate court judges found that older judges were more likely to favor conservative (pro-employer) outcomes in labor cases and to rule conservatively in a number of other regulatory areas. *See* Goldman, *Voting Behavior Revisited*, *supra* note 49, at 499. Our results, especially in the section 10(c) category, could be viewed as reinforcing the adage that with old age comes a reluctance to deviate from the status quo. *See* Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 455 (1899) ("Judges commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties."). *But cf.* Sisk et al., *supra* note 29, at 1460 (finding that age of district court judge had no effect on whether the judge declared federal sentencing guidelines unconstitutional).

[239] *See* ROBERT BOOTH FOWLER ET AL., RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE, AND STRATEGIC CHOICES 90, 92, 108–11 (2d ed. 1999) (discussing tendency of American Catholics and Jews in mid-twentieth century to adopt liberal social and political perspective); KENNETH D. WALD, RELIGION AND POLITICS IN THE UNITED STATES 66, 89 (1987) (discussing tendency of first and second generation Catholics and Jews to join New Deal coalition between 1930s and 1960s, based to a large extent on their economic status).

[240] *See, e.g.*, FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 206–20 (1976) (examining appellate and trial court decisions addressed to separation of church and state, and finding that Jewish and Catholic judges differ significantly in their approaches); Ulmer, *supra* note 25, at 624–28 (examining votes of 14 Supreme Court Justices in criminal law decisions, and hypothesizing that religious affiliation was a proxy for social class); Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POLITICS 337, 353 (1964) (examining district court decisions on race relations, and finding significant differences between Catholics and "orthodox Protestants").

While two studies involving federal appellate court judges from earlier periods did not find religious background to be significant on labor law issues, those studies involved much smaller numbers of labor law votes than are present in our database. *See* Goldman, *Voting Behavior*, *supra* note 12, at 380–82 (examining labor law votes in unanimous reversals and nonunanimous decisions over a 3 year period (July 1961 through June 1964) and finding no significant difference between Catholic and Protestant judges); Goldman, *Voting Behavior Revisited*, *supra* note 49, at

Similarly, African American judges are significantly more likely than Whites to support union legal positions on section 8(b) and divisive issues (Tables V, VII). For much of this century, African American workers were not broadly welcomed into the trade union movement.[241] Since the late 1950s, however, many unions have reached out to the African American workforce through organizing and collective bargaining efforts as well as advocacy in Congress for stronger antidiscrimination laws.[242] The development of this supportive relationship, and the fact that by the 1970s Black workers had joined unions in large numbers,[243] may explain why African American status is a modestly significant variable in a pro-union direction.

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498–99 (examining labor law votes over a 7 year period (July 1964 through June 1971) but only in nonunanimous opinions and finding no significant differences between Catholic and Protestant judges). The fact that our unit of analysis was the issue rather than the case magnifies these differences in size between the two data sets. Further, Goldman omitted Jewish judges from his analysis because at that time their number on the appellate bench was too small to draw reliable inferences. *See* Goldman, *Voting Behavior*, *supra* note 12, at 381 n.34.

Some studies have found that religious background does not significantly influence judicial behavior in other areas of federal law. *See, e.g.*, Ashenfelter et al., *supra* note 29, at 270–71 (finding minimal influence for civil rights and prisoner rights cases in district courts); Gryski & Main, *supra* note 29, at 535 (finding no significance for sex discrimination cases in state supreme courts).

[241] *See, e.g.*, Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944) (invalidating collective bargaining agreement that discriminated against Negro firemen); *see generally* WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 15–22 (1977) (arguing that labor movement in 1960s had an ambivalent response to the reality of racial discrimination in the workplace); IRVING HOWE & B.J. WIDICK, THE UAW AND WALTER REUTHER 207–34 (1949) (discussing UAW's struggles to address discriminatory attitudes among White workers in the 1940s). *But cf.* JACK SANTINO, MILES OF SMILES, YEARS OF STRUGGLE: STORIES OF BLACK PULLMAN PORTERS 33–68 (1989) (describing success of Brotherhood of Sleeping Car Porters and its ability to secure important protections for Black workers).

[242] *See, e.g.*, RAY MARSHALL, THE NEGRO AND ORGANIZED LABOR 311–12 (1965) (describing development of more egalitarian racial practices among many unions in the 1960s); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 14, 82–83, 109, 144 (1985) (detailing key role played by AFL-CIO and constituent unions in lobbying process leading up to enactment of Civil Rights Act).

[243] *See* STATISTICAL ABSTRACT OF THE UNITED STATES 1986, at 424 (106th ed. 1985) (reporting that in 1983, 27.2% of Black wage and salary workers were union members, as opposed to 19.3% of White workers); DeFreitas, *supra* note 101, at 292 (reporting that 29.4% of Black workers aged 23–30 were covered by collective bargaining agreements in 1988, as opposed to 16.7% of White workers, and that higher percentage of coverage for young Black workers applies to professional and technical jobs as well as clerical and blue collar occupations); Thomas A. Kochan, *How American Workers View Labor Unions*, 102 MONTHLY LAB. REV., Apr. 1979, at 23, 26–27 (reporting that nonwhite workers appear to be willing to join unions as a matter of course).

### D. *The NLRA and the Gender Effect*

Our database includes votes from twenty-one female judges, eleven appointed by President Carter and ten named by Presidents Reagan or Bush.[244] The female Democrats did not differ significantly in their voting patterns from male Democrats. Democratic appointees, both male and female, were significantly more likely than Republican appointees to support the union in many of our analyses. Political party, not gender, best explained the votes of these female Democrats.

Among Republican appointees, however, a striking gender gap emerged. In five of our seven analyses, Republican women were significantly more likely to support the union than their male Republican colleagues. In three of the equations in which gender was significant, including our analysis of all issues in all cases, Republican women joined their Democratic colleagues in registering significant pro-union support.[245] In two other equations, including our analysis of divisive issues, Republican women were significantly more likely to support the union than *any* of their colleagues—including both male and female Democrats.[246]

This gender difference between Republican men and women was one of the largest effects we identified. Among all issues in all cases, a Republican man was more than twice as likely as a Republican woman to reject the union's position (Table III). For divisive issues, a male Republican was more than four times as likely as a female Republican to rebuff the union's claim (Table VIII).[247]

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[244] Although the number of Democratic and Republican women was closely matched, the Democratic women contributed more votes to our database. Carter appointees cast 386 of the 582 female votes on All Case issues (66%). Their relative participation was higher on divisive issues, on which they cast 85 of the 108 female votes (79%).

[245] *See* Tables II (all issues in all cases); V (section 8(a)(1) and (3) claims); VII (published cases).

[246] *See* Tables V (section 8(b) claims); VII (divisive issues). The divisive issues include only 23 votes cast by Republican women, and 85 by Democratic women, so this result should be interpreted with caution. Still, the effect is noteworthy. Republican women also were more likely to support the union than any of their colleagues on claims arising under section 8(b), but the number of Republican and Democratic female votes in this analysis was even smaller than in our examination of divisive issues.

In our analysis of section 8(a)(5) issues, Republican women resembled Republican men, with both groups differing from Democrats. Democratic appointees, both male and female, were significantly more likely to support the union on 8(a)(5) claims than were Republican judges of either gender. Finally, neither gender nor political party was significant with respect to remedial matters litigated under section 10(c).

[247] Tables III and VIII report probabilities that judges with selected characteristics would favor the union's legal position. These comparisons invert those probabilities to focus on the likelihood of rejecting the union's claim.

We earlier identified two different theoretical approaches that have been advanced to explain why a judge's gender might influence decisional outcomes.[248] The argument for a distinctly female perspective on judging seems unpersuasive when applied to our labor law data. None of our multivariate analyses revealed a significant difference between women as a group and men as a group. Three analyses found that Democratic men, Democratic women, and Republican women differed significantly from Republican men; two discovered that Republican women varied significantly from Democratic men, Democratic women, and Republican men; and one revealed that Democrats (male and female) differed from Republicans (male and female). None of our analyses, in short, uncovered a distinctive "female voice."

Moreover, the analysis that might have been most likely to reveal a communitarian female ethic, as posited in the "different voice" theory, displayed no such effect. Section 8(a)(5) protects the exercise and effectiveness of collective bargaining by the union, an entity asserting group rights on behalf of the community of all represented employees.[249] The section thus comes closest to recognizing and protecting communitarian values. In this analysis, however, political party was significant while gender was not. Republican women parted from Democratic women, with whom they might have shared a communitarian support for collective bargaining, and voted consistently with Republican men on these issues.

The other approach, that female judges' experiences as relative outsiders in the legal profession may foster a tendency to support union legal positions, better fits our data. This first generation of female judges carved out unusual professional paths to the appellate bench, while facing special role conflicts and a hostile work culture. Despite top academic honors, these women had difficulty finding legal employment, received lower pay than men performing the same work, and had few role models for overcoming these obstacles.[250] Assuming that women's values do

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[248] *See supra* notes 36–48 and accompanying text (discussing psychologically based "different voice" approach positing that women adopt less individualistic and more communitarian moral positions, and sociologically based approach predicated on female judges' initial experiences as relative outsiders in the legal profession).

[249] By contrast, employer misconduct under section 8(a)(1) and section 8(a)(3) typically involves attacks against the rights of individual employees to be free from interrogation, threats, discrimination, and similar autonomy-related interference. *See supra* notes 113–15, 157–61and accompanying text (discussing this important distinction).

[250] *See, e.g.*, Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13, 15–16 (1997) (recalling that in 1963, the same year the Equal Pay Act was passed, the Dean of Rutgers Law School "carefully explained about the state university's limited resources, and then added it was only fair to pay me [more] modestly [than men on the faculty], because my husband had a very good job"; the following year, she "borrowed clothes from [her] ever supportive, one size larger mother-in-law" to conceal a pregnancy and

not inherently differ from those of men, this generation of female judges may still vote in distinctive ways on workplace rights issues that create a relatively clear polarization between haves and have-nots.

This perspective also best explains why Republican women parted from their male Republican colleagues and joined Democratic men and women to support union outcomes. The generation of Republican women who came of age in the legal profession between 1960 and 1990 may have a particularly sharp sense of outsider status. During this period, Republican members of Congress and Republican Presidents increasingly advocated positions adverse to the interests of women in the workforce and society at large.[251] For these and other reasons, the Republican party experienced a substantial gender gap with the voting public, especially after 1980.[252] Women appointed by Republicans in the 1980s and early 1990s, therefore, may perceive themselves as distinctly outside the mainstream of their own party—to a far greater extent than would be the case for their Democratic counterparts. Perhaps this stronger sense of being outsiders contributed to their greater propensity to identify with the employee protection policies and participatory values advocated by unions.

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insure renewal of her annual contract); Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 673 (1996) (reporting that when she graduated from Stanford Law School, the "best job offer I received in the private sector was as a legal secretary"); Deanell Reece Tacha, *"W" Stories: Women in Leadership Positions in the Judiciary*, 97 W. VA. L. REV. 683, 683–84 (1995) (noting her "anguish [in] . . . trying to piece together [a] professional and personal life without patterns to guide" her, and recounting that her father drove overnight to her college dormitory to plead in person that she not apply to law school); *see also supra* note 47.

[251] *See, e.g.*, Carla M. da Luz & Pamela C. Weckerly, Recent Development, *Will the New Republican Majority in Congress Wage Old Battles Against Women?*, 5 U.C.L.A. WOMEN'S L.J. 501, 517–20 (1995) (discussing Republican opposition to Family and Medical Leave Act in late 1980s and early 1990s, including two vetoes of a similar bill by President Bush); 134 CONG. REC. 4633–69 (1988) (reporting Senate debate and override of President Reagan's veto of Civil Rights Restoration Act, which inter alia broadened antidiscimination protections for women in higher education; majority of Senate Republicans voted to sustain President Reagan's veto).

[252] *See* BARBARA C. BURRELL, A WOMAN'S PLACE IS IN THE HOUSE: CAMPAIGNING FOR CONGRESS IN THE FEMINIST ERA 92–94, 146 (1994) (reporting that Republican party nearly excluded women from candidacies for public office between 1976 and 1988, and that "[t]he emphasis on the traditional family among the conservatives . . . conflict[s] with their promotion of women in political leadership positions"); O'Connor, *supra* note 250, at 669–70 (citing figures demonstrating "the emergence of a sizeable political party gender gap in American politics"); Theodore H. White, *New Powers, New Politics*, N.Y. TIMES, Feb. 5, 1984, § 6, at 22 (reporting that exit polls from 1980 Presidential election indicated male voters favored Ronald Reagan by 56% to 36%, while female voters supported him by only 47% to 45%); STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 269 (116th ed. 1996) (reporting that in 1988 and 1992 Presidential elections, female voters were substantially more inclined than male voters to favor Democratic candidate—50% v. 44% in 1988; 61% v. 55% in 1992).

Our findings regarding Republican women are consistent with two recent studies finding that female judges are significantly more likely than their male colleagues to support employment discrimination claimants.[253] It is noteworthy that one of these studies found the pro-plaintiff gender effect to be larger for Republican female judges than for their Democratic counterparts.[254] The female Republican judges in our database were significantly more likely than male Republicans to support litigants alleging violations of individual employee rights under sections 8(a)(1) and (3); these are the NLRA claims that are most analogous to employment discrimination complaints. Our results, however, go well beyond the findings of the two previous studies. Support for union legal positions against employers often involves disputes in which the equal treatment rights of female claimants, or indeed individual employee rights of any kind, play no part. Moreover, the fact that Republican women were also significantly more likely to support the union on section 8(b) claims, which often are raised by individual employees and not employers, suggests a willingness to favor union positions against allegations of individual employee mistreatment. The Republican gender gap, in other words, involved more than just an empathetic response to sex discrimination claims filed by individual employees.

Democratic women, of course, also suffered career constraints and outsider treatment, yet they did not differ significantly from Democratic men in their treatment of union claims. It may be that both the experiences of professional women in this generation and the beliefs that contribute to Democratic affiliation create pro-union sympathies, but that the effects are not cumulative. Whatever the mechanism, the finding serves as an important reminder that gender (like political party) is not monolithic. Gender is one of many characteristics that, in combination with other judicial life experiences, can have some relation to attitudes.

### E. *Some Caveats and a Broader Perspective*

We have attempted to explain why many different social background variables may have been significantly associated with the likelihood that a judge would support or reject the union's legal position in the court of appeals. It is important to emphasize, however, that statistically significant correlation does not equate with

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253 *See* Crowe, *supra* note 30 (reviewing sex discrimination decisions in courts of appeals from 1981 to 1996); Davis et al., *supra* note 30, at 131 (reviewing employment discrimination decisions in courts of appeals from 1979 to 1992).

254 *See* Crowe, *supra* note 30; *see also* Thomas, *supra* note 43, at 49, 51 (reporting that while female legislators in California are generally more supportive of women's issues than their male counterparts, the gender effect is relatively slight among Democratic legislators but quite strong among Republican legislators).

causation.[255] With respect to judicial behavior, it would be misguided to assert that a simple, direct relationship exists between social background and votes in particular decisions or specific types of cases. Some life experiences, such as running for office, may shape attitudes in ways that dispose a judge to support arguments protecting employee efforts to secure representation. Yet the individuals who chose to pursue elective office may already have held beliefs that favored such arguments; those beliefs may have drawn them into the life experiences that later correlated with pro-union votes. Some of the associations we detected might also be proxies for quite different associations. Graduates of selective colleges may have been more likely than other judges to have grown up in the suburbs; Republican women may have been more likely than their colleagues to have led volunteer organizations. Social background is complex, and no analysis can control for all of those complexities.

In addition, all associations are averages, while judges vote as individuals. The fact that Republican men, on average, are less likely than other judges to support the union's legal position does not mean that all Republican men vote against the union all of the time. Some Republican men favor the union's position more often than Democrats or women do. Every judge, moreover, is a composite of all the background variables in our database. For each individual, some characteristics predict a sympathy for policies that promote collective bargaining while others suggest an opposition to those policies. Analyses like ours identify composite trends; they do not pigeonhole particular judges.

Finally, all of our variables together explained no more than one-third of the variance in our "support union" dependent variable.[256] That bottom line leaves considerable scope for the operation of doctrine, precedent, and other more traditional legal factors.[257] Our model, using an especially large number of

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[255] *See generally* JOHNSON AND JOSLYN, *supra* note 119, at 56–57, 376–77 (distinguishing between causation and correlation); SIRKIN, *supra* note 119, at 21–22, 436–38 (same); *see also* Wald, *supra* note 27, at 238–39 (observing that while correlations often exist between a judge's votes on certain cases and the political party of her appointing President, personal experience as a judge has led her to doubt that such correlations are a secure basis for predicting her votes).

[256] Our $R^2$ analogue was 25% for all issues in all cases, 17% for all issues in published cases, and 34% for all divisive issues. *See* Tables II and VII *supra*. For statutory subsections, the $R^2$ analogue displayed a wider range—from 15% for issues under section 8(a)(1) or (3) and 17% for issues under § 10(c) to 25% for issues under section 8(a)(5) and 36% for issues under section 8(b). *See* Table V *supra*. As we observed earlier, *supra* note 180, the $R^2$ analogue, like other goodness-of-fit statistics, is only a *relative* measure; there is no justification for referring to a particular $R^2$ analogue of 25% or 35% as "good" in some absolute sense. *See* KING, *supra* note 123, at 24 n.7.

[257] Other factors, such as random error in sampling or coding, as well as personal attitudes or background factors for which we could not control, would also account for some of the variance in our dependent variable that is unexplained by our model.

independent variables and controls, confirms the predominant role of those legal factors in deciding most cases. Indeed, Board outcome, or deference to the administrative agency, was the most powerful predictor in all of our equations, explaining up to half of the variance accounted for in each equation.[258]

Notwithstanding these caveats, our analysis has identified numerous personal, political, and professional background factors that are significantly associated with a judge's propensity to support or reject the union's legal position. Republican women, Democratic men, and Democratic women are about 10% more likely than Republican men to vote for the union, even when one considers the full range of published and unpublished cases.[259] Among all appeals from Board decisions favoring the employer, judges with NLRA management experience are more than twice as likely as other judges to adopt the union's position and reverse the Board.[260] In the category of divisive issues, some of the marginal effects are even larger, with Republican women about four times more likely than other judges to adopt the union's position and judges with elected office experience almost twice as likely to do so.[261] These findings strongly suggest that social background factors play a meaningful role in influencing judicial approaches to labor law issues.

Our explanations for that role hypothesize a connection between life experiences and the formation of attitudes empathizing with the policies behind collective bargaining. People, including those who become judges, are not born hostile to or supportive of unions. Instead, exposure to unions, to blue collar voters, to chilly professional climates, or to other experiences may foster broader

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[258] In our analysis of all issues in all cases, Board outcome explained between 7.99% and 18.56% of the variance, depending on whether it was entered last or first in the equation, while the remaining variables explained between 6.28% and 16.85% of the variance. *See supra* note 180 (explaining how the percentage of variance explained by a variable may depend upon when a variable is entered in the equation). Among published issues, Board outcome explained between 5.15% and 9.81% of the variance, with all other variables contributing between 5.15% and 6.84%. And among divisive issues, Board outcome explained between 14.63% and 16.98% of the variance, with other variables explaining 16.70% to 19.05%.

Apart from the direct explanatory influence of our judicial attributes, *see supra* notes 180–83 and accompanying text, the controls for circuits explained between 2% and 6% of the variance in our three primary equations. These variables almost certainly reflect the influence of some judicial attributes, because the courts vary in the number of judges holding each of the characteristics we examine. Thus, if a circuit produces pro-union results more often than other circuits, the result may stem in part from a disproportionate number of judges holding characteristics (such as NLRA management experience) associated with those outcomes. The circuit variables, however, also reflect factors like case mix, local precedent, and circuit culture.

[259] *See supra* Table III.

[260] *See id.*

[261] *See supra* Table VIII.

understanding for the objectives furthered through organization and collective bargaining. In the judicial context, that understanding informs doctrinal interpretation and policy elaboration; it does not trump those elements.

The robust association between NLRA management experience and pro-union outcomes provides a particularly dramatic illustration of the way in which judicial background may shape understanding of the claims litigated under a statute. Judges with management-side experience were significantly more likely than other judges to vote *against* their former clients, especially when their NLRA experience was diverse and especially when a pro-union vote required reversing the Board. The best explanation for this effect is that extensive experience applying the NLRA gave these judges a special appreciation for the statute's purposes and workings. In this sense, the social background and traditional legal models of judicial decisionmaking are linked, because familiarity with a statute's purposes (generated by personal background) creates or enhances doctrinal understanding.[262]

In terms of the broader intellectual debate between law and political science, we have demonstrated that social background factors are valuable in helping to explain judicial behavior. The language of statutory text and the principled application of precedent to facts play a substantial part, but they do not constitute the whole story in the federal courts of appeals. Individual judges' attitudes toward unions also make a difference. At the same time, votes are not determined by a single pre-judicial event or exposure. Rather, judicial policy preferences are an intricate tapestry of personal, educational, and professional experiences woven together over the course of a lifetime. By constructing a model that is both careful and detailed, we have identified some experiences as especially meaningful in shaping those preferences.

## CONCLUSION

Our findings illuminate the process of appellate decisionmaking under a major federal statute, one that harks back to an entire generation of New Deal legislation. From a scholarly perspective, our analyses suggest that intensive exploration of a single subject matter can best crystallize the complex cross-currents of judicial

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[262] Our results for section 8(a)(5) claims underscore this linkage. Section 8(a)(5) raises issues that are most distinctive to collective bargaining and most foreign to the individual rights orientation of contemporary legal culture. Under that section, judges with NLRA management experience differed most sharply from their colleagues, showing an especially strong propensity to reverse the Board and protect collective bargaining rights. Other judges (including graduates of elite law schools, older judges, and even those, like Democratic appointees and Republican women, who often favored union legal positions) showed less empathy for union arguments under this section.

behavior. Analysis of a data set that focuses on one field of substantive law, and on subdivisions of case outcomes within that field, makes it easier to identify the demographic, socioeconomic, and occupational experiences that appear to influence judicial decisionmaking. Our unprecedented access to a full range of unpublished opinions in this field also allowed us to explore effects in both controversial and noncontroversial cases—as well as to show the pitfalls of confining analysis to any one category.

As in any study of a single time period, our results may be affected if not shaped by the broader historical context. Appellate court judges appointed between 1945 and 1965 acquired their life experiences in an era when public views regarding unions' role in society, and the basic value of government regulation, were considerably more favorable than they have been since the mid-1970s. Further examination of judicial behavior interpreting the NLRA during earlier (and, eventually, later) historical periods would allow for useful comparative assessment of the role played by our various background factors.

From a practical standpoint, our findings with regard to NLRA management experience—suggesting that judges with extensive knowledge of the Act apply it with greater sensitivity than other judges—could be invoked to promote the establishment of a specialized labor court, analogous to the specialized tribunals created in recent decades to enforce other federal statutory schemes.[263] The need for specialized knowledge, and the lack of uniformity across circuits, are among the features most commonly associated with the creation of specialized courts.[264] While

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[263] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.) (creating Federal Circuit Court of Appeals to review and enforce patent law); Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210 § 211(b)(1), 85 Stat. 743, 749; Emergency Petroleum Act of 1973, Pub. L. No. 93-159, § 5, 87 Stat. 627, 633; Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, § 10(b), 91 Stat. 4, 9 (creating Temporary Emergency Court of Appeals to review and enforce energy programs); Pub. L. No. 91-172, § 951, 83 Stat. 730 (1969) (creating United States Tax Court to review and enforce aspects of revenue laws); *see generally* Bruff, *supra* note 223, at 332–39.

[264] *See* Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 617–21 (1989) (identifying as key criteria that justify creation of a nonregional appellate court forum the need for judges to develop and maintain familiarity with a specialized area of law, and the corrosive effects of nonuniform regional decisions). Although our discussion does not focus on intercircuit variation, two or more of the circuit variables were significant in all but one of our equations. Indeed, in the equation for all issues in all cases, seven of the eleven circuit variables approached or reached significance. The one equation that did not show significant circuit effects, our analysis of section 8(b) claims, was the one in which 43% of all issues were concentrated in a single circuit, providing substantial evidence of forum shopping.

federal labor courts are well-entrenched in many European countries,[265] we do not advocate the establishment of a specialized labor court based on our study. Apart from the obvious need to collect additional detailed information, there are many costs associated with specialization.[266] Any benefits gained from a specialized court, moreover, may not be as substantial where a national adjudicative agency already exists that in theory can provide much of the expertise and guidance associated with specialized tribunals.[267]

Our findings, however, do support the need for ongoing judicial training about the distinctive purposes and policies of the NLRA—and, perhaps, about other complex regulatory schemes. The Federal Judicial Center and several academic institutions already offer extensive programs of continuing legal education to judges.[268] Those programs, like other professional education programs, may have a natural tendency to focus on recent developments or new doctrines. Our results suggest that it is equally important to revisit the fundamental principles of aging statutes that remain an important component of the appellate docket.

As with other older federal laws, Congress for many decades has not altered the basic structure of the NLRA. While this legislative inaction may not reflect

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[265] *See, e.g.*, Xavier Blanc-Jouvan, *The Settlement of Labor Disputes in France*, *in* LABOR COURTS AND GRIEVANCE SETTLEMENT IN WESTERN EUROPE 1, 15–40 (Benjamin Aaron ed. 1971) (discussing French system of labor courts); Thilo Ramm, *Labor Courts and Grievance Settlement in West Germany*, *in* LABOR COURTS, *supra* at 81, 96–127 (discussing German labor court system); Folke Schmidt, *The Settlement of Employment Grievances in Sweden*, *in* LABOR COURTS, *supra*, at 159, 198–226 (discussing Sweden's single labor court).

[266] *See, e.g.*, Bruff, *supra* note 223, at 331–32 (identifying costs of creating specialized courts, including loss of the generalist perspective, diminished court prestige, and problems of bias in appointments process and in application of review standard); Dreyfuss, *supra* note 222, at 25–51 (discussing costs of specialization as demonstrated by initial Federal Circuit experience; citing pro-patentee bias, problems of jurisdictional definition, and difficulty of supervising lower courts).

[267] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (describing Labor Board as "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect"). Of course, the courts of appeals have been criticized over the years for not conferring sufficient respect upon Board judgments. *See generally* JULIUS G. GETMAN & BERTRAND B. POGREBIN, LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE 7–9 (1988) (discussing reasons why federal courts have played a far greater role than was contemplated by NLRA drafters). Moreover, even the Supreme Court in *Universal Camera* stated that in the wake of Taft-Hartley amendments modifying the standard for judicial review, "courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past." 340 U.S. at 488.

[268] *See* Pub. L. No. 90-219, § 101, 81 Stat. 664, 664 (codified at 28 U.S.C. § 620(b)(3) (1994)) (authorizing Federal Judicial Center to "conduct programs of continuing education and training for personnel of the judicial branch of the government, including . . . judges").

widespread satisfaction with the Act, Congress's repeated refusals to approve proposals for reform in either direction at least signal that there is no consensus to alter the historic scheme.[269] In these circumstances, it is appropriate to deepen and enrich judicial sensitivity to NLRA paradigms and policies, so that courts applying this older statute are in a better position to implement faithfully Congress's still-prevailing norms.

In addition to this specific recommendation, our study supports the need for further inquiry into the forces that shape judicial conduct. We are in the midst of a spirited debate between appellate court judges and scholars about the relevance of a judge's political affiliation in predicting votes.[270] Such disagreements should not obscure the importance of developing more sophisticated analyses of other judicial background factors, and of exploring the possible relationships between those factors and specific aspects of legal doctrine. Additional research is especially timely as the federal bench becomes steadily more diverse in a number of demographic and socioeconomic respects. In this regard, we share Judge Wald's recently expressed belief that in the years ahead, social background factors will assume an increasingly meaningful role as indicators of judicial voting behavior.[271]

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[269] *See* Brudney, *supra* note 70, at 943–44 (discussing unsuccessful campaigns for pro-union reform between 1977 and 1994, and unsuccessful employer efforts at reform since 1995).

[270] *See* Edwards, *supra* note 24 (criticizing Revesz, *supra* note 8, and Cross & Tiller, *supra* note 22); Wald, *supra* note 27 (criticizing Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215 (1999)).

[271] *See* Wald, *supra* note 27, at 252 n.65.

## Appendix A
## Coding Schemes

### 1. Employer Liability: Specific Unfair Labor Practice Issue Codes Under Section 8(a)

| | |
|---|---|
| 8a1 Misc | Catch-all for 8a1 violations not otherwise identified |
| 8a1B | Conferring or promising benefits during campaign |
| 8a1I | Interrogation |
| 8a1S | Employer solicitation policies |
| 8a1SU | Surveillance |
| 8a1T | Threats |
| 8a2 | Domination or interference with labor organization |
| 8a3 Misc | Catch-all for 8a3 violations not otherwise identified |
| 8a3MM | Mixed-motive discrimination against union members or supporters |
| 8a4 | Retaliation for filing charge or testifying under Act |
| 8a5 Misc | Catch-all for 8a5 violations not otherwise identified |
| 8a5BF | Bad faith bargaining, including surface bargaining |
| 8a5GFD | Good faith doubt as to continued majority status |
| 8a5I | Refusal to provide information requested by union |
| 8a5MS | Refusal to bargain on mandatory subjects |
| 8a5MT | Unilateral mid-term modifications or other unilateral pre-impasse changes |
| 9S | Technical 8a5 based on challenge to identity or scope of bargaining unit |
| 9U | Technical 8a5 based on challenge to union/employees' conduct during campaign |
| 8f | Pre-hire agreement |

### 2. Union Liability: Specific Unfair Labor Practice Issue Codes Under Section 8(b)

| | |
|---|---|
| 8bEr | Union misconduct directed at employer, including violations of §§ 8(b)(1)(A), 8(b)(1)(B), 8(b)(2), 8(b)(3), 8(b)(4), 8(b)(7) |
| 8bEes | Union misconduct directed at one or more individual employees, including violations of §§ (b)(1)(A), 8(b)(2) |

### 3. Relief Against Employer: Specific Issue Codes Under Section 10(c)

| | |
|---|---|
| 10BP | Backpay awards against employer |
| 10BO | Bargaining Orders |
| 10cMisc | Catchall for § 10(c) relief not otherwise identified |

Most issues were readily identifiable based on the descriptive and analytic discussion in the appellate court opinions. As a general matter, when the issue was not sufficiently identifiable, it was placed in the "catch-all" category – *e.g.*, an 8a5 ULP that did not plainly belong in one of the five more specific subgroups.

### 4. Appellate Court Judges Data Collection Form

_____ Judge's Name

_____ Judge's Circuit (1 through 11 plus DC = 12)

DEMOGRAPHIC DATA

____ Year of Birth (Last 2 digits of birth year)

____ Race (0-W; 1-B; 2-L; 3-A; 4-NA/PI; 5-Oth)

____ Gender (0-M; 1-F)

____ Religion (0-Protestant; 1-Catholic; 2-Jewish; 3-Oth)

APPOINTMENT DATA

____ Year appointed (Last 2 digits)

____ Appointing President (0-GB; 1-RR; 2-GF; 3-RN; 4-IKE; 5-BC; 6-JC; 7-LBJ; 8-JFK; 9-FDR/HT)

____ Confirming Senate (0-D; 1-R)

____ Active or senior: 10/28/86 (0-A; 1-S)

____ Active or senior: 11/2/93 (0-A; 1-S)

EDUCATIONAL BACKGROUND

| | | |
|---|---|---|
| ____ | College attended | (Code schools in alpha order) |
| ____ | Year of degree | (Last 2 digits) |
| ____ | Law School attended | (Code schools in alpha order) |
| ____ | Year of degree | (Last 2 digits) |
| ____ | Law School Geographical Region | (W-West; MP-Mountain & Plains; MW-Midwest; MA-Mid-Atlantic; NE-Northeast; SE-Southeast; SC-South Central; SW-Southwest) |

PRE-APPOINTMENT PROFESSIONAL EXPERIENCE

| | | |
|---|---|---|
| ____ | Workplace law experience | (0-no; 1-yes) |
| ____ | Non-NLRA-related, state | (0-no; 1-some; 2-substantial) |
| ____ | Non-NLRA-related, federal | (0-no; 1-some; 2-substantial) |
| ____ | NLRA-related | (0-no; 1-some; 2-substantial) |
| ____ | Political experience | (0-no; 1-yes) |
| ____ | State elective | (0-no; 1-yes) |
| ____ | State legis hi-level | (0-no; 1-yes) |
| ____ | State exec hi-level | (0-no; 1-yes) |
| ____ | Fed elective | (0-no; 1-yes) |
| ____ | Fed legis hi-level | (0-no; 1-yes) |
| ____ | Fed exec hi-level | (0-no; 1-yes) |

____ Legal academic experience (0-no; 1-adjunct; 2-full-time) (List all applicable)

____ Law clerk experience (0-no; 1-state; 2-Fed.D.Ct.; 3-Fed.Ct.App; 4-S.Ct.) (List all applicable)

____ Judicial experience (0-no; 1-st trial; 2-st app; 3-federal) (List all applicable)

____ Private practice experience (Code number of years) (Non-govt, non-public interest)

MISCELLANEOUS DATA

____ Net worth (0-<250G; 1-<500G; 2-<1Mil; 3-<3Mil; 4-<5Mil; 5->5Mil)

____ Residence when appointed (Code states in alpha order)

____ Sen. Judic. Comm. Questionnaire Used (0-no; 1-yes)

____ Other Sources Used (0-Almanac of Fed. Judic; 1-Am.Bench; 2-Fed.Judic.Almanac; 3-Other)

## 5. District Court Judges Data Collection Form

_____ Judge's Name

_____ Judge's Circuit (1 through 11 plus DC = 12)

DEMOGRAPHIC DATA

____ Year of Birth (Last 2 digits of birth year)

____ Race (0-W; 1-B; 2-L; 3-A; 4-NA/PI; 5-Oth)

____ Gender (0-M; 1-F)

APPOINTMENT DATA

____ Year appointed (Last 2 digits)

____ Appointing President (0-GB; 1-RR; 2-GF; 3-RN; 4-IKE; 5-BC; 6-JC; 7-LBJ; 8-JFK; 9-FDR/HT)

____ Confirming Senate (0-D; 1-R)

____ Active or senior: 10/28/86 (0-A; 1-S)

____ Active or senior: 11/2/93 (0-A; 1-S)

EDUCATIONAL BACKGROUND

____ College attended (Code schools in alpha order)

____ Year of degree (Last 2 digits)

____ Law School attended (Code schools in alpha order)

____ Year of degree (Last 2 digits)

____ Law School Geographical Region (W-West; MP-Mountain& Plains; MW-Midwest; MA-Mid-Atlantic; NE-Northeast; SE-Southeast; SC-South Central; SW-Southwest)

MISCELLANEOUS DATA

____ Sources Used (0-Almanac of Fed. Judic; 1-Am.Bench; 2-Fed.Judic.Almanac; 3-Other)

# Appendix B

**Logistic Regression for Supporting the Union**
**All Section 8(a) Issues (N=4,409)**

| | Coefficient | Robust Std. Err. | Significance |
|---|---|---|---|
| **Judicial Characteristics** | | | |
| Democratic Appointee | .83 *** | .18 | .000 |
| Year Appointed | -.01 | .01 | .387 |
| Age | -.02 * | .01 | .076 |
| Female | .97 *** | .35 | .006 |
| Female/Democratic Interaction | -1.12 ** | .45 | .013 |
| African American | -.37 | .29 | .201 |
| Latino or Asian | -.79 * | .43 | .065 |
| Catholic or Jewish | -.01 | .14 | .953 |
| College Selectivity | -.03 *** | .01 | .000 |
| Elite Law School | -.02 | .14 | .869 |
| Elected Office | .13 | .14 | .357 |
| Nonelective Position | -.13 | .15 | .400 |
| Prior Judicial Experience | -.13 | .14 | .322 |
| Legal Academic | .02 | .15 | .906 |
| Workplace Law Experience | -.32 | .24 | .186 |
| Corporate Law Experience | -.34 | .21 | .103 |
| NLRA Management Experience | 1.45 ** | .61 | .017 |
| NLRA Mgmt./Board Interaction | -1.81 *** | .60 | .003 |
| **Control Variables** | | | |
| Board for Union | 3.16 *** | .24 | .000 |
| Section 8(a)(5) | -.19 | .11 | .103 |
| Other Section 8(a) | -1.57 *** | .34 | .000 |
| D.C. Circuit | -.18 | .22 | .420 |
| First Circuit | .46 | .54 | .387 |
| Second Circuit | 1.54 *** | .30 | .000 |
| Third Circuit | 1.24 *** | .34 | .000 |
| Fourth Circuit | -.70 *** | .23 | .002 |
| Fifth Circuit | -.88 *** | .24 | .000 |
| Seventh Circuit | .33 | .22 | .138 |
| Eighth Circuit | -.34 | .25 | .168 |
| Ninth Circuit | .80 *** | .26 | .002 |
| Tenth Circuit | .47 | .32 | .143 |
| Eleventh Circuit | -.02 | .34 | .942 |
| Year of Decision | -.03 | .03 | .409 |
| **Constant** | 4.72 * | 2.74 | .084 |
| **Pseudo $R^2$** | .18 *** | | .000 |

*** $p \leq .01$, ** $p \leq .05$, * $p \leq .10$