



ST. MARY'S
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The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 16 | Number 1

Article 1

1-1-2013

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ARTICLES

IDEOLOGICAL VOTING APPLIED TO THE SCHOOL DESEGREGATION CASES IN THE FEDERAL COURTS OF APPEALS FROM THE 1960S AND 1970S

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Author's Note: I thank the Saint Louis University School of Law Half-Baked Faculty Workshop for much fruitful discussion that seriously helped me guide the direction of this paper. In addition, I want to thank the Central States Law Schools Association for inviting me to present this paper where I received more excellent feedback. I want to thank long-time mentor, Peter Schanck for his excellent reading of the manuscript. Anders Walker for his read and very helpful input. Andrew D. Martin for his very helpful comments and suggestions. Brenda Smith-Custer for her helpful read and formatting. I also want to thank two excellent faculty fellows: Andrew Wrenn and Theresa Yoffe. Thanks to Lacy Rakestraw who did some footnote citation work. An additional thank you to Ann Fessenden, Eighth Circuit Court Librarian; Debra Davendonis-Todd, University of Florida; Jim Cusick, University of Florida; Rita Wallance, Sixth Circuit Court Librarian; Sabrina Sondhi, Columbia University School of Law Librarian; Jason G. Speck, University of Baltimore; Matthew White, Fourth Circuit Court Librarian; Katie Pappageorge, Eighth Circuit Court Librarian; Tricia Kent, UNC Chapel Hill Librarian; John Klaus, Seventh Circuit Court Librarian; Carrie Hintz, Columbia University; Marian Drey, Fifth Circuit Court Librarian; Sarah Hartwell, Dartmouth College; Michael T. Davis, Eleventh Circuit Court Librarian; Heather Smedberg, UC San Diego Mandeville Special Collections Library; Jason G. Speck, Special Collections Librarian, University of Maryland; Joan Voelker, Eighth Circuit Court Librarian; and the staffs of the First Circuit Court Library, University of Iowa College of Law Library, Ninth Circuit Court Library, and the Missouri Historical Society Archives.

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I. INTRODUCTION

*Americans have not only a right but a responsibility to consider the values of those who seek to lead them—whether they arise from life experience, political ideology or religious belief.*¹

Since the great political philosopher Alexis de Toqueville penned *Democracy in America* in 1835, scholars have considered how political minds are swayed by outside influences.² This Article will explore judicial decision-making and consider which outside influences, if any, impact how judges rule. Over the last several years there has been considerable discussion in legal scholarship as to what factors judges consider in arriving at their decisions.³ While several models and methods of decision-mak-

1. ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 335 (Henry Reeve, trans., Pratt, Woodford, & Co., 8th ed. 1848) (1835). For instance, when considering the impact of religion, de Toqueville wrote, “The Americans combine the notions of Christianity and of liberty so intimately in their minds, that it is impossible to make them conceive the one without the other; and with them this conviction does not spring from that barren traditional faith which seems to vegetate in the soul rather than to live.” *Id.* at 335.

2. Gary Bauer, *Column: Why Voters Should Apply a Religious Test*, USA TODAY (Jan. 8, 2012), <http://http://usatoday30.usatoday.com/news/opinion/forum/story/2012-01-08/religious-test-campaign-president/52455988/1>.

3. See, e.g., Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1276–79 (2005); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 220–21 (1999); Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices’ Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049, 1049 (1996); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1471–82 (2003); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1465–70 (1998); Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decision Making?*, 58 DUKE L.J. 1531, 1540 (2009); Michael A. Perino,

ing have been discussed and examined, this Article will concentrate on four.⁴

The first model is the controversial “Rule of Law Model,” or, as it is alternatively known, the “Legal Model.”⁵ Influential legal scholars have greatly criticized the Legal Model over the last twenty years, and some of these criticisms are discussed below.

The second model is known as the “Attitudinal Model,” a model that was first championed by Professors Jeffrey A. Segal and Harold J. Spaeth.⁶ The Attitudinal Model encompasses judicial voting based upon policy preferences rather than strict adherence to established legal precedent.⁷ An Article by scholars Cass Sunstein, David Schkade, and Lisa Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation (Ideological Voting)* discusses the Attitudinal Model and serves as inspiration for this Article.⁸ *Ideological Voting* is discussed in detail.

The third model is known as the “Personal Attributes” or “Social Background Model,” first proposed by Professor C. Neal Tate.⁹ This

Strategic Decision Making in Federal District Courts: Evidence from Securities Fraud Actions, ST. JOHN’S U. SCH. OF L. RESEARCH PAPER SERIES (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=727905; Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005). *But cf.* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1336 (1998) (arguing that judicial decision-making in the D.C. Circuit is facilitated by congeniality among judges, and not principally by ideology or other particular decision-making models as the other listed sources suggest).

4. The Legal Model, the Attitudinal Model, the Personal Attributes Model, and the Strategic Model are the four decision-making models that will be discussed in this article. Although some researchers may use other terms for these models, the names listed here are used throughout this discussion.

5. Connor N. Raso & William N. Eskridge, *Chevron as a Canon, not a Precedent: An Empirical Study of What Motivates Justices in Agency Difference Cases*, 110 COLUM. L. REV. 1727, 1742 (2010).

6. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

7. *See id.* at 86 (explaining in greater detail the attitudinal model and preferences that typically comprise the attitudinal model). The authors state, for example, the Attitudinal Model explains “Rehnquist votes the way he [did] because he was extremely conservative; Marshall voted the way he did because he was extremely liberal. *Id.*”

8. Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 309 (2004).

9. C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1975*, 75 AM. POL. SCI. REV. 355, 365 (1981).

model examines personal attributes and considers how life experiences may influence judicial voting.¹⁰

The final model studied in this Article is the “Strategic Model.”¹¹ Strategic Models rely on the assumption that all actors derive motivation from particular preferences.¹²

After a detailed look at the four decision-making models, this Article discusses the aforementioned *Ideological Voting* Article.¹³ This Article then introduces a study of judicial decisions rendered in school desegregation cases in the 1960s and 1970s—a topic suggested in *Ideological Voting* for further research on judicial decision-making.¹⁴ The school desegregation study conducted for this Article examines Federal Circuit Court decisions starting in 1960 and running through 1973. This Article then discusses differences between outcomes in *Ideological Voting* and outcomes in the school desegregation decision-making study, in which each of the four decision-making models are applied.

The conclusion of this Article summarizes the merits of the four decision-making models and the degree to which any of the models proved helpful in explaining what attributes or factors influenced the judges when rendering their decisions in school desegregation cases. Finally, the Article discusses any aspect of this study that may be applicable to today’s legal world.

II. LEGAL MODEL

The Legal Model, according to Professor Frank Cross, is the “path of the law” that “can be identified through reasoned analysis of factors internal to the law.”¹⁵ Another definition comes from Professor Jack Knight, who states that judges applying the Legal Model are those moti-

10. *Id.* at 358, 362. Examples of such attributes include a judge’s religion, prior employment history, and education. *See id.* at 358 (citing these attributes as independent variables in a study of the Personal Attribute Model and its effect on judicial decision-making).

11. Barry Friedman & Andrew D. Martin, *Looking for Law in all the Wrong Places: Some Suggestions for Modeling Legal Decision-making*, in *WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE* 143, 151 (Charles Geyh ed., 2011). The Strategic Model is actually a class of models, and when testing this model, a researcher should focus only on one. *See id.* (providing examples of the various strategic models, including the “separation of powers model” and “bargaining among the judges” model).

12. *Id.* (“noting [s]trategic models begin with the explicit assumption that actors are motivated by preferences”). *Id.* “These preferences might be over policy—similar to the attitudinal model—but in principle can be over anything.” *Id.*

13. Sunstein et al., *supra* note 8, at 301.

14. *Id.* at 347.

15. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 *Nw. U. L. REV.* 251, 255 (1997).

vated by precedent and “who craft opinions that are grounded in past decisions.”¹⁶

However, it is very difficult to obtain an empirical analysis of the Legal Model and determine whether a judge is really applying the Legal Model to their decision-making process because of the lack of an objective measure on how a judge actually decides a case.¹⁷ As Spaeth contended, the Legal Model is not “falsifiable.”¹⁸ Advocates of the Legal Model state that as decision makers, judges are to be independent and nonplussed by any other political philosophy, other than the one based on substantive law.¹⁹ In the United States today, however, most people believe that judges are partisan.²⁰ As Sunstein states, “[n]o reasonable person seriously doubts that ideology, understood as normative commitments of various sorts, helps to explain judicial votes.”²¹

Several of those who have examined the Legal Model have stated that the outcomes are “mechanical.”²² In rendering their decisions, judges take the law and facts of a case and drop them into the “precedent machine” and the correct holdings pop out. This is a silly description, but one that I use in class to get students accustomed to the concept of the Legal Model. With such a mechanical nature, does this mean that in applying the legal model there may never be a dissent? No, because sometimes there is disagreement among judges as to which specific precedent is to be applied in the case before the court.²³

16. Knight, *supra* note 3.

17. See Sara C. Bensh, *Harold J. Spaeth: The Supreme Court Computer*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 116, 119 (Nancy Maveety ed., 2003) (comparing the Legal Model to the Attitudinal Model and highlighting the drawbacks of the Legal Model).

18. *Id.* (noting Spaeth took “great pains to ensure that the attitudinal model [was] indeed . . . rigorously tested”).

19. See, e.g., Keith J. Bybee, *U.S. Public Perception of the Judiciary: Mixed Law and Politics*, *JURIST* (Apr. 10, 2011), <http://jurist.org/forum/2011/04/us-public-perception-of-the-judiciary-mixed-law-and-politics.php#> (citing the example of the recent litigation related to the Patient Protection and Affordable Care Act, and noting one attorney involved claimed his clients were strictly concerned with the law itself, not partisanship). The author notes that this is an image that “participants in the judicial process are trying to project.” *Id.*

20. *Id.* (highlighting results of a survey conducted by the Campbell Public Affairs Institute at Syracuse University, Harvard University, the Massachusetts Institute of Technology, and polling firm, YouGov, that indicated only seven percent of Americans polled believed that the political background of a judge had no bearing on their case decisions). The survey also reported that forty-five percent of Americans did believe that partisanship had at least some effect on case decisions, when forty-two percent believed that partisanship had “a lot of influence.” *Id.*

21. Sunstein et al., *supra* note 8, at 352.

22. SEGAL & SPAETH, *supra* note 6, at 48.

23. Christopher H. Schroeder, *Deliberative Democracy’s Attempt to Turn Politics into Law*, 65 *LAW & CONTEMP. PROBS.* 95, 108 (2002).

An additional aspect of the Legal Model that proves troubling to some is its focus on only the parties named.²⁴ It is a valid conclusion that rulings in cases that are issued by state supreme court justices or by appellate federal court judges often affect parties far beyond the stated litigants. Thus, with the influence of many decisions extending well beyond the named parties, arguably the courts are leaving the parameters of the Legal Model and moving into that of judicial policymaking.

In their chapter of the book *What's Law Got to do With it? What Judges Do, Why They Do It, and What's at Stake*,²⁵ Professors Barry Friedman and Andrew D. Martin list several sources that effectively criticize the Legal Model.²⁶ However, the most salient criticism in the chapter is one they make themselves:

. . . [t]he “[L]egal [M]odel” . . . does not constitute a model. Asserting that condition *X* matters to an outcome is an incomplete explanation. *How* condition *X* should matter, and under what *circumstances* and with what *limitations*, are important components of positing an explanatory model. Without rigorously sorting out these explanations, what is described as the [L]egal [M]odel is not an explanatory object but rather is a collection of indeterminate factors.²⁷

III. THE ATTITUDINAL MODEL

If the Legal Model exists, judges are certainly going beyond it in their decision-making and have been since Chief Justice Marshall's opinion in *Marbury v. Madison*.²⁸ To that end, Segal and Spaeth state that judges make decisions based on “ideological attitudes.”²⁹ They state that judges are using the Attitudinal Model and voting based on their “values.”³⁰ The Attitudinal Model is founded on the belief that judges are placing more emphasis on policy considerations than they are on legal considerations in determining the outcome of cases.³¹ Critics of the Attitudinal

24. See Brian E. Butler, *Legal Pragmatism: Banal or Beneficial as a Jurisprudential Position?*, 3 *ESSAYS IN PHILOSOPHY* 2, 11–12 (2002). Butler noted that, while on the surface, judicial decision-making in the legal model produces the most equitable outcomes, this is not really the case, because the decision a judge renders in a particular case can affect parties far beyond just those parties named in that particular case. *Id.* Furthermore, the strict nature of the legal model can also make it difficult for other non-legal, but still relevant, factors to be introduced into the case proceedings. *Id.*

25. Friedman & Martin, *supra* note 11, at 143.

26. *Id.* at 155–58.

27. *Id.* at 156–57.

28. *Marbury v. Madison*, 5 U.S. 137 (1803).

29. SEGAL & SPAETH, *supra* note 6, at 64.

30. *Id.* at 244–45.

31. *Id.* at 64–65, 69.

Model concede that “ideological values . . . of Supreme Court justices have a profound impact on their decisions in many cases.”³²

The role that the Attitudinal Model plays in judicial decision-making is widely debated. Some judges³³ and scholars believe that while lower federal court judges will consider policy, they ultimately take the legal precedence more seriously in their decision-making, thereby applying the Legal Model.³⁴ Segal and Spaeth make a distinction between the U.S. Supreme Court and their lower court brethren, stating, “[t]he institutional rules and incentives that allow Supreme Court justices [to apply the Attitudinal Model] in votes on the merits do not apply in full to other courts”³⁵

If Segal and Spaeth are correct, it is curious as to how a judge who previously was committed to something else, perhaps the Legal Model, would now decide cases based on policy preferences. Segal and Spaeth suggest that this shift, commonly exhibited by U.S. Supreme Court justices, occurs because they are finally free from electoral or political accountability (political accountability being a significant constraint on federal district court judges), ambition for any higher office, or concern about future reversal.³⁶ The absence of these factors allows the Supreme Court justices to partake in attitudinal voting.

Segal and Spaeth point toward *Bush v. Gore*³⁷ as evidence of the Attitudinal Model. They state that this case should end any “pretense”³⁸ on

32. Songer & Lindquist, *supra* note 3.

33. See, e.g., Judge Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, in *JUDGES ON JUDGING: VIEWS FROM THE BENCH* 71–76 (David M. O’Brian, ed., 1997) (noting that while judges do have considerable power, they are also subject to many constraints that limit this power). *But see* Judge Richard A. Posner, *What Am I, a Potted Plant? The Case Against Strict Constructionism*, in *JUDGES ON JUDGING: VIEWS FROM THE BENCH* 182–86 (David M. O’Brian, ed., 1997) (explaining that it would be very difficult for judges to solely rely on the legal model in rendering decisions, and it is the “nature of law” that there will be some policy considerations made, because it would be impossible to predict every possible situation that would come up that the law would affect). Judge Posner states, “[t]here has never been a time when the courts of the United States . . . behaved consistently in accordance with [strict constructionism]. Nor could they, for reasons rooted in the nature of law and legal institutions, in the limitations of human knowledge, and in the character of the political system.” *Id.* Judge Posner currently serves on the Seventh Circuit Court of Appeals, while Judge Kozinski currently sits on the Ninth Circuit Court of Appeals.

34. RICHARD J. RICHARDSON & KENNETH N. VINES, *THE POLITICS OF FEDERAL COURTS: LOWER COURTS IN THE UNITED STATES* 49 (1970).

35. Jeffrey A. Segal & Harold J. Spaeth, *The Authors Respond*, in 4 *LAW AND COURTS* 10, 11 (Susan E. Lawrence ed., 1994).

36. SEGAL & SPAETH, *supra* note 6, at 69.

37. *Bush v. Gore*, 531 U.S. 98 (2000).

38. Steven G. Gey, *The Odd Consequences of Taking Bush v. Gore Seriously*, 29 *FLA. ST. U. L. REV.* 1005, 1027 (2001).

the part of the judiciary that they are truly beholden to legal precedent after deciding a case in such a “shamelessly partisan” way.³⁹ In essence, judicial decision-making, at least at the level of the U.S. Supreme Court, is “wholly political”⁴⁰ and reflects that judge’s policy preferences.⁴¹

Segal and Spaeth argue that judges possess certain attitudes or values about particular areas of the law and those attitudes or values are good predictors of how they will vote in the future regarding these types of cases.⁴² To that end, by researching a judge’s voting record in different areas of the law, Professors Lee Epstein and Carol Mershon contend that a scholar can predict how liberal a judge will vote on those particular areas of law.⁴³ Moreover, Professor Frank Cross asserts that issues related to the constitutionally-protected rights of criminal offenders and civil liberties, such as the death penalty, are valuable types of cases to study to determine the political leanings of judges because decisions in those cases tend to have more of a policy or political basis.⁴⁴ However, Cross acknowledges that the study of these less-than-typical cases has drawn criticism from some scholars.⁴⁵

Some of these criticisms stem from the attitudinal model’s predictive shortcomings. Friedman and Martin contend that the Attitudinal Model is a good model to use to explain past decisions but does not predict future opinions.⁴⁶ For the purpose of this Article, which is to examine case outcomes from the 1960s and 1970s, the predictive value of the Attitudinal Model is not imperative. Nevertheless, a good paper should address any ramifications of judicial decisions that can be taken to the present day and, as stated above, the Attitudinal Model does purport to assert how liberal a judge has been in their rulings compared to a group of judges, but as Friedman and Martin contend, it “tells us nothing about where they would divide on the merits of any given case.”⁴⁷

39. SEGAL & SPAETH, *supra* note 6, at 2.

40. Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship And Naive Legal Realism*, 83 ST. JOHN’S L. REV. 231, 258–59 (2009).

41. *Id.* at 259.

42. SEGAL & SPAETH, *supra* note 6, at 64–65, 69.

43. Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261, 275 (1994).

44. Cross, *supra* note 15, at 285.

45. *See id.* (noting that these are specialized areas of the law and thus are not “a representative sample of the law as a whole” and may not provide an accurate sample with which to test the Attitudinal Model).

46. Friedman & Martin, *supra* note 11, at 151.

47. *Id.*

IV. THE PERSONAL ATTRIBUTES MODEL

C. Neal Tate argues the Personal Attributes Model does not identify a justice's attitudes or beliefs, but simply records how a justice voted on a particular case.⁴⁸ There is no explanation as to how the votes are related to any specific attitude or belief.⁴⁹ Tate proffers that judges develop their policy and political decision-making attitudes based on their background and socio-economic status.⁵⁰ Tate states that how liberal a judge is can be correlated to factors such as the political party of the judge, the prior employment of the judge, what region of the country the judge comes from, and the religion and education of the judge.⁵¹

The Personal Attributes Model is sometimes referred to as the "Social Background Theory." However, "[r]egardless of the label, these studies hypothesize that judicial characteristics influence judicial decisions."⁵² The Personal Attributes Model may be said to be indicative of some voting patterns of recent Supreme Court justices. For example, under the Personal Attributes Model, perhaps gender has been a key attribute for analyzing Sandra Day O'Connor's and Ruth Bader Ginsburg's voting patterns in abortion-related cases.

V. THE STRATEGIC MODEL

Friedman and Martin state that there is not one specific Strategic Model.⁵³ Rather, there are several different Strategic Models that share some common axioms.⁵⁴ The Strategic Model that will be studied in this paper is the one explained in the book *The Choices Judges Make* by Professors Lee Epstein and Jack Knight.⁵⁵

There are three main components to the Strategic Model addressed in the book.⁵⁶ The first component states that justices are goal-oriented and want to see their political values and beliefs, and ultimately, their policy preferences, reflected in their decisions.⁵⁷ Secondly, judges are "seekers

48. See C. Neal Tate & Panu Sittiwong, *Decision Making of the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations*, 51 J. OF POL. 900, 904-06 (1989).

49. *Id.* at 905.

50. *Id.*

51. See *id.* at 906, 907.

52. Tracey E. George, *From Judge To Justice: Social Background Theory And The Supreme Court*, 86 N.C. L. REV. 1333, 1336 n.12 (2008).

53. Friedman & Martin, *supra* note 11, at 151.

54. *Id.*

55. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUDGES MAKE* (1998).

56. *Id.* at 10-11.

57. *Id.* at 9-10.

of legal policy”⁵⁸ and their “ability to achieve their [primary policy] goals depends on a consideration of the preferences of others.”⁵⁹ In other words, judges do not make decisions in a vacuum, solely based on their own ideological beliefs and values; they act strategically, taking into consideration the preferences of the other judges.⁶⁰ Thirdly, judges realize that they are tied to an institutional setting that brings associated pressures that they must account for in their voting.⁶¹ These institutions can be “formal, such as laws, or informal, such as norms and conventions,” or “groups.”⁶² Working within these institutional restraints forces judges to sometimes work in unconventional ways to “pursue their policy goals.”⁶³

In the Strategic Model described by Epstein and Knight, components of both the Legal Model and Attitudinal Model can be at play. The Personal Attributes Model may already be in play regardless of how the judges actually vote. Some of the institutional constraints that are part of the Legal Model are also apparent in the Strategic Model. For example, judges acting strategically are aware of the necessity of getting other judges to join their particular views. If they brazenly avoid the facts, law, and precedent, it will only frustrate their intention. In this tempered approach, the Attitudinal Model measures what a single judge’s intentions are focused on in regard to policy preferences.

For evidence of the Personal Attributes Model, one only needs to consider the judge selection process. During the search process, the Executive Branch places a strong emphasis on the characteristics of a candidate’s background in an effort to predict how a candidate may vote in the future.⁶⁴

VI. IDEOLOGICAL VOTING

*Ideological Voting*⁶⁵ closely examined the voting behavior of the United States Courts of Appeals over a seven-year period from 1995 through 2002.⁶⁶ *Ideological Voting* cited Segal and Spaeth, stating,

58. *Id.* at 10.

59. *Id.* at xiii.

60. *Id.* at 9–10.

61. *Id.* at 10.

62. *Id.* at 17.

63. Brandon J. Almas, *From One [Expletive] Policy to the Next: The FCC’s Regulation of “Fleeting Expletives” and the Supreme Court’s Response*, 63 *FED. COMM. L.J.* 261, 273 (2010).

64. Tom Curry, *A Guide to the Supreme Court Nomination*, *NBC NEWS* (Nov. 25, 2005), http://www.nbcnews.com/id/6694744/ns/us_news-the_changing_court/t/guide-supreme-court-nomination/#.UItWOyRKD2Y.

65. Sunstein et al., *supra* note 8, at 301.

66. *Id.* at 313.

“[i]nsofar as party effects are present, our findings are broadly supportive of this idea [the Attitudinal Model].”⁶⁷ Sunstein, however, went beyond just testing the Attitudinal Model. He also looked at what he labeled the “Sociological Model,”⁶⁸ or the effects that sitting on a court panel may have upon the decision making of justices.⁶⁹

However, it is important not to confuse these two models. The Sociological Model is not the same thing as the Social Background or Personal Attributes Model. The Sociological Model is concerned with the influence that other actors in the same grouping have upon each other.⁷⁰ The Personal Attributes Model focuses on attributes that judges bring with them to the judgeship.⁷¹ There is a relation of the Sociological Model to the second component of Epstein and Knights’ Strategic Model that stresses that judges need to be cognizant of the wishes of others in the group.⁷²

In *Ideological Voting*, the authors hypothesized that an individual ideology influences the decision making of the circuit court of appeals judges.⁷³ The study in *Ideological Voting* used the proxy of the appointing President’s political party to determine a judge’s ideology.⁷⁴ Through the testing of the authors’ first hypothetical,⁷⁵ they found that ideological voting is prevalent in “a subset of possible case types, focusing on a number of controversial issues that seem especially likely to reveal divisions between Republican and Democratic appointees.”⁷⁶

The second and third hypotheses tested in *Ideological Voting*⁷⁷ stated that sitting on a panel could either dampen or amplify a judge’s vote depending on the composition of the three judges.⁷⁸ The findings show that judges are split by political party in several legal areas, but at times come together and conform in decision making when sitting on a judicial panel. For example, a Democratic court of appeals judge sitting with two like-kind Republican judges on a three-person panel is more likely to vote conservative, thus dampening the Democrat judge’s vote (and vice versa);

67. *Id.* at 309.

68. *Id.* at 342.

69. *Id.* at 337–46.

70. *Id.* at 340.

71. Tate & Sittiwong, *supra* note 48, at 905–07.

72. EPSTEIN & KNIGHT, *supra* note 55, at 10.

73. Sunstein et al., *supra* note 8, at 304.

74. *Id.* at 303.

75. *Id.* at 304.

76. *Id.*

77. *Id.* at 304–05.

78. *Id.*

whereas a panel consisting of three Democratic judges will likely vote to extend or amplify the liberal vote.⁷⁹

As stated above, the authors of *Ideological Voting* assumed that the political ideology of a circuit court judge could be determined by examining the political party of the President who appointed that judge, assuming that judges appointed by a Democratic President will be liberal, and judges appointed by a Republican President will be conservative.⁸⁰ Using this assumption appeared to work for the time span they covered, from 1995 to 2002.⁸¹ Applying this assumption to earlier periods of the twentieth century is more problematic, however, when covering the findings from the school desegregation study. Application of this assumption over a longer period of time in our nation's history becomes, in equal parts, foolish and mistaken.⁸²

The study in *Ideological Voting* measured thirteen different legal topic areas: abortion, affirmative action, Americans with Disabilities Act, campaign finance, capital punishment, Commerce Clause, criminal appeals, EPA, federalism, piercing the corporate veil, sex discrimination/harassment, the Takings Clause, and Title VII/racial discrimination.⁸³ The study confirmed the three hypotheses tested in *Ideological Voting* in eight of the thirteen areas: affirmative action,⁸⁴ sexual discrimination/harassment,⁸⁵ campaign finance,⁸⁶ piercing the corporate veil,⁸⁷ Americans With Disabilities Act,⁸⁸ contracts clause violations,⁸⁹ Title VII/racial discrimination,⁹⁰ and EPA regulations.⁹¹ The study repudiated the three hypotheses in the areas including the Commerce Clause,⁹² federalism,⁹³ takings claims,⁹⁴ and criminal appeals.⁹⁵ Study results in two other topi-

79. *Id.*

80. *Id.* at 305.

81. *Id.* at 313.

82. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 485–86 (1989) (noting that American political ideas tend to have a cyclical nature and highlighting the example of the category of liberal Republicanism that has been present at various times throughout American history).

83. Sunstein et al., *supra* note 8, at 304.

84. *Id.* at 319.

85. *Id.* at 319–20.

86. *Id.* at 321–22.

87. *Id.* at 321.

88. *Id.*

89. *Id.* at 323–24.

90. *Id.* at 324–25.

91. *Id.* at 322–23.

92. *Id.* at 326–27.

93. *Id.*

94. *Id.* at 352 (“It might be surprising to find that in some controversial areas, the political affiliation of the appointing president is not correlated with judicial votes, and

cal areas, abortion and capital punishment, supported the first hypothesis, but not the second or third.⁹⁶ In regard to abortion and capital punishment, the authors stated that judges appeared to be voting their convictions and were not being swayed by panel effects.⁹⁷

VII. SCHOOL DESEGREGATION IN THE 1960s AND 1970s

The study conducted for this article tests the same three hypotheses tested in *Ideological Voting*. This study tests these three hypotheses within an area of the law that the authors of *Ideological Voting* suggested as appropriate for future research: the effects of judges' political ideology on deciding school desegregation cases in the 1960s and 1970s.⁹⁸

One hundred three circuit court cases, spanning the years from 1960 through 1973, were analyzed for this study. This was a sufficient number of cases to test an area of law and capture indications of political ideology on the part of the judges.⁹⁹ In comparison, the authors of *Ideological Voting* analyzed thirteen different legal topical areas.¹⁰⁰ Some of these areas produced hundreds of cases for the authors to test, while other areas, such as campaign finance and contracts clauses, produced less than 100.¹⁰¹

The school desegregation study conducted for this article, as well as the *Ideological Voting* study, only analyzed published cases. One practical reason for this is that, unlike the contemporary time period that the authors of *Ideological Voting* studied, few, if any, unpublished circuit court cases were available to be analyzed from the 1960s and 1970s.¹⁰² The second reason is a reason the authors of *Ideological Voting* cited: pub-

hence that in those areas, none of these effects can be observed. This is the basic finding for criminal appeals, takings, and federalism.”).

95. *Id.* at 325–26 (“It might be anticipated that Democratic appointees would be sympathetic to criminal defendants and that Republican appointees would be relatively unsympathetic. This is a popular platitude about judicial behavior. Hence, the three hypotheses might be anticipated to receive support. But all of them are rejected, at least in three courts of appeals from 1995 to the present.”).

96. *Id.* at 327.

97. *Id.* at 335 (“It seems clear that judges have strong beliefs about abortion and capital punishment, issues about which beliefs are often fiercely held. In cases of this kind, it is natural to assume that votes will be relatively impervious to panel effects.”).

98. *Id.* at 309–10.

99. *Ideological Voting* studied less than 100 cases in two areas of law. The school desegregation study analyzed 103 cases.

100. Sunstein et al., *supra* note 8, at 311–13.

101. *Id.* at 312 n.30.

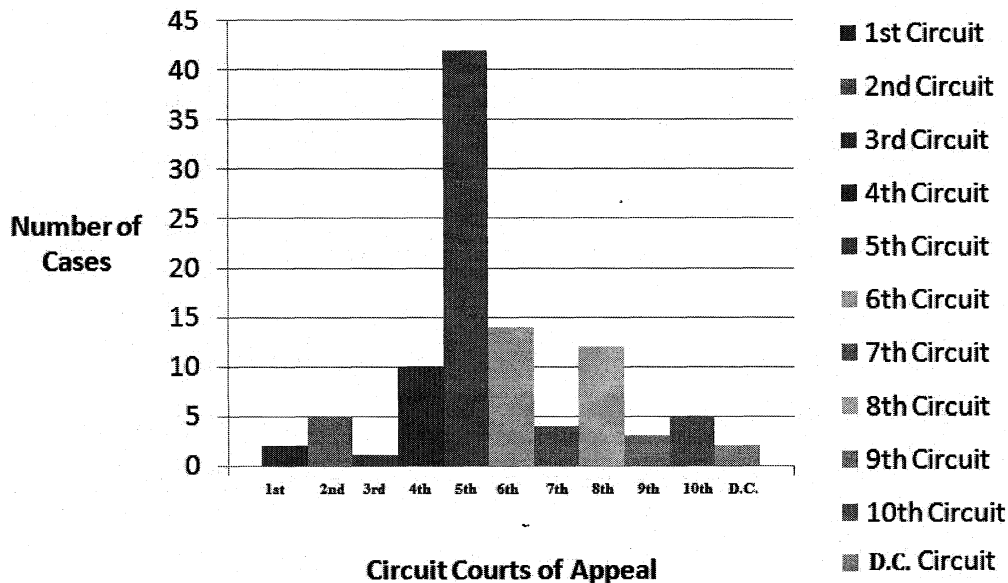
102. Kenneth F. Hunt, *Saving Time or Killing Time: How the Use of Unpublished Opinions Accelerates the Drain on Federal Judicial Resources*, SYRACUSE L. REV. 315, 320–21 (2011).

lished cases are more likely to involve complex or difficult issues, issues that are more likely to bring forth a pattern of ideology on the part of the judges.¹⁰³ An unpublished opinion, on the other hand, is normally thought to be more of the general and straightforward type, not the type of decision that will lend itself easily to political ideological analysis.¹⁰⁴

As stated above, 103 published school desegregation decisions decided by three-judge U.S. Circuit Court judge panels were examined. Starting with the year 1960, each successive year was examined until at least 103 cases had been examined by the year 1973.¹⁰⁵ The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and the D.C. Circuits were examined.¹⁰⁶ Following the example of the *Ideological Voting* study, the party of the nominating President served as the proxy in the study of school desegregation cases.¹⁰⁷

The overall number of cases studied is illustrated by Table 1 below, along with a breakdown of the circuits and the numbers that each separate circuit heard.

TABLE 1



103. Sunstein et al., *supra* note 8, at 313.

104. See, e.g., Brian T. Damman, *Guess My Weight: What Degree Of Disparity Is Currently Recognized Between Published And Unpublished Opinions, and Does Equal Access to Each Form Justify Equal Authority For All?*, 59 *DRAKE L. REV.* 887, 888–89 (2011).

105. Figure includes years 1960–1973.

106. The Eleventh Circuit, which split the traditional Fifth Circuit, was not yet in existence.

107. Sunstein et al., *supra* note 8, at 303.

VIII. POLITICAL ENVIRONMENT AT THE TIME

When one considers contemporary notions of “liberalism” and “conservatism,” the definitions may be different for different readers. For the purposes of this paper, a rather simple but effective definition from Charles Dunn and David Woodard is used that appears consistent for both the contemporary time period the *Ideological Voting* study covered and the time period of this study covering the 1960s and early 1970s.¹⁰⁸ Dunn and Woodard stated that at the governmental level, those who identify with liberal ideology believe that the federal government is the most effective agent in influencing policy to affect society.¹⁰⁹ Conservatives, in contrast, believe state and local government are the best suited to indirectly influence society.¹¹⁰

An example related to the time period of the school desegregation study may give further understanding of these distinctions. In 1961, before a regional gathering of Southern Republican leaders in Atlanta, Georgia, then-Arizona Senator Barry Goldwater, who later took a public stance against the Civil Rights Act,¹¹¹ stated that school integration was “the responsibility of the states. I would not like to see my party assume it is the role of the federal government to enforce integration in the schools.”¹¹²

While Goldwater seemed to be speaking for the Republican Party at the time, the message was likely intended to gain support of southerners.¹¹³ Certainly, he was not speaking for the whole party because there was a strong liberal flank that still existed in the Republican Party in the 1960s.¹¹⁴ Goldwater would later attempt to exploit this liberal flank when running for President in 1964.¹¹⁵ Both the Republican and Democratic Parties seemed split on civil rights in the 1960s.¹¹⁶ Thus, in order to use the same proxy that the authors of *Ideological Voting* used—that of the ideology of the appointing President’s party—the re-

108. CHARLES DUNN & DAVID J. WOODARD, *THE CONSERVATIVE TRADITION IN AMERICA* (1996).

109. *Id.* at 31 fig.2-1 (1996) (comparing liberalism and conservatism and highlighting a broad role for the federal government as being central to liberal thought).

110. *Id.*

111. ANDERS WALKER, *THE GHOST OF JIM CROW* 134 (2009).

112. Jack Bass, *That Old-time Southern Strategy*, SALON (July 8, 2011), http://www.salon.com/2004/03/25/southern_strategy/singleton/.

113. WALKER, *supra* note 111.

114. *See id.* (noting that by “exploiting the divisions within the liberal flank of the GOP[.]” Barry Goldwater was able to force then-President Lyndon Johnson to shift to the right in his campaign for re-election).

115. *Id.*

116. *See id.* (highlighting party and intraparty politics on civil rights).

sults will be different because the ideologies of the political parties in the 1960s and early 1970s were not as cut and dry.

In the 1950s, the Democratic Party still had a strong block of conservative liberals, almost entirely located in the South, and the Republicans also included many moderates, with a block of liberal Republicans in the Northeast.¹¹⁷ The country was still experiencing the lasting effects of a prevailing ideology shaped by the notion of liberalism defeating poverty and fascism.¹¹⁸ The elected President in 1952 was World War II hero Dwight D. Eisenhower.¹¹⁹ A small group of the progressive northeastern Republicans, led by Henry Cabot Lodge, had drafted Eisenhower to run for President.¹²⁰

Eisenhower was a moderate.¹²¹ He did not turn back New Deal policies, which conservatives wanted him to do.¹²² Instead, he extended the Social Security system and started the national highway system.¹²³ He was moderate to liberal concerning civil rights,¹²⁴ though some scholars criticize Eisenhower on his civil rights record.¹²⁵ Some dispraise him only on the basis of what Chief Justice Earl Warren stated about Eisenhower

117. Jonathan Schoenwald, *We Are an Action Group: The John Birch Society and the Conservative Movement in the 1960s*, in *THE CONSERVATIVE SIXTIES* 25 (David Farber & Jeff Roche eds., 2003).

118. See David Farber, *Democratic Subjects in the Sixties: National Politics, Cultural Authenticity, and Community Interest*, 81 *MID-AM.: AN HIST. REV.* 322–24 (2003) (examining New Deal Liberalism during the 1930s and post-World War II).

119. *American President: Dwight David Eisenhower: Campaigns and Elections*, MILLER CENTER, <http://millercenter.org/president/eisenhower/essays/biography/3> (last visited Oct. 10, 2013).

120. HERBERT S. PARMET, *EISENHOWER AND THE AMERICAN CRUSADES* 49–50 (1972).

121. *Dwight D. Eisenhower*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/dwightdeisenhower> (last visited Oct. 13, 2013).

122. *Id.*

123. PARMET, *supra* note 120, at 508–09.

124. MILLER CENTER, *supra* note 119 (noting while President Eisenhower did achieve some important milestones in the area of Civil Rights—for example, signing the Civil Rights Act of 1957 into law—he remained relatively silent on the issue during his presidency); see also DAVID A. NICHOLS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION* 98–99 (2007) (explaining that Eisenhower’s “hands off” approach to the *Brown* decision stemmed from his commitment to the separation of powers doctrine, as well as a desire to “moderate the inevitable political backlash against *Brown* in the South”). The author also notes that “[t]his was also the flag he waived to retain white southern support while quietly making judicial appointments and taking actions contrary to segregationist interests.” *Id.*

125. See, e.g., PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION* 401 (1999) (describing President Eisenhower’s commitment to the civil rights movement as “lukewarm at best”).

in his memoir,¹²⁶ which was published eight years after Eisenhower's death. In his memoir, Chief Justice Warren wrote about several uncorroborated personal conversations he had with Eisenhower related to civil rights issues.¹²⁷ One irony about Warren's tense relationship with Eisenhower is that Warren needed the support of the Fifth Circuit if his mandate in *Brown v. Board of Education* was to be enforced in the Deep South, and Eisenhower gave him that with his nomination of a progressive Fifth Circuit Court.¹²⁸

Eisenhower ended up electing many federal judges who went on to have very progressive records on civil rights. He refused to appoint a Southerner or a segregationist to the Supreme Court despite enormous political pressure.¹²⁹ Eisenhower's Attorney General, Herbert Brownwell,¹³⁰ knew what Eisenhower was looking for and consistently recommended men of quality who had open minds in regard to civil rights.¹³¹ Eisenhower also tried to avoid segregationists in his appointments of judges in lower federal courts.¹³²

IX. DISAGGREGATING BY CIRCUIT

The authors of *Ideological Voting* studied the voting by circuit in part of their study.¹³³ This paper will do the same. We found and surveyed at least one panel decision on school desegregation in all eleven circuits covering the period from 1960 to 1973. Only seven of the eleven circuits, however, had decided as many as five panel school desegregation cases during this period.¹³⁴

126. See EARL WARREN, *THE MEMOIRS OF EARL WARREN* 291–92 (1977) (“I have always believed that President Eisenhower resented our decision in *Brown v. Board of Education* and its progeny.”) Chief Justice Warren then elaborated on this assertion, explaining that interactions with President Eisenhower before and after the opinion in *Brown v. Board of Education* was rendered by the Supreme Court led him to believe that President Eisenhower did, indeed, resent their decision in the landmark school desegregation case. *Id.*; see also IRONS, *supra* note 125, at 403 (“Someone later asked Eisenhower if he had made any mistakes as president. ‘Yes, two,’ he replied, ‘and they are both sitting on the Supreme Court.’ Ike referred to Earl Warren and William Brennan . . .”).

127. WARREN, *supra* note 126, at 289–92.

128. NICHOLS, *supra* note 124, at 83–85.

129. *Id.* at 77.

130. HERBERT BROWNWELL & JOHN P. BURKE, *ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNWELL* (1993).

131. *Id.* at 82–83.

132. *Id.* at 83.

133. Sunstein et al., *supra* note 8, at 331.

134. These included the Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits.

Ideological Voting articulated what has become a commonly held belief in recent decades: the Seventh and newer Fifth Circuits are the most conservative circuits,¹³⁵ and the Ninth, Third, and Second Circuits are the most liberal.¹³⁶ In the school desegregation survey, when considering the time period, the effects of ideology differed significantly across circuits. The circuits in which the most school desegregation cases were heard in the period from 1960 through 1973 were the circuits in which the most plaintiffs could be gathered—in the circuits containing the most Southern states as depicted in Table 2 below.¹³⁷ The Fifth Circuit decided the most school desegregation cases. During the period covered in the survey, the Fifth Circuit included Louisiana, Mississippi, and Texas, as well as Alabama, Georgia, and Florida.

After *Brown II*,¹³⁸ the law had changed but not much else. With the nearly ubiquitous absence of local school board compliance, the onus fell upon black parents to bring suit to enforce the Supreme Court's decision. The NAACP would search for brave parents throughout the Deep South who would attempt to place their students in all-white public schools.¹³⁹ This was a difficult task for the NAACP. Not only did they need to find willing black parents, they also needed to meet with the school board to go over the usual denial.¹⁴⁰ If there was no satisfaction from this school board meeting the NAACP would file suit in federal court.¹⁴¹

However, filing the desegregation lawsuit was just the beginning. Many of the school desegregation cases would languish in the courts for

135. Sunstein et al., *supra* note 8, at 307.

136. *Id.*

137. These included the Fifth, Sixth, Eighth and Fourth Circuits.

138. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (“The judgments [in *Brown I* were] accordingly reversed and the cases remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with [*Brown II*] as [were] necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”).

139. See J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 104 (Univ. of Ill. 1971) (1961) (stating “[l]ocal and national NAACP officials unapologetically [encouraged] Negroes to petition school boards and to step forward as plaintiffs”); see also HOWARD ZINN, THE SOUTHERN MYSTIQUE 41 (Knopf 1964) (“There is a far better chance of acceptance if a direct confrontation occurs . . . [More militant Negroes] . . . start from the simple, reasonable assumption that the rejecting white has more cause to feel embarrassment than the rejected negro. Even if a Negro is admitted in such a situation as a temporary expedient, this often heralds a permanent breakdown in the segregation pattern; every time the line is stepped on it becomes fainter.”).

140. PELTASON, *supra* note 139, at 102.

141. *Id.* at 105–06.

years while the public schools remained segregated.¹⁴² After *Brown I* in 1954, and until 1961, the vast majority of state legislatures and governors in the South did anything within their power to keep their public schools segregated.¹⁴³ To that end, New Orleans was considered to be the capital of segregated schools in the South; to lose it to desegregation would be a devastating loss to the South.¹⁴⁴

With the delay in the courts, it is not surprising that only 103 published school desegregation opinions were found from 1960 through 1973. Moreover, factors such as the non-specific and standard-less language of the two *Brown* decisions, which resulted in little guidance for courts to follow in subsequent litigation, coupled with the resistance that potential black plaintiffs felt from the school boards and public at the time, slowed the desegregation movement to a crawl.¹⁴⁵ It is worth noting that for the study in this article, we counted a particular opinion once, regardless of the number of renditions that made their way through the appeals court.

There were forty-three cases surveyed from the Fifth Circuit alone, and the decisions in thirty-six of the forty-three cases can be classified as “liberal.” A decision was considered liberal if the court was moving for immediate desegregation or ruled in a way that exhibited a steadfast commitment toward desegregation. A decision was considered “conservative” if the court appeared to be slowing down the process. A tell-tale sign of this conservatism was when a court would use the phrase “with all deliberate speed,” language taken directly from *Brown II*.¹⁴⁶ This language can be construed as code that the particular court was sanctioning the school district taking a slow pace in their desegregation efforts.

Seventy-nine percent of the judges appointed by Democratic Presidents voted for school desegregation in the Fifth Circuit, compared to ninety-one percent of the judges appointed by Republican Presidents.

142. See Gloria Ladson-Billings, *Landing on the Wrong Note: The Price We Paid for Brown*, 33 *EDUC. RESEARCHER* 3, 5 (2004) (explaining that “[d]espite making the right decision, the justices and the plaintiffs and other champions of social justice and equality did not (and, indeed, could not) anticipate the depth of [w]hite fear and resentment toward the decision and the limitations such a decision would have in a racist context”).

143. See, e.g., PELTASON, *supra* note 139, at 93–100 (providing examples of the lengths to which public officials in southern cities would go to prevent desegregation in public schools).

144. *Id.* at 125–27 (summarizing efforts by the New Orleans School Board to do all it could to delay desegregation and arguing that no other board fought harder or longer for such delays).

145. See, e.g., Robert R. Merhige, Jr., *A Judge Remembers Richmond in the Post-Brown Years*, 40 *WASH. & LEE L. REV.* 23, 23–25 (1992) (recounting factors retarding Virginia’s public school desegregation in the 1960s).

146. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

Having read the findings in the *Ideological Voting* article, these numbers may strike the reader as contrary to what would be expected, but as stated above, party lines in the 1960s and early 1970s did not line up neatly with contemporary ideology.

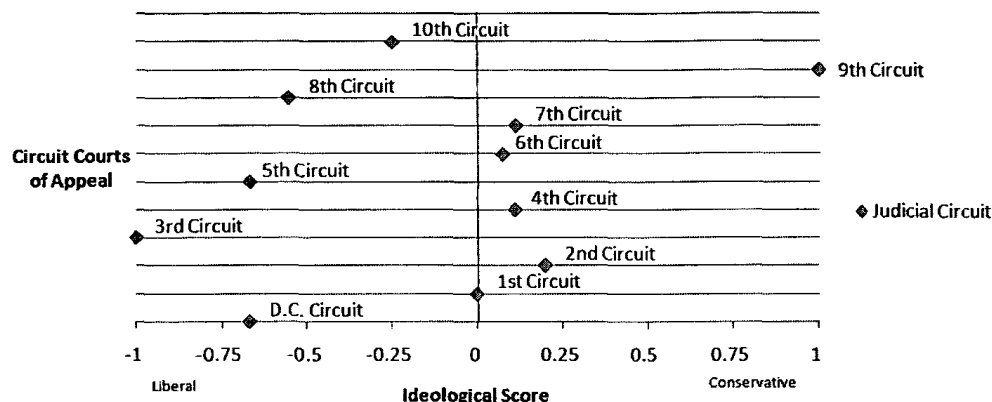
The Circuit with the second-most school desegregation cases surveyed was the Sixth Circuit with fourteen cases. The Sixth Circuit includes the states of Kentucky, Michigan, Ohio, and Tennessee. The judges in the Sixth Circuit proved to be more conservative than those in the Fifth. The cases split down the middle. Seven decisions were conservative and seven decisions were liberal. As was the case with the Fifth Circuit, the voting in the Sixth Circuit did not split evenly along party lines. The Democratic appointees voted liberally forty-eight percent of the time and their Republican counterparts voted liberally fifty-four percent of the time. Below, Table 2 shows how the circuits ranked according to ideology.

The Eighth Circuit had the third-most school desegregation cases surveyed with thirteen. It includes seven states: Arkansas, Iowa, Minnesota, Missouri, Nebraska, and North and South Dakota. With the inclusion of Arkansas and Missouri, border states, the Eighth Circuit proved to be one of the four circuits that heard the most school desegregation cases in the period studied. Of the thirteen desegregation cases studied, ten were liberal decisions. Democrat-appointed judges voted liberally sixty-three percent of the time in this circuit and Republican-appointed judges voted liberally eighty-seven percent of the time. Much like the Fifth Circuit, and to a lesser extent, the Sixth, the ideological shift of the judges was apparent with the Republican judges voting more liberal overall than their Democratic brethren.

The next circuit with the most school desegregation cases decided was the Fourth Circuit, with ten. It was surprising to discover that the Fourth Circuit, with the most Southern states outside of the Fifth Circuit, decided only ten three-judge panel cases on school desegregation. The Southern states of Maryland, North and South Carolina, Virginia, and West Virginia make up the Fourth Circuit. Of the ten cases decided, four were deemed to render liberal decisions. The ideological bent in the Fourth Circuit during the 1960s and early 1970s is the closest to what would be considered more typical to what a reader today would expect. The Democratic appointees were voting liberally fifty percent of the time and the Republican-appointed judges were voting liberally just thirty-one percent of the time.

None of the other seven circuits had as many Southern or border states and the resulting number of school desegregation cases decided reflects this. Of the remaining circuits, the Second, Seventh, and Tenth decided the most school desegregation cases, with only five school desegregation cases each.

TABLE 2



X. SCHOOL DESEGREGATION AND MODELS

A. Attitudinal Model

Of the three hypotheses presented by the authors in the *Ideological Voting* article,¹⁴⁷ the first hypothesis dealt with the Attitudinal Model. It stated:

Ideological voting. In ideologically contested cases, a judge’s ideological tendency can be predicted by the party of the appointing president; Republican appointees vote very differently from Democratic appointees. Ideologically contested cases involve many of the issues just mentioned, such as affirmative action, campaign finance, federalism, the rights of criminal defendants, sex discrimination, piercing the corporate veil, racial discrimination, property rights, capital punishment, disability discrimination, sexual harassment, and abortion.¹⁴⁸

The authors of *Ideological Voting* found in most of the legal areas investigated that the political party of the appointing president was “a fairly good predictor of how individual judges will vote.”¹⁴⁹ In eleven of the fourteen legal areas surveyed, the first hypothesis was supported.¹⁵⁰ In regard to some of the areas, affirmative action cases (surveyed from 1978 through 2002) and sex discrimination cases (surveyed from 1995 through 2002) showed evidence of ideological voting.¹⁵¹ Sexual harassment (a

147. Sunstein et al., *supra* note 8, at 301.

148. *Id.* at 304.

149. *Id.* at 305.

150. *See id.* at 318 (listing eleven areas in which the first hypothesis was supported: abortion, affirmative action, campaign finance, capital punishment, contract cause violations, disability, environmental regulation, harassment, piercing the corporate veil, sex discrimination, and Title VII).

151. *Id.* at 319–20.

subset of the sex discrimination data collected by the authors) was not one of the fourteen law areas identified but was still reported due to the level of judicial ideology involved. Republican appointees voted in favor of plaintiffs thirty-seven percent of the time in these cases compared to fifty-two percent of the Democratic appointees.¹⁵²

Disability was another area surveyed in the *Ideological Voting* survey that demonstrated judicial ideology.¹⁵³ There were also indications of ideological voting, but to a lesser degree, in the areas of Contract Clause violations and Title VII.¹⁵⁴ Abortion and capital punishment were two other legal areas that were indicative of individual ideological voting.¹⁵⁵ Republican appointees cast pro-choice votes forty-nine percent¹⁵⁶ of the time compared to their Democratic counterparts who voted pro-choice seventy percent of the time.¹⁵⁷ The area of capital punishment provided a demonstrable ideological difference of approximately twenty percent. Democratic appointees voted for defendants in capital punishment cases at a rate of over forty percent, double the rate at which Republican appointees voted for defendants.¹⁵⁸

Regarding attitudinal voting and school desegregation cases surveyed in this Article, there was no significant distinction based on party ideology. Justices appointed by Democrats voted for school desegregation sixty-five percent of the time compared to sixty-four percent for the Republican appointees.¹⁵⁹ These numbers cover all circuits for the 103 cases surveyed.

B. *Personal Attributes Model*

This part of the Article examines those judges who sat on the most school desegregation panel cases on the Fifth, Sixth, Eighth, and Fourth Circuits to determine if any personal attributes were present that influenced how they voted on school desegregation cases. Below, Table 4 lists the names of the judges who voted on at least three panel decisions involving school desegregation. Table 4 also lists how liberal a judge voted in regard to his decision making on school desegregation cases. Judges who voted consistently conservatively had an ideological score of +1. A judge who voted liberal every time had an ideological score of -1. A judge who voted equally for and against school desegregation would have

152. *Id.* at 320.

153. *Id.* at 321.

154. *Id.* at 323–25.

155. *Id.* at 328.

156. *Id.*

157. *Id.*

158. *Id.*

159. This represents the total votes from all the judges in all the circuits.

a score of 0. Any other voting score would be indicated by a percentage accompanied with a plus or negative dependent upon whether more of their votes were conservative or liberal.

One judge in the Fifth Circuit, Benjamin Cameron, was a force for the segregation cause and a thorn in the side of the “Fifth Circuit Four.”¹⁶⁰ The Fifth Circuit Four were four staunch pro-civil rights judges (John Wisdom, appointed from Louisiana; Richard Rives, appointed from Alabama; John Robert Brown, appointed from Texas; and Elbert Tuttle, appointed from Georgia) who helped drive desegregation through the Fifth Circuit.¹⁶¹ Because of his influence on civil rights, Cameron is included in this survey, even though he was only on two three-judge panels deciding school desegregation during the period covered.¹⁶²

Earlier in the 1950s, Cameron sat on more civil rights panels involving constitutional challenges to state laws, but Judge Rives,¹⁶³ the acting Chief Justice of the Fifth Circuit, disengaged Cameron from hearing more civil rights panel cases when Cameron stated that he “considered himself on the court to represent the people of Mississippi and didn’t believe Brown should be enforced there.”¹⁶⁴ Cameron issued continual complaints against Rives and his successor, Chief Justice Tuttle, contending that the panels deciding civil rights cases were being packed with liberals.¹⁶⁵ He even took his complaint public, memorializing his criticism in a penned dissent.¹⁶⁶ Tuttle showed little sympathy, especially since Cameron refused to apply the Fourteenth Amendment to civil rights cases.¹⁶⁷ Cameron will be discussed more below.

i. Law School Education

There has been a common criticism by conservatives that the federal judiciary is comprised of liberal activists from elite Ivy League law

160. See DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* 18 (describing Judge Cameron as the Fifth Circuit’s main opponent to desegregation).

161. See generally *id.* (narrating the Fifth Circuit’s decisions on civil rights cases).

162. See, e.g., *Bowman v. Birmingham Transit Co.*, 292 F.2d 4 (5th Cir. 1961) (listing Judge Cameron as a member of the three judge panel); see also *United States v. Mississippi*, 229 F. Supp. 925 (S.D. Miss. 1964) (citing the same), *rev’d*, 380 U.S. 128 (1965).

163. See PELTASON, *supra* note 139, at 26 (citing Rives as one of the Fifth Circuit Four and the only one not appointed by Eisenhower. He was appointed by President Truman).

164. J. Robert Brown, Jr., & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1049 n.63 (2000) (quoting JACK BASS, *UNLIKELY HEROES* 245 (1981)).

165. *Id.* at 1047, 1048–50 (specifying Tuttle was one of the Fifth Circuit Four and describing Cameron’s allegations).

166. *Armstrong v. Bd. of Educ.*, 323 F.2d 333, 353 (5th Cir. 1963).

167. *Brown & Lee, supra* note 164, at 1062.

schools.¹⁶⁸ In the Fifth Circuit, justices serving in the 1960s and early 1970s attended several different law schools.¹⁶⁹ Fifteen justices represent the Fifth Circuit in Table 4 below, and only three of those judges attended Ivy League schools: John Cooper Godbold, Irving Goldberg, and Elbert Tuttle.¹⁷⁰ Interestingly, these three judges do meet the common conservative argument noted above.¹⁷¹ All three judges held an impressive liberal voting record (eleven to one)¹⁷² on school desegregation panel decisions. The most socially-conservative justice on the Fifth Circuit during this period was states' rights adherent and segregationist, Benjamin Cameron.¹⁷³

Cameron, appointed by President Eisenhower early in his first term,¹⁷⁴ did not attend an Ivy League school, but did attend a private, well-healed southern law school, Cumberland School of Law (located at Samford University in Birmingham, Alabama).¹⁷⁵ Tuttle, also appointed by President Eisenhower,¹⁷⁶ attended Cornell and was a member of the Fifth Circuit Four,¹⁷⁷ along with Brown, Wisdom, and Rives. Brown attended the University of Michigan and Wisdom attended Tulane University.¹⁷⁸ Rives, the only member of the group who was not an Eisenhower appointee and was not a Republican (he was a Democrat appointed by Truman), did not attend law school.¹⁷⁹

168. Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1185–86 (2010); *Should the Ninth Circuit Be Broken Up?*, REDSTATE.COM (July 13, 2012, 1:56 AM), <http://www.redstate.com/davenj1/2012/07/13/should-the-ninth-circuit-be-broken-up/>; Thomas Sowell, *The Great Danger of Supreme Quotas*, HUMAN EVENTS (July 7, 2005), <http://www.humanevents.com/2005/07/07/the-great-danger-of-supreme-quotas>.

169. See *Biographical Directory of Federal Judges, 1789–present*, FED. JUD. CTR., <http://www.fjc.gov/public/home.nsf/hisj> (last visited Sept. 22, 2013).

170. See *id.*

171. See, e.g., REDSTATE.COM, *supra* note 168 (arguing the Ivy League produces a disproportionate number of federal judges).

172. See, e.g., *Gaines v. Dougherty Cnty. Bd. of Educ.*, 392 F.2d 669, 670 (5th Cir. 1968) (voting in favor of desegregation by Goldberg and Tuttle); *Jones v. Caddo Parish Sch. Bd.*, 421 F.2d 313 (5th Cir. 1970) (indicating Goldbold voted to desegregate schools).

173. David Marcus, *Flawed but Noble Desegregation Litigation and Its Implications for the Modern Class*, 63 FLA. L. R. 657, 694 (2011) (“Cameron . . . described the South as a ‘conquered province’ victimized by the so-called ‘Civil Rights Statutes.’”).

174. FED. JUD. CTR., *supra* note 169.

175. *Id.*

176. See PELTASON, *supra* note 139, at 26 (noting Judge Tuttle was one of the Fifth Circuit Four appointed by President Eisenhower).

177. *Biographical Directory of Federal Judges, 1789–present*, FED. JUD. CTR., <http://www.fjc.gov/public/home.nsf/hisj> (last visited Sept. 22, 2013).

178. FED. JUD. CTR., *supra* note 169.

179. *Id.*

Of the eight justices on the Eighth Circuit who were more closely studied,¹⁸⁰ there was only one who had an Ivy League education—Harry Blackmun, who attended Harvard¹⁸¹ and was a member of the Republican Party.¹⁸² He was another example of a socially-liberal Republican appointed by Eisenhower.¹⁸³ He voted for the plaintiffs in each of the three school desegregation panel cases in which he was involved. The other six justices in the Eighth Circuit either attended public law schools or read the law.¹⁸⁴

There are eight judges from the Sixth Circuit listed in Table 4. Two of those judges attended Ivy League schools—Justices McCree and Miller.¹⁸⁵ Again, the Ivy-Leaguers proved to vote liberally, with McCree voting liberally each of the four times he voted and Miller voting for plaintiffs four of the five times he voted. These two justices stand out, particularly in the Sixth Circuit, because the Sixth Circuit turned out to be more conservative than the Fifth or Eighth Circuits. Only Edwards,¹⁸⁶ of the remaining six justices in the Sixth Circuit, had a liberal voting record in regard to school desegregation.

The Fourth Circuit bucked the pattern of the other three circuits in having two Ivy League educated justices voting conservatively. Justice Bryan, who graduated from Columbia,¹⁸⁷ voted against the plaintiff in each of the three cases surveyed and Justice Haynesworth, from Harvard,¹⁸⁸ voted against the plaintiff in two of the three cases in which he was involved. If Bryan and Haynesworth had been exposed to liberal ideas in their legal education, these findings tend to indicate that other personal attributes or influences may have outweighed this exposure. Examples of other factors that could have influenced their voting include where they practiced law prior to becoming a judge, or the direct influences of the other conservative judges in the Fourth Circuit.

To summarize, when looking at the effects of an Ivy League legal education, six of the eight Ivy Leaguers voted primarily for the plaintiff, while two voted conservatively. The eight had an ideological voting score

180. These eight judges were Henry Blackmun, Myron Bright, Floyd Gibson, Gerald Heaney, Donald Lay, Marion Matthes, Martin Van Oosterhout, and Charles Vogel.

181. FED. JUD. CTR., *supra* note 169.

182. *Justice Blackmun, Author of Abortion Right, Dies*, N.Y. TIMES, Mar. 5, 1999, <http://www.nytimes.com/1999/03/05/us/justice-blackmun-author-of-abortion-right-dies.html>.

183. FED. JUD. CTR., *supra* note 169.

184. *Id.*

185. *Id.*

186. *Id.* (indicating Justice Edwards did not attend at Ivy League law school. He instead attended the Detroit College of Law, a Jesuit law school).

187. *Id.*

188. *Id.*

of seventy-nine percent liberal. This is considered significant but the sample size was very small.¹⁸⁹ This would be an area for more research. Other research possibilities would be comparing justices who attended public versus private law schools, or elite law schools versus other law schools (Ivy League schools are not the only elite schools).

ii. Religion of Judges

Tate and other disciples of the Personal Attributes Model hold out religion as another possible influence on how judges vote.¹⁹⁰ Some scholars believe there is some systematic difference in how judges vote depending on their religious affiliation.¹⁹¹ For example, Jewish justices have been said to vote for the “underdog” in cases largely because of their own historical outsider status.¹⁹² Despite various conservative rules governing the Roman Catholic Church, there is a perception that American Catholics are more liberal than most non-American Catholics.¹⁹³ Evangelical judges are generally thought to be conservative.¹⁹⁴

Those religious groupings that fall under the rubric of what has historically been deemed “liberal Protestantism,” such as Episcopalians, Presbyterians, Methodists, and Congregationalists (now the United Church of Christ), have held and exerted extraordinary power, of both an intellectual and social construct, on American culture since the early nineteenth century.¹⁹⁵ The liberal Protestants helped elect one of their own in President Woodrow Wilson.¹⁹⁶ Wilson, the son of a Presbyterian pastor, wrestled with the decision to enter the United States into World War I. When he eventually did, it helped change the minds of many of the previously pacifist members of the liberal Protestant churches.¹⁹⁷

189. This warrants more research and is beyond the scope of this article.

190. Tate & Sittiwong, *supra* note 48, at 906; Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1115–16 (2000); Rick A. Swanson & Albert P. Melone, *The Partisan Factor and Judicial Behavior in the Illinois Supreme Court*, 19 S. ILL. U. L.J. 303, 307–08 (1995).

191. Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision-Making?*, 45 CT. REV., J. AM. JUDGES ASS'N 112, 115 (2009).

192. ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISE LAND 3 (1990); Bornstein & Miller, *supra* note 191.

193. *Id.*; Sheldon Goldman, *Voting Behavior on the U.S. Courts Revisited*, 69 AM. POL. SCI. REV. 491, 498 (1975).

194. Bornstein & Miller, *supra* note 191.

195. RICHARD WIGHTMAN FOX & JAMES T. KLOPPENBERG, A COMPANION TO AMERICAN THOUGHT 394 (1998).

196. GARY DORRIEN, THE SOUL IN SOCIETY: THE MAKING AND RENEWAL OF SOCIAL CHRISTIANITY 50 (1995).

197. *Id.*

From 1875 to 1925, liberal Protestants and Evangelical sects came together to create an “undisputed sway” in the United States.¹⁹⁸ This power connection ended with the Scopes Trial, with its resultant fallout causing most Evangelicals at that time to fall largely out of the public eye.¹⁹⁹ After the Scopes trial, the liberal Protestants were now free from the Evangelicals, but there still remained an uncomfortable, yet lesser, relationship with rural Fundamentalists.²⁰⁰ There was also a growing criticism of the sentimental pretensions of the liberal Protestant church.²⁰¹ These issues continued to afflict the liberal Protestant sects throughout the first half of the twentieth century.²⁰² Eventually, a new cause grabbed the imagination of liberal Protestantism: the Civil Rights fight in the 1950s and 1960s.²⁰³

The Fifth Circuit Four were all liberal Protestants. Justices Brown and Rives were both Presbyterian, and Justices Wisdom and Tuttle were both Episcopalian.²⁰⁴ Interestingly, conservative segregationist, Justice Benjamin Cameron, was also Episcopalian.²⁰⁵ The Fifth Circuit had several other liberal Protestants on the bench. David Dyer, who voted four to zero for school desegregation, was Episcopalian.²⁰⁶ Ivy-Leaguer John Cooper Godbold, who voted consistently for school desegregation, was also Episcopalian.²⁰⁷ Justice Joe Ingraham, a Republican, first appointed by President Eisenhower to the position of a United States District judge and later appointed by President Nixon to the Fifth Circuit in 1969,²⁰⁸

198. WIGHTMAN FOX & KLOPPENBERG, *supra* note 195, at 395.

199. GARRY WILLS, *HEAD AND HEART: A HISTORY OF CHRISTIANITY IN AMERICA* 365 (2007).

200. *Id.* at 417–19 (discussing Fundamentalist activity in the United States after the Scopes trial and the tension between Fundamentalist and liberal Protestants).

201. *Id.* at 380–83.

202. *Id.* at 378–79.

203. WIGHTMAN FOX & KLOPPENBERG, *supra* note 195, at 395.

204. E-mail from Joseph A. Custer to Marian Drey, Libr. 5th Cir. (July 7, 2011) (on file with author); Lawrence Kestenbaum, *Lawyer Politicians in Georgia, R-Z*, THE POLITICAL GRAVEYARD, <http://politicalgraveyard.com/geo/GA/lawyer.R-Z.html> (last updated July 22, 2013) (noting that Tuttle was buried in an Episcopalian cemetery).

205. Lawrence Kestenbaum, *Index to Politicians: Cameron*, THE POLITICAL GRAVEYARD, <http://politicalgraveyard.com/bio/cameron.html> (last updated July 22, 2013).

206. E-mail, *supra* note 204.

207. Lawrence Kestenbaum, *Index to Politicians: Godard to Godes*, THE POLITICAL GRAVEYARD, <http://politicalgraveyard.com/bio/godard-goder.html> (last updated July 22, 2013); Memorial, FIND A GRAVE, <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=83873190> (last visited Nov. 1, 2013) (indicating memorial service at Church of the Ascension, a local Episcopalian church).

208. *Joe M. Ingraham Dies; Federal Judge Was 86*, N.Y. Times, May 30, 1990, <http://www.nytimes.com/1990/05/30/obituaries/joe-m-ingraham-dies-federal-judge-was-86.html>.

was a Presbyterian²⁰⁹ who consistently voted for the plaintiffs in school desegregation cases.

Two other justices in the Fifth Circuit who were liberal Protestants voting liberally on school desegregation cases were Lewis Morgan, a Presbyterian²¹⁰ and a Georgia Democrat appointed by President John F. Kennedy,²¹¹ and William Thornberry, a Texas Democrat appointed by President Lyndon Baines Johnson.²¹²

Non-liberal Protestant judges sitting on the Fifth Circuit during the 1960s and early 1970s who were affiliated with other faiths were also notable in regard to their involvement in school desegregation cases. James Coleman, a Johnson appointee,²¹³ was Baptist.²¹⁴ Many Baptist sects were, and still are, very fundamental and conservative.²¹⁵ This includes the contemporary black Baptist Church, which recently, under the leadership of the Coalition of African-American Pastors, suggested that black Baptist parishioners withdraw their support for President Obama in the 2012 election due to his support of gay marriage.²¹⁶

In his book, *The Ghosts of Jim Crow*,²¹⁷ Anders Walker takes a very harsh look at Mississippi political figure James P. Coleman, particularly during his days as Governor of Mississippi from 1956 through 1960.²¹⁸

209. Staff Article, *Federal Judge Joe Ingraham, 86, Dies in Houston Hospital*, HOUS. CHRON., May 28, 1990.

210. Lewis R. Morgan Papers, *Biographical Note*, RICHARD B. RUSSELL LIBRARY FOR POLITICAL RESEARCH AND STUDIES, UNIV. OF GA. LIBRARIES, http://russelldoc.galib.uga.edu/russell/view?docId=ead/RBRL142LRM_VI-ead.xml;query=&brand=default (last visited Oct. 12, 2013).

211. FED. JUD. CTR., *supra* note 169.

212. *Id.*; Interview by Joe B. Frantz with William Homer Thornberry, Judge, 5th Cir. (Dec. 21, 1970) (describing the relationship between Judge Thornberry and President Johnson).

213. FED. JUD. CTR., *supra* note 169.

214. *Coleman Papers*, MISS. DEP'T OF ARCHIVES, <http://mdah.state.ms.us/manuscripts/z1877.html> (last modified Oct. 30, 2005).

215. Gregory Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 565–66 (2004) (“Baptists in our study, tend to hold in common today . . . a general adherence to traditional or conservative social values and moral principles, which may conflict with the commands and policy-initiatives of secular and liberal government.”).

216. *Black Clergy Group Opposes Pres. Obama on Gay Marriage*, C-SPAN (July 31, 2012), <http://www.c-span.org/Events/Black-Clergy-Group-Opposes-Pres-Obama-on-Gay-Marriage/10737432751> (“The Coalition of African American Pastors (CAAP) called the President’s stance ‘disgraceful’ and has launched a marriage petition in a nation-wide campaign to rallying African Americans to withdraw support from the President.”).

217. WALKER, *supra* note 111.

218. *Id.* at 2, 3, 8–9, 19–20 (criticizing Coleman for his endorsement of “pupil placement” as a means to circumvent *Brown* and for his controversial responses to both the Emmet Till scandal and the killing of civil rights activist Medgar Evers). Walker also criti-

Later in his career, Coleman would sit on the Fifth Circuit Court of Appeals.²¹⁹ Coleman had tempered his earlier segregationist stance on civil rights and eventually voted moderately on school desegregation.

A Southern judge who, unlike Coleman, voted consistently for school desegregation, was Texan and Ivy-Leaguer Irving Goldberg. Goldberg was appointed by President Johnson in 1966²²⁰ and was Jewish.²²¹ John Milton Simpson was another Fifth Circuit²²² justice who voted consistently for plaintiffs. He voted for school desegregation each of the five times he voted. Despite continued efforts, we were unable to uncover his religion, if indeed he had one.

In the Eighth Circuit, Harry Blackmun and Donald Lay were both Methodist.²²³ Marion Matthes was Presbyterian.²²⁴ All three voted consistently for the desegregation of schools. The fourth justice in the Eighth Circuit that voted mostly liberal on school desegregation was Martin Van Oosterhout, a member of the Reformed Church.²²⁵ The Reformed Church is an offshoot of Calvinism and was originally a very conservative denomination that used to associate with Evangelicals.²²⁶ Beginning in the 1950s and 1960s, the Reformed Church became more moderate to progressive and took a place at the forefront of the civil rights movement.²²⁷ Van Oosterhout's votes for school desegregation would be consistent with this.

In regard to school desegregation, the Sixth Circuit was conservative. Two members associated with liberal Protestantism, but who voted mostly against plaintiffs in school desegregation cases, were Lester Cecil, a Methodist,²²⁸ and John Peck, an Episcopalian.²²⁹ Two other Sixth Cir-

cizes Coleman's stint as Attorney General of Mississippi, highlighting his prosecution of Willie McGee, an alleged black rapist who was put to death for what the evidence seemed to prove was no more than an affair with a white woman. *Id.* There was a national outcry for his release. *Id.*

219. FED. JUD. CIR., *supra* note 169.

220. *Id.*

221. Kestenbaum, *supra* note 204.

222. FED. JUD. CIR., *supra* note 169.

223. E-mail from Joseph A. Custer to Joan Voelker, Libr. 8th Cir. (June 20, 2011) (on file with author).

224. *Id.*

225. *Id.*

226. *History—Where Did We Come From*, CHRISTIAN REFORMED CHURCH, http://www.crcna.org/welcome/history#Where_did_we_come_from (last visited Oct. 13, 2013); *History—Becoming North American*, CHRISTIAN REFORMED CHURCH, http://www.crcna.org/welcome/history#Becoming_North_American (last visited Oct. 13, 2013).

227. *History—The Sixties*, CHRISTIAN REFORMED CHURCH, http://www.crcna.org/welcome/history#The_Sixties (last visited Oct. 13, 2013).

228. E-mail from Rita Wallace, Libr. 6th Cir., to Andrew Wrenn (Professor Custer's Faculty Fellow) (June 22, 2011) (on file with author).

cuit judges who voted mostly conservatively and were members of two denominations that certainly had conservative members were Judges Clifford O'Sullivan, a Catholic, and Harry Phillips, a Baptist.²³⁰

There were three other judges associated with liberal Protestantism in the Sixth Circuit who voted mostly liberally: William Miller, George Edwards, and Wade H. McCree, Jr. William Miller, a Republican appointed by Eisenhower,²³¹ was Methodist,²³² George Edwards, a Democrat appointed by President Johnson,²³³ was an Episcopalian,²³⁴ and Wade H. McCree, Jr., also a Democrat, but appointed by President Kennedy,²³⁵ was a Unitarian.²³⁶ Unitarianism, since the 19th century, is sometimes referred to as "liberal Christianity."²³⁷

In the Fourth Circuit, there were two justices who voted conservatively on school desegregation, Herbert Boreman and Albert Vickers Bryan, Sr. Boreman and Bryan were both appointed by Eisenhower²³⁸ and both were Episcopalian.²³⁹ Judge Simon Sobeloff, appointed by Eisenhower,²⁴⁰ voted mostly liberally on civil rights issues and school desegregation and he was Jewish.²⁴¹

In summary, there seems to be a possible correlation between how some judges voted and the liberal leanings, or lack thereof, of the faiths with which they were associated. As stated above, the Fifth Circuit Four²⁴² all happened to be liberal Protestants, which lines up nicely with a liberal ideology. Of the twenty-one judges associated with liberal Protestantism described above, sixteen voted liberally compared to five who did not. However, isolating a particular attribute when studying many

229. *Id.*

230. *Id.*

231. FED. JUD. CTR., *supra* note 169.

232. E-mail, *supra* note 228.

233. FED. JUD. CTR., *supra* note 169.

234. E-mail from Joseph A. Custer to Rita Wallace, Libr. 6th Cir. (June 22, 2011) (on file with author).

235. FED. JUD. CTR., *supra* note 169.

236. Kin Foley MacKinnow, *Wade McCree, Jr.: Solicitor General of the United States*, HARVARD SQUARE LIBRARY, <http://www.harvardsquarelibrary.org/unitarians/mccree.html> (last visited Oct. 13, 2013).

237. William H. Swatos, Jr., *Unitarianism*, ENCYCLOPEDIA OF RELIGION AND SOC'Y (Aug. 10, 2012), <http://hrr.hartsem.edu/ency/Unitarianism.htm>.

238. *See infra* Table 4.

239. *See infra* Table 4.

240. *See infra* Table 4.

241. *See infra* Table 4.

242. E-mail from Joseph A. Custer to Marian Drey, Libr. 5th Cir. (July 7, 2011) (on file with author).

attributes is an imperfect science.²⁴³ Thus, it is very difficult to assess the impact.²⁴⁴

iii. Prior Work Experience

Prior work experience is another personal attribute that may influence how U.S. Court of Appeals justices vote. For example, Professor Corey Rayburn Yung has tested particular attributes and their potential effect on contemporary federal circuit judges and has discovered that a judge's prior work experience in the government (outside of the judiciary) has a tendency to indicate a liberal voting preference.²⁴⁵

In their book *Continuity and Change on the United States Court of Appeals*, Professors Donald Songer, Reginald Sheehan, and Susan Haire²⁴⁶ state that prior to 1960, Republican presidents tended to appoint judges with previous federal judicial experience and Democratic presidents tended to appoint judges with strong ties to their home state.²⁴⁷ However, Professor James Brudney states that after 1960, these attributes had less to offer Presidents in their selection of potential judges and that “[the] party affiliation [became] a significant predictor of voting patterns by federal judges.”²⁴⁸ Songer, Sheehan, and Haire seemed to be in line with Brudney, stating that since 1960, the career paths of judges seemed to become less significant when choosing judges.²⁴⁹ This is not to be confused, however, with the idea that previous federal judicial experience had no influence on judicial decision making.

In the school desegregation survey, Richard Rives, sitting on the Fifth Circuit, was the sole Democrat appointed by Truman who was a member of the Fifth Circuit Four.²⁵⁰ Rives spent almost all of his prior work in

243. Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 101 (1998) (“A proposition is said to be ambiguous when a multiplicity of its attributes can be isolated from one another with relative ease. Ambiguous propositions are malleable and thus especially susceptible to restructuring.”).

244. Kevin H. Smith, *External Validity: Representativeness and Projectability in the Probative Value of Sample Surveys*, 39 WAYNE L. REV. 1433, 1462 (1993) (noting that in a research setting, the researcher must adequately define the parameters and variables, and noting “[t]he failure to specify accurately the legally relevant universe may have a devastating impact”).

245. Yung, *supra* note 168, at 1133.

246. DONALD R. SONGER ET AL., *CONTINUITY AND CHANGE ON THE UNITED STATES COURT OF APPEALS* (2000).

247. *Id.* at 236.

248. James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 163 (2003).

249. SONGER ET AL., *supra* note 246, at 36, 44, 236.

250. Brown & Herren Lee, *supra* note 164, at 1046; FED. JUD. CTR., *supra* note 169.

private practice.²⁵¹ Eisenhower appointed the other three justices.²⁵² John Wisdom, the last of the Fifth Circuit Four appointed by President Eisenhower in 1958, had worked in private practice but also had been a law professor at Tulane.²⁵³ John Brown spent his prior work life as an admiralty lawyer in Houston and Galveston.²⁵⁴ Elbert Tuttle, the first of the Fifth Circuit Four appointed by Eisenhower, spent most of his career in private practice in Atlanta, Georgia, but also worked for a short time for the U.S. Treasury Department, just prior to his appointment to the circuit court.²⁵⁵ Benjamin Cameron²⁵⁶ spent the lion's share of his previous career in private practice, but was also a federal prosecutor, which is another work-related attribute shared by many conservative judges.²⁵⁷ Cameron was not a member of the Fifth Circuit Four.

Kennedy's Southern federal appellate appointees tended to be more conservative than Eisenhower's.²⁵⁸ Kennedy seemed to bow to the custom of "senatorial courtesy"²⁵⁹ and appointed federal judges for the South that were satisfactory to the conservative Southern Dixiecrat Senators.²⁶⁰ Walter Gewin, a Democrat who practiced in various towns and cities in Alabama, also served as a prosecuting attorney in Hale County, Alabama, for nine years.²⁶¹ Gewin was "decidedly conservative" when ruling on "race cases" early on in his career as a judge, but he did take on a transformation over the years.²⁶² Gewin voted for desegregation in five out of eight school desegregation cases. His background as a prosecuting attorney may have also had an early influence on his early conservative years.²⁶³

In 1961, President Kennedy appointed Griffin Bell, a Southern Baptist Democrat²⁶⁴ from Georgia (who later became President Jimmy Carter's

251. FED. JUD. CTR., *supra* note 169.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. Tate, *supra* note 9, at 358.

258. *American President: A Reference Source: John Fitzgerald Kennedy Domestic Affairs*, MILLER CTR., <http://millercenter.org/president/kennedy/essays/biography/4> (last visited Sept. 8, 2013).

259. Brannon P. Denning, *The 'Blue Slip': Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 76 n.3 (2001).

260. MILLER CTR., *supra* note 258.

261. FED. JUD. CTR., *supra* note 169.

262. Brown & Herren Lee, *supra* note 164, at 1048, 1054 n.47.

263. FED. JUD. CTR., *supra* note 169.

264. REG MURPHY, UNCOMMON SENSE: THE ACHIEVEMENT OF GRIFFIN BELL 73 (2001).

Attorney General), to the Fifth Circuit.²⁶⁵ Bell spent years in private practice in Georgia, except for the three years prior to his judicial appointment when he served as the Chief of Staff for the segregationist Georgia Dixiecrat Governor, Ernest Vandiver.²⁶⁶ Griffin Bell was a complicated man, and his tribulations mirrored those of the changing South.²⁶⁷ His record on school desegregation was conservative to moderate. He voted for school desegregation three of the seven times he voted on the topic. He was viewed by many on the court as a moderating voice who could bring the two factions to the table.²⁶⁸ Many speculate that perhaps the civil rights of blacks would have been better championed in the early 1960s if a Republican or Democrat who was willing to alienate the South had been in the Oval Office.²⁶⁹

President Johnson appointed several appeals court judges who voted for plaintiffs in school desegregation cases, such as Lewis Morgan from Georgia.²⁷⁰ Morgan voted consistently for the plaintiffs on school desegregation cases. John Milton Simpson was another of the Johnson appointed judges who was consistently pro-plaintiff.²⁷¹ Simpson was heavily involved in Florida state government. He was an assistant state attorney in Florida, a judge in Duval County, and a circuit judge on the Florida Court of Appeals before being appointed to the United States District Court for the Southern District of Florida.²⁷² In 1966, President Johnson appointed Simpson to sit on the Fifth Circuit.²⁷³

James Coleman, another judge appointed by President Johnson for the Fifth Circuit, was Southern Baptist.²⁷⁴ Coleman had been everything from a District Attorney in Mississippi, to a Mississippi Circuit Judge, to the Governor of Mississippi.²⁷⁵ Coleman was a self-described moderate Southerner who appeased Mississippi by stating he would uphold segre-

265. FED. JUD. CTR., *supra* note 169.

266. *Reflections on Georgia Politics Oral History Collection: Griffin Bell Biographical Note*, RICHARD B. RUSSELL LIBRARY FOR POLITICAL RESEARCH AND STUDIES, UNIV. OF GA. LIBRARIES, <http://russelldoc.galib.uga.edu/russell/view?docId=ead/RBRL220ROGP.015-ead.xml> (last visited Oct. 14, 2013).

267. *See, e.g.*, MURPHY, *supra* note 264, at 4–5 (contrasting Bell's traditional southern rearing with his desire to identify with worldwide cultural movements).

268. *See, e.g., id.* at 129.

269. *See* Derrick A. Bell, Jr., *Civil Rights Lawyers on the Bench*, 91 *YALE L.J.* 814, 822–24 (1982) (arguing the Kennedy Administration's weak attempt at protecting the constitutional rights of blacks would have been served equally by a Republican with black support).

270. FED. JUD. CTR., *supra* note 169.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

gation while he was in office.²⁷⁶ However, Anders Walker makes the case that Coleman was actually a closet segregationist, hoodwinking his way through Mississippi state government claiming to be moderate.²⁷⁷ He did vote moderately on school desegregation, but this was later in his career as a federal circuit judge. It is worth noting that President Johnson appointed Coleman to the Fifth Circuit as part of a quid pro quo to appease Southern legislators so that Johnson could get his man, Thurgood Marshall, into the Solicitor General's seat.²⁷⁸

John Godbold and Irving Goldberg were two judges President Johnson appointed who had primarily practiced law before their appointments.²⁷⁹ Nothing about their work appeared to forecast their eventual voting patterns. Johnson also appointed two pro-plaintiff judges to the Fifth Circuit, who had previously been appointed to the United States District Court by President Kennedy—David Dyer,²⁸⁰ a Democrat, and William Thornberry,²⁸¹ also a Democrat. Dyer spent most of his pre-judicial career in private practice,²⁸² while Thornberry had been involved in state government, serving a brief time as a district attorney in Travis County, Texas, before serving as a member of Congress for fourteen years.²⁸³

Joe Ingraham, a Nixon appointee who consistently voted for desegregation, spent several years as a U.S. District Court Judge in the Southern District of Texas, having been appointed to the position by President Eisenhower.²⁸⁴ He spent most of his pre-judicial career in private practice.²⁸⁵

Two judges who Eisenhower appointed for the Sixth Circuit who proved to vote conservatively on school desegregation were Lester Cecil²⁸⁶ and Clifford O'Sullivan.²⁸⁷ Cecil was a prosecuting attorney before he became a judge in the Court of Common Pleas in Ohio.²⁸⁸ O'Sullivan worked in private practice prior to becoming a judge.²⁸⁹ An-

276. WALKER, *supra* note 111, at 3–6.

277. *See id.* at 26.

278. Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 411 (2000).

279. FED. JUD. CTR., *supra* note 169.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. FED. JUD. CTR., *supra* note 169.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

other Eisenhower appointee, Paul Weick,²⁹⁰ proved to be moderate on school desegregation. Prior to his appointment, Weick also worked in private practice.²⁹¹

Kennedy Democratic appointee, Wade H. McCree, Jr.,²⁹² voted consistently pro-plaintiff on school desegregation. Before joining the Sixth Circuit, he was a commissioner on Michigan's Workers Compensation Commission and a Michigan state circuit court judge.²⁹³ Kennedy also appointed a conservative Southern judge from Tennessee, Harry Phillips, to the Sixth Circuit.²⁹⁴ Phillips was a member of the Tennessee state House of Representatives and an assistant state attorney general of Tennessee before he went to private practice.²⁹⁵ George Edwards, a Democrat, was a moderate appointed by Kennedy and was sworn in after Kennedy's death.²⁹⁶ Edwards was very involved in Michigan government before becoming a U.S. circuit court judge.²⁹⁷ He served as chairman of the Detroit Election Commission, was president of the Detroit Common Council, and spent time serving as a probate judge and circuit judge before becoming the chief of police in Detroit.²⁹⁸

President Johnson appointed Ohioan John Peck,²⁹⁹ a conservative-leaning Democrat, to the Sixth Circuit. Peck had been very active at the state level in his native Ohio, having served as the Executive Secretary to the Ohio Governor.³⁰⁰ He also served as the state tax commissioner and served as a judge on the Court of Common Pleas in Ohio,³⁰¹ and was a member of the U.S. Army Judge Advocate General Corps for four years, which may have contributed to his conservative leanings.³⁰² William Miller, a Republican appointed by President Richard Nixon,³⁰³ proved to be a judge that voted for plaintiffs more often than not. Miller had been a state court chancellor in Tennessee before being appointed to the U.S. District Court by President Eisenhower.³⁰⁴

290. *Id.*

291. FED. JUD. CTR., *supra* note 169.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. FED. JUD. CTR., *supra* note 169.

304. *Id.*

Eisenhower's appointments in the Eighth Circuit resembled the appointees he made for the Fifth Circuit. The judges he appointed to the Eighth Circuit were progressive on civil rights. Justices Blackmun, Matthes, Van Oosterhout, and Vogel cast a combined fourteen to two vote total for plaintiffs on school desegregation. Prior to his appointment, Blackmun, a Republican, had been in private practice for years.³⁰⁵ He also was counsel for the Mayo Organization in Rochester, Minnesota.³⁰⁶ Both Marion Matthes, a Missourian,³⁰⁷ and Van Oosterhout, an Iowan,³⁰⁸ were involved in state posts and their respective state legislative bodies before being appointed to the Eighth Circuit. Matthes, also a lecturer at Washington University School of Law in St. Louis, had been a city attorney very early in his career,³⁰⁹ whereas Van Oosterhout had been a state district judge.³¹⁰ Charles Vogel,³¹¹ a Democrat, got the wheels of integration rolling at Central High School in Little Rock with his 1957 opinion in *Aaron v. Cooper*.³¹² Vogel spent most of his career in private practice, but had run unsuccessfully for the seat of U.S. Senator from North Dakota before being appointed by President Roosevelt for the U.S. District Court.³¹³

Kennedy appointed a Missouri Democrat, Floyd Gibson,³¹⁴ for the Eighth Circuit. Floyd practiced law and spent several years in both the Missouri House of Representatives and Senate before being appointed.³¹⁵ He proved to be a moderate on school desegregation, voting for the plaintiff half of the time. President Johnson's appointments in the Eighth Circuit proved again to be more progressive than President Kennedy's. Donald Lay,³¹⁶ an Illinois Democrat, had attended Iowa Law School and, prior to his appointment to the judgeship, spent most of his career as a law professor.³¹⁷ Gerald Heaney³¹⁸ and Myron Bright,³¹⁹

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *See Aaron v. Cooper*, 243 F.2d 361 (8th Cir. 1957) (quoting Vogel's opinion which started the process of integration at Central High School in Little Rock).

313. FED. JUD. CTR., *supra* note 169.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

both Democrats from Minnesota and alumni of the University of Minnesota Law School, spent their prior work life in private practice.

In the Fourth Circuit, Eisenhower appointed Herbert Boreman,³²⁰ who was termed by one of his Court of Appeals colleagues, Judge Donald Russell, as “a conservative of conservatives.”³²¹ Boreman fits one of the attributes that has been identified as a precursor to becoming a conservative judge, in that he had been a prosecuting attorney in West Virginia.³²² Eisenhower also appointed Simon Sobeloff, who served in several different governmental posts in his native state of Maryland, including city solicitor, U.S. Attorney for Maryland, chairman of the Commission on the Administrative Organization of Maryland, chief judge of the Maryland Supreme Court, and, ultimately, solicitor general of the United States before becoming a federal judge.³²³ During his first several years on the court, he tended to allow school systems to make their own attempts at rectifying segregation.³²⁴ However, over time he grew more progressive in school desegregation cases, becoming increasingly impatient with Southerners’ stalling tactics.³²⁵

Another Eisenhower appointee, Clement Haynesworth, Jr., a moderate Democrat³²⁶ who had not been active “in the effort to continue segregated schools,”³²⁷ would turn out to be a bit more conservative on the bench.³²⁸ He became more famous as the unsuccessful Nixon appointment to the U.S. Supreme Court in 1969.³²⁹ He spent most of his pre-judicial work in private practice.³³⁰

President Kennedy had the opportunity to appoint two judges to the Fourth Circuit, Spencer Bell³³¹ and Albert Bryan.³³² Spencer Bell spent his previous life practicing law and also served in the North Carolina state senate.³³³ Albert Bryan, termed “a conservative in the deepest old-Vir-

320. *Id.*

321. Hon. H. Emory Widener Jr., *Remembering the Fourth Circuit Judges: A History from 1941 to 1998*, 55 WASH. & LEE L. REV. 471, 482 (1998).

322. See Tate, *supra* note 9, at 363.

323. FED. JUD. CTR., *supra* note 169.

324. See Sanford Jay Rosen, *Judge Sobeloff's Public School Race Decisions*, 34 MD. L. REV. 498, 502–06 (1974).

325. See *id.* at 512–13 (“In future desegregation cases, Sobeloff accelerated the time table for desegregation with increasing court involvement.”).

326. NICHOLS, *supra* note 124, at 100.

327. *Id.*

328. NPR Staff, *A History of Conflict in High Court Appointments*, NPR (July 6, 2005), <http://www.npr.org/templates/story/story.php?storyId=4732341>.

329. *Id.*

330. FED. JUD. CTR., *supra* note 169.

331. *Id.*

332. *Id.*

333. *Id.*

ginian sense,”³³⁴ led a life in private practice until President Truman tabbed him for the U.S. Eastern District Court of Virginia in 1947.³³⁵ Like several of Kennedy’s other Southern appointees, Bryan proved to be a conservative vote on school desegregation. Spencer Bell, however, proved to be a moderate vote on school desegregation. There were not any justices appointed by either Presidents Johnson or Nixon for the Fourth Circuit who were active on panels deciding school desegregation cases.

In conclusion, there appears to be no clear correlation generally between work experience and liberalism or conservatism in school desegregation cases, at least from this limited sample. In addition, there appears to be no correlation between being a conservative judge and previously serving as a prosecutor, at least in regard to the small sample of court of appeals judges. With the exception of Jones and Matthes, the other four former prosecutors Eisenhower appointed were conservative.³³⁶ Kennedy appointed three former prosecutors: Gewin, Phillips, and Gibson. Gewin and Gibson proved to be conservative, while Gibson was more moderate in regard to voting on school desegregation. President Johnson appointed six judges with prosecutorial experience: Milton, Simpson, Coleman, Morgan, Thornberry, Peck, and Dyer. Only Coleman and Peck matched the correlation, while Simpson, Morgan, Thornberry, and Dyer were not conservative, at least regarding school desegregation. Nixon only appointed two of the thirty-eight judges more closely examined, and neither one had previously been a prosecutor. In sum, from this small sample of former prosecutors appointed and later confirmed to be federal court of appeals judges, only eight of fifteen were conservative.

In looking at Corey Rayburn Yung’s contention that Democratic Presidents look for candidates who have strong governmental work experience (not judicial) prior to their judgeship,³³⁷ both President Johnson and President Kennedy conform to this theory. Ten of Johnson’s twelve appointments in this study had significant prior government experience, and five of the seven Kennedy appointments in this study had similar experiences.

Other attributes that Tate wrote about that could be correlated with how a judge may actually vote, such as the region of the country from which the judge came, the judge’s race and gender, and the age of the judge³³⁸ proved to be too elusive or too homogeneous amongst the sam-

334. *Albert Vickers Bryan, Sr.*, WASH POST, Mar. 17, 1984, at A16.

335. FED. JUD. CTR., *supra* note 169.

336. These individuals include Cameron of the Fifth Circuit, Cecil of the Sixth Circuit, and both Boreman and Soboloff of the Fourth Circuit.

337. Yung, *supra* note 168, at 1188, 1201.

338. Tate & Sittiwong, *supra* note 48, at 905–07.

ple to be worthy of analyzing. There were some possible correlations, as mentioned above, in examining the Personal Attributes Model. For instance the congressional influence on President Kennedy's Southern appointments³³⁹ suggests that this model is ripe for further exploration and research.

C. Legal Model

The Legal Model is concerned with decision-making based upon legal precedent. Justices are simply to follow precedent in a mechanical way. In essence, most decisions are black or white, as there will be no grey areas as long as the law has been previously decided.³⁴⁰ As mentioned before, this model has been largely criticized over the last twenty years.³⁴¹ In 1960, the *Brown* rulings became clear legal precedent to be followed.

*Brown I*³⁴² prohibited intentional racial discrimination; however, what the law did *not* do was the main problem. *Brown II*,³⁴³ the case that was supposed to implement the parameters to apply *Brown I*, ended up adding confusion and ultimate relief to the segregated South.³⁴⁴ According to *Brown II*, school districts were expected to use "all deliberate speed"³⁴⁵ in taking steps to eliminate discrimination in their schools.

However, as Joel Goldstein states, the "adjectives suggested integration not happen immediately."³⁴⁶ The South took considerable advantage of the non-specific standard provided in the case by responding with resistance and delay.³⁴⁷ Segregationist judges could legitimately contend that they were following the rule of law with their slow down tactics.³⁴⁸ In as late as 1964, only two percent of all black children in the South attended schools with white children.³⁴⁹ Historian James Patterson stated,

339. MILLER CTR., *supra* note 258.

340. SEGAL & SPAETH, *supra* note 6, at 48.

341. Friedman & Martin, *supra* note 11, at 153, 155–58.

342. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

343. *Brown v. Bd. of Educ.*, (*Brown II*) 349 U.S. 294 (1955).

344. Jordan M. Steiker, *Brown's Descendants*, 52 *How. L.J.* 583, 610 (2009) ("But the decade following *Brown II* saw extraordinary efforts to avoid integrated education as many districts deliberately manipulated their ostensibly race-neutral placement criteria to keep children in the schools to which they had formerly been assigned on the basis of their race.").

345. *Brown*, 349 U.S. at 301.

346. Joel K. Goldstein, *Approaches to Brown v. Board of Education: Some Notes on Teaching a Seminal Case*, 49 *ST. LOUIS U. L.J.* 777, 801 (2005).

347. *Id.*

348. Charles J. Ogletree, *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 *HARV. BLACKLETTER L.J.* 1, 19–20 (2009).

349. JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART* 54 (2010).

“[V]irtually all southern black children who entered first grade in 1954 and who remained in southern schools graduated from all-black schools twelve years later.”³⁵⁰ Many Southern courts came to endorse what became known as the Briggs Dictum,³⁵¹ which stated that the Constitution did not require integration but only forbade “the use of governmental power to enforce segregation.”³⁵²

Things started to change in 1964 with the passage of the Civil Rights Act,³⁵³ which was hastened by the southern resistance to the *Brown* rulings.³⁵⁴ In 1968, the U.S. Supreme Court finally put an end to the “all deliberate speed” requirement. Justice Brennan, who wrote the opinion in *Green v. County School Board of New Kent County*,³⁵⁵ stated that the school board must “come forward with a plan that promises realistically to work, and promises realistically to work *now*.”³⁵⁶

The *Green* case suggested a new day for desegregation. Lester Maddox, Governor of Georgia at the time the decision was rendered, responded to the *Green* ruling by having all state flags flown at half-mast.³⁵⁷ No longer could Southern leaders contend they were moderates by applying pupil placement plans,³⁵⁸ the plans that had given local school districts discretion to term black students “unfit.”³⁵⁹ Southern school districts were finally on alert that they needed to come forward with real plans that would implement integration.³⁶⁰ In 1971, three years after *Green*, the Supreme Court penned another important pro-plaintiff ruling in *Swann v. Charlotte-Mecklenburg Board of Education*,³⁶¹ which stated lower courts should and will order busing if needed to secure desegregation.³⁶²

The hope and promise that was symbolized, if not actually fulfilled by the *Brown* cases, finally seemed to be coming to fruition. That hope and promise was quickly and deeply curtailed, however, with the two opinions rendered by U.S. Supreme Court Justice Lewis F. Powell (who, inciden-

350. *Id.*

351. *See* Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (“[The Constitution] does not require integration. It merely forbids discrimination.”).

352. RYAN, *supra* note 349, at 55.

353. Pub. L. 88-352, 78 Stat. 241, enacted July 2, 1964.

354. RYAN, *supra* note 349, at 55.

355. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968).

356. *Id.* at 439.

357. RYAN, *supra* note 349, at 56.

358. WALKER, *supra* note 111, at 26.

359. Nicole L. Mace, Comment, *Local Control and Funding of Schools: A Critical Analysis*, 10 J. L. SOC'Y 43, 51 (2008).

360. *Id.* at 70.

361. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

362. *Id.* at 2.

tally, was a Southerner) in *San Antonio v. Rodriguez*³⁶³ and *Milliken v. Bradley*.³⁶⁴ The decision in *Rodriguez* protected local control over finances, so property-affluent suburban school districts did not have to share their wealth with the severely strapped city schools.³⁶⁵ *Milliken* preserved local control and insulated suburbs from having to overlap school boundaries and desegregate with city schools.³⁶⁶

Prior to authoring these decisions, Powell served as chairman of the Richmond School Board from 1952 to 1961 and was not a supporter of Brown³⁶⁷ or an advocate for desegregation.³⁶⁸ In 1961, when Powell left as chairman “after eight years of service, only two of the city’s 23,000 black children attended school with white children.”³⁶⁹

If the Legal Model was used to analyze the decisions, the constraints placed on conservative judges with the *Green* and *Swann* cases would suggest a pro-plaintiff shift in decision-making. If there was a shift, however, the *Rodriguez* and *Milliken* cases would suggest its impact was short lived and significantly curtailed. There is more detail on the possible effects below. This is an area where further research would be very welcome.

Friedman and Martin effectively argue that, collectively, there is little that the Legal Model adds to empirical scholarship.³⁷⁰ They make an interesting exception, however, to studies in which the author measured the effect a key precedent, or set of precedents, had on how judges evaluate cases in a particular legal area.³⁷¹ It is important to note that, according to Friedman and Martin, this method of using the Legal Model is not predictive of how judges may vote in the future.³⁷² It is only to be used as

363. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

364. *Milliken v. Bradley*, 418 U.S. 717 (1974).

365. *Rodriguez*, 411 U.S. at 2.

366. *Milliken*, 418 U.S. at 718.

367. Snyder, *supra* note 278, at 438 (discussing the lack of desegregation in Richmond schools during Powell’s service as chairman of the Richmond School Board).

368. See JOHN JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 2, 172, 234 (1994) (acknowledging Powell’s measured pace on desegregation during his tenure on the Richmond School Board and the State Board of Education).

369. Gail L. Heriot, *Affirmative Action in American Law Schools*, 17 J. CONTEMP. LEGAL ISSUES 237, 239 n.3 (2008).

370. Friedman & Martin, *supra* note 11, at 153–54 (detailing the limitations of the Legal Model).

371. See *id.* at 154–56 (examining three studies with model variables).

372. See *id.* at 159 (explaining correctly-predicted judicial decisions are due more to the result of a court’s opinion regarding a subset of disputes than an accurately forecasting legal model).

a method of analyzing past decision-making in a very specific and well-defined legal area.³⁷³

The authors, in the studies they offer in consideration of this exception, “carefully developed a tailored legal model”³⁷⁴ that provides for a “precise hypothesis in a particular area of the law.”³⁷⁵ Applying this logic could provide for an interesting study in how the *Green* and *Swann* cases may have affected how U.S. Circuit Court judges evaluated cases regarding school desegregation. Addressing the *Rodriguez* and *Milliken* cases for this paper will not work because the case gathering ended in 1973,³⁷⁶ the year *Rodriguez* was decided.³⁷⁷ *Milliken* was decided a year later.³⁷⁸

This proposed study would be a paper in itself, but for the purposes of this Article there are enough findings to at least consider the impact anecdotally. There were sixteen federal courts of appeals cases in our study that cited *Green* from late 1968 through the year 1973. Eleven of these cases were liberal or rendered decisions for the plaintiff(s). Likewise, there were eighteen cases in the study that cited *Swann* from late 1970 through 1973. Thirteen of these eighteen cases were decided for the plaintiff(s). Eleven cases cited both *Green* and *Swann* but only slightly more than half of them (six) were decided for plaintiff(s). There were many more U.S. Courts of Appeals cases decided during this period that cited either or both *Green* and *Swann*. However, these cases were either decided by the full court due to the determined importance of the subject matter, or did not make our original study due to a lack of apparent ideology.³⁷⁹

It would be misleading to read too much into these scarce results from this paper, other than the fact that the two pro-plaintiff cases of *Green* and *Swann* were at least getting attention and provided the foundation for positive outcomes for plaintiffs to some degree. Some of the conservative decisions mentioned *Green* or *Swann* in a string cite and then explained why this line of legal thought was not controlling in the particular case or for the unique record.³⁸⁰ These cases, and the few others that

373. See *id.* at 156 (noting the Legal Model is not predictive and should only be used to examine specific areas of law).

374. *Id.* at 155.

375. *Id.* at 156.

376. In 1973, the legal profession surpassed over 100 cases decided by panels. Such decisions could be determined liberal or conservative.

377. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

378. *Milliken v. Bradley*, 418 U.S. 717 (1974).

379. The cases were procedural, for example, and offered no obvious ideological leanings.

380. See, e.g., *Pride v. Comm. Sch. Bd. of Brooklyn*, 488 F.2d 321, 326–27 (2nd Cir. 1973) (“First, appellants misconstrue the function of the compelling necessity test. Cases applying that standard invariably involve state action having a segregatory or discrimina-

cited *Green* or *Swann* and did not hold them as controlling, suggest the Legal Model, for this short period of time and for these specific cases decided in the limited legal area of school desegregation, was not being followed. Again, a study beyond these anecdotal findings is needed to truly test the Legal Model in regard to the effect of *Green* and *Swann* on decision-making and, shortly thereafter, the counter-effect from the *Rodriguez* and *Milliken* cases.

D. *Strategic Model*

The Strategic Model selected for study in this Article has three components: 1) judges want to see their policy preferences reflected in their decisions; 2) judges are deciding cases with their brethren's ideology in mind; and 3) judges are considering the institutional context in which the decisions are being made.³⁸¹

The authors of *Ideological Voting* tested two other hypotheticals besides the first that dealt with the Attitudinal Model.³⁸² The second hypothesis tested in *Ideological Voting* states:

Ideological dampening. A judge's ideological tendency, in such cases, is likely to be dampened if she is sitting with two judges of a different political party. For example, a Democratic appointee should be less likely to vote in a stereotypically liberal fashion if accompanied by two Republican appointees, and a Republican appointee should be less likely to vote in a stereotypically conservative fashion if accompanied by two Democratic appointees.³⁸³

Note that the authors of *Ideological Voting* used phrases like "stereotypically liberal" and "stereotypically conservative" throughout their ar-

tory effect. No court has applied the test where state action has had the effect and objective of reducing discrimination and segregation."); *Dowell v. Bd. Educ. Okla. City Pub. Sch.*, 430 F.2d 865, 868 (10th Cir. 1970) ("The challenge of the Plan in the trial court and as made by the appellants in this court does not persuade us that it departs from the mandate of the Supreme Court . . . It is instead sufficient to hold that the proposed Plan of the Board of Education of the Oklahoma City Public Schools . . . conforms to the requirements laid down by the Supreme Court."); *Goss v. Knoxville Bd. of Educ.*, 406 F.2d 1183, 1188 (6th Cir. 1969) ("[T]he Superintendent of Schools testified that any Negro can transfer out of a school in which his race is in the majority to a school attended by a majority of whites. This is in contrast to the freedom of choice or transfer plan condemned by the Supreme Court.").

381. See EPSTEIN & KNIGHT, *supra* note 55, at 9–11 (explaining the judicial thought processes underpinning this Model).

382. See Sunstein et al., *supra* note 8, at 304–05 (detailing the three hypotheses used in *Ideological Voting*).

383. *Id.* at 304.

ticle.³⁸⁴ The authors stated it was for the sake of simplicity, but admitted it would be “foolish to predict that Republican appointees will always vote against sex discrimination plaintiffs or in favor of challenges to affirmative action programs.”³⁸⁵ For the purposes of the school desegregation study it will become clear below that it is foolish to predict Republican-appointed justices voted stereotypically conservative on school desegregation cases, or vice versa (Democratic-appointed justices voted stereotypically liberal).

The third hypothesis tested in *Ideological Voting* states:

Ideological amplification. A judge’s ideological tendency, in such cases, is likely to be amplified if she is sitting with two judges from the same political party. A Democratic appointee should show an increased tendency to vote in a stereotypically liberal fashion if accompanied by two Democratic appointees, and a Republican appointee should be more likely to vote in a stereotypically conservative fashion if accompanied by two Republican appointees.³⁸⁶

In the case of the Strategic Model, the federal appellate judges with life tenure have several competing considerations to examine. They have their own preferences and ideology to consider, in addition to taking into account the goal of consensus (federal courts try hard to stave off dissents,)³⁸⁷ while also experiencing the outside political pressures.

In considering hypothetical two, regarding ideological dampening, the study in *Ideological Voting* found that a Republican (or a Democrat) appointee was less likely to vote in a stereotypically conservative (or stereotypically liberal) fashion if accompanied by two other Democrat (or two other Republican) appointees, on several legal topics.³⁸⁸ In our school desegregation study, however, this hypothesis did not hold well. Something I term “reverse ideological dampening” took place. Reverse ideological dampening finds a Republican (or Democrat) appointee more likely to vote in a stereotypically conservative (or stereotypically liberal) fashion if accompanied by two Democrat (or by two Republican) appointees, as long as the two other judges are non-stereotypical in regard to their particular ideology.

384. *Id.* at *passim*.

385. *Id.* at 304 n.7.

386. *Id.* at 304–05.

387. See Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821, 836–39 (2011) (demonstrating a history of justices agreeing not to outwardly disagree).

388. See Sunstein et al., *supra* note 8, at 314–18 (explaining the diminished propensity of judges to vote along partisan lines, on certain issues, when paired with two judges from a differing political background).

An example of reverse ideological dampening in practice comes from a case decided in the Eighth Circuit, *Smith v. Board of Educ. of Morrilton School District*.³⁸⁹ In this case, the appellate court was to rule on a matter the district court dismissed on its merits. The case involved an Arkansas school district arguing to continue segregation, contending black teachers did not understand the problems of white pupils.³⁹⁰ The contention was black teachers were unable to create a rapport with white students, primarily due to the inferior education they received at “Arkansas negro colleges.”³⁹¹

The plaintiffs appealed, and Justice Henry Blackmun, who later became a Supreme Court justice, wrote the opinion for the Eighth Circuit. Blackmun could at times be conservative in his opinions, but he was mostly progressive on civil rights matters.³⁹² Van Oosterhout, another Republican, would also vote for the plaintiff on civil rights matters more often than not, and Gibson was one of the conservative Democrats Kennedy could get through the Southern congress. Perhaps Gibson was best described as an “accommodationist.”³⁹³

In *Smith*, Gibson voted in a non-stereotypical conservative fashion, while Blackmun and Oosterhout voted in a non-stereotypical liberal fashion. This is an example of reverse ideological dampening, because the ideologies of many Republican and Democrat U.S. Courts of Appeals justices in the 1960s and early 1970s, especially in regard to civil rights, were atypical by contemporary standards. Starting in the mid-sixties, with the passing of the 1964 Civil Rights Act, and for years to come, large numbers of Democrats, particularly white Democrats (Dixiecrats) in the South, would leave their party when it became clear that their former party supported blacks and their causes.³⁹⁴

Another panel effect category, which is new for this paper, is called the “Ideological Homogenous” category. In this instance, there still exists one judge from one party and two judges from another party on the panel, but there does not appear to be any dampening taking place one way or the other. An example of a case that exhibits Ideological Homo-

389. *Smith v. Bd. of Educ. of Morrilton Sch. Dist. No. 32*, 365 F.2d 770 (8th Cir. 1966).

390. *Id.* at 774–76.

391. *Id.* at 780–81.

392. N.Y. TIMES, *supra* note 182.

393. David N. Atkinson & Lawrence H. Larsen, *A Case Study in Federal Justice: Leading Bill of Rights Proceedings in the Western District of Missouri*, 28 CREIGHTON L. REV. 593, 607 n.66 (1995).

394. See Lawrence J. McAndrews, *The Politics of Principle: Richard Nixon and School Desegregation*, 83 J. NEGRO HIST. 187, 188 (1998) (explaining the Southern strategy of Republicans which lured white voters away from the Democratic party).

geneity is *Louisiana State Bd. of Educ. v. Baker*,³⁹⁵ where the defendant, the Louisiana State Board of Education, contended that Louisiana state law legally allowed them to deny seven qualified black applicants admission to Nicholls State College.³⁹⁶ In *Baker*, two Democratic judges, Rives and Morgan, and one Republican judge, Wisdom, issued an order that restrained the Louisiana State Board of Education from denying the admission of the seven qualified blacks.³⁹⁷

These three judges voted based on their convictions, without any obvious indication of influence from the other judges. Two legal areas that *Ideological Voting* examined in which the composition of the panel had no influence were abortion and capital punishment.³⁹⁸ In these two areas, the justices were, according to the authors of *Ideological Voting*, voting based on their convictions.³⁹⁹ It does not take much imagination to place school desegregation into this same category, dealing with youth and their well-being and future. Therefore, it can be argued that this area of law, school desegregation, is one that can take on the characteristics of areas that transcend panel effects, as well as legal and institutional restraints.

In considering the third hypothetical tested in *Ideological Voting*,⁴⁰⁰ ideological amplification, the authors hypothesized that unified groups of three Democrat-appointed (or Republican-appointed) judges were, comparatively, far more likely to vote in an amplified “liberal” (or “conservative”) manner.⁴⁰¹ Sunstein found this hypothesis to be true for many of the legal areas he tested.⁴⁰² As previously mentioned, the contemporary liberal and conservative ideologies that Sunstein was comfortable with were not so cut and dry in the school desegregation study.

Nevertheless, there still were several cases of ideological amplification taking place with circuit judges in the 1960s and early 1970s. There were three cases with a unified Republican panel voting in a conservative manner and eight cases with a unified Democratic panel voting in a liberal manner. What should not be too surprising to the reader was the fact that there were even more occurrences of unified Republican and Demo-

395. *La. State Bd. of Educ. v. Baker*, 339 F.2d 911 (5th Cir. 1964).

396. *Id.*

397. *Id.* at 914.

398. *See Sunstein et al., supra* note 8, at 327–28 (2004) (demonstrating the domination of political ideology and minimization of panel effects for judges on the issues of abortion and capital punishment).

399. *See id.* (examining the lack of mixed-panel impact on judges in abortion and capital punishment cases because the judges were voting in-line with their values).

400. *See id.* at 304–05 (describing Sunstein’s third hypothetical).

401. *See id.*

402. *See id.* at 315.

cratic panels voting liberally and conservatively, respectfully. For the purposes of this study, this added category is called “Reverse Amplification.” Refer to Table 3 below to see the breakdown of voting in each category.

Reverse amplification transpired simply when a unified Republican panel voted in a liberal fashion or a unified Democratic panel of judges voted in a conservative fashion, or in an atypical or non-stereotypical manner.⁴⁰³ In the school desegregation study, there were eight panels of unified Republican judges who voted liberally and five panels of unified Democratic judges who voted conservatively.

An example of reverse amplification in the school desegregation study is the case *Bossier Parish School Bd. v. Lemon*.⁴⁰⁴ In this case, a school board denied black children admittance to their white school.⁴⁰⁵ On appeal to the Fifth Circuit, the panel consisting of three Republicans—Justices Wisdom, Brown, and Burger—stated that this denial was illegal because, under the Civil Rights Act of 1964, a condition of receiving federal funds was that the school district admit black students.⁴⁰⁶ Therefore, we have a unified panel of Republican judges voting liberally.

TABLE 3

Circuit	Amplification	Reverse Amplification	Dampening	Reverse Dampening	Homogeneous	Totals
4 th	3	1	0	3	2	9
5 th	7	8	1	6	13	35
6 th	1	2	3	1	4	11
8 th	0	2	3	2	5	12
Totals	11	13	7	12	24	

XI. CONCLUSION

Recall at the beginning of this Article, it was stated that the conclusion would summarize the merits of the four models, and whether any of the four models appeared to be useful in determining the decision-making process of the circuit court judges deciding the school desegregation cases of the 1960s and early 1970s.

403. The author is aware of the potentially misleading connotations of “liberal” and “conservative” when associating these terms with different eras. Here, the author is using *Ideological Voting’s* categories as a point of reference.

404. *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847 (1967).

405. *Id.*

406. *Id.* at 850–51.

It can be asserted, after conducting the school desegregation study, that there are some useful insights found in the Attitudinal Model. The Model, explained in great detail above, is one that allows judges to vote in a way that reflects their own policy preferences.⁴⁰⁷ Our study showed that there was no significant party ideological distinction across the board. Democratic appointed justices voted for school desegregation sixty-five percent of the time, compared to sixty-four percent for the Republican appointees.

The next model we studied was the Personal Attributes Model. The Model holds that judge's various experiences before they are appointed play a role in their policy preferences.⁴⁰⁸ In our school desegregation study, the decision was made to test for only three attributes: law school attended (specifically Ivy League), religion of the judge, and prior work experience.

In regard to the law school attended there may be a relationship, at least in the 1960s and early 1970s, between judges attending Ivy League law schools and having a propensity to vote liberally as a judge. In the four circuits scrutinized, there were eight justices with Ivy League juris doctorates, and six of those eight justices voted more for the plaintiff. In fact, four of the justices consistently voted for the plaintiff: Tuttle, Blackmun, McCree, and Goldberg. Both of the Ivy Leaguers who voted conservatively were in the more conservative Fourth Circuit, Justices Bryan and Haynesworth.

When considering the impact of religion,⁴⁰⁹ there were members of the traditional liberal Protestant sects, for example, the Fifth Circuit Four,⁴¹⁰ who voted liberally. There were also other members who were very conservative, such as Benjamin Cameron.⁴¹¹ There were Baptists who were conservative, Jews that were liberal, and Roman Catholics who were both conservative and liberal, but with an overall inclination toward conserva-

407. Harold J. Spaeth, *The Attitudinal Model*, in CONTEMPLATING COURTS 296, 306 (Lee Epstein, Ed., 1995).

408. Tate & Sittiwong, *supra* note 48, at 905–07.

409. As one might imagine, verifying the religious affiliations of various justices was not an easy undertaking. More than several of the associated religions were found via the Internet. The website *Political Graveyard* and online obituaries were particularly helpful. See Lawrence Kestenbaum, THE POLITICAL GRAVEYARD (Feb. 19, 2013), <http://www.politicalgraveyard.com>. In several cases, we obtained answers from living family members. In other cases, requests to the area library or historical society archives proved fruitful. A few judges could not be accurately associated with any particular religion. However, as to the judges we could associate with a religion, certain patterns did emerge.

410. Brown & Lee, *supra* note 164, at 1047.

411. FED. JUD. CTR., *supra* note 169.

tism.⁴¹² But, again, the sample size was too small to suggest a definitive correlation.

Further research would be welcome, but there is a real barrier confronting any interested potential researcher to this area. The barrier has nothing to do with the time and effort it took to garner the information in this study, but rather many people today consider their religion to be a “strictly private and personal” affair.⁴¹³ Most judges today do not readily disclose such personal details in their confirmation process, leading some scholars to think that judges now believe that religious affiliation is a strictly private matter.⁴¹⁴ Others speculate that the ever-present argument of separation of church and state influences them.⁴¹⁵

The prior work experience attributes seemed to offer the least promise of the three attributes studied. Among the small sample of fifteen judges with prosecutorial experience within the sample of thirty-eight more closely examined judges, only eight turned out to be conservative. The notion that Republican Presidents, prior to 1960, tended to appoint individuals with prior federal judging experience was accurate from the study, but with only President Eisenhower to study, our article does not provide strong support for that contention.⁴¹⁶ This is ripe for further research. There was some evidence in the study that Democratic Presidents did pick potential judges who had significant governmental (but not judicial) experience.⁴¹⁷ Refer to Table 4 below to examine exactly what prior work attributes each of the thirty-eight judges had.

What about the Legal Model? Could an attorney in 1974 anticipate the outcome of his school desegregation case based on established precedent? After conducting this analysis, the answer to this is a definite “no.” The *Brown* decisions were very important for ending segregation but they did not supply the country with any practicable means of gaining that end. Not until the *Greene* case in 1968 and *Swann* case in 1970 did the U.S. Supreme Court finally take the steps necessary to end segregation, only to lose most of the gains to *Rodriguez* and *Millikan*. In the end, the Legal Model was not helpful during the time of the school desegregation study, with the possible exception of suggesting further study on the effects of the isolated precedents of *Green*, *Swann*, *Rodriguez*, and *Millikan*

412. *Id.*

413. Gregory C. Sisk & Michael Heise, *Ideology ‘All the Way Down’? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1241 (2012).

414. *Id.*

415. *Id.*

416. D.R. SONGER, R.S. SHEEHAN, & S.B. HAIRE, CONTINUITY AND CHANGE ON THE UNITED STATES COURT OF APPEALS 28–29 (2000).

417. Yung, *supra* note 168, at 1188.

on the decision-making of judges in the 1970s. The Model is not to be used for predictive purposes.

The last model is the Strategic Model. The Strategic Model holds that judges want to vote based upon their values⁴¹⁸ and there is ample evidence to support this Model. A successful judge also needs to be cognizant of what the other judges are thinking because they will need the other judges' support to make the policy ideas they favor come to fruition.⁴¹⁹ The judge will also need to be aware of the institutional restraints such as precedent and outside political pressures.⁴²⁰ Sometimes judges desire to vote more liberally or conservatively, but restraints will inhibit them from doing so.⁴²¹ There were cases in the South of federal district judges, who lived in the very area their rulings would take effect, voting for desegregation and suffering terrible consequences.⁴²² Circuit court judges, most of the time geographically removed from the areas in dispute, were largely removed from this type of peril.

The second and third hypotheticals in *Ideological Voting* are not attitudinal because they go beyond the policy preference of the individual judge.⁴²³ They represent the aspect of a strategic model in which a judge is aware and sensitive to what the other judges are thinking.⁴²⁴

Is the school desegregation study explained by the Strategic Model? We must consider the numbers. Fourteen of the 103 cases analyzed had a dissenting opinion. There were twenty-four cases that fell under the "ideological homogenous" category indicating judges' lack of consideration of other judges' views. If the twenty-four ideological homogeneous decisions⁴²⁵ are added to the fourteen dissenting decisions, there are thirty-eight of 103 decisions, equaling thirty-seven percent of all cases that show an open disregard for what other judges were doing with their vote. Per-

418. EPSTEIN & KNIGHT, *supra* note 55, at 9–10.

419. *Id.* at xiii.

420. *Id.* at xiii.

421. Daniel M. Katz, *Institutional Rules, Strategic Behavior, and the Legacy of Chief Justice William Rehnquist: Setting the Record Straight on Dickerson v. United States*, 22 J.L. & POL. 303, 309–10 (2006).

422. See, e.g., Benjamin V. Madison, *Color-Blind: Procedure's Quiet but Critical Role in Achieving Racial Justice*, 78 UMKC L. REV. 617, 637–39 (detailing the terrible suffering Federal District Court Judge Skelly Wright went through in Louisiana while deciding civil rights cases).

423. Sunstein et al., *supra* note 8, at 304–05.

424. *Id.* at 303 (stating "a judge's likely vote is influenced by the other two judges assigned to the same panel").

425. None of the opinions under the category "ideological homogenous" penned a dissent.

haps Justice Griffin Bell best described the atmosphere at the time when he said there is no collegiality—every judge went in her own direction.⁴²⁶

The Legal Model is one institutional restraint that can be part of the third component of the Strategic Model chosen for this study, but this Article has already contended that in totality, the Legal Model is lacking. Political institutional restraints from the outside can be another form of institutional restraint, but it seemed as though the pressures and intimidation were concentrated more on the federal district court judges in the South, as opposed to their higher court brethren. The Personal Attributes Model was interesting, and some attributes appeared to have a correlation, but the sample size was too small to be definitive. This may be an area for more research with a bigger sampling size.

Of the four models studied in this Article, the Attitudinal Model is the most useful in using the available data to determine the judges' decision-making. The school desegregation voting did not support hypothesis two or three of the Sunstein paper. Therefore, school desegregation could have been the type of legal area that tended to make judges vote based upon their convictions, rather than be swayed by other factors.

What can we learn from this Article that can be applied to today's legal world? First, connoting a political party with a particular ideology may work in the short run, but it may not work well when applying it to a different historical era. The period of the 1960s through the early 1970s represents a different era when the two main political parties were not solely identifiable with being either liberal or conservative. There were liberal Republicans and conservative Democrats. Things certainly have changed since that era, and the author of the popular book *What's the Matter with Kansas?: How Conservatives Won the Heart of America*, depicts how the country, over the last thirty years, has shifted right, stating that "vast reaches of the country have gone from being liberal to being stoutly conservative"⁴²⁷

Without getting into the causes for the most recent shift and other previous ideological shifts in our country's history,⁴²⁸ there certainly does

426. Allison H. Lee, William W. Shakely, & J. Robert Brown Jr., *Judge Warren L. Jones and the Supreme Court of Dixie*, 59 LA. L. REV. 209, 210 (1998).

427. THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS?: HOW THE CONSERVATIVES WON THE HEART OF AMERICA* 19 (2005).

428. *See generally* LEWIS GOULD, *GRAND OLD PARTY: A HISTORY OF THE REPUBLICANS* (2003) (charting the Republican Party's history from its roots in the abolitionist movement of the 1850s to the present day); MORTON KELLER, *AMERICA'S THREE REGIMES: A NEW POLITICAL HISTORY* (2007) (discussing various political periods in American history); JULES WITCOVER, *PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS* (2003) (discussing the Democratic Party's history, from its origins in the founding of the United States, all the way to the current iteration of progressivism espoused by the party).

seem to be a cyclical aspect to both parties' ideological beliefs.⁴²⁹ This will need to be taken into consideration for future research. A corollary worth mentioning is that the influence of political party ideology on judges' decision-making is a phenomenon that has existed for a very long time. One need look no further than the *Marbury* case and Chief Justice Marshall's policy-laden decision to recognize this to be true.⁴³⁰

What else can we learn from this study? I suggest the use of the Attitudinal and Personal Attributes Models for historical empirical research. The Attitudinal Model was the most effective because it clearly laid out the fact that Republican-appointed judges deciding the school desegregation cases in the 1950s and 1960s basically were just as liberal as the Democratic-appointed judges at that time, at least in regard to voting on school desegregation cases. I would encourage those interested in using the Attitudinal Model in their research to do so.

The Personal Attributes Model was surprising in the correlations it showed. There seemed to be some correlation between the law school a judge attended and his ideology (at least for the Ivy League law school graduates). I suggest that more research be done with a bigger pool of judges and that future studies go beyond the Ivy League to test private versus public law schools, or top law schools in the top twenty-five of the *U.S. News and World Report* rankings versus law schools ranked lower (perhaps below the second tier).⁴³¹

There did seem to be some religious correlation for liberal Protestants and Jewish judges to vote liberally. The Baptists, and to a lesser extent, the Catholics, tended to be more conservative. In regard to the judges' prior work environment, there were correlations, but not as distinct as with the other two attributes studied. Prior to 1960, Republican-appointed circuit judges with a history of being a federal district judge did have a better chance of being appointed. Prosecutors, more often than not,⁴³² turned out to become conservative justices, and while both President Johnson and President Kennedy readily chose people who had worked in the government, so did President Eisenhower at even a greater rate, so Yung's theory did not apply well to this era. My suggestion is for future researchers to closely examine the Personal Attributes Model and test it against larger pools of judges.

429. See Ackerman, *supra* note 82 (stating that liberal Republicanism is cyclical throughout United States history).

430. See *Marbury v. Madison*, 5 U.S. 137 (1803).

431. This presupposes USNEWS rankings are of objective value.

432. Eight of the fifteen judges who were former prosecutors were conservative.

TABLE 4

<u>Judge</u>	<u>Circuit</u>	<u>DOB + Location</u>	<u>Law School</u>	<u>Prior Experience</u>	<u>Pros. Exp.</u>	<u>Political Party of Nominating President</u>	<u>Religion</u>	<u>Number of Cases Decided</u>	<u>Ideological Score</u>
Ainsworth, Robert	5th Circuit	May 10, 1910. Gulfport, MS	Loyola University of New Orleans, 1932	Private Practice; Federal Government; State Government; Federal Dist. Judge	No	D; LBJ	Baptist	3	-0.33
Bell, Spencer	4th Circuit	April 1, 1906. Charlotte NC	UNC 1930	Private Practice; State Government	No	D; JFK	Methodist	4	0
Bell, Griffin	5th Circuit	October 31, 1918; Americus, GA	Mercer University Law School, 1948	Private Practice; State Government; Federal Government	No	D; JFK	Baptist	7	0.14
Blackmun, Harry	8th Circuit	November 12, 1908. Nashville, IL	Harvard, 1932	Federal Judiciary; Private Practice	No	R; DDE	Methodist	3	-1
Borenman, Herbert	4th Circuit	September 21, 1897. Middlebourne WV	West Virginia University, 1920	Private Practice; State Judge; State Government; Federal Government; Federal Dist. Judge	Yes	R; DDE	Presbyterian	6	0.34
Bright, Myron	8th Circuit	1919. Eveleth, MN	University of Minnesota, 1947	Federal Government; Private Practice	No	D; LBJ	Jewish	3	-0.33
Brown, John	5th Circuit	December 10, 1909. Funk, NE	University of Michigan, 1932	Private Practice; Federal Government	No	R; DDE	Presbyterian	11	-1

Bryan, Albert Vickers	4th Circuit	July 23, 1899; Alexandria, VA	UVA Law, 1921	Private Practice ; Federal Dist. Judge	No	D; JFK	Episcopalian	3	1
Cameron, Benjamin	5th Circuit	December 14, 1890. Meridian, MS	Cumberland University, 1914	Private Practice; Federal Government	Yes	R; DDE	Episcopalian	2	1
Cecil, Lester	6th Circuit	November 21, 1893. Miami County, OH	University of Michigan, 1917	Private Practice; Local Government; Local Judge; State Judge; Federal Dist. Judge	Yes	R; DDE	Methodist	3	1
Coleman, James	5th Circuit	January 9, 1914, Ackerman, MS	George Washington University, 1930	Private Practice; State Government; State Judge	Yes	D; LBJ	Baptist	7	-0.14
Dyer, David	5th Circuit	June 28, 1910. Columbus, OH	Stetson University Law School, 1933	Private Practice; Federal Government; Federal Dist. Judge	Yes	D; LBJ	Methodist	4	-1
Edwards, George	6th Circuit	August 6, 1914. Dallas, TX	Detroit College of Law, 1949.	Federal Government; Private Practice; Local Government; State Judge; State Government	No	D; JFK	Episcopalian	4	-0.5
Gewin, Walter	5th Circuit	December 9, 1908. Nanafaha, AL	University of Alabama, 1935	Private Practice; State Government	Yes	D; JFK	Presbyterian	8	0
Gibson, Floyd	8th Circuit	March 10, 1910. Prescott, AZ	University of Missouri Columbia, 1933	Private Practice; State Government; Federal Dist. Judge	No	D; LBJ	Catholic	4	0

Godbold, John C.	5th Circuit	March 24, 1920; Coy, Alabama	Harvard, 1948	Federal Government; Private Practice; Federal Judiciary; Academia	No	D; LBJ	Episcopalian	3	-0.33
Goldberg, Irving	5th Circuit	June 29, 1906; Port Arthur, TX	Harvard, 1929	Private Practice; Federal Government	No	D; LBJ	Jewish	4	-1
Haynsworth, Clement	4th Circuit	October 31 1912, Greenville, SC	Harvard, 1936	Private Practice; Federal Government	No	R; DDE	Episcopalian	3	0.33
Heaney, Gerald	8th Circuit	January 29, 1918. Goodhue, MN	University of Minnesota, 1941	State Government; Federal Government; Private Practice	No	D; LBJ	Catholic	3	-1
Ingraham, Joe	5th Circuit	July 5, 1903. Pawnee County, OK	National University Law School, 1927	Private Practice; Federal Government; Federal Dist. Judge	No	R; RMN	Presbyterian	4	-1
Jones, Warren	5th Circuit	July 2, 1895. Gordon, NE	University of Denver, 1924	State Government; Private Practice	Yes	R; DDE	Undetermined	3	-1
Lay, Donald	8th Circuit	August 24, 1926. Princeton, IL	University of Iowa, 1951	Federal Government; Private Practice; Academia	No	D; LBJ	Methodist	3	-1
Matthes, Marion	8th Circuit	January 29, 1906. DeSoto, MO	Read Law, 1928	Private Practice; Local Government; State Government; Academia	Yes	R; DDE	Presbyterian	5	-1

McCree, Wade	6th Circuit	July 3, 1920. Des Moines, IA	Harvard, 1944	Federal Government; Private Practice; State Judge; Academia; Federal Dist. Judge	No	D; LBJ	Unitarian	4	-1
Miller, William	6th Circuit	February 3, 1908. Johnson City, TN.	Yale, 1933	Private Practice; State Judge; Federal Government; Federal Dist. Judge	No	R; RMN	Methodist	5	-0.66
Morgan, Lewis	5th Circuit	July 14, 1913. LaGrange, GA	University of Georgia, 1935.	Federal Government; Private Practice; State Government; Local Government; Federal Dist. Judge	No	D; LBJ	Presbyterian	3	-1
O'Sullivan, Clifford	6th Circuit	December 8, 1897. Chicago, IL.	Notre Dame, 1920.	Private Practice; Federal Dist. Judge	No	R; DDE	Roman Catholic	6	0.66
Peck, John	6th Circuit	June 23, 1913. Cincinnati, OH	University of Cincinnati, 1938.	Private Practice; Federal Government; State Judge; Federal Dist. Judge	Yes	D; LBJ	Episcopalian	4	0.5
Phillips, Harry	6th Circuit	July 28, 1909. Watertown, TN	Cumberland University, 1933	Private Practice; State Government; Federal Government	Yes	D; JFK	Baptist	6	0.33
Rives, Richard	5th Circuit	January 15, 1895. Montgomery AL	Read Law, 1914	Private Practice; Federal Government	No	D, HST	Presbyterian	7	-0.43
Simpson, John Milton	5th Circuit	May 30, 1903; Kissimmee, FL	University of Florida, 1926	Private Practice; State Government; State Judge; Federal Government; Federal Dist. Judge	Yes	D; LBJ	Undetermined	6	-1

Sobeloff, Simon	4th Circuit	December 3, 1894; Baltimore, MD	University of MD, 1915	Private Practice; Local Government; State Government; State Judge; Federal Government	Yes	R; DDE	Jewish	5	-0.2
Thornberry, William	5th Circuit	January 9, 1909. Austin, TX	University of Texas, 1936	Private Practice; State Government; Federal Government; Local Government; Federal Dist. Judge	Yes	D; LBJ	Methodist	5	-0.6
Tuttle, Elbert	5th Circuit	July 17, 1897. Pasadena, CA	Cornell Law School, 1923	Federal Government; Private Practice	No	R; DDE	Episcopal	6	-1
Van Ossterhout, Martin	8th Circuit	October 10, 1900. Orange City, IA	University of Iowa, 1924	Private Practice; State Government; State Judge	No	R; DDE	Reformed Church	4	-0.5
Vogel, Charles	8th Circuit	September 20, 1898. Star Lake, MN.	University of Minnesota, 1923	Federal Government; Private Practice; Federal Judiciary; Federal Dist. Judge	No	D; FDR	Episcopalian	4	-0.33
Weick, Paul	6th Circuit	August 25, 1899. Youngstown, OH	University of Cincinnati, 1920.	Private Practice; Federal Dist. Judge	No	R; DDE	Undetermined	5	0.2
Wisdom, John	5th Circuit	May 17, 1905. New Orleans, LA	Tulane Law School, 1929	Federal Government; Private Practice; Academia	Yes	R; DDE	Episcopal	20	-1