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## ARTICLE

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### CIRCUIT EFFECTS: HOW THE NORM OF FEDERAL JUDICIAL EXPERIENCE BIASES THE SUPREME COURT

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*For the first time in American history, all nine Justices of the U.S. Supreme Court came to their positions directly from U.S. courts of appeals. As new vacancies arise in the coming years, should the President continue to look to the circuits for Supreme Court nominees? Commentators disagree on the answer. Those who support the current practice claim that the Senate is more likely to confirm nominees with judicial experience. Proponents also argue that former federal judges are more likely to reach decisions based on precedent rather than on their own ideological values. Those opposed to current practice point to the costs of elevating federal judges. Among the most pernicious may be “circuit effects,” or the possibility that former U.S. courts of appeals judges are predisposed toward affirming decisions of the institutions they just left—their respective federal circuits.*

*We enter this debate not by rehashing the existing arguments, but by exploring them empirically. From our analyses, a clear conclusion emerges: the*

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benefits of drawing Supreme Court Justices from the circuits are, at best, overstated, while the costs are, at a minimum, understated. Indeed, the data reveal a strong predilection on the part of Justices with federal judicial experience to rule in favor of their respective home court. For some, the attachment is so strong that they are twice as likely to affirm decisions coming from their former circuit as decisions coming from all others. Even more striking is the advantage now enjoyed by the U.S. Court of Appeals for the District of Columbia—the former home of four sitting Supreme Court Justices.

An obvious antidote is for the President to end the practice of appointing Supreme Court Justices from the circuits, and instead turn to the nation's law schools, law firms, legislatures, executives, and state courts. A less obvious, though no less plausible, remedy is for the President to select nominees from circuits underrepresented on the Court.

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## INTRODUCTION

After the appointments of John G. Roberts and Samuel A. Alito, commentators were quick to point to a new source of diversity on the U.S. Supreme Court: religion.<sup>1</sup> For the first time in the Court's history, Protestants do not hold a majority or plurality of seats; Catholics do.<sup>2</sup>

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<sup>1</sup> See, e.g., Michael J. Gerhardt, *Why the Catholic Majority on the Supreme Court May Be Unconstitutional*, 4 U. ST. THOMAS L.J. 173, 174 (2006) (arguing that Justices with ideo-

But religion may be the exception. On many other dimensions, the Roberts Court, as it is currently composed, is among the more homogeneous Courts in recent memory.<sup>3</sup> Most noticeably, for the first time in American history all nine Justices came to their positions directly from U.S. courts of appeals.<sup>4</sup>

While this “professionalization” of the Court is without precedent, it has been long in coming.<sup>5</sup> Ever since President Dwight D. Eisenhower made clear that he “would use an appeals court appointment as a stepping stone to the Supreme Court,”<sup>6</sup> the vast majority of nominees have come from the federal circuits.<sup>7</sup> Even more to the point, the Senate has not confirmed any Supreme Court nominee lacking circuit court experience since William H. Rehnquist in 1986. Of course, there was President George W. Bush’s attempt in 2005 to ap-

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logical or religious commitments devalue the importance of precedent in judicial decision making); Jake Tapper & Brooke Runnette, *Alito Would Create Catholic Majority on Top Court*, ABC NEWS, Jan. 24, 2006, <http://abcnews.go.com/Nightline/SupremeCourt/story?id=1536354> (contrasting the historical and current public reactions to Catholics in power); Robin Toner, *The Supreme Court’s Catholic Majority*, N.Y. TIMES, Apr. 25, 2007, [http://www.nytimes.com/2007/04/25/us/politics/26web-toner.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/04/25/us/politics/26web-toner.html?_r=1&oref=slogin) (discussing the complicated role that Catholicism has played in American politics).

<sup>2</sup> Detailed data on the Justices’ religious backgrounds is available in LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 280-90 (4th ed. 2007).

<sup>3</sup> Seven of the nine Justices are Republicans (all but Justices Stephen Breyer and Ruth Bader Ginsburg). Only two of the nine (Justices Kennedy and Stevens) worked outside of the Northeast at the time of their appointment—a regional imbalance that would have been unthinkable in the Court’s early years. See, e.g., Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469 (1989) (arguing that “[g]eography preoccupied the founding generation” and influenced its decisions regarding the Supreme Court); Orrin G. Hatch, *Save the Court from What?*, 99 HARV. L. REV. 1347, 1352 (1986) (book review) (noting that seats on the Court were “allocated according to geographical considerations”). Finally, all but Justice Stevens attended law school at Harvard, Yale, or Columbia—an unprecedented nod to the Ivy League. See Richard Cohen, *Ivy-Covered Court*, WASH. POST, Nov. 15, 2005, at A21 (“You might think that the lock the Ivy League has on the Supreme Court is long-standing. Not so. This is a rather new phenomenon . . .”). Information on the Justices’ backgrounds, including their party affiliations, regional ties, and education, is available in EPSTEIN ET AL., *supra* note 2, at 271, 280, 291, 387-88.

<sup>4</sup> See EPSTEIN ET AL., *supra* note 2, at 352-53 (indicating the Justices’ positions at the time of nomination). The Chief Justice and Justices Ginsburg, Scalia, and Thomas served on the D.C. Circuit; Justices Breyer and Souter on the First; Justice Alito on the Third; Justice Stevens on the Seventh; and Justice Kennedy on the Ninth.

<sup>5</sup> Marcia Coyle, *A Man Comfortable in “the Box,”* NAT’L L.J., July 25, 2005, at 1, 19 (quoting Sheldon Goldman).

<sup>6</sup> SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 115 (1997).

<sup>7</sup> For data supporting this point, see *infra* Part I.

point his White House counsel, Harriet Miers. Ironically enough, this nomination—so roundly criticized on the very ground that Miers had never served on the bench<sup>8</sup>—may have solidified the practice of looking to the circuits for Supreme Court nominees. As one observer noted, “[t]he appointments of Chief Justice Roberts and Justice Alito, and contrastingly the rejection of Harriet Miers, reinforce a trend on the Court that nominees not only have prior judicial experience, but also federal appellate experience.”<sup>9</sup>

As new vacancies are likely to arise on the Court in the not-so-distant future, should the next presidential administration and the Senate continue to appoint Justices from the U.S. circuits? Commentators disagree on the best approach.<sup>10</sup> Those who support this so-

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<sup>8</sup> See Anita F. Hill, *Why Harriet Miers Mattered*, MS., Winter 2006, at 19, 19 (“It’s certainly possible to criticize Miers’ qualifications for the Supreme Court without resorting to sexism . . . .”); Robin Toner et al., *Steady Erosion in Support Undercut Nomination*, N.Y. TIMES, Oct. 28, 2005, at A16 (noting questions raised by senators about Miers’s “constitutional mastery”); Patrick J. Buchanan, *Miers’ Qualifications Are Non-Existent*, Oct. 3, 2005, <http://www.humanevents.com/article.php?id=9444> (“[H]er qualifications for the Supreme Court are non-existent. She is not a brilliant jurist, indeed, has never been a judge.”). On the other hand, many commentators allege that conservatives questioned her credentials because they were unsure of her ideological commitments. See, e.g., Kevin P. Martin, *Miers’s Qualifications*, BOSTON GLOBE, Oct. 7, 2005, at A19 (“Why . . . rush to dismiss Miers as a mere crony? Mostly it is because conservatives have long had a dream list of nominees to the court . . . .”); Toner et al., *supra* (indicating Senator Sam Brownback’s view that “social conservatives were simply not inclined to go on faith that Ms. Miers was a reliable conservative”); Emily Bazelon, *Let-Down Lady*, SLATE, Oct. 3, 2005, <http://www.slate.com/id/2127361/> (“The real fear on the right, of course, is that Miers will turn out to be another Justice David Souter, a respector of precedent who lets her colleagues pull her to the center and then to the left.”).

<sup>9</sup> Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 815 (2006).

<sup>10</sup> For recent reviews of some of the many arguments both for and against the practice of elevating circuit court judges to the Supreme Court, see Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 983-84 (2007), who argues that looking to appellate courts for nominees provides the “opportunity to evaluate judicial temperament and craftsmanship through the nominee’s past judicial experience,” but “also create[s] undesirable incentives for decisions made with an eye to advancement through necessarily political confirmation processes.” See also Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 908 (2003) (“We argue that there now exists a norm of prior judicial experience that induces a highly problematic level of career homogeneity on the Court.”); Terri L. Peretti, *Where Have All the Politicians Gone? Recruiting for the Modern Supreme Court*, 91 JUDICATURE 112, 112 (2007) (discussing the change from a “statesmanlike” Court to a judicial one).

called “norm”<sup>11</sup> of federal judicial experience point to any number of benefits. Two such benefits appearing on many lists are less contentious confirmation processes and, ultimately, superior products—Justices who reach decisions based on precedent or other neutral sources, and not on their own political preferences.<sup>12</sup> Those opposed to the norm do not necessarily dispute these benefits but instead argue that the costs are substantial. They point to several disadvantages along these lines,<sup>13</sup> perhaps one of the most pernicious being “circuit effects”—the possibility that federal-appellate-judges-turned-Supreme-Court-Justices are predisposed to affirm decisions coming from the circuits they just left.<sup>14</sup>

In what follows, we weigh in on this debate, not by rehashing the existing arguments but rather by exploring them empirically. After supplying a brief history of the norm of federal judicial experience, such as it is,<sup>15</sup> we turn in Part II to its purported benefits and in Part III to its possible costs. On balance, we find that the benefits are virtually nonexistent—confirmation proceedings are no smoother for candidates coming from the circuits than for other nominees, and former appellate court judges are no more likely to follow precedent or to put aside their policy preferences than are Justices lacking judicial experience. The costs, on the other hand, are considerable. While we do not observe circuit effects in the form of Justices consis-

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<sup>11</sup> See Epstein et al., *supra* note 10, at 906 (calling the need for prior judicial experience a “norm”); Peretti, *supra* note 10, at 117 (agreeing that prior judicial experience is a norm, though writing that it is not “inviolable or universal”); see also Joel B. Grossman, *Paths to the Bench: Selecting Supreme Court Justices in a “Juristocratic” World*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE JUDICIAL BRANCH 142, 162 (Kermit L. Hall & Kevin T. McGuire eds., 2005) (deeming prior judicial experience “nearly a de facto qualification”).

<sup>12</sup> We describe and analyze these claims *infra* Part II.

<sup>13</sup> When he served as Chief Justice, William Rehnquist argued that professionalization of the bench may lead to a decline in its independence and the respect it has always been afforded. He bemoaned the fact that while at one time his Court housed the likes of Louis Brandeis, John Harlan, and Byron White—in other words, Justices “drawn from a wide diversity of professional backgrounds”—those days are long gone. See WILLIAM H. REHNQUIST, 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY, <http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html> (last visited Jan. 15, 2009). Others have asserted that the Court’s “steady homogenization” has caused it to become “more reluctant” to hear and decide cases. See, e.g., Stuart Taylor, Jr., Comment, *Remote Control*, ATLANTIC MONTHLY, Sept. 2005, at 37, 37-38.

<sup>14</sup> See *infra* Part III (discussing data supporting the conclusion that appellate court judges promoted from below are more likely to affirm lower decisions). It is worth noting that we know of no other empirical work on the Supreme Court along these lines and seek to fill this gap.

<sup>15</sup> See *supra* note 11 and accompanying text.

tently biased towards all the U.S. courts of appeals, the data do reveal a clear predisposition on the part of former federal judges to rule in favor of their home courts. For some Justices the attachment is so strong that they are twice as likely to affirm decisions coming from the circuit on which they served than they are to affirm decisions coming from all other circuits.<sup>16</sup>

Under any circumstances, circuit effects seem problematic; they suggest that when the President and senators follow the norm of federal judicial experience, the Justices they appoint are more likely to give the benefit of the doubt to some circuits than to others. But the problem of bias now transcends individual Justices. Because four of the nine current Justices served on the U.S. Court of Appeals for the District of Columbia, the norm has created a collective presumption in favor of decisions handed down by the D.C. Circuit judges. To provide but one example, while all other federal appellate court judges can expect the U.S. Supreme Court to reverse their decisions in about two out of every three disputes, those sitting on the D.C. Circuit actually enjoy a higher probability of being affirmed than reversed.<sup>17</sup> Diluting this advantage, as we explain in Part IV, could take one of two forms: occasionally abandoning the practice of appointing federal judges to the Supreme Court, or selecting nominees from the range of circuits so that no single circuit is disproportionately represented.

#### I. THE ENTRENCHMENT OF THE NORM OF FEDERAL JUDICIAL EXPERIENCE

It is virtually indisputable that at least a practice, if not a norm,<sup>18</sup> exists of appointing federal circuit court judges to the Supreme Court. As early as 1959 and as recently as 2008,<sup>19</sup> commentators have acknowledged the grave hesitation of the President and senators alike to

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<sup>16</sup> For example, in cases coming to the Supreme Court from the U.S. Court of Appeals for the First Circuit, the predicted probability of Justice Stephen Breyer—a former judge on that court—casting a vote to affirm is 0.69; for cases coming from all other circuits, that figure is 0.29. For more details on our analysis of Justice Breyer, along with all other Justices serving since 1953, see *infra* Part III.

<sup>17</sup> For the details on how we computed these figures, see the conclusion of this Article.

<sup>18</sup> See *supra* note 11 and accompanying text.

<sup>19</sup> See, e.g., Peretti, *supra* note 10, at 112 (noting the shift from appointing statesmen to the Supreme Court to selecting jurists); John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1 (1959) (examining an earlier shift in criteria for selecting Supreme Court Justices from prior judicial experience to personal qualifications and character).

appoint anyone other than sitting judges, especially U.S. federal appellate court judges. Given empirical evidence in support of this claim,<sup>20</sup> it should be noted that of the sixty-two nominations made between 1869 (when Congress established the first separate judgeships for the U.S. circuits<sup>21</sup>) and 1952 (the last full year of the Truman administration), just 16% went to federal circuit court judges; since the onset of the Eisenhower administration in 1953, that figure increased to nearly 66%.<sup>22</sup>

The demarcation of 1953 is no accident. Almost all scholars who have studied the increasing presence of circuit court judges on the Court claim that the practice's genesis lies in the 1950s, during the Eisenhower years,<sup>23</sup> though disagreement arises over its origin. Some suggest that the instigators were members of Congress, who, in the wake of *Brown v. Board of Education*<sup>24</sup> and other controversial decisions, pressured Eisenhower to appoint members of the bench. Sitting judges, the legislators claimed, would be more likely than politicians (such as Hugo Black or Earl Warren) or law professors (such as Felix Frankfurter)<sup>25</sup> to respect precedent and to "base [their] decisions . . . upon 'law,' not 'sociology.'"<sup>26</sup> Several members of Congress went so far as to propose legislation requiring all future appointees to have at least five years' judicial experience.<sup>27</sup>

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<sup>20</sup> See Epstein et al., *supra* note 10, at 909-17 (presenting empirical data in support of the claim that selection of Supreme Court Justice nominees from the appellate judge pool is now the norm).

<sup>21</sup> EPSTEIN ET AL., *supra* note 2, at tbl.4-12; Judiciary Act of 1869, ch. 22, § 2, 16 Stat. 44 (1869). Not until 1891 did Congress establish the U.S. Circuit Courts of Appeals in the Judiciary Act of 1891, ch. 517, 26 Stat. 826 (1891). William B. Woods was the first U.S. circuit court judge nominated to the Supreme Court, in 1880.

<sup>22</sup>  $\chi^2 = 23.39$  ( $p \leq 0.05$ ).

<sup>23</sup> See, e.g., Epstein et al., *supra* note 10, at 909 (claiming that the shift began as early as 1959); Peretti, *supra* note 10, at 114 ("Most commentators point to the 1950s as the origin of this new norm."). We adapt some of the material in this paragraph from the former.

<sup>24</sup> 347 U.S. 483 (1954).

<sup>25</sup> Justices Black, Frankfurter, and Warren were all members of the Court that produced *Brown*. Prior to their nomination to the Supreme Court, Black was a U.S. Senator, and Warren was Governor of California. Frankfurter was a professor at Harvard Law School.

<sup>26</sup> Schmidhauser, *supra* note 19, at 41.

<sup>27</sup> For a review of the proposals, see Robert J. Steamer, *Statesmanship or Craftsmanship: Current Conflict over the Supreme Court*, 11 W. POL. Q. 265, 270-71 (1958). Peretti, *supra* note 10, at 117, writes that even today "Congress regularly considers requiring Supreme Court justices to have five or ten years of previous judicial experience."

Other commentators point to President Eisenhower himself as the originator of the norm.<sup>28</sup> They claim that after nominating Earl Warren as Chief Justice, Eisenhower deliberately “imposed” the criterion of judicial experience to distance himself from the overt “cronyism” that had characterized Franklin D. Roosevelt’s and, especially, Harry Truman’s approach to judicial selection.<sup>29</sup>

## II. THE BENEFITS OF THE NORM OF PRIOR JUDICIAL EXPERIENCE

Whatever the origins of the practice of appointing federal judges to the Supreme Court, it is impossible to refute David Yalof’s claim that they are now the “darlings of the selection process.”<sup>30</sup> But should they remain so? To begin to address that question, we consider the purported advantages of adhering to the practice of promoting judges from the circuits: a smoother confirmation process (Part II.A) resulting in superior Justices (Part II.B). Part III explores the possible costs of continued adherence to the practice.

### A. *The Confirmation Process*

While analysts debate many features of the norm of federal judicial experience, virtually all agree that its entrenchment can be traced at least in part to the confirmation process: if Presidents want the Senate to confirm their nominees—as they invariably do—circuit judges are the safest bet. Should the President nominate “somebody

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<sup>28</sup> See GOLDMAN, *supra* note 6, at 115 (discussing Eisenhower’s selection of Justices). See generally DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999) (analyzing the Justice-selection process as it becomes increasingly politicized).

<sup>29</sup> See GOLDMAN, *supra* note 6, at 115 (noting that Eisenhower’s criteria for choosing Supreme Court Justices included an upper age limit, common sense, and lack of extreme viewpoint). Indeed, Eisenhower apparently went so far as to make appellate court service a near prerequisite for service on the Supreme Court. In his diary, Eisenhower recounted a conversation he had with Attorney General Brownwell about appointing Brownwell to the Supreme Court:

I told Brownwell that if he had any ambitions to go on the Court, that we should appoint him immediately to the vacancy now existing on the Appellate Court in New York and then when and if another vacancy occurred on the Supreme Court, I could appoint him to it.

*Id.* (citation and brackets omitted). Brownwell turned down Eisenhower’s offer.

<sup>30</sup> YALOF, *supra* note 28, at 170 (internal quotation marks omitted).

who does not have a strong record of judicial experience,” he may place himself and his candidate in a “vulnerable position.”<sup>31</sup>

Why? Commentators offer three explanations: (1) the public and politicians perceive federal appellate court judges as particularly well qualified for a seat on the Court; (2) organized interests are less likely to battle sitting federal judges; and, ultimately, (3) senators, even those who do not share the President’s political affiliation, are more likely to support candidates elevated from the circuits. While each of these rationales seems plausible, none survives empirical scrutiny.

### 1. Qualifications

Among the purported advantages of appointing appellate court judges, their qualifications for office often rise to the top of the list. The reason is straightforward: because candidates with federal appellate court experience already have withstood the American Bar Association (ABA) vetting process, the President has an *ex ante* reason to believe that they will survive it again. That is, sitting federal judges (e.g., Samuel Alito) start from a position of strength; until proven otherwise, they will be considered qualified. Candidates lacking such experience (e.g., Harriet Miers) do not enjoy the same presumption.<sup>32</sup> Such “benefit of the doubt” logic is important to the President for any number of reasons, not the least of which is that the Senate is far more likely to confirm a perceivably qualified candidate than one who is not perceived as such.

While it is true that qualifications are important to a successful confirmation,<sup>33</sup> the data fail to show that appellate court judges are perceived as more meritorious than other nominees. Consider, first, the ABA’s ratings. Since it began screening candidates in 1956, the ABA has handed down only five (out of twenty-eight) non-unanimous or otherwise problematic ratings: to Potter Stewart, G. Harrold

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<sup>31</sup> Mark Murray, *Hillary on the Supreme Court?*, MSNBC, May 23, 2008, <http://firstread.msnbc.msn.com/archive/2008/05/23/1057014.aspx> (quoting David Yalof).

<sup>32</sup> See, e.g., Samahon, *supra* note 9, at 816 (“Federal appellate judges have previously survived ABA and FBI scrutiny during a prior confirmation.”); David A. Yalof, *Dress Rehearsal Politics and the Case of Earmarked Judicial Nominees*, 26 *CARDOZO L. REV.* 691 (2005) (discussing President George W. Bush’s conservative nominees and the difficulty of confirming them).

<sup>33</sup> See Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 *J. POL.* 296, 305 (2006) (“[W]hile ideological distance may ‘matter’ more than ever, professional merit continues to exert an important influence on senators’ votes.”).

Carswell, William H. Rehnquist (in 1971), Robert Bork, and Clarence Thomas.<sup>34</sup> Of the five, just Rehnquist lacked federal appellate court experience. To put it another way, of the nine candidates nominated between 1956 and 2006 who had not served on a circuit, only Rehnquist received a mixed ranking, while four of the nineteen circuit judges were greeted with a less-than-enthusiastic reaction from the ABA.<sup>35</sup>

Consider yet another indicator of professional merit: Segal and Cover's qualifications scores,<sup>36</sup> which the researchers derived by analyzing newspaper editorials written between the time of the President's nomination and the Senate's vote.<sup>37</sup> Unlike the ABA rating,<sup>38</sup>

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<sup>34</sup> Stewart received a rating of exceptionally well-qualified by a ten-to-one vote; Carswell, a unanimous rating of qualified; Rehnquist, a rating of qualified, with nine members voting that he was well qualified and three not opposed; Bork received ten votes of well-qualified, one not opposed, and four not qualified; and Thomas received a rating of qualified by a divided vote (twelve voted qualified, two not qualified, and one recusal). EPSTEIN ET AL., *supra* note 2, at 389-90.

<sup>35</sup> The difference is not statistically significant ( $p \leq 0.05$ ).

<sup>36</sup> Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989); see also Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990) (using a statistical model to estimate Senate confirmation votes based on electorally attractive positions). The updated scores are available on Segal's website. See Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005, <http://www.sunysb.edu/polsci/jsegal/qualtable.pdf> (last visited Jan. 15, 2009).

<sup>37</sup> More specifically, Segal and Cover identified every editorial in four leading newspapers that offered an opinion on a candidate's qualifications. With the editorials in hand, Segal and Cover evaluated their content on the basis of claims about the nominee's acceptability from a professional standpoint. For example, the following, which appeared in the *New York Times*, would be evaluated as a negative statement about Clarence Thomas's credentials: "Believe him or not, nothing in this bizarre episode enhances Judge Thomas's qualifications, which were slim to start. . . . If Judge Thomas were a brilliant jurist, a Holmes or a Brandeis, the gamble might be justified. But Clarence Thomas offers no such brilliance. . . ." Editorial, *Against Clarence Thomas: Even "Don't Know" Calls for a "No" Vote*, N.Y. TIMES, Oct. 15, 1991, at A24. On the other hand, this sentence, also appearing in the generally liberal *New York Times*, would be counted as a positive claim about Antonin Scalia's and William Rehnquist's qualifications: "Even liberal critics acknowledge the impressive legal credentials of the Supreme Court nominees. Justice Rehnquist was first in his Stanford Law School class; Judge Scalia was a Harvard Law Review editor; both have written scholarly articles and learned, if combative, judicial opinions." Editorial, *Presidential Insults: On Manion*, N.Y. TIMES, June 25, 1986, at A26. After analyzing all of the editorials, Segal and Cover created a scale of the lack of qualifications for each nominee that ranges from 0 (most qualified) to 1 (least qualified). Segal & Cover, *supra* note 36, at 562 fig.1.

<sup>38</sup> Several analysts have accused the ABA of a liberal ideological bias in its rankings. See, e.g., James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17 J.L. & POL. 1, 28 (2001) ("For those without prior judicial experience, just having been nominated by Clinton

this measure contains no biases—ideological or otherwise—and so is frequently invoked by scholars systematically studying appointments to the Court.<sup>39</sup> Nonetheless, it provides no more support for the received wisdom about the higher qualifications of circuit judges than do ABA ratings.

We highlight this point in Figure 1, which depicts the Segal-Cover score for each nominee since 1937. Sitting appellate court judges are in the right panel; all others are in the left. Note that in both panels we observe a large fraction of highly qualified candidates: Justices Ginsburg and Scalia among the former circuit judges and Justices Fortas and Frankfurter among those taking other career paths. Fewer candidates were perceived as extremely unqualified—Judges Carswell and Haynsworth in the left panel, and Tom Clark and Hugo Black in the right—but no major imbalances seem to exist between the circuit court judges and the others. That is, the former appellate judges do not appear to be perceived as any more (or less) qualified than those selected from other occupations. Nominees with federal judicial experience are in the right panel; nominees who never served as a federal appellate court judge are in the left.<sup>40</sup>

Statistics confirm this visual impression. On a scale of 0 (extremely qualified) to 1 (extremely unqualified), the mean for the twenty-three nominees without federal judicial experience is 0.24; for the twenty former appellate court judges it is 0.26—a difference both substantively and statistically trivial.<sup>41</sup>

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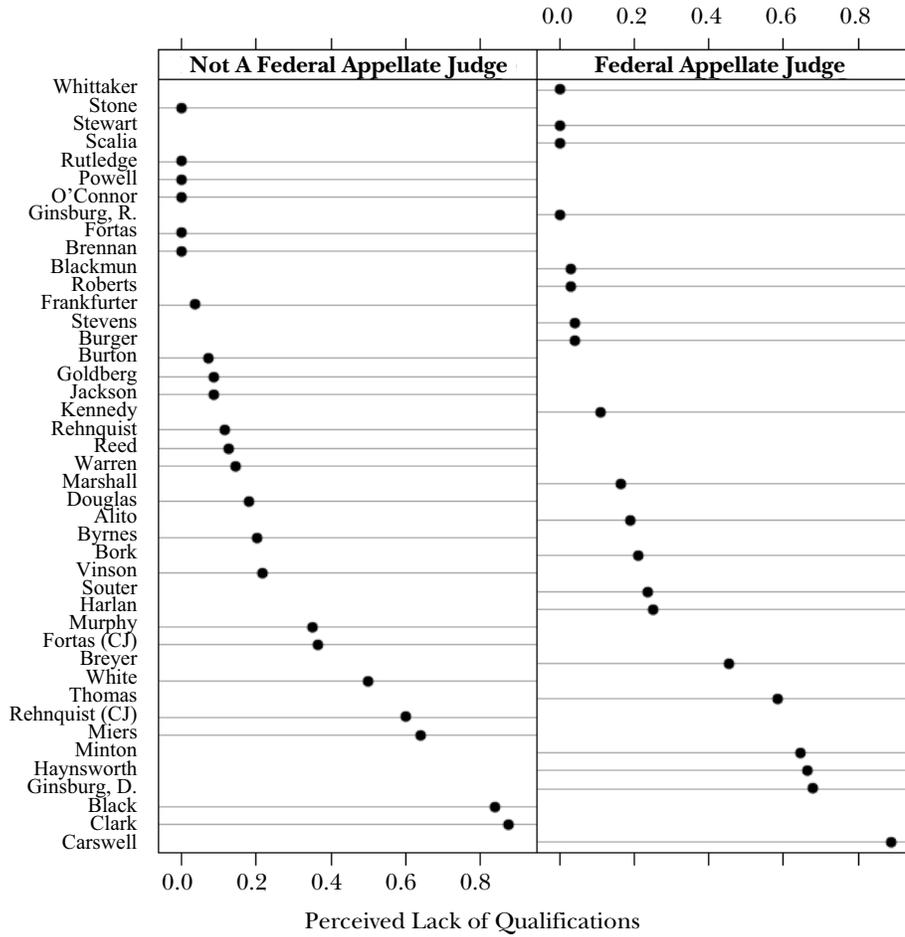
instead of Bush is a stronger positive variable [for earning an ABA ‘Well Qualified’ rating] than any other credential or than all other credentials put together.”)

<sup>39</sup> See, e.g., Epstein et al., *supra* note 33, at 297 (stating that the Segal-Cover calculation “figure[s] prominently into many (if not most) essays” on the topic).

<sup>40</sup> We include Thurgood Marshall, who had served as a federal appellate court judge, but was Solicitor General at the time of his appointment. The results are the same if we exclude him or do not treat him as a former circuit court judge.

<sup>41</sup> The standard deviations are, respectively, 0.27 and 0.29. ( $t = 0.2943$ ,  $p = 0.77$ ).

**Figure 1: The Perceived Qualifications of Nominees to the Supreme Court, from Hugo Black (1937) Through Samuel Alito (2006)**



Note: Nominations are ordered from most to least qualified.

## 2. Organized Interests

Higher qualifications are not the only professed advantage of elevating federal appellate court judges. Another centers on organized interests: because interest groups can complicate and even derail Supreme Court appointments, the President prefers nominees who are

less likely to draw the attention of those groups—and those nominees, analysts contend, are almost always life-tenured federal judges.<sup>42</sup> Unlike, say, public officials who must take stands on the contentious issues of the day, U.S. circuit judges are able to “chart a course of moderation on policy issues.”<sup>43</sup> Even when they must cast a vote over a controversial dispute, circuit judges can almost always claim that their decision followed Supreme Court precedent or some other “neutral” principle.<sup>44</sup> As a result, federal court judges are less attractive targets for interest groups, if only because the groups would have to “expend considerable resources trying to turn a federal appeals judge into a political lightning rod during the confirmation process.”<sup>45</sup>

While many observers have advanced this hypothesis, once again the data fail to substantiate it, as Figure 2 makes clear. There we show the fraction of interest groups testifying against each nominee among all groups testifying. The former circuit court judges appear in the right panel; all others are in the left.

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<sup>42</sup> See, e.g., YALOF, *supra* note 28, at 171.

<sup>43</sup> *Id.*

<sup>44</sup> For example, when asked by Senator Kohl about his dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 720-25 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part), in which he argued that the requirement that a woman notify her husband prior to obtaining an abortion did not impose an undue burden upon a woman, Samuel Alito responded:

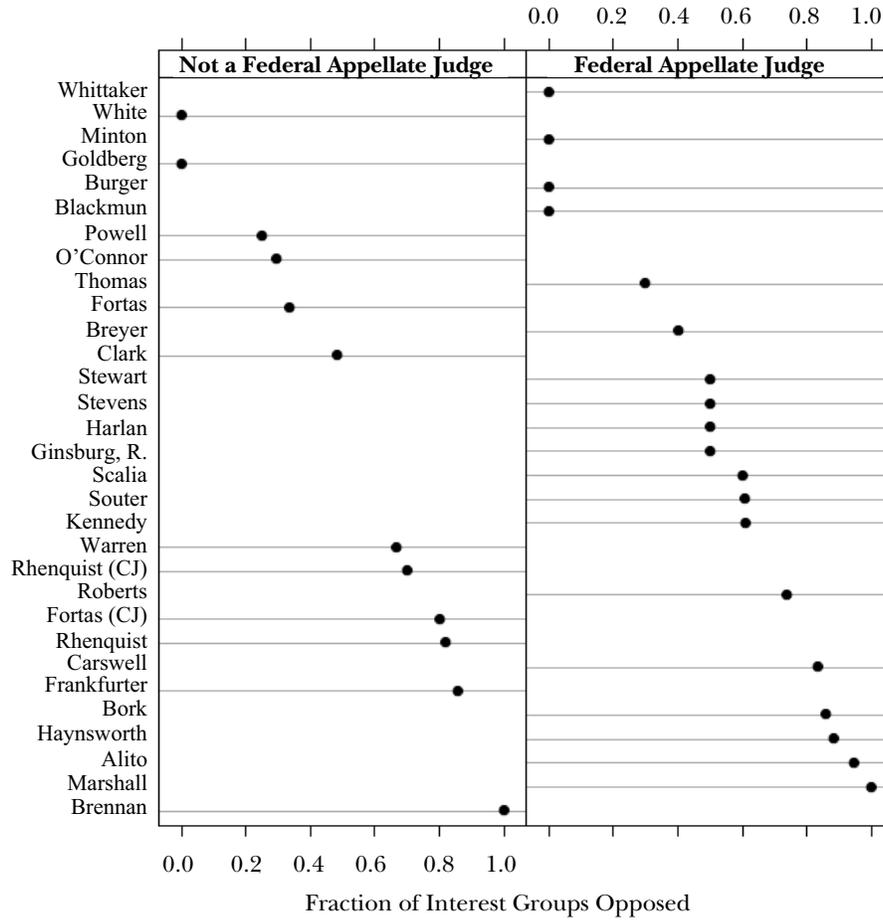
Trying to apply the undue burden test at that time to the provisions of the Pennsylvania statute that were before the court in *Casey* was extremely difficult, and I can really remember wrestling with the problem and I took it very seriously and I mentioned that in my opinion and it presented some really difficult issues. Part of the problem was that the law just was not very clear at that time.

The undue burden standard had been articulated by Justice O'Connor in several of her own opinions and there were just a few hints in those opinions about what she meant by it.

*Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 382-83 (2006) (statement of then-Judge Samuel Alito).

<sup>45</sup> YALOF, *supra* note 28, at 171.

**Figure 2: The Fraction of Interest Groups Testifying Against Nominees to the Supreme Court, from Earl Warren (1953) Through Samuel Alito (2006)**



Note: In the right panel are nominees with federal judicial experience; in the left panel are nominees who never served as a federal appellate court judge.

Overall, organized interests paid scant attention to most modern-day nominations: across all thirty-one, the median number of groups testifying in support or opposition is just six. This is not terribly surprising given that presidents attempt to select candidates with an eye toward minimizing controversies. More surprising, in light of claims

to the contrary,<sup>46</sup> is that when it comes to groups testifying in opposition, no major differences emerge between the former judges and those taking a different career path, as Figure 2 suggests.

Actually, the average fraction of groups testifying against a nominee who is an appellate judge (0.51) is nearly identical to the average fraction of groups testifying against all other nominees (0.52).<sup>47</sup>

### 3. Senators

While former appellate court judges are no more or less likely to attract the attention of organized interests and are perceived as no more or less qualified for office, it still remains possible that the Senate is more likely to confirm them. As Yalof reminds us, unlike most other candidates, all federal appellate court judges

boast of the experience of having successfully survived Senate Judiciary Committee scrutiny at least once before. Most appeals court judges also maintain crucial ties with senators, the same individuals who originally supported them for appointment to their current judicial positions; those senators now become ready-made political patrons available to help shepherd them through the often torturous Supreme Court confirmation process.<sup>48</sup>

Past success in the Senate, of course, “permits the political rhetoric that, in view of the Senate’s prior confirmation, no good reason now exists to oppose the nominee.”<sup>49</sup> But more than that, a previous successful confirmation—coupled with higher qualifications and less organized opposition—is more likely to result in future success.

This may be a long-standing piece of conventional wisdom but, yet again, the data simply do not support the belief. As a descriptive matter, since the establishment of separate judgeships for the circuits in 1869, Presidents have made ninety-four nominations to the Supreme Court. Of the ninety-four, about one third ( $n = 31$ ) had served as federal appellate court judge and two-thirds had not ( $n = 63$ ).<sup>50</sup> The dif-

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<sup>46</sup> See, e.g., *id.* (suggesting that circuit court judges are preferable to other professions due to their moderate positions on policy issues).

<sup>47</sup> The difference is not statistically significant ( $t = 0.02$ ;  $p = 0.98$ ). Again, we include Thurgood Marshall who had served as a federal appellate court judge but was Solicitor General at the time of his appointment. The substantive results are the same if we exclude him ( $t = 0.55$ ;  $p = 0.59$ ).

<sup>48</sup> Yalof, *supra* note 32, at 697.

<sup>49</sup> Samahon, *supra* note 9, at 816.

<sup>50</sup> Again, we include Thurgood Marshall as an appellate court judge. The results are the same if we exclude him.

ference in confirmation success (77.8% for the judges and 77.4% for the others) is statistically indistinguishable.<sup>51</sup> Simply put, for every Robert Bork, there was a Harriet Miers; and for every Ruth Bader Ginsburg, there was a Lewis Powell.

More systematic analyses, however, do demonstrate a significant relationship between confirmation success and service on a U.S. court of appeals, but one that works in precisely the opposite direction of the conventional view: the President actually has a tougher time with senators when he nominates a circuit court judge.

This much we learned from reestimating a standard statistical model that seeks to explain senators' voting over all Supreme Court nominees from Hugo Black in 1937 through Samuel Alito in 2006. Developed by Cameron, Cover, and Segal, the model takes into account the nominees' perceived qualifications and their ideology relative to each senator, as well as whether the President's party controlled the Senate and whether the senator and President were of the same party.<sup>52</sup> As Cameron and his colleagues have demonstrated, each of these factors exerts a significant influence on the senators' votes.<sup>53</sup>

What they have not assessed is whether the nominee's career experience also affects Senate votes. We take this step here by incorporating into their statistical model a variable indicating whether the candidate had served on a U.S. court of appeals.

As Table 1 shows, the results could not be clearer. In direct contradistinction to the conventional view, senators are statistically *less likely* to vote for circuit court judges than all other types of nominees.<sup>54</sup> Not only is the estimate of the variable "Experience as Federal Appellate Judge" negatively signed (indicating an inverse relationship between a ye a vote and service as a circuit court judge) and statistically significant, it is also substantively important.

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<sup>51</sup> The same holds whether we consider confirmations before or after 1953. Of the 62 nominees prior to 1953, 76.9% of those who lacked service on the circuits were confirmed; that figure for the appellate court judges was 90.0%. After 1953, the Senate confirmed 71.4% (15 out of 21) of the judges and 81.8% (9 out of 11) of the non-judges. In neither period is the difference statistically significant.

<sup>52</sup> Cameron et al., *supra* note 36, at 528-29; *see also* Epstein et al., *supra* note 33, at 298 (describing the model's variables).

<sup>53</sup> *See* Cameron et al., *supra* note 36, at 530-31 ("Overwhelmingly . . . it is the interaction of qualifications and ideology that determines the votes of Senators.").

<sup>54</sup> This analysis codes Thurgood Marshall as an appellate court judge. The results are substantively and statistically identical if we treat him as a nonfederal judge.

**Table 1: Senate Voting on Supreme Court Nominees,  
from Hugo Black (1937) to Samuel Alito (2006)**

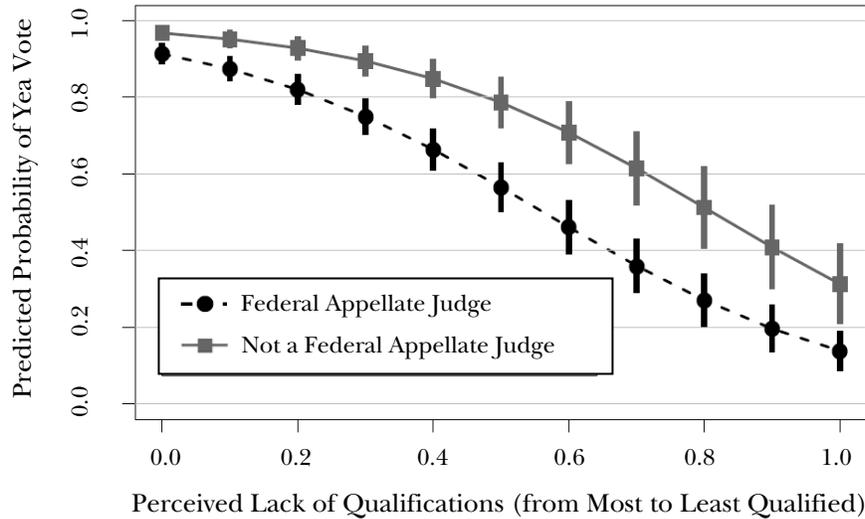
Variable	Coefficient	Standard Error
Experience as Federal Appellate Judge	-1.04*	0.15
Senator and President of Same Party	1.33*	0.16
Strong President	0.65*	0.15
Lack of Qualifications	-4.18*	0.23
Ideological Distance	-4.15*	0.25
Constant	4.25*	0.22
<hr/>		
$N = 3809$		
Log-likelihood = -885.92		
$\chi^2_{(5)} = 612.77$		

Note: Cell entries are logit coefficients and robust standard errors. \* indicates  $p \leq 0.05$ .<sup>55</sup>

Figure 3 vividly illustrates this last point. There we show the predicted probability of a senator casting a yea vote for a Supreme Court nominee who does and does not have experience as a federal appellate court judge. For purposes of presentation, we draw the comparison by the extent to which each candidate was perceived as qualified (at the left end of the graph) or not (at the right end of the graph).

<sup>55</sup> The standard errors in this table are very likely too small since the implicit assumption that the confirmation votes are independent of one another given the covariates seems unlikely to hold. We simply note this fact rather than attempting a complicated correction because the main purpose of the table is to summarize the observed data and not to test formal hypotheses.

**Figure 3: The Effect of Federal Appellate Court Judge Status on Senate Voting over Supreme Court Nominees, from Hugo Black (1937) Through Samuel Alito (2006)**



Note: This figure shows the predicted probability of a senator casting a yea vote for nominees who served as a federal appellate court judge and those who had not, over the range of their perceived qualifications (0 indicates most qualified and 1 indicates least qualified) based on the model in Table 1. The vertical lines are 95% confidence intervals. All other variables (see Table 1) are set at their means or modes.<sup>56</sup>

At no point on the above figure is the dashed line (indicating federal appellate court judges) above the solid line (indicating non-judges). This tells us that the odds of a senator casting a yea vote for an appellate court judge are significantly lower than for other candidates, regardless of the nominee's merit. To be sure, at some levels of qualification the difference is trivial—for highly qualified judges, for example, the probability of a yea vote is 0.91 and for highly qualified nonjudges it is 0.97.<sup>57</sup> But as we move away from the most qualified

<sup>56</sup> We generated this figure via SPost. See generally J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA (2d ed. 2006).

<sup>57</sup> The 95% confidence intervals are, respectively, [0.89, 0.93] and [0.96, 0.98].

candidates the difference becomes more meaningful. When a candidate is perceived as only moderately qualified, the odds of a successful confirmation for a nonjudge remain high (0.79), but for judges they actually fall uncomfortably close to the 0.50 mark (0.57).<sup>58</sup> It is worth noting that our results do not depend on Robert Bork. Removing him from the analysis still produces a statistically significant coefficient on the variable indicating whether a nominee served as a circuit court judge, and the other variables remain equally unaffected.

Taken collectively, these results seem quite surprising in light of conventional views about the ease of confirming federal appellate court judges. They strongly suggest that the received wisdom is a myth—in this case a myth likely perpetuated for five reasons: Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer. All were sitting appellate court judges at the time of their nomination, and the Senate confirmed all by very wide margins.<sup>59</sup> Nonetheless, we can point to other members of the federal bench who faced substantial obstacles in their quest to obtain a seat on the Court. Indeed, five of the eight highly contentious nominations since 1937 were federal appellate judges.<sup>60</sup> Clement Haynsworth, G. Harrold Carswell, and Robert Bork were all sitting judges at the time of their rejection; Clarence Thomas and Samuel Alito, though confirmed, escaped defeat by ten or fewer votes.<sup>61</sup> Only Abe Fortas (for Chief Justice) and William Rehnquist (for both nominations)—neither a former appellate court judge—generated as much controversy.<sup>62</sup>

### B. *The Products of the Confirmation Process*

A smoother appointment process is not the only reason presidents and other policymakers have offered for instantiating a practice of promoting from within the federal courts. The other explanation strikes at the very nature of judging: appellate court judges are more likely to have developed the appropriate judicial temperament and, as

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<sup>58</sup> The 95% confidence intervals are, respectively, [0.73, 0.84] and [0.51, 0.62].

<sup>59</sup> Justice Scalia was confirmed by a vote of 98-0; Justice Kennedy, 97-0; Justice Souter, 90-9; Justice Ginsburg, 96-3; and Justice Breyer, 87-9. EPSTEIN ET AL., *supra* note 2, at 387-88 tbl.4-15.

<sup>60</sup> By contentious nomination, we mean a nomination garnering twenty-five or more nay votes.

<sup>61</sup> EPSTEIN ET AL., *supra* note 2, at 387 tbl.4-15.

<sup>62</sup> *Id.*

a result, will be superior Justices.<sup>63</sup> The idea here is that prior judicial experience neutralizes even the most partisan and ideological of lawyers, forcing them to become more respectful of the organizational constraints that they confront, such as respect for precedent and the need for fair and neutral arbitration.

Certainly, many politicians have deployed this argument for strategic purposes. After *Brown v. Board of Education*, southern legislators proposed requiring judicial experience for membership on the Court.<sup>64</sup> During George W. Bush's presidency, it was Democrats who objected to particular nominees on the basis of their lack of prior service on the bench. It seems doubtful that many of those same Democrats also believed "that Chief Justice Earl Warren, Justice Hugo Black, and even Chief Justice Marshall were somehow lacking because they had not been involved in politics and had no prior judicial experience."<sup>65</sup> Then there is Harriet Miers. More than a few observers allege that it was conservative Republicans who flagged her lack of judicial experience, not because the void in her resume deeply troubled them, but "because they were insufficiently confident she would support their extreme agenda."<sup>66</sup>

Even so, the belief that judicial experience makes for better Supreme Court Justices—whether because they are more likely to respect precedent or be more neutral in their decision making—remains quite widespread. Look no further than Samuel Alito's confirmation proceedings. Senators filled the public record with comments echoing themes initially developed by President Bush,<sup>67</sup> noting

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<sup>63</sup> This argument also occasionally arises in the context of lower court nominations. For example, in considering Jerome A. Holmes's nomination for the Tenth Circuit, Senator Feingold proclaimed,

President Bush originally nominated Mr. Holmes to be a Federal district judge in Oklahoma earlier this year.

. . . .

But for some reason Mr. Holmes' nomination was upgraded to the U.S. Court of Appeals for the Tenth Circuit. Placing a nominee with no judicial experience on an appellate court makes it hard to evaluate the nominee's judicial temperament—his capacity to be fair and impartial.

152 CONG. REC. S8149 (daily ed. July 25, 2006) (statement of Sen. Feingold).

<sup>64</sup> For a list of proposals and their sponsors, see Steamer, *supra* note 27, at 270-71.

<sup>65</sup> 152 CONG. REC. S5200 (daily ed. May 25, 2006) (statement of Sen. Hatch).

<sup>66</sup> *Id.* S347 (daily ed. Jan. 31, 2006) (statement of Sen. Reid); *see also supra* note 8 (citing media references to Miers's lack of experience).

<sup>67</sup> When he nominated Samuel Alito, the President emphasized Alito's prior judicial experience. *See* Remarks Announcing the Nomination of Samuel A. Alito, Jr.,

that “[Alito] has more judicial experience than any Supreme Court nominee in 70 years,”<sup>68</sup> and that “[o]f the 109 men and women who have been chosen to serve this country on the Supreme Court, Judge Alito has spent more time on the Federal bench than all but four,”<sup>69</sup> and so on. Whether the senators thought Alito’s experience was valuable is less the heart of the matter than their belief that their constituents would regard it as a plus.

Moreover, seemingly neutral scholars have advanced similar claims. Legal historian Kermit Hall defended the practice of promoting judges from the circuits on the ground that “having heard appeals court arguments and decided cases gives you a better way of sorting through what the meaning of the law is.”<sup>70</sup> Even more important, Hall said, is that “[t]he life course of a judge makes a difference.”<sup>71</sup> Along similar lines, Stephen Carter declared that “a number of observers (I am among them) have argued that seats on the Court should be reserved for those who have spent many years as appellate court judges.”<sup>72</sup>

In what follows, we take seriously claims about the importance of federal judicial experience by empirically examining its three chief underpinnings: that circuit court judges will be more respectful of the organizational expectations of (1) stare decisis and (2) neutrality, and, (3) ultimately make for more influential, even great, Justices. Once again, the data fail to support any of these three contentions.

### 1. Respect for Precedent

A common theme among those advocating a norm of prior judicial experience centers on precedent—specifically, the tendency to “equate abandonment of stare decisis . . . as behaviour typical of those justices who were not properly conditioned for high judicial office.”<sup>73</sup> As one Senator explained, “the process of judicial seasoning and judi-

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to Be an Associate Justice of the Supreme Court of the United States, 44 WEEKLY COMP. PRES. DOC 1625 (Oct. 31, 2005).

<sup>68</sup> 152 CONG. REC. S92 (daily ed. Jan. 25, 2006) (statement of Sen. Allard).

<sup>69</sup> *Id.* S197 (daily ed. Jan. 26, 2006) (statement of Sen. Dole).

<sup>70</sup> David E. Rosenbaum, *If Approved, a First-Time Judge, Yes, but Hardly the First in Court’s History*, N.Y. TIMES, Oct. 4, 2005, at A24.

<sup>71</sup> *Id.*

<sup>72</sup> STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS 161 (1994).

<sup>73</sup> John R. Schmidhauser, *Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194, 204 (1962).

cial experience . . . is almost the only way to make an outstanding jurist who is wedded to the system of precedents.”<sup>74</sup> Most other types of nominees, including “legislators and schoolmen,” according to a former president of the ABA, are “least influenced” by *stare decisis*.<sup>75</sup>

No doubt a perception exists “that prior judicial experience makes a justice more deferential to precedent,”<sup>76</sup> but one of the few systematic studies on the matter provides, if anything, evidence to the contrary. Writing in 1962, John R. Schmidhauser demonstrated “a higher proportion . . . of the justices possessing significant prior judicial experience showed a strong propensity to abandon *stare decisis* than did the justices lacking such experience.”<sup>77</sup> He went on to conclude that “the distributions consistently support the hypothesis that significant prior judicial experience is inversely related to strict adherence to precedent.”<sup>78</sup>

Our analyses of both the Court and the individual Justices are more consistent with Schmidhauser’s argument than that of advocates of judicial experience. Looking first at the institution collectively, we find no relationship between its general propensity to follow *stare decisis* and the number of former circuit court judges—that is, the Court is no more or less likely to override its past decisions as the total number of former circuit court judges increases.<sup>79</sup>

If we consider cases in which the Court overruled precedent, however, an association emerges, and this may be what Schmidhauser detected: as more appellate court judges have joined the Court, the majority has grown more and more likely to overturn a particular type

<sup>74</sup> 102 CONG. REC. 7277 (1956) (statement of Sen. Stennis).

<sup>75</sup> Walter P. Armstrong, *Mr. Justice Douglas on Stare Decisis: A Condensation of the Eighth Cardozo Lecture*, 35 A.B.A.J. 541, 543 (1949).

<sup>76</sup> William G. Ross, *The Ratings Game: Factors that Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 420 (1996).

<sup>77</sup> Schmidhauser, *supra* note 73, at 202.

<sup>78</sup> *Id.*

<sup>79</sup> We estimated a logistic regression in which the outcome variable was whether the Supreme Court overturned one of its own precedents and the number of former federal appellate court judges was entered as a covariate. The coefficient on the number of former judges was not statistically significant ( $p = 0.83$ ). As a check on the analysis, we also considered whether the Court was less likely to overturn precedent as the number of all former judges (state and federal) increased. Again, the coefficient was not statistically significant ( $p = 0.86$ ). Data are from Harold J. Spaeth, *Documentation, The Original United States Supreme Court Judicial Database: 1953–2007 Terms*, <http://www.cas.sc.edu/poli/juri/sctdata.htm> (select “Documentation” file format under The Original U.S. Supreme Court Judicial Database (nickname: ALLCOURT) header, with *analu* = 0 and *dec\_type* = 1, 6, or 7) (last visited Jan. 15, 2009).

of precedent—precedent that is decidedly liberal,<sup>80</sup> such as *Spinelli v. United States*,<sup>81</sup> *Fullilove v. Klutznick*,<sup>82</sup> and *Conley v. Gibson*.<sup>83</sup> If only one member of the Court had served on a federal circuit, the probability of repudiating a left-of-center (as opposed to conservative) precedent would have been about 0.14.<sup>84</sup> When the number of Justices with prior service swells to five, the predicted probability that the Court overrules the lower court decision increases to 0.47.<sup>85</sup>

To conclude that a Court replete with appellate judges is more likely to override precedent, however, would be a mistake. The results instead suggest that adherence to the principle of *stare decisis* has little to do with the presence or absence of circuit court judges and far more to do with ideology; because roughly half of the Justices coming to the Court from the circuits were quite conservative,<sup>86</sup> it is no surprise to see the Court overturning liberal precedent.

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<sup>80</sup> For this analysis we considered only previously decided cases that the Court overruled. We coded the overruled precedent as liberal or conservative based on Spaeth's "dir" variable (indicating whether a decision was liberal or conservative), *supra* note 79. We then estimated a logistic regression of the number of former federal appellate court judges on whether the Court overturned a liberal (coded 1) or conservative (coded 0) precedent. The coefficient on the number of former federal judges is +0.41 (with a standard error of .10), which tells us that a statistically significant relationship exists between the number of former federal judges and the Court's propensity to overturn liberal precedent. The same result holds if we consider the number of all judges, state and federal.

<sup>81</sup> See 393 U.S. 410, 415 (1969) (laying out a strict standard for evaluating a finding of probable cause and rejecting a "totality of the circumstances" approach), *overruled by* *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>82</sup> See 448 U.S. 448, 480 (1980) (describing a separate standard of review for Congress's remedial use of racial and ethnic criteria), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

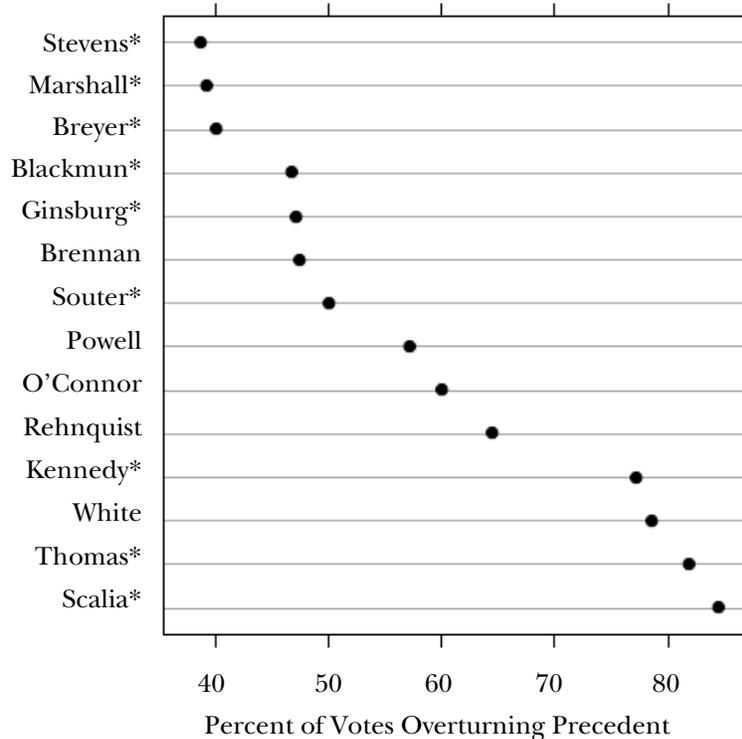
<sup>83</sup> See 355 U.S. 41, 45-46 (1957) (setting forth the rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"), *abrogated by* *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007).

<sup>84</sup> The 95% confidence interval is [0.05, 0.24].

<sup>85</sup> The 95% confidence interval is [0.36, 0.57].

<sup>86</sup> In our dataset are seventeen former federal circuit court judges: Chief Justices Roberts and Burger; and Justices Alito, Blackmun, Breyer, Burger, Ginsburg, Harlan, Kennedy, Marshall, Minton, Scalia, Souter, Stevens, Stewart, Thomas, and Whittaker. Of these, eight (Roberts, Burger, Alito, Harlan, Minton, Scalia, Thomas, and Whittaker) were to the right of the median Justice for most, if not all, of their service on the Court. We base this claim on Andrew Martin and Kevin Quinn's ideal point estimates. See Andrew D. Martin & Kevin M. Quinn, *Martin-Quinn Scores: Measures*, <http://mqscores.wustl.edu/measures.php> (last visited Jan. 15, 2009) [hereinafter *Martin-Quinn Scores*]. See generally Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002) (explaining the methodology behind the scores).

**Figure 4: Justices' Votes on Overturning Precedent,  
1986–2000 Terms**



Note: This figure shows the percentage of cases in which a Justice voted to overturn a precedent when at least one other Justice stated his or her desire to overturn precedent ( $n = 45$ ).

\* indicates a former federal appellate court judge.

Further support for the importance of ideology, rather than judicial experience, comes from analyses of the individual Justices' behavior. To conduct these analyses, we considered all cases decided between the 1986 and 2000 terms in which at least one Justice (whether in the dissent or in the majority) advocated that the Court overturn precedent.<sup>87</sup> We display the results in Figure 4.

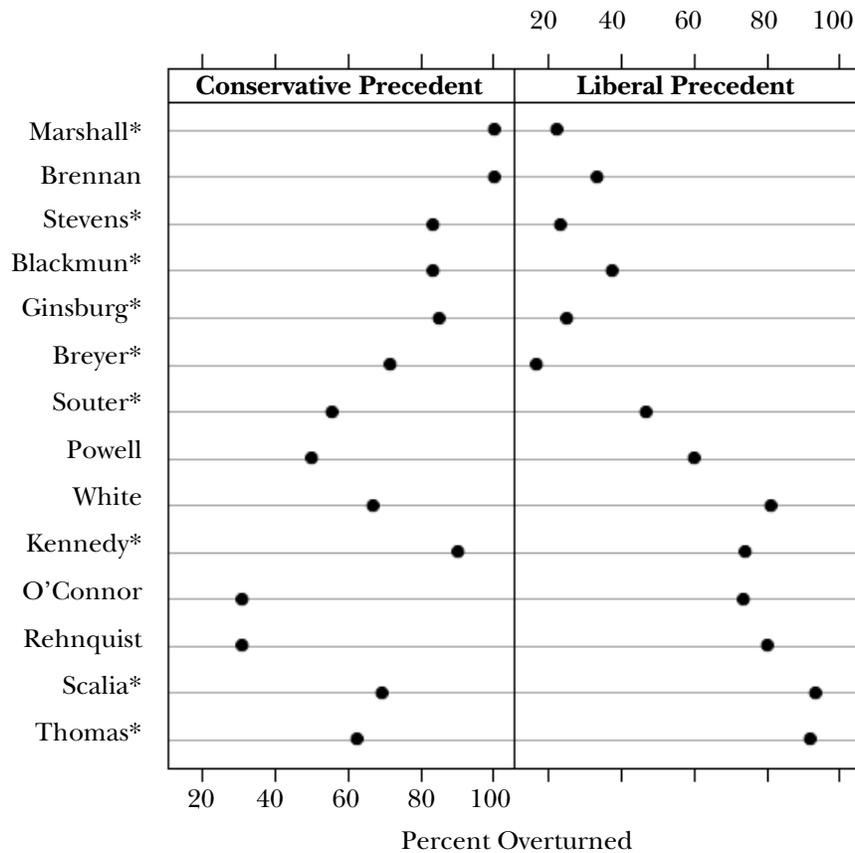
<sup>87</sup> ( $n = 45$ ). Data are from JEFFREY A. SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 317 tbl.12-3 (2005). See Cambridge Featured Titles: The Supreme Court in the American Legal System, <http://www.cambridge.org/>

As we can observe, no difference emerges between former circuit court judges and the others. While Justices Stevens, Marshall, and Breyer—all with prior service on the circuits—were among the least likely to vote to overturn precedent, Justices Thomas and Scalia were among the most likely. In about 80% of the cases, one or the other expressed the view that an existing precedent should be overturned, compared to 40% for Stevens, Marshall, and Breyer.

That the left wing of the Court appears at the top of the chart and the conservatives at the bottom, regardless of circuit service, is hardly a coincidence. Once again, it is ideology—the ideology of the Justice and of the ideological valence of the precedent—that is far more associated with the willingness to overturn precedent than judicial experience. Figure 5 solidifies this point by showing, in the left panel, the percentage of cases in which the Justices voted to overturn (rather than uphold) liberal precedents, with the Justices ordered from left to right. The right panel displays votes to overturn right-of-center precedents, with the Justices ordered from most conservative to most liberal. Justices with asterisks served on a circuit court prior to their ascension to the Court.

Beginning with the left panel, a clear linear pattern appears to emerge: the more liberal the Justice, the lower the percentage of votes to overturn precedent, regardless of whether they were circuit court judges. If prior experience served as a brake on their willingness to overturn precedent, we should see Justices such as Scalia, Thomas, and Kennedy with very low percentages, but instead these three conservatives are at the very high end.

**Figure 5: Justices' Votes on Overturning Liberal and Conservative Precedent, 1986–2000 Terms**



Note: These figures show the percentage of cases in which a Justice voted to overturn a liberal (left panel) or conservative (right panel) precedent when at least one other Justice stated his or her desire to overturn precedent. In both panels, the Justices are ordered on the basis of their ideology (in the left panel from most liberal to most conservative, and in the right panel from most conservative to most liberal).<sup>88</sup> \* indicates a former federal appellate court judge.

<sup>88</sup> To measure ideology, we use the mean (1986–2000 terms) of the Justices' Martin-Quinn scores. See Martin-Quinn Scores, *supra* note 86.

A statistical analysis, we hasten to note, confirms what our eyes tell us: it is ideology and not federal judicial experience that explains the Justices' willingness to overturn precedent. To reach this conclusion, we regressed the percentage of votes to overturn liberal precedent cast by each Justice on a variable indicating whether the Justice had served in the circuits and on a measure of their ideology (i.e., their Martin-Quinn scores<sup>89</sup>). Their service on the appellate court was not related, to a statistically significant degree, to their willingness to overturn liberal precedent; their ideology was.<sup>90</sup> In concrete terms, as we move from the most liberal Justice (and former circuit judge) to the most conservative, the expected percent of overturning liberal precedent increases from 5.5% to 88.4%.

The story for overturning conservative precedent is somewhat more complicated. Certainly, ideology matters: note, for example, that Marshall, Brennan, and Stevens—the Justices least likely to overturn liberal precedent—are now three of the most likely to overturn conservative precedent. Likewise, Thomas is one of the most likely to overturn liberal precedent but less likely to overturn conservative precedent.

Statistical analyses again corroborate this relationship between ideology and overturning conservative precedent.<sup>91</sup> But they also unearth another, perhaps more surprising result: former circuit court judges are significantly more likely to overturn conservative precedent even after controlling for ideology. Figure 5 provides some hint of this: Rehnquist (who lacked federal judicial experience) is at the very low end and Kennedy (a circuit court judge for thirteen years) is at the very high. More generally, our statistical model indicates that when we set ideology at its mean, the expected percentage of overturning conservative precedent for former circuit court judges is 76.6; for all others it is 57.9.<sup>92</sup>

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<sup>89</sup> *See id.*

<sup>90</sup> The coefficient on whether the judge had served on a circuit is -11.82 (with a standard error of 7.29); on the Justices' ideology it is 10.96 (with a standard error of 1.67).

<sup>91</sup> We estimated a logit model with the percentage of votes to overturn conservative precedent as the dependent variable, and both the Justices' ideology and whether they had served as a federal circuit court judge as independent variables. The coefficient on ideology is -6.41 (with a standard error of 1.93); on federal circuit court experience, it is 18.7 (8.43). Both are statistically significant ( $p \leq 0.05$ ).

<sup>92</sup> The 95% confidence intervals are, respectively, [66.76, 86.41] and [44.66, 71.09].

Because the total number of cases and Justices is quite small,<sup>93</sup> we should interpret these results with caution. Still, it is worth reiterating that whatever effects we have identified are far more consistent with Schmidhauser's original finding than with conventional wisdom. Depending on how we parse the data, former circuit court judges may be more willing to overturn precedent, as Schmidhauser concluded, but at the least they are no less willing to overturn precedent than their other colleagues.

While this finding refutes the claim that former circuit court judges are more compelled to follow organizational norms such as *stare decisis*, it seems entirely explicable. As Vicki Jackson,<sup>94</sup> Judith Resnik,<sup>95</sup> and others have noted, the practice of appointing Justices from the circuits may be creating "undesirable incentives"—incentives for appellate court judges to make decisions "with an eye to advancement through necessarily political confirmation processes."<sup>96</sup> Surely, decisions regarding *stare decisis* fall into this category. Were a circuit court judge to repeatedly (or even occasionally) refuse to adhere to precedent, she would be deemed unsuitable for a seat on the high Court. With that knowledge, judges interested in promotion may be especially diligent in demonstrating the appropriate judicial temperament by respecting the norm of *stare decisis*. Once on the Supreme Court, however, such incentives vanish and the very same judges—now Justices—behave no differently from their other colleagues.

If Professors Jackson and Resnik are right, their account helps to solve two puzzles: why some commentators continue to believe that Justices coming from the circuits will be more likely to respect precedent and why those judges (once Justices) do not. The belief reflects reality. Appellate court judges who view their positions as "stepping stones" rather than "capstones"<sup>97</sup> will be able to point to a judicial re-

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<sup>93</sup> These analyses include only the forty-five cases in which at least one Justice stated his or her desire to overturn precedent and only the fourteen Justices sitting between 1986 and 2000.

<sup>94</sup> See Jackson, *supra* note 10, at 984 (discussing the potential increase in temptation for self-interested decision making, especially when confirmation battles focus on ideology).

<sup>95</sup> See Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 609 (2005) (expressing concern that "the possibility of promotion may undercut the ability of judges to feel unfettered by personal interest when rendering judgments" (footnote omitted)).

<sup>96</sup> Jackson, *supra* note 10, at 983-84.

<sup>97</sup> *Id.* at 984.

cord of respect for precedent, as will their appointing President and supporters in the Senate. But because that record has been built with an eye toward promotion—and not necessarily with regard for organizational norms—different behavior once on the Supreme Court is not altogether surprising.

## 2. Ideology

Respect for precedent is not the only purported advantage of appointing Justices with appellate court experience; another is that former judges will be less ideologically extreme in their decision making. The idea is that such nominees will have been socialized in the ways of judging, not politics—think John Harlan, not Earl Warren. Or, as one commentator put it,

[M]any [appellate court judges] are career jurists who have spent the greater part of their professional lives in relative isolation from thorny political controversies. Still others may have seen their potentially controversial candidacies benefit from time spent on the appeals bench, where a judge's formal responsibility is to temper his own personal opinions and interpret the law as United States Supreme Court precedents demand.<sup>98</sup>

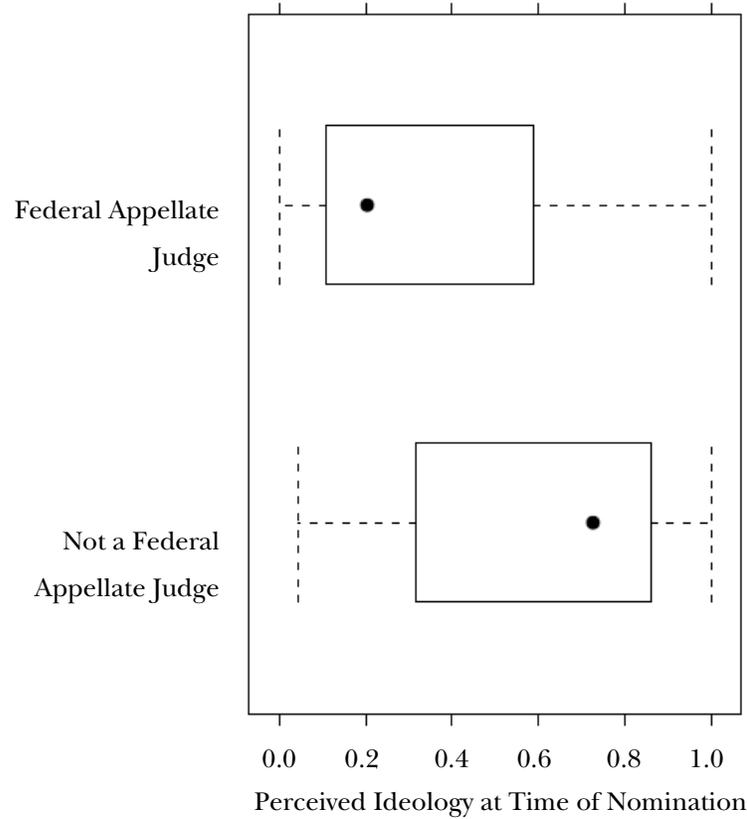
Regardless of the approach we take, we find little or no support for this proposition. Consider, first, perceptions of the candidates' political values at the time of their nomination. To measure these, we again relied on Segal and Cover's approach, which categorizes nominees as "unanimously liberal" (1) to "unanimously conservative" (0) based on newspaper editorials published before the Senate's vote.<sup>99</sup> Were it the case that former circuit court judges were viewed as less ideological, we should see them bunching up in the middle range of the measure, 0.50, not at the extremes. As Figure 6 shows, however, this supposition does not hold.

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<sup>98</sup> Yalof, *supra* note 32, at 697.

<sup>99</sup> Segal & Cover, *supra* note 36, at 559-60 (justifying their methodology on the grounds that newspaper editorials can provide data with (1) ideological content, (2) comparable data, (3) independence from prior votes, and (4) no systematic errors); *see also supra* note 37, describing the procedures Segal and Cover used to categorize the qualifications of nominees. They used the same approach to characterize the nominees' ideology.

**Figure 6: Perceptions of the Nominees' Ideology at the Time of Appointment, by Prior Service as a Federal Appellate Judge, from Hugo Black (1937) Through Samuel Alito (2006)**



Note: The dot shows the median and the boxes represent the interquartile range, which is the distance between the 25th percentile and the 75th percentile.

Nominees who served as federal judges and all others are perceived as equally ideological, though the judges were viewed as more conservative while the other candidates were viewed as more liberal.<sup>100</sup> Both types are roughly equidistant from 0.50. In addition, as the figure shows, the interquartile range for both groups is relatively simi-

<sup>100</sup> For former federal judges the median perceived ideology at the time of nomination is 0.21; for those without prior service on the federal bench it is 0.73.

lar,<sup>101</sup> suggesting that neither group is more dispersed than the other. Finally, in considering extremist nominees—those below the 25th percentile or above the 75th percentile (regardless of whether they are conservatives or liberals)—no significant difference emerges between those with or without prior federal judicial experience.<sup>102</sup>

What of the former appellate judges who make it to the Court? Are they less extreme in their decision making? To assess this, we considered the percentage of left-of-center votes cast by all Justices during the 1953 to 2006 terms, with the goal of determining whether those without federal judicial experience were significantly more conservative or liberal than their colleagues with such experience. Figure 7 summarizes the results, and they indicate no substantial differences on this dimension. Not only are the medians nearly identical for the nominees with and without former judicial experience (49.8% and 47.9%, respectively) but, more importantly, the interquartile ranges are very similar (30.6% for those lacking judicial experience and 23.4% for those with it). In short, a federal judicial background simply “does not ensure similar or less ideological behavior.”<sup>103</sup>

Assuming that at least some of these former federal appellate court judges acted strategically, that is, with an eye toward promotion, our results once again seem quite explicable: “the muzzle of federal judicial service might prevent incautious words that could later sink a nominee.”<sup>104</sup> The path to a successful Supreme Court appointment, in other words, may counsel against extreme behavior—or at least against the position-taking behavior we expect of politicians. But once on the Court, and the goal of promotion realized, that constraint obviously becomes inoperative.<sup>105</sup>

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<sup>101</sup> The interquartile range is 0.58 for the former federal judges and 0.48 for the others.

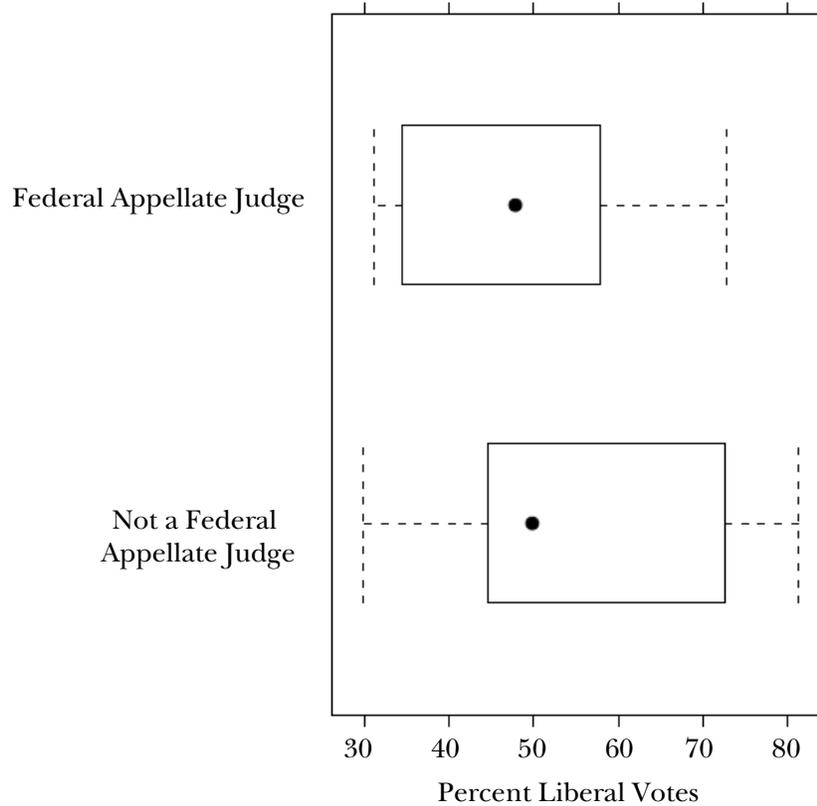
<sup>102</sup> Under this definition, 60% of the former federal judges were extremists; the figure for those lacking federal judicial experience is 39.1%.

<sup>103</sup> Peretti, *supra* note 10, at 118.

<sup>104</sup> Samahon, *supra* note 9, at 816; *see also* Resnik, *supra* note 95, at 609 (“To the extent we value independent judges, unafraid of encountering popular disapproval and free from needing collegial approval, the possibility of promotion may undercut the ability of judges to feel unfettered by personal interest when rendering judgments.” (footnote omitted)).

<sup>105</sup> *But see* Segal & Cover, *supra* note 36 (showing that data on the perceptions of nominees is no better a predictor of ideology for lower court judges than for nominees coming from other walks of life). This seems to suggest that “[j]udges and scholars perpetuate the myth of merit. The reality, however, is that every appointment is

**Figure 7: Liberal Voting of Supreme Court Justices, by Prior Service as a Federal Appellate Judge, 1953–2006 Terms**



Note: The dot shows the median; the boxes represent the interquartile range, which is the distance between the 25th percentile and the 75th percentile.

### 3. Ultimate Legacy

If nominees coming from the circuits are no more or less likely to take extreme positions in their decisions or to follow precedent, do they nonetheless make for superior Justices? Whether owing to greater experience, expertise, or socialization, countless commentators have claimed that federal court judges do make superior nomi-

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political.” DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 34 (7th ed. 2005).

needs,<sup>106</sup> or simply assume it to be true,<sup>107</sup> but just as many systematic analyses refute it.<sup>108</sup> In fact, perhaps because it represents something of an acid test for proponents of the norm of federal judicial experience, numerous scholars have tried but failed to establish a link between service in the circuits and judicial “greatness,” however defined.

Consider Kosma’s study, which analyzed citations to the Justices’ opinions in an effort to discover their relative influence on the development of the law.<sup>109</sup> This study found that Justices who were private attorneys were significantly more influential than those coming from the bench. Kosma observed that this finding is not especially supportive of the norm of federal judicial experience: “Former judges as a class appear not to have been the most consistently influential of justices. Especially given the similar backgrounds of most of the current members of the Supreme Court, these results argue in favor of broader consideration of private attorneys (and perhaps law professors) for upcoming appointments.”<sup>110</sup>

Other scholars, relying on surveys of law professors, historians, and social scientists, have reached much the same conclusion. Walker and Hulbary found that Justices without judicial experience tended to receive higher marks from panels of experts than those with judicial experience.<sup>111</sup> Using the same expert survey but more sophisticated methods, Caldeira similarly concluded that “[j]udicial experience, the sine qua non of quality for so many bar politicians and legislators, exerts no influence on eminence.”<sup>112</sup> More recently, Goldberg created a

<sup>106</sup> Cf. Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 148-49 (2006) (extending the claim by arguing that the President should appoint more federal appellate court judges and Supreme Court Justices with service on a district court).

<sup>107</sup> See, e.g., Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 300, 303 (2004) (proposing to subject federal judges to a tournament “where the reward to the winner is elevation to the Supreme Court,” using the “norm” of including only federal appellate judges as the “starting point for the tournament”).

<sup>108</sup> See, e.g., Steven Goldberg, *Federal Judges and the Heisman Trophy*, 32 FLA. ST. U. L. REV. 1237, 1238-43 (2005) (discussing the underrepresentation of former federal judges amongst consensus “great” Supreme Court Justices).

<sup>109</sup> Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333 (1998).

<sup>110</sup> *Id.* at 370 (footnote omitted).

<sup>111</sup> See Thomas G. Walker & William E. Hulbary, *Selection of Capable Justices: Factors to Consider*, in THE FIRST ONE HUNDRED JUSTICES 52, 66 (Albert P. Blaustein & Roy M. Mersky eds., 1978) (“[T]he group of justices with the highest performance scores were those that had no judicial service prior to assuming a position on the Court.”).

<sup>112</sup> Gregory A. Caldeira, *In the Mirror of the Justices: Sources of Greatness on the Supreme Court*, 10 POL. BEHAV. 247, 258 (1988). Using an updated version of the same data,

master list containing the name of any Justice identified on one of eleven lists of leading Justices.<sup>113</sup> His conclusion tracks Kosma's, Walker and Hulbary's, and Caldeira's:

[W]hen you have ninety-nine Justices, twenty-four of whom were lower federal court judges, you might expect that the twenty-four would be reasonably well-represented in a long, composite list of great Justices. When you find only one of them on such a list, you begin to suspect that lower federal court judges are not the best group to study when you are trying to identify successful Justices.<sup>114</sup>

Finally, a team of researchers at Washington University took much the same approach as Goldberg, analyzing sixteen lists of "great Justices" compiled by social scientists and law scholars. They reached a similar conclusion: "[I]f past presidents had limited their pool of nominees to appellate judges, they would have been limited to but six of the thirty-nine Justices [appearing on one or more list]—none of whom received ratings of 'great' by more than three experts."<sup>115</sup>

In light of these existing studies of citation patterns and expert surveys—not to mention the uniformity of their results—we undertook one additional analysis: authorship of consequential decisions. Using a measure originally developed by David Mayhew<sup>116</sup> and applied to the Court by Epstein and Segal,<sup>117</sup> we considered whether former circuit court judges are more likely to write for the Court in especially important or salient cases. The logic here is simple: if the majority is about to hand down a decision of consequence and if former circuit court judges are in fact superior "craftsmen," we should see these

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Robert C. Bradley, *Who Are the Great Justices and What Criteria Did They Meet?*, in GREAT JUSTICES OF THE U.S. SUPREME COURT 1, 9 (William D. Pederson & Norman W. Provizer eds., 2d prtg. 1993), did not need to update the conclusion: "In considering future Court appointees, presidents should heed the message that prior judicial experience is not related, and is possibly an adverse influence, to superior Court performance."

<sup>113</sup> Goldberg, *supra* note 108, at 1240-42.

<sup>114</sup> *Id.* at 1241.

<sup>115</sup> Workshop on Empirical Research on the Law (WERL), *On Tournaments for Appointing Great Justices to the U.S. Supreme Court*, 78 S. CAL. L. REV. 157, 166 (2004).

<sup>116</sup> See DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING AND INVESTIGATIONS, 1946-2002, at 9 (2d ed. 2005) (measuring the relevance of congressional investigations by whether an investigation was a front page story in the *New York Times* "on at least twenty days . . . during any Congress").

<sup>117</sup> See Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72 (2000) (assessing media coverage to determine issue salience).

critical opinion assignments going their way.<sup>118</sup> But the data belie the hypothesis. Actually, in line with Kosma's citation analyses and the expert judgment studies, our analysis suggests a significant relationship between the lack of federal judicial experience and the production of an important decision.<sup>119</sup> That is, when the Court hands down a consequential decision, the probability that a former appellate court judge wrote it is only about 0.38, versus 0.62 for Justices that took other career paths.<sup>120</sup>

Why former circuit court judges do not perform especially well on any of these indicators—and, in fact, may even be inferior Justices relative to their other colleagues—is anyone's guess. Goldberg suggests that “the jobs are different in many ways: having the final say, always sitting en banc, the certiorari process, the political nature of many Supreme Court decisions, and many other variables may come into play.”<sup>121</sup> Judge Harry T. Edwards of the D.C. Circuit concurs: “[T]he Supreme Court's docket consists of many more ‘very hard’ cases. . . . The Supreme Court also faces the burden of having to sit en banc in every case.”<sup>122</sup> It is beyond speculation, though, that our data suggest that Justice Frankfurter was correct when he famously (and defensively) noted, “without qualification . . . the correlation between

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<sup>118</sup> The relationship could also work the other way: when a superior craftsman writes, the opinion is more important. To assess this, we use a model developed by Lee Epstein, Barry Friedman, and Nancy Staudt, *On the Capacity of the Roberts Court to Generate Consequential Precedent*, 86 N.C. L. REV. 1299, 1309-13 (2008), designed to predict the circumstances leading to a consequential decision (we exclude cases in which the number of participating former circuit court judges was 0 or 9). Incorporating into this model a variable to indicate whether a former appellate court judge wrote the majority opinion leads to the same conclusion we discuss in the text: majority opinions written by former appellate court judges are significantly less likely to result in important decisions than those written by other Justices. Holding all other variables at their mean, when a former judge writes for the majority opinion, the odds are only 0.12 (with a 95% confidence interval of [0.11, 0.14]) that it will result in an important decision; the figure increases to 0.18 [0.16, 0.19] for all other Justices.

<sup>119</sup> Specifically, we estimated a logistic regression, in which the dependent variable was whether or not the majority opinion was a former federal circuit court judge and the independent variable was whether the case was consequential or not, as measured by Epstein & Segal's approach, *supra* note 117. The coefficient on the independent variable is -0.47 (with a standard error of 0.07).

<sup>120</sup> The 95% confidence intervals are, respectively, [0.35, 0.41] and [0.59, 0.65].

<sup>121</sup> Goldberg, *supra* note 108, at 1241-42 (citations omitted).

<sup>122</sup> Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1644 (2003).

prior judicial experience and fitness for the functions of the Supreme Court is zero.”<sup>123</sup>

### III. THE HOME COURT ADVANTAGE

Fifteen years ago, Lee Bollinger wrote, “I sense that, especially with the tendency exhibited over the past decades to give a high priority to prior judicial experience in making appointments to the bench, that we are heading towards a professionalized judiciary. . . . That . . . does not bode well for society.”<sup>124</sup> Bollinger may have been more right than he knew. If our analyses thus far suggest anything, it is that the advantages attributed to the norm of federal judicial experience lack evidentiary support. Actually, a serious downside already seems to have emerged: far from providing an objective evaluation of “judicial temperament and craftsmanship through the nominee’s past judicial experience,”<sup>125</sup> the experiential norm may be providing evaluators with misinformation. Because “[t]he chance for promotion . . . is likely sufficient to induce behavior by lower court judges that they view as enhancing their chances for promotion,”<sup>126</sup> we are likely to get only a partial picture of the Justice who will eventually emerge on the Court.

But this is not the only potential downside. Another possibility centers on what we call “circuit effects.” The general idea is that when former federal judges come to the Court, they may be favorably (or even unfavorably) predisposed to the U.S. courts of appeals generally or toward their former circuits in particular. Either way, if circuit effects exist we might expect to find the judges-turned-Justices affirming (or reversing) more frequently than they otherwise would.

This is not a new idea, of course. Several scholars have discussed the possibility of such effects, though typically in the context of trial court judges promoted to the appellate courts. In his recent book, *How Judges Think*, Judge Richard Posner opines that, “Appellate judges promoted from the trial court may be more likely than other appellate judges to vote to affirm a trial judge. They are more sensitive to the

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<sup>123</sup> Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 795 (1957).

<sup>124</sup> Lee C. Bollinger, *The Mind in the Major American Law School*, 91 MICH. L. REV. 2167, 2176 (1993).

<sup>125</sup> Jackson, *supra* note 10, at 983.

<sup>126</sup> Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC’Y REV. 163, 170 (2006).

advantages that the trial judge has over the appellate court in gaining a deep understanding of a case . . . .”<sup>127</sup> A more recent paper by Nick Linder and John Dorsett Niles partially confirms Posner’s intuition.<sup>128</sup> Based on an analysis of criminal-sentencing cases that came before the Ninth Circuit between 2003 and 2007, these researchers found that circuit court judges with prior experience as a state trial judge are significantly more likely to affirm decisions below.<sup>129</sup>

This is a general type of bias. For former appellate court judges sitting on the Supreme Court, another type of bias is possible: differential treatment of decisions coming out of each Justice’s former circuit versus all other circuits. While appellate court judges with trial court experience receive cases only from districts within their circuits, former appellate court judges sitting on the Supreme Court hear cases from all circuits. Having worked with judges on their circuit for months, years, or even decades, it is entirely possible that Justices will have developed some attachment to their “home team” rather than to all circuits generally. No doubt, to provide one example, Justice Alito occasionally clashed with his former colleagues on the Third Circuit. Yet, seven of them, assembled by Alito’s “longtime friend” Judge Edward Becker,<sup>130</sup> testified on Alito’s behalf despite the obvious conflict of interest—an interest in retaining “warm ties with a Supreme Court justice able to rule on their decisions that are appealed to the nation’s highest court.”<sup>131</sup> As one commentator noted, testimony of this sort was “extraordinary . . . for . . . sitting judges who will be dealing with a

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<sup>127</sup> RICHARD A. POSNER, HOW JUDGES THINK 74 (2008).

<sup>128</sup> Nick Linder & John Dorsett Niles, *The Effect of Trial-Judge Experience on Appellate Decisionmaking Behavior* (Apr. 25, 2008) (unpublished manuscript) available at <http://ssrn.com/abstract=1126655> (empirically analyzing the relative likelihood of former state and federal trial judges affirming trial court decisions following promotion to a federal circuit court).

<sup>129</sup> See *id.* at 33 (attributing such tendencies to state judges’ familiarity with the trial court’s advantage of hearing evidence directly). But Linder and Niles also find that prior experience as a federal trial judge does not have a statistically significant effect on decisions to reverse or affirm lower court rulings. *Id.*

<sup>130</sup> Charles Babington, *Sitting Judges to Speak on Alito’s Behalf*, WASH. POST, Jan. 7, 2006, at A5.

<sup>131</sup> *Id.* The possibility of ethical violations was also raised. Democrats on the Senate Judiciary Committee asserted that the judges, if allowed to testify, would be in violation of Canon 2B of the *Code of Conduct for United States Judges*. Editors at the *New York Times* and other commentators echoed the Democrats’ concern. See Editorial, *Fairness in the Alito Hearings*, N.Y. TIMES, Jan. 11, 2006, at A28 (“It is extraordinary for judges to thrust themselves into a controversial Supreme Court nomination in this way, a move that could reasonably be construed as a partisan gesture. The judges will be doing harm to the federal bench.”).

colleague who could be positioned to uphold or overturn their rulings.<sup>132</sup>

In the case of Justice Alito, we might expect a positive circuit effect toward his former colleagues, but it is entirely possible that such an effect does not always work to the advantage of the home circuit. In fact, given the infamously bad relations between some Supreme Court Justices and their former colleagues—Justice Burger’s clashes with liberals on the D.C. Circuit are notorious<sup>133</sup>—they may even work to the disadvantage of those courts.

In what follows, we explore the two forms of circuit effects: a general bias towards the circuits and more specific biases toward the home courts. We find no evidence of the former, but attachments to the Justices’ former circuits are quite substantial.

#### A. *Bias Toward the Circuit Court*

As a general matter and regardless of their career path, circuit court judges tend to affirm lower court decisions.<sup>134</sup> Precisely the opposite holds for Supreme Court Justices.

Figure 8, which depicts the Justices’ reversal rates, underscores the point.<sup>135</sup> With but two exceptions, Whittaker and Marshall,<sup>136</sup> all Justices sitting since 1953 voted to reverse more often than not. This holds for Justices as ideologically diverse as Fortas and Goldberg on the left, Powell and O’Connor in the middle, and Rehnquist and Scalia on the right; and it holds for the Court’s newest members, Alito and Roberts, neither of whom shows any indication of breaking with the long-standing tradition of reversal. Even more to the point, the reversal trend holds for Justices with federal judicial experience and those without it. While the former are less likely to reverse (0.59 versus 0.64), the difference is not statistically significant.

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<sup>132</sup> Babington, *supra* note 130, at A5.

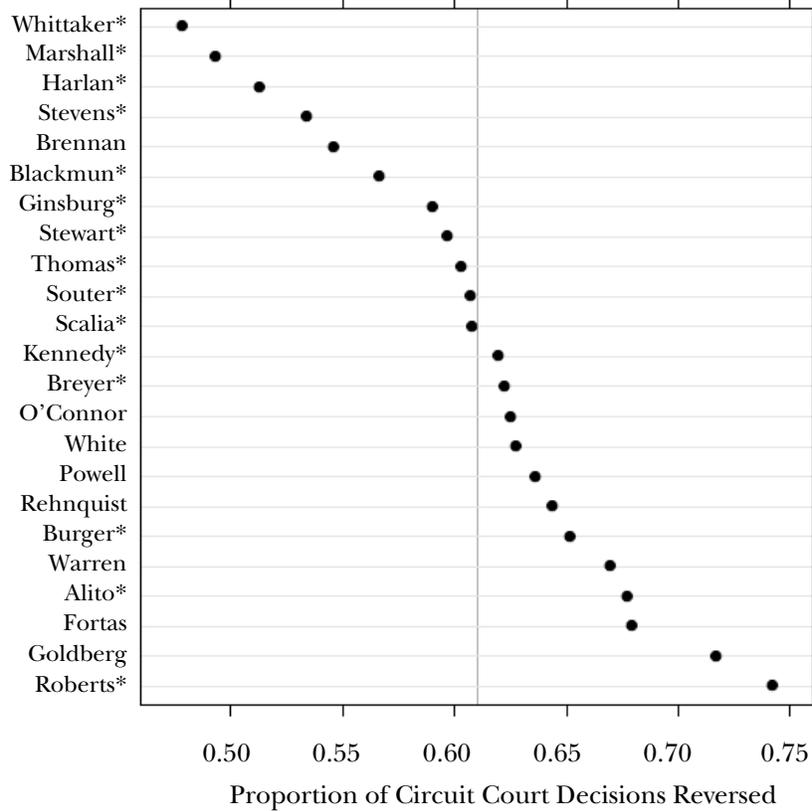
<sup>133</sup> See, e.g., LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 23-24 (2005) (noting that when Burger joined the D.C. Circuit, he “threw himself into the ideological combat. His nemesis was the equally combative [Judge David] Bazelon”)

<sup>134</sup> For an interesting analysis of the propensity of these courts to reverse, see FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007), analyzing the statistical effects that an array of factors have on circuit court judges’ decisions.

<sup>135</sup> Data are from Spaeth, *supra* note 79.

<sup>136</sup> Their reversal rates, respectively, are 0.48 and 0.49.

**Figure 8: Justices' Reversal Rates on Cases Coming from the U.S. Courts of Appeals**



Note: The thin vertical line indicates the mean reversal rate. The data are for Justices starting their service on the Court since 1953 and include only cases that were orally argued. \* indicates former circuit court judges.

Why this regularity persists across time and areas of the law is not especially difficult to explain. Under most theories of judging on the Supreme Court, “reversal” is the more plausible forecast. Scholars who study the hierarchy of justice, for example, have noted that the threat of reversal is the only sanction available to Supreme Court Jus-

tices against errant circuit courts. Were the Justices to affirm all their decisions, the threat would lose its credibility.<sup>137</sup>

The patterns become somewhat more interesting when we compare the treatment of cases coming to the Supreme Court from the circuits with those coming from all other courts (primarily state courts of last resort), while controlling for the ideological direction of the lower court's decision (either liberal or conservative). Under Judge Posner's logic, we might expect former circuit court judges to show a greater willingness to affirm appellate court rulings regardless of whether the decision below was left or right of center. In order to examine the factors affecting whether Justices voted to affirm the court below, we ran logistic regressions for each Justice on the type of court that had its ruling under review (federal appellate or another) and the ideological direction of the decision (liberal or conservative). The regressions show that for all but three of the Justices (Burton, Minton, and Reed), the ideological direction of the decision below was statistically significant.<sup>138</sup> Put simply, regardless of whether the ruling comes from a state or federal court, liberal Justices vote to reverse conservative decisions and conservative Justices vote to reverse liberal decisions. Justices Alito and Ginsburg provide useful examples. If the decision of a circuit court is conservative, the probability that Alito will cast a vote to reverse is about 0.50;<sup>139</sup> when it is a liberal decision, that figure jumps to nearly 0.80.<sup>140</sup> Conversely, Ginsburg votes to reverse seven out of every ten conservative decisions coming before the Court but only five out of every ten liberal decisions.<sup>141</sup>

Given the vast literature on the subject, ideological decision making of this sort is no surprise. Much more surprising, in light of the Posner hypothesis, is that only four of the sixteen former circuit court

<sup>137</sup> Analysts focusing on the internal calculations of the Justices reach a similar conclusion. They show that Justices who agree with the lower court's decision are better off denying certiorari. If they vote to grant and the Court ultimately reverses, the cost is substantial: the establishment of unfavorable precedent across all the circuits. But if they vote to deny certiorari, "there [is] a small but certain gain." JAN PALMER, *THE VINSON COURT ERA* 59 (1990). That is, they can be assured that at least one circuit will maintain favorable precedent. Now consider a Justice who disagrees with the lower court's decision. "[T]here [is] a small but certain loss from denying cert. Thus, justices [are] more likely to vote to grant when they want[] to reverse the lower court." *Id.*

<sup>138</sup> The results of the regressions are available at <http://epstein.law.northwestern.edu/research/circuiteffects.htm>.

<sup>139</sup> The prediction is 0.53 with a 95% confidence interval of [0.39, 0.68].

<sup>140</sup> The prediction is 0.78 with a 95% confidence interval of [0.68, 0.89].

<sup>141</sup> The predictions are 0.68 [0.64, 0.72] versus 0.50 [0.45, 0.54].

judges show any bias toward the circuits—relative to the state supreme courts—and for two, Scalia and Thomas, the bias works against the circuits.<sup>142</sup> That is, Justices Scalia and Thomas are significantly more likely to reverse a decision from the circuits than a comparable decision from the state courts—though the effect itself is reasonably small. Based on our estimates, Thomas, for example, reverses roughly four out of every ten conservative decisions coming from the circuits; that figure is closer to three out of every ten decisions coming from the states.<sup>143</sup> On the other hand, five of the fifteen Justices without prior federal appellate experience exhibit some favoritism toward the circuits over all other courts, even after controlling for the ideological direction of the lower court decision: Justices Brennan, Clark, Douglas, Reed, and Powell.

#### B. *Bias Toward the Home-Court Circuit*

While Justices Scalia, Thomas, and most of the others with appellate court experience show no favoritism toward the U.S. courts of appeals as a collective, a wholly different picture emerges when we focus on their former home courts. With only a few exceptions, Justices who served on the circuits behave in a significantly different manner toward their former court relative to all others.

Figure 9 vividly illustrates this point. There we depict the thirteen former appellate court judges appointed to the Supreme Court since 1953,<sup>144</sup> along with a comparison of their reversal rates for the circuit on which they served against all other circuits. Note that for three Justices—Blackmun, Souter, and Stewart—the difference appears rather negligible. For the other ten Justices, however, a statistically significant difference emerges between the treatment of their former circuit and of the other appellate courts.<sup>145</sup>

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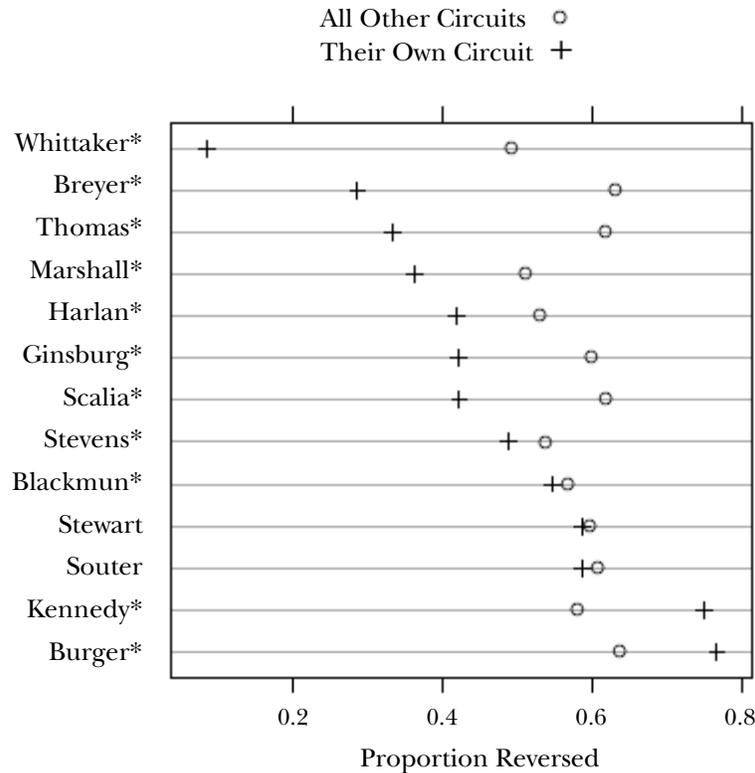
<sup>142</sup> Justices Blackmun and Marshall were favorably and significantly biased toward the circuits.

<sup>143</sup> The predictions are 0.41 [0.37, 0.45] versus 0.34 [0.28, 0.40].

<sup>144</sup> Due to an insufficient number of cases from their home circuits, we exclude Justice Alito ( $n = 1$ ) and Chief Justice Roberts ( $n = 1$ ).

<sup>145</sup> In this analysis, which does not control for the ideological direction of the circuit court's decision, Justice Stevens's behavior toward his former circuit and all others is statistically indistinguishable. Including the control for the ideological direction of the decision, he is positively biased toward his circuit, ( $p = 0.54$ ).

**Figure 9: Justices' Reversal Rates on Cases Coming from the U.S. Courts of Appeals on Which They Served and All Others**



Note: The data are for Justices starting their service on the Court since 1953; Justices Alito and Roberts are excluded for insufficient cases. \* indicates a statistically significant difference between the Justice's treatment of cases coming from his or her former circuit court and of cases from all other circuits.

For eight of the ten Justices, the relationship is positive, meaning that they favored their former circuit (note that the crosses in Figure 9 are to the left of the circles). Take Ruth Bader Ginsburg, for example. Looking across all of the 946 decisions coming out of the U.S. courts of appeals that were reviewed by the Supreme Court since she joined the Court in 1994, Justice Ginsburg voted to affirm in about 40% and voted to reverse in 60%. The figures for the D.C. Circuit, where she served between 1980 and 1993 are nearly the mirror image:

Justice Ginsburg voted to affirm in 58% and to reverse in 42%. Likewise, over the course of his career Justice Thurgood Marshall voted to reverse federal appellate court decisions about as often as he voted to affirm them—except when it came to his former court, the Second Circuit. He voted to affirm more than six out of every ten cases coming from the Second Circuit.<sup>146</sup> Then there is Charles Whittaker, who formerly sat on the Eighth Circuit. In only one of the dozen cases coming from the Eighth Circuit did he vote to reverse his former colleagues, though his overall reversal rate was about 50%.

For two of the ten Justices, the relationship is negative—meaning they were systematically biased against their circuit. That Chief Justice Burger was more inclined to vote to affirm decisions coming out of all other circuits relative to his former home is not surprising. As mentioned, he had a famously poor relationship with Judge Bazelon. Justice Kennedy, however, is a bit more of a puzzle. We know of no accounts claiming that his relationship with colleagues on the Ninth Circuit was anything but cordial. On the other hand, he was a relatively conservative jurist on a relatively liberal circuit—naturally raising the possibility that the effect depicted in Figure 9 is less about a bias toward specific courts and more about ideology.

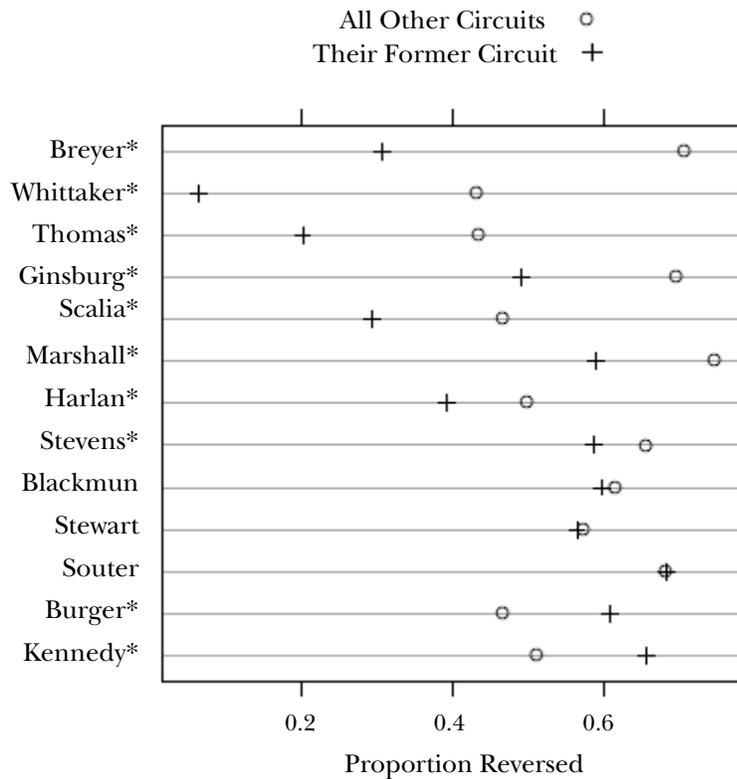
Nonetheless, even after controlling for the ideological direction of the lower court decision, the basic patterns displayed in Figure 9 remain. Of the thirteen Justices with federal judicial experience, only Justices Stewart, Souter, and Blackmun show no bias toward the former circuits; Justices Burger and Kennedy are significantly less favorably disposed to their home court; and the others are significantly more favorably disposed. Moreover, the size of the effect is nontrivial, as we show in Figure 10. Consider Justice Breyer: If the First Circuit were to reach a decision favoring, say, the defendant in a criminal case or a plaintiff in an employment discrimination suit, the likelihood of Justice Breyer—a former member of that court—casting a vote to affirm is very high at  $p = 0.69$ .<sup>147</sup> However, if a similar case were to come from another circuit, the odds that he would vote to affirm fall to well below  $p = 0.50$ .

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<sup>146</sup> Of the 254 cases coming from the Second Circuit, Justice Marshall voted to affirm in 162, or 64%.

<sup>147</sup> The 95% confidence interval is [0.48, 0.91].

**Figure 10: Predicted Probability of the Justices Voting to Reverse Decisions Coming from Their Former Circuit and All Other Circuits**



Note: The Justices are ordered by the absolute distance between the predicted probability of them voting to reverse decisions from their former circuit and the predicted probability of them voting to reverse decisions from all other circuits. The data are for Justices starting their service on the Court since 1953. Justices Alito and Roberts are excluded due to insufficient cases from their home circuits.

\* indicates a statistically significant difference between the Justice's treatment of cases coming from his or her former circuit court and of cases coming from all other circuits, controlling for the ideological direction of the lower court decision. For all Justices, we computed the predicted probabilities for voting to reverse a conservative decision from the court below.

Even more interesting, perhaps, are the cases of Justices Clarence Thomas and Antonin Scalia. As the analyses above indicate, both are significantly more likely to affirm decisions of state courts than the circuits; this is not so when it comes to their former home, the U.S. Court of Appeals for the District of Columbia. For cases in which the D.C. Circuit reached a conservative decision, the likelihood of Thomas casting a vote to reverse is only 0.20; for similarly conservative decisions coming out of all other circuits, the figure more than doubles, at 0.44. We can say the same of Justice Scalia—and, for that matter, another former member of the D.C. Circuit, Justice Ginsburg (see Figure 10). In fact, affirming decisions from their home court may be one of the few proclivities shared by Scalia and Thomas, on one side of the ideological spectrum, and Ginsburg, on the other.

#### CONCLUSION

From this analysis and all those preceding it, a clear conclusion emerges: the benefits of drawing Supreme Court Justices from the federal circuits are, at best, overstated, while the costs are, at minimum, understated. An obvious antidote is for the President to look to other pools for potential Court candidates. If confirmation is viewed as an important consideration, one can now feel reasonably certain that sitting federal judges are no less likely to face contentious proceedings than any other candidate; indeed, sitting judges may actually be more difficult to confirm. And if making high-quality appointments is a relevant criterion, the President can now legitimately claim that previous federal judicial experience is no guarantee that the candidate, as a Justice, will be more likely to follow precedent and less likely to follow his or her own political values, or even to go down in the annals as one of the “greats.”

A less obvious, though no less plausible, remedy would be for appointers to work toward greater representation of the circuits on the Supreme Court. Arlen Specter implicitly made this point in response to conflict-of-interest concerns that were raised when Justice Alito’s colleagues from the Third Circuit testified on his behalf. No one should worry that Alito would be predisposed toward affirming the Third Circuit’s rulings, Specter declared, because, “if confirmed, [Alito] would be one of nine people reviewing their cases.”<sup>148</sup>

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<sup>148</sup> Babington, *supra* note 130.

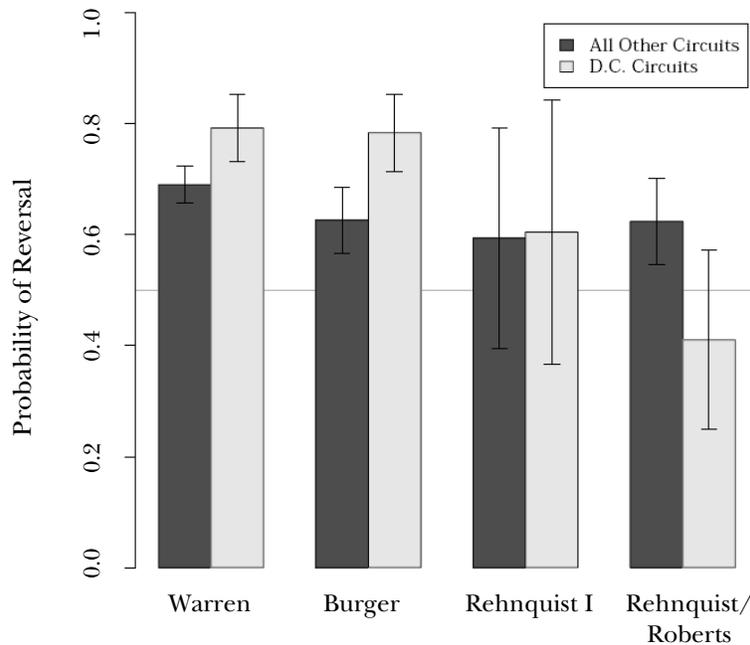
This is true for the Third Circuit: Alito is the first and only Justice elevated from that court. It does not, however, hold for the First Circuit, on which two current Justices served (Souter and Breyer), nor for the D.C. Circuit, now with four representatives on the Supreme Court. In fact, our recommendation of greater diversity in circuit court representation follows from the D.C. Circuit's disproportionate presence on the current Court. Put simply, with its current status as something of a training camp for Supreme Court Justices, the Court of Appeals for the District of Columbia is now at a considerable advantage relative to the other eleven circuits.

Figure 11, which depicts the predicted probability of the Justices reversing the D.C. Circuit and all others, shows as much. Note the D.C. Circuit's change in fortune over time. During the 1950s, 1960s, and 1970s, when no more than one Justice had served there (Burger), the Supreme Court was significantly more likely to reverse the decisions of the D.C. Circuit than those coming from all other circuits, even after controlling for the ideology of the Court and the ideological direction of the lower court decision.<sup>149</sup> A D.C. Circuit decision had 0.79 likelihood of reversal during the Burger years—a figure substantially higher than 0.63, the probability of reversal for all other circuits during this time. By the 1994 term (after Justice Ginsburg joined her former colleagues, Justices Scalia and Thomas) and into the Roberts Court years, the situation reversed itself. A statistically significant difference remains between the D.C. Circuit and all other circuits, but it now works to the D.C. Circuit's advantage. While all other circuits face a reasonably high probability of reversal (0.62), the D.C. Circuit actually faces a higher probability of affirmance (0.41 reversal rate).

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<sup>149</sup> Along with an interaction of ideology and lower court direction.

**Figure 11: Predicted Probability of Reversal for the U.S. Court of Appeals for the District of Columbia and All Other Circuits**



Note: Warren = 1953–1968 terms; Burger = 1969–1985 terms; Rehnquist I = 1986–1993 terms; Rehnquist/Roberts = 1994–2006 terms. The capped vertical lines show 95% confidence intervals. The predicted probability for each era is based on a logit model that takes into account whether the appeal was from the U.S. Court of Appeals for the District of Columbia or another circuit, the ideological direction of the lower court decision, the median’s ideology, and an interaction between the two. The predicted probability displayed in the figure is based on a conservative lower court decision, with all other variables set at their mean. The coefficient on the U.S. courts of appeals variable is statistically significant in all models except Rehnquist I.

If we assume that systematic bias is undesirable in any court, neutralizing it will require appointers to look toward other, unrepresented circuits for the next few appointees. Doing so should not be difficult. For most of the nation’s history, geographic diversity was a strong norm—perhaps as strong as the norm of judicial

experience is now.<sup>150</sup> If a Supreme Court Justice from the East resigned, the President nominated an easterner; if a southerner departed, the President looked to the South for a replacement. Ensuring greater representation of the circuits should be no more difficult; with little doubt, credible Democratic and Republican candidates reside in each. More to the point, all politicians involved in the appointments process should want to take this approach. With the exception of the northeastern corridor, the home team advantage now so apparent on the nation's high court may well be disadvantaging appellants from all parts of the country. Senators serving in the first Congress would have found this intolerable and it is hard to imagine today's legislators—given their own reelection concerns—finding it any less so.

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<sup>150</sup> See, e.g., BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT? 5-6 (1991) ("Presidents were particularly scrupulous in maintaining a balance among the country's regions prior to the Civil War."); Amar, *supra* note 3, at 472 (discussing the importance of geographical concerns for the founders in differentiating between the jurisdiction of the Supreme Court and the lower federal courts); Hatch, *supra* note 3, at 1351-52 (describing how nominations during the Reconstruction Era "were considered political patronage and were allocated according to geographic considerations").