

DOUBLE AGENTS: AN EXPLORATION OF THE MOTIVATIONS OF COURT OF
APPEALS JUDGES

DISSERTATION

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ABSTRACT

Judges of the United States courts of appeals represent a unique class of American political actors. While their subordinate status to the Supreme Court might be expected to make them faithful agents of the Supreme Court, other components of their environment might be expected to counteract the pressure to execute the wishes of the Supreme Court. The broader question of the motivation of the court of appeals judges lies at the heart of this project. I argue that previous work on court of appeals judges has not devoted sufficient attention to the possible variety of goals of court of appeals judges and the means they use to accomplish those goals.

Using reversal of court of appeals decisions by the Supreme Court, I subject to empirical test three competing explanations for the motivations of court of appeals judges. I argue that judges might consider policy goals or goals related to making good law. If they choose to follow policy goals, they may attempt to do so using sincere or strategic means. Looking at two different units of analysis, I test hypotheses designed to test for the presence of three types of behavior. I follow up by looking at the relationship between the Ninth Circuit Court of Appeals and the Supreme Court as an illustration of the potential implications of different types of behavior by court of appeals judges.

My findings provide support for the argument that scholars should consider the possibility that court of appeals judges attempt to accomplish multiple goals and do so using multiple means. This suggests that a reexamination of the assumptions previously held by researchers who study the courts of appeals may want to be more explicit about the nature of their research and more careful when discussing the implications of their results.

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CHAPTER 1

INTRODUCTION

In 1996, the Fifth Circuit Court of Appeals, in *Hopwood v. Texas*, declared that the admissions system used by the University of Texas School of Law constituted reverse discrimination and was therefore unconstitutional. The rationale of the majority suggested that the Supreme Court's decision in *University of California Regents v. Bakke* (1978) was no longer good law. In *Bakke*, the Court had narrowly concluded that universities could use racial preference programs to permit schools to enhance diversity in pursuit of academic freedom. Justice Powell, in what may be considered *dicta*, speculated that programs that gave minorities a "plus" in admissions would meet the strict scrutiny test which should be applied to policies which treat members of different races unequally. The most interesting aspect of the Fifth Circuit's decision was its complete rejection of Justice Powell's reasoning in *Bakke*. Judge Jerry Smith, writing for the majority, concluded:

We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than

facilitates, the goals of equal protection...No case since *Bakke* has accepted diversity as a compelling state interest under strict scrutiny analysis...[R]ecent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny. Foremost, the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs.

The findings of the Fifth Circuit stand in marked contrast to a recent Sixth Circuit decision, *Grutter v. Bollinger*, concerning the constitutionality of the affirmative action program used by the University of Michigan Law School, which closely resembles the program under scrutiny in *Hopwood*. The Sixth Circuit case, heard *en banc*, concluded that the affirmative action program used by Michigan was constitutional and did not violate the Equal Protection Clause of the Fourteenth Amendment. Indicative of the degree to which the two circuits differ is the majority's assessment of the applicability of *Bakke* to the Sixth Circuit case: "Justice Powell's opinion constitutes *Bakke*'s holding and provides the governing standard here...Because this court is bound by Justice Powell's *Bakke* opinion, we find that the Law School has a compelling state interest in achieving a diverse student body."

Affirmative action in higher education remains one of the most compelling political issues of the day, but the Supreme Court has maintained its silence on the issue for over twenty years. While the possibility remains that the Supreme Court will finally address the issue this term (Greenhouse, 2002)¹, as it stands now the US courts of appeals are the highest courts to address the issue. In at least two other circuits, the Ninth and Eleventh Circuits, the issue has also forced court of appeals judges to deal with the conflicting constitutional claims and policy perspectives embedded in affirmative action programs. One might interpret the conflicting decisions of the Fifth and Sixth Circuits as

evidence that court of appeals judges do decide cases according to their views on public policy: the Sixth Circuit majority consisted of judges appointed entirely by Democrats, while the minority consisted of three Republican appointees and one Democratic appointee, Ronald Lee Gilman.² *Hopwood* was decided by three Republican appointees, and when the entire Circuit was asked to review the panel decision, seven judges, six Democratic appointees and one Republican appointee, dissented from denial of rehearing *en banc*. One would expect Democrats to be, on average, more supportive of affirmative action programs, and the judges here conform to these patterns.

One might also conclude that the judges differ on a legal question—the precedential value of Justice Powell’s *Bakke* opinion. If judges are trying to make good law, they would be looking to follow the Supreme Court’s guidance on the issue. While Justice Powell considered diversity of opinion a suitable justification for affirmative action programs in an educational context, more recent Supreme Court decisions outside of the educational context have contended that the only possible justification for affirmative action programs is remedying past wrongs. The Court adopted this perspective in *City of Richmond v. J.A. Croson Co.* (1989), but it was a position explicitly rejected in the educational context by Justice Powell in *Bakke*. As the opinions in both *Hopwood* and *Grutter* indicate, the Supreme Court’s precedents on affirmative action in higher education suggest competing conclusions.

¹ On December 2, 2002, the Supreme Court agreed to hear *Grutter v. Bollinger* and its companion case, *Gratz v. Bollinger* (2002 U.S. Lexis 8677).

² The lead dissent, authored by Danny Boggs, a Reagan appointee, even accuses two judges of the majority of suppressing the case until two Republican appointees, Alan Norris (Reagan) and Richard Suhrenreich (Bush I), took senior status.

The struggles court of appeals judges have with issues like affirmative action in the absence (or even presence) of Supreme Court guidance suggest the attraction of studying their behavior. Because the Supreme Court can only hear a small fraction of the cases tried in the lower courts, intermediate appellate judges, both state and federal, serve a very important function and have considerable opportunity to shape the development of both law and public policy. That courts of appeals do not have the formal control over their docket that the Supreme Court does means that the courts of appeals have the final say on most cases that reach them. This may free them to decide cases differently from how they would if the possibility of review were greater. Despite their importance, court of appeals judges have escaped the degree of scrutiny given Supreme Court justices. There may simply be more appeal to studying the most influential policymakers in the national system, and the relative availability of evidence on the workings of the Supreme Court may enhance the attractiveness of studying Supreme Court justices.

But the important role played by court of appeals judges suggests that study of their motivations and how they accomplish their goals could shed light on a broad set of issues of interest to political scientists. For example, study of court of appeals judges offers the opportunity to answer questions of how judicial institutions can be designed to maximize different goals, including efficiency, accountability, and degree of access to the society they serve. Even more broadly, court of appeals judges occupy an important place in a hierarchy that allows them to serve as both principals and agents. Accordingly, study of court of appeals judges has implications for the design of institutions beyond judiciaries.

My research question is considerably narrower: given the environment of court of appeals judges, what goals do they have and how do they seek to accomplish those goals? I attempt to integrate the arguments in literature that crosses disciplines, as both legal academics and political scientists have attempted to ascertain what motivates appeals court judges and what means they use to accomplish those goals. The answer to this question provides the opportunity to assess the possible contributions of the views of both political scientists and legal scholars. Both have developed views of circuit judges that share substantial components, but the two differ to some degree as well. Integrating the two views may provide a clearer picture of the true range of options available to court of appeals judges and a more complete understanding of the possible ranges of behavior options available to lower court judges.

It is possible to discern from the pattern of the behavior of court of appeals judges what motivates their decisions. For example, there are several possible explanations for the divergent results reached in *Hopwood* and *Grutter*. But there also theories of behavior for circuit judges that suggest that the two different panels should have reached similar results. The differing results, then, would seem to rule out the possibility of some theories of appellate judge behavior, while confirming others. But I also argue that the decisions made by court of appeals judges can vary: they are not permanently locked into one behavioral mode. Even if individual judges choose a particular mode of behavior, other judges may choose an alternative mode. Acknowledging the possibility of diverse motivations remains a shortcoming of the extant literature, and it is one that I hope to correct with my study.

1.1 Overview

Court of appeals judges operate in a fundamentally different decision environment from Supreme Court justices and federal district judges. In essence, they represent features of both levels: their status as appellate judges leaves them free to answer questions of law and policy and not of fact, but their lack of control over their docket also exposes them to pressures Supreme Court justices, particularly in the past several years, have not felt. Every other hierarchical relationship in the federal judiciary and many hierarchical relationships in state court systems are much closer than the relationship between the courts of appeals and the Supreme Court. As a result, understandings about the relationship between the two courts may not be applicable to other hierarchical relationships in the judiciary.

All of this amounts to saying that court of appeals judges are unique and that their decision-making environment, while containing familiar components, is a special case that merits study because of the important role they play in the federal judiciary. It should not suggest that any findings about what motivates court of appeals judges can not be generalized. More properly, because court of appeals judges are so unique, what we learn about court of appeals judges can enhance our understanding of the constraints and opportunities provided by the institutional setting that they occupy. Accordingly, study of court of appeals judges can facilitate both explanation and prediction of the interaction of the goals of political actors and how institutions shape those goals. As scholars and policy makers become increasingly interested in the proper role of an independent judiciary in stable governments, we can learn from studying not only the highest courts

but also their subordinates in successful systems. The same forces that insulate Supreme Court justices from political pressure may increase the exposure of lower court judges to such pressures. If, for example, lower court judges in other nations lack the security of life tenure that is granted to judges of those nations' highest courts, then political influence may enter the system through lower court judges. One of the goals of my research is to isolate the consequences of certain aspects of the institutional structure in which US court of appeals judges operate.

The focus of new institutionalism in political science has centered on the interplay between actors' preferences and the institutional design that channels those preferences. One of the greatest appeals of the study of politics is the endogenous nature of political institutions—actors can manipulate the design of institutions to increase the likelihood of a given outcome. Studies of the federal judiciary are replete with examples of this type of logic—Landes and Posner (1976) argue that an independent judiciary, the most important feature of which is life tenure for appointees, allows elected officials to make deals with interest groups that have higher value because they can be enforced by an independent third party. But judges themselves may manipulate institutional structure to serve their own goals. Though Congress established the broad outlines of jurisdiction for the federal judiciary, the courts of appeals have long used a series of informal devices to winnow the cases on which they must expend resources. Though these reforms have been made with the ostensible goal of dealing with the increasing workload of the appellate judiciary (see, e.g., Hellman, 1990), they also have implications for the policy output of the federal appellate judiciary.

All of this makes the assumption that court of appeals judges *respond* to changes in the environment, an assumption commonly associated with strategic behavior. But court of appeals judges, like other political actors, may not be as sensitive to their environment as some research suggests. In fact, the assumption that court of appeals judges are strategic actors is little more than an assumption, having eluded, for the most part, a proper test. One could argue that court of appeals judges have little or no reason to act strategically, as their accountability to the public, Congress or the Supreme Court is, at best, limited. At the same time, despite the limited accountability, court of appeals judges may still act as if that accountability constrains their behavior. If that is the case, then we would have reason to believe that court of appeals judges do behave strategically.

My goal is to test some of the assumptions about the behavior of court of appeals judges. It is possible that because of the diversity of situations court of appeals judges encounter in the cases they face, they use a more complex set of goals and means than are traditionally ascribed to them. More fundamentally, the mix of goals and means they deploy varies as cases and actors change. I suggest judges have both legal and policy goals and use both strategic and sincere means to accomplish those goals. I endeavor to develop a broader vision of behavior of court of appeals judges by separating goals and means, and then propose specific tests for the presence or absence of the different mixes of aims and objectives as the environment around judges changes.

1.2 Theory

1.2.1 Goals of Court of Appeals Judges

The first decision made by court of appeals judges when choosing how to decide a case is to decide what goals to pursue. This is an issue which is generally considered irrelevant when studying the Supreme Court. To some degree or another, political scientists agree that the only relevant motivation for Supreme Court justices is the desire to enact their policy preferences—their views about what constitutes good public policy. This argument may not be generalizable to other groups of judges. Judges on other courts have different role orientations from Supreme Court justices. For Supreme Court justices, there are no reasons they can not enact their policy preferences and there are very few reasons why they should not (Peretti, 1999).

While court of appeals judges, like Supreme Court justices, may pursue policy goals, lower court judges may be more likely to have goals that are separate from their policy preferences. Because of the nature of the cases and the workload of court of appeals judges, goals related to making good law independent of policy preferences likely become more important as the cases become more routine and the caseload increases. Both of these features describe the nature of decision making for the vast majority of cases that are processed by the courts of appeals. Carp and Stidham (1996) note that the vast majority of cases appellate judges review are cases where the primary task of the court of appeals panel is to correct the errors made at the lower court level. As a consequence, even though judges on a panel may disagree ideologically, their individual decisions on a given case may be similar simply because of the

uncontroversial nature of the decision. Alternatively, their preferences may suggest that they vote differently from their colleagues, but the workload related to writing a dissent or a desire to reach consensual outcomes may discourage following the behavior their preferences suggest (Dubois, 1988). One of the important implications of this function of appellate decision-making is that goals not traditionally ascribed to judges with control of their own docket become far more important when docket control is removed and the caseload becomes far more routine.

Two aspects of routine error correction militate against the dominance of policy goals: first, the lack of real policy questions suggests that judges' policy goals will not assist in making decisions. Second, even if cases presented real policy choices, judges may prefer to follow goals related to quality of life if the policy implications of a particular decision could have repercussions on the ability of a judges, panels, or circuits to process an entire portion of their docket. While judges may, as a matter of policy, oppose the good faith exception to the exclusionary rule, to implement this in decisions would create intra-circuit disagreement requiring review by the entire circuit or the Supreme Court and might encourage litigants who would not otherwise seek relief from the court of appeals to attempt to do so, increasing the number of cases the court has to hear. In short, there are a number of situations where legal goals, those related to creating clear and consistent law that also facilitate efficient processing of cases, may take precedence over a judge's policy goals.

Perhaps due to their focus on the Supreme Court, political scientists have not paid much attention to the relevance of non-policy goals for judges at lower levels. As Baum

(1997) suggests, though, the diversity of goals increases as one moves down the judicial hierarchy. For court of appeals judges, this likely means that legal goals are of some importance. The evidence for the relevance of such goals is both normative and empirical, though it tends to be provided more by legal scholars than political scientists. Caminker (1994a) argues that the “doctrine of hierarchical precedent” dictates that “the deciding court must fairly apply the superior court’s precedent even if the deciding court believes it to be wrongly decided” (3). At issue for Caminker is not whether lower courts should obey superior courts, but whether they should adopt a proxy or precedent model when doing so. The proxy model suggests that inferior judges should substitute their calculations of the superior court’s ultimate disposition of a case for their own, or, more clearly, for an earlier decision by a superior court that may no longer be valid. The precedent model simply argues that an inferior court should apply relevant earlier reasoning to the case at hand and not attempt to guess the present predisposition of the superior court. One of the advantages of the precedent model is that it allows the superior court to see how a decision might be reached using the existing framework. If inferior court judges use the proxy model to make decisions, the superior court only sees how the case is decided according to their preferences, depriving the superior court of a source of information. Cross and Tiller (1998), in what may be a self-serving characterization of the legal literature on court of appeals judges, assert that “much of the scholarship simply assumes the sincere application of legal doctrine without considering the possibility that it may at times be nothing more than a convenient rationalization for political decision-making” (2156).

There is also evidence that the nature of appellate decision-making is, as a practical matter, influenced by the need to pursue legal goals. As the workload of court of appeals judges has grown, outstripping the occasional addition of judgeships, the courts have responded through a variety of intramural reforms, including denial of oral argument, unpublished opinions, and increases in support staff to facilitate processing of appeals (Baker, 1994). These reforms come in response to a system that, as a consequence of the increasing workload, has increased the inconsistency and unpredictability of the appellate process (Hellman, 1999).

In short, reforms, including proposals to address the oversized Ninth Circuit, represent awareness by both judges and legal scholars of the need to provide means to process cases quickly and fairly (U.S. Congress, 1998). These goals are important enough to suggest that they may routinely take precedence over policy goals. Despite the importance of these goals, political scientists have generally failed to incorporate this dimension of judicial behavior into their portraits of court of appeals judges.

There is, however, ample reason to suspect that a model of behavior of court of appeals judges should include the possibility of non-policy goals. Gibson (1978) suggests that, for a lower court judge, role orientation, or “a psychological construct which is the combination of the occupant’s perception of the role expectations of significant others and his or her own norms and expectations of proper behavior for a judge” intervenes between the preferences and behavior (917). In other words, lower court judges are constrained by what they feel it is proper and possible for a person in their situation to do. This suggests that, to varying degrees, all lower court judges are

constrained in their actions, but the degree to which their role orientation alters the preference-behavior relationship likely varies depending on a judge's location in the hierarchy. For court of appeals judges, it is likely to introduce a different set of goals, separate from those related to making policy. Judges of the courts of appeals may also be expected to have goals related to making good law.

The distinction between legal and policy goals is a difficult one to make, in part because it is so rare in discussions of the motivations of judges that are relevant to their decision-making behavior. Baum (1997) suggests that legal goals consist of clarity and accuracy. The former is related to "clear and consistent interpretation of the law", while the latter refers to "accurate interpretation of the law" (58). Most importantly, one would expect judges pursuing legal goals to occasionally diverge from their policy preferences: while there are circumstances that would allow the two to produce the same behavior, the desire to craft clear and accurate law might also dictate that judges' behavior diverge from their policy preferences. Even then, it is not clear what kind of behavior represents pursuit of legal goals. In terms of clarity, clear law and consistent law might be two different things. Clear law would presumably be that which is easy to interpret (and might, due to ease of interpretation, be consistently applied across judges and cases). Consistent interpretation of the law suggests that judges should interpret the law the same way it has been interpreted previously, so as to ensure harmonious application. The most obvious implication of this would be to follow precedent: one would assume that judges concerned solely about consistent application of the law would seek to apply extant precedent in the most faithful way possible.

Accurate interpretation of the law proves even more difficult to distinguish than clarity, in part because what passes for accuracy may simply be a cover for policy preferences. That is, if judges want to “get it right” in terms of doing what the law seeks, they may simply be guided by what they see as right in terms of outcome. If accuracy is independent of previous interpretations of the law or of the facts in a case, it becomes nearly impossible to distinguish a desire to accurately interpret law from a desire to enact policy preferences. That said, accuracy may also closely resemble an adherence to precedent: if judges tend to believe that previous interpretations of the law were accurate (but did not produce the ideologically “correct” result), they would continue to follow that precedent. The problem arises, of course, in interpreting deviation from the precedent—does such deviation suggest a desire to accurately interpret the meaning of the enacting legislature or does it suggest a desire to move the law closer to one’s policy preferences?

Some of the confusion may be eased by attempting to assess what judges’ baseline goals are and if that baseline varies across judges (variation within a judge across cases would also be possible, but that would be deviation from the baseline, not deviation of baselines). It seems safe to say that Supreme Court justices have as their baseline, a policy-oriented baseline: their first inclination in any case is to pursue their goals related to making public policy and may, on occasion, deviate from that baseline for a series of reasons (see, e.g., Hausegger and Baum, 1999). Working backward from the preferences of Supreme Court justices, we can posit that court of appeals judges may have the same baseline. Most recent Supreme Court justices were court of appeals judges

and it would be difficult to imagine that Supreme Court justices suddenly developed their policy preferences. It seems fair to expect that court of appeals judges have policy preferences and would like to act on them if possible. At the same time, one might expect one of the conceptions of legal goals to dominate and pursuit of policy preferences to represent a deviation from that baseline. If, as some court of appeals judges suggest, the workload dominates their environment (Klein, 1996), then their baseline motivation may be to simply make it through the cases they must decide in order to, as Posner so delicately puts it, “maximize their leisure time” (1987).

I argue that it is more likely that the predominant mode of court of appeals decision making revolves around a desire to enact policy preferences. Almost any other motive attributable to court of appeals judges fails to explain the prestige of people who accept appointments to the courts of appeals. It is difficult to argue that people choose to become court of appeals judges because it is a good job with better-than-average job security. In all likelihood, a combination of ambition (perhaps for the Supreme Court), the desire to gain or refine prestige, and the opportunity to influence policy (which, admittedly, could be legal or ideological) represent the reasons people seek or accept appointments to the courts of appeals. It is hard to imagine that appointees accept and keep their jobs simply because they enjoy the day-to-day barrage of work which accompanies their job. If they liked deciding cases, they could be trial judges. If they like the law, they need not leave private practice or their positions as law professors. While the regular business of the courts of appeals may require the most time, it is the

opportunity to shape the law and the policy that stems from that law that make being a court of appeals judge an attractive position.

If one accepts the argument that court of appeals judges are interested in shaping policy outcomes, it becomes possible to assess the restraints and opportunities that shape their ability to translate their decisions into policy. From this perspective, the desire to make good law, while an important goal, is a secondary consideration and may be one pursued where judges are not interested in shaping policy or see making good law as a higher priority than attempting to shape policy. It may be the case, for example, that judges are not particularly concerned about the ideological content of policy on search and seizure, but prefer to see that defendants are treated fairly and that the law is interpreted so as to accurately reflect the wishes of the Framers regarding the Fourth Amendment. This would shift a judge into a legal-oriented framework instead of one dominated by policy considerations.

Related to this might be concerns about workload. Judges have developed a series of intramural reforms (Baker, 1994) to help sift through appeals so they can concentrate their efforts on those they view as truly meritorious. Judges' concerns about efficiency are related to the desire to create consistent law: consistent interpretations facilitate efficient processing of cases. If there is little uncertainty about how a given panel (or an entire circuit) will dispose of a claim on appeal, district courts (and administrative agencies whose decisions are reviewed by the courts of appeals) will be able to easily determine the rule in their circuit. Consistent law would, for the same reason, discourage appeals because losing parties would know that appealing would be a

waste of scarce resources. Judges, then, might prefer to act in favor of developing good law, but one would only expect this type of behavior in cases where the judge decides that the cost of departing from their policy preferences is sufficiently low to encourage the development of good law. This may also happen when judges decide that the value of making good law exceeds the value that might be accrued from acting in accordance with their policy preferences. What is not clear is the conditions under which either of these situations might occur.

1.2.2 The Means Used to Accomplish the Goals

The second decision that judges face is what means should be used to accomplish the goals they have chosen. At this decision node, the choices are more clear: judges can accommodate the responses or anticipated responses of other actors or they can simply choose to behave according to their true preferences. At this point, some clarification of terms is necessary. “Strategic” means that an actor maximizes his or her expected utility in any situation. The most important implication of strategic behavior is that actors consider the potential responses of other actors before making their decisions. While this may suffice as a minimal definition of strategic action, its implications remain unclear. In studies of the Supreme Court, strategic behavior generally has two components: strategic interaction amongst the justices and strategic behavior with respect to other actors in the political system, including Congress, the executive, and the public (Murphy, 1964; Epstein and Knight, 1998). To these two audiences, a third can be added for court of appeals judges, who are likely to be concerned about the response of the Supreme Court to their decisions. Indeed, it is extremely unlikely that court of appeals judges

would be worried about potential responses by any one other than the Supreme Court—very few of their decisions attract attention beyond the legal community, with only the Supreme Court capable of regularly generating a response by Congress or anyone else.

Using the same terms, “sincere” behavior would be that which directly reflects an actor’s preferences and does not take into account the potential responses of other actors which might alter the policy output. This conception of sincere behavior suggests that the actors’ preferences map directly to their actions, regardless of what others may do. This conception of behavior is also one familiar to the judicial behavior literature: much of the study of Supreme Court justices still relies on the attitudinal model (Segal and Spaeth, 1993; 2002) and the evidence of a strong relationship between the preferences of Supreme Court justices and their actions is nearly irrefutable.

It is important to acknowledge that both strategic and sincere behavior are possible, as the two are often thought of as mutually exclusive concepts. One version of sincere behavior considers it a form of strategic behavior: actors consider the possible payoffs and decide they can maximize their expected utility by behaving in a manner that is consistent with their true preferences: they need not adjust their behavior to the other players in the game. This can happen under two sets of circumstances. First, the players accrue considerable utility from playing their preferred positions. In this scenario, even if the probability of reaching an outcome where their preferred positions become policy is somewhat low, the expected utility of playing this strategy remains high.

Second, even if the utility of playing sincere preferences is not that much greater than departing from sincere preferences to avoid alteration by other players, the

probability of other players altering the outcome may be sufficiently low as to allow court of appeals judges to pursue their sincere preferences. Both of these behaviors would be indistinguishable from what may be called “naïve” behavior, where an actor behaves as if there are no other actors in the game. Because they all produce the same behavior, it would not be possible to ascertain which of the three generates decisions that map directly to policy preferences. This problem can be thought of in terms of the behavior of Supreme Court justices. Justices may behave according to their preferences because they get some utility from expressing their preferences, or because they do not see reversal of a given decision by Congress as a very likely occurrence.

Judicial behavior literature, like the rest of American politics, has been deeply affected by the division between sincere and strategic behavior. The strong body of evidence in favor of sincere judicial behavior can be traced back at least to Pritchett (1948), who, in his analysis of the votes of the Roosevelt Court, concluded “the Supreme Court of the United States always has been and, so long as it retains its present powers, always will be a political institution” (16). By scaling the justices on their votes on nonunanimous cases, Pritchett demonstrated that the justices could be labeled, with considerable reliability, on a liberal-to-conservative scale. Doing so provided important evidence that justices were not simply deciding cases by objectively applying relevant law to the facts of a particular case, but were using their ideological predispositions to guide their behavior on individual cases.

This rejection of the so-called legal model was an important step forward for understanding judicial behavior, and it has served as the foundation for a substantial

portion of the modern literature on judicial behavior. Some scholars (e.g. Schubert, 1962; Rohde and Spaeth, 1976; Segal and Spaeth, 1993) have studied votes of justices and made the argument that they can be explained by the ideology of the justices. As it has developed, this approach has been called the attitudinal model, which centers around the belief that “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices” (Segal and Spaeth, 1993, 65). Perhaps the greatest appeal of the attitudinal model is its explanatory power: no other factor seems to better explain how the justices divide on cases than their ideological leanings.

The attitudinal model has been applied to court of appeals judges as well. Though debates still carry on about proper measures of the preferences of court of appeals judges, something resembling a consensus seems to have emerged that ideology, measured in a variety of ways, can explain some portion of the votes made by court of appeals judges. Some of the first work on applying the attitudinal model to court of appeals judges was done by Goldman (1966, 1975). He suggested that while demographic variables proved to be poor indicators of the voting history of judges, party of appointing president, a proxy for ideology, did prove to provide some leverage in predicting the liberalism or conservatism of judges’ decisions. Perhaps the most robust finding comes from Pinello’s (1999) study of the relationship between party of appointing president and voting behavior by circuit judges. He performed a meta-analysis of studies that assess the correlates of court of appeals voting and argues that “the most cautious conclusion from the meta-analysis about the relationship between judges’ political party affiliation and

their ideology is that there is a relationship: Democratic judges are indeed more liberal than Republican ones” (240). The correlation between party and voting behavior by court of appeals judges may prove reassuring to presidents whose nominees are expected to vote in a particular way, but it also provides evidence for the link between preferences and behavior that is so evident in studies of Supreme Court voting. Leaving aside for the moment the issues of the robustness, reliability and validity of using party of appointing president as a measure of a judge’s ideology, the finding that court of appeals judges use their policy preferences as a guide provides important evidence for the possibility that court of appeals judges can pursue ideological goals through sincere means.

While attitudinalists focus overwhelmingly on the votes of justices, the behavior that precedes the votes can be considered at least as important as the final votes on a particular case. It is these other behaviors that recent literature on which judicial behavior has focused. Walter Murphy, in his seminal work, *The Elements of Judicial Strategy* (1964), developed the argument that justices on the Supreme Court need to consider the potential responses of their colleagues and the broader political community when reaching their decisions. Because justices must marshal a majority to have a genuine opportunity to influence policy, they must find ways to obtain “at least four, and hopefully eight, additional votes for the results he wants and the kinds of opinions he thinks should be written in cases important to his objectives” (37). Even more challenging may be convincing actors in other institutions to acquiesce. In a system of separated and shared powers, the judiciary needs to recognize the degree to which its legitimacy relies on decisions that can be enforced by the other branches. Since some

decisions require positive action by Congress (and the president) and the remainder require at least acquiescence, one of the most important tasks of justices is walking the fine line between what they prefer and what they can accomplish.

Murphy's work has more than a few modern disciples. Perhaps the most fundamental change in the study of judicial behavior is the emergence of a new type of data. Using archival evidence and diaries, scholars have started to look at how coalitions form in the Supreme Court and how those coalitions achieve a final position. Spriggs, Maltzman and Wahlbeck (2000), looking at the opinion writing process, contend that "justices care about more than just the final disposition of a particular case...the strategic model also suggests that justices--as rational actors--put considerable care into their tactics for shaping the Court's final opinions" (93). Because justices have the opportunity to write opinions that can have far-ranging implications, scholars have correctly realized that there is more to judicial behavior than voting. Looking at process evidence has also brought judicial behavior literature into a debate about how to interpret justices' behavior. A central tenet of the attitudinal model has been that Supreme Court justices, almost unique among American political actors, have the opportunity to act sincerely on their policy preferences: because they are essentially unaccountable to any specific audience and reversal of their rulings by Congress or the president is nearly impossible, they need not act strategically to accomplish their policy goals. This position was articulated most clearly by Segal (1997), who argued that, especially given the option of deciding cases on constitutional (as opposed to statutory) grounds, Supreme Court justices answer to no audience but their own conscience.

Epstein and Knight, in *The Choices Justices Make* (1998), have developed some of the most convincing arguments against the contention that justices are free to act sincerely to implement policy. They make arguments very similar to those articulated by Murphy: that justices must adapt to the preferences of their colleagues in order to marshal a majority and that much of the Court's influence on policy depends on institutional prestige, which the Court, both collectively and individually, must preserve in order to maintain its influence on policy. Epstein and Knight contend that "justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act" (10). At the core of their argument is that the Supreme Court does not have the power or wherewithal to make policy unilaterally and depends on the compliance of the other branches.

The important argument made by Epstein and Knight follows that made by Murphy: when assessing strategic behavior, one must consider the audience. While the evidence is mixed that justices act strategically with respect to the other branches (Spiller and Gely, 1992; Segal, 1997), there seems to be considerably more evidence that justices act strategically with respect to one another. The same, it seems true, would hold for judges on the courts of appeals. For them, the relevant audience is other judges, which means colleagues as well as members of the Supreme Court. Since a decision by court of appeals judges may face the additional step of review by the Supreme Court, the likelihood of their acting strategically would be greater than it is for Supreme Court justices.

That said, the likelihood of review and reversal of court of appeals decisions by the Supreme Court has declined for some time. In the fiscal year ending on September 30, 1999, the courts of appeals terminated 26,727 appeals on the merits, of which 9,924 were disposed of after oral argument (Mecham, 1999). In its October 1999 term, the Supreme Court reviewed 86 cases from the courts of appeals (Spaeth, 2000), or .3% of the cases decided on the merits by the courts of appeals. It seems plausible to contend that the threat of reversal, which is somewhat smaller than the likelihood of review, may not always encourage court of appeals judges to act strategically.

Nonetheless, scholars have also uncovered evidence of strategic behavior by appeals judges. For example, Songer (1987) argued that judges responded to ideological changes in the Court—as the Court became more conservative, so did court of appeals decisions. Though judges appointed by Republican presidents were more responsive to the Court’s conservative turn in 1971, judges appointed by presidents of both parties adjusted their behavior according to the Court’s shift in preferences. Songer, Segal and Cameron (1994) provided additional evidence of court of appeals responsiveness to changes in the Court’s membership. As appointees by Nixon, Ford, Reagan and Bush reshaped the Warren Court into a much more conservative body, court of appeals judges (themselves part of a more conservative judiciary) responded by behaving more conservatively. This finding is augmented by the work of Cameron, Segal and Songer (2000), who find that court of appeals judges endeavor to avoid Supreme Court review of their decisions. Employing a signaling model, where the Supreme Court can review the signal sent by the court of appeals decision, but at a cost, they find that, in some cases,

lower court judges make their decisions based on the anticipated response by the Supreme Court.

The Supreme Court is not the sole constraint on court of appeals judges. From the strategic perspective, court of appeals judges are also constrained by their colleagues. Van Winkle (1996) argues that court of appeals judges who are preference outliers in their circuits are concerned about the prospect of *en banc* review and reversal, and may cloak their true preferences when in the minority on a three-judge panel. Given a temporary ideological majority, though, they can exploit their status by voting in line with their ideological preferences. Cross and Tiller (1998) argue that a combination of the Supreme Court and fellow appellate judges shape the decisions made by court of appeals judges. Looking at DC Circuit obedience to the Supreme Court's doctrine of deference to agency statutory interpretation,³ Cross and Tiller contend that panels that consist entirely of Republican appointees are less likely than panels that consist of two Republican appointees and one Democratic appointee to diverge from the *Chevron* doctrine. They conclude that this suggests court of appeals judges comply *more* with Supreme Court opinions in the presence of a "whistleblower", a judge whose vote could signal to the Supreme Court that the panel's decision diverges from the Supreme Court's preference. All of this suggests that court of appeals judges are sensitive to the preferences of both their colleagues and the Supreme Court, but only under certain conditions.

Deviation from policy preferences can not be easily interpreted as strategic behavior. Such deviation may be the result of a decision to pursue legal goals instead of

policy. If, for example, the outcome dictated by good law and a judge's sincere preferences diverge, a vote consistent with the outcome of good law may also represent the result of a judge's calculations of the response by fellow panel members, the circuit, or the Supreme Court. It should be the case, however, that deviation from policy preferences that does not serve the interests of clear or accurate law is likely evidence of strategic behavior. If, for example, a judge's behavior clearly departs from his preferences and from existing precedent, then the remaining possibility is strategic behavior in pursuit of policy goals.

1.2.3 Combining Goals and Means

To this point, I have argued that a judge makes two decisions: first, which set of goals to pursue and, second, what means to use to accomplish those goals. A decision tree would look like this:

[Figure 1.1 here]

The most important feature of this is that I argue that once judges decide to pursue legal goals, they do not have a choice of what means to use to accomplish those goals. In significant part, this is because I find it difficult to imagine what a choice of means would look like at this node. Sincere behavior in service of legal goals seems straightforward: a judge has some conception about what makes for clear and accurate law and behaves in accordance with that conception. Strategic behavior in pursuit of legal goals is also possible: if the objective is to move the final outcome closer to what judges believe good law is, they may compromise between their position and what they perceive to be the

³ *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* (1984)

position(s) of the relevant actors. The problem is ascertaining how this type of strategic behavior differs from strategic behavior in service of policy goals.

At one level, judges' preferred positions if they are interested in making good law on a case are likely different from their preferred positions on the policy dimension, even if they can be mapped on to the same line (or space). In reality, particularly on an issue-by-issue basis, it becomes extremely difficult to map the preferred position of the relevant actors, especially as all of them may have two preferred positions—one along a legal dimension and one along a policy dimension. There are other indicators of strategic behavior, and this project, like nearly all other work on strategic behavior by judges and justices, will rely on those other indicators. I generally interpret evidence of strategic behavior as evidence of strategic behavior in pursuit of policy goals.

It is worth noting that the possibility certainly exists that judges will deploy strategic means in pursuit of legal goals. For example, judges concerned about making good law may endeavor to provoke a response by the Supreme Court to a decision, perhaps by creating a conflict with another circuit. Doing so would increase the chance the Supreme Court will establish a national standard, even if that standard is different from what they may prefer. That is, they may prefer a national standard (to one that varies from circuit to circuit) over what their preferred outcome may be on a policy dimension and may behave strategically to accomplish this goal.

The fundamental problem with acknowledging this possibility is that I can not think of a way in which the observed behavior of judges pursuing legal goals *strategically* would differ from the observed behavior of a judge pursuing legal goals

sincerely. If judges are concerned about making good law, the two types of behavior are either irrelevant (a choice of means is not a decision that can be made) or indistinguishable (the choice of means does not produce observably different outcomes). This leaves us with the following typology:

[Figure 1.2 here]

Rasmusen (1998) posits a series of possible goals for trustees, like judges and central bankers: public servants not exposed to the whims of the electorate (thereby removing reelection as a goal) or able to profit personally from their actions. He suggests that these goals can be classified as the “Five Ps”: policy, pride, place, power and principle (7-8). While place (the perks accorded to being a judge) and power certainly matter, it is difficult to conceive of these as varying amongst judges in ways that is relevant to their decision-making behavior.⁴ The remaining terms match up well with my conception of the possible behaviors of court of appeals judges.

The possibility of these three types of behavior should frame any study of behavior of court of appeals judges. I attempt to demonstrate that this is not generally true in the extant literature in political science and in the legal community. The overwhelming tendency is to assume one mode of behavior, though some studies test for the presence of one or two of the behaviors. Generally speaking, though, very little work starts assumption-free and attempts fair tests of all three types of behavior.

⁴ One could certainly argue that a desire to accrue more power affects the decisions judges make, particularly if they aspire to the Supreme Court (which many of them undoubtedly do). But this ambition likely does not vary significantly across judges. In addition, it is extremely difficult to ascertain *how* ambition might affect the choices judges make. Some may decide to appear more moderate than they really are because they figure a president would want a confirmable nominee. Others might feel they are better off appearing more extreme than they really are, figuring a president would want to make a stand when choosing a nominee. Both strategies have their strengths and weaknesses and likely depend on the political environment at some unknown future time. I assume that these ambition-induced

1.3 Chapter Outline

The picture of court of appeals judges that emerges from the literature, then, closely resembles how we conceive of Supreme Court justices. While the attitudinal model continues to receive strong theoretical as well as empirical support, the emerging rational choice revolution has already left its mark on our conceptions of the behavior of justices and judges. This controversy has shaped debates on judicial behavior, but it is not the only complication faced by those who study court of appeals judges. In addition to the debate over means, there remains no clear conception of what goals drive the decisions court of appeals judges make. One of the weaknesses of political science literature is the ignorance of goals related to legal policy that likely play an important role in how judges on the courts of appeals decide cases. The challenge of any research is to distinguish situations where different goals and different means will produce different behavioral outcomes.

Chapter 2 explains how I use Supreme Court reversal of court of appeals decisions to uncover trends in the behavior of court of appeals judges. I argue that the predictability of Supreme Court reaction to court of appeals decisions allows judges on lower courts to behave in ways that either decrease or increase the likelihood of reversal, and that these behaviors represent certain manifestations of the modes of behavior outlined in this chapter. Because looking directly at the behavior of court of appeals judges poses a series of problems, I suggest that an alternative approach may shed light on the goals of court of appeals judges and the means used to accomplish them.

behaviors cancel each other out.

Chapter 3 will begin the quantitative analysis of patterns of reversal. I develop and test hypotheses related to the different types of behavior. Each behavior mode—sincere policy, strategic policy, legal—would suggest different patterns of reversals. In a way, this chapter and the next chapter generalize the example of the Fifth and Sixth Circuits’ affirmative action decisions. As the example notes, different types of behavior would be expected from liberal and conservative judges, depending on what goal is relevant to their decision and how they choose to achieve that goal. More generally, if certain patterns of indicators predict an increased or decreased likelihood of reversal, then it is possible to infer what those patterns represent for the motivations of court of appeals judges.

Chapter 4 analyzes how court of appeals judges respond to change in the external environment. I compare two periods of recent Supreme Court history, one of substantial membership and ideological change and one of membership and ideological stability. If different indicators predict reversal in the different periods, we can infer that judges behave in different ways when the Court is in flux than when the Court is relatively stable.

Chapter 5 takes a closer look at one of the more interesting phenomena in the relationship between the courts of appeals and the Supreme Court. The Ninth Circuit, which covers most of the western United States, persistently has more reversals than any other circuit. Part of this is attributed to the sheer size of the circuit, but observers generally agree that the Ninth Circuit is also one of the most liberal circuits in the country. With few exceptions, this phenomenon has escaped rigorous analysis by

political scientists. I hope to apply my theory of judges' goals and means to the problem of the Ninth Circuit to assess, with some rigor, the patterns of reversal of Ninth Circuit decisions.

I expect no single piece of evidence to be dispositive of any part of my argument. Instead, I seek to assemble evidence from three separate yet related analyses of reversal of court of appeals decisions to assess if there is any evidence of a dominant form of behavior of court of appeals judges or if some combination of the three behavior modes best explains the choices court of appeals judges make when confronted with cases. Overall, the contribution I hope to add is that of testing for the presence of more than one mode of behavior, not proving that a particular type of behavior dominates the decisions of court of appeals judges.

1.4 Conclusion

The decisions of Court of appeals judges are almost certainly constrained by the institutional structure within which they operate. But the degree of influence of these constraints has never been clearly understood. If court of appeals judges desire to enact their policy preferences into law, what, if anything, prevents them from doing so? Do they really desire to behave according to their policy preferences to the degree political scientists assume, or are other goals relevant? Answers to these questions can be sought by looking at which court of appeals decisions are reversed by the Supreme Court. In order to expand understanding of the motivations of court of appeals judges, all of the motivations that might prove relevant to their behavior must be considered. It is my hope

that the theoretical framework outlined in this chapter and the empirical framework outlined in the next prove capable of accomplishing this task.

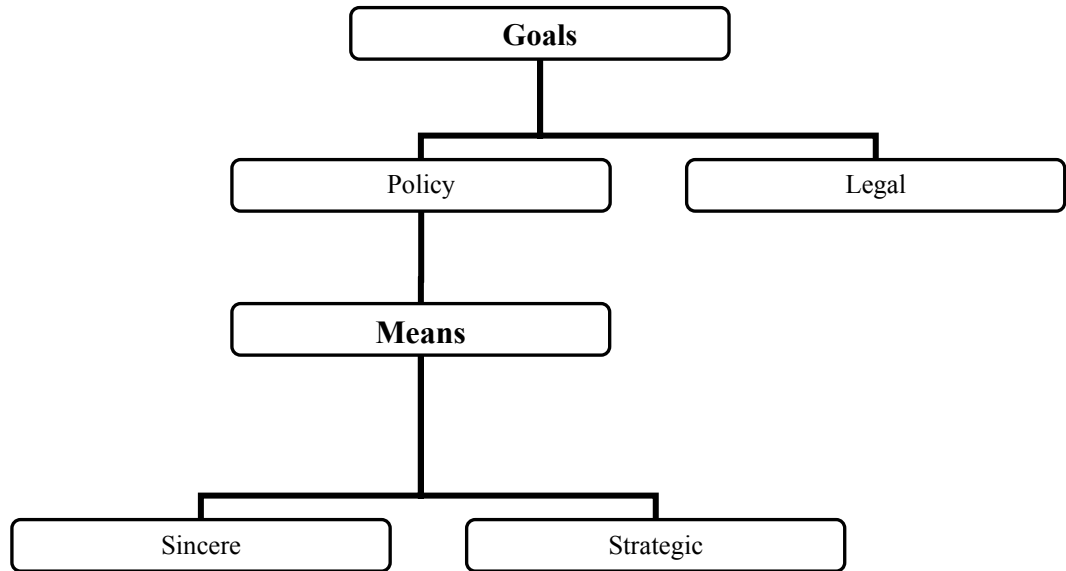


Figure 1.1: Order of Decisions Made by Court of Appeals Judges

	SINCERE MEANS	STRATEGIC MEANS
POLICY GOALS	Principle	Policy
LEGAL GOALS	Pride	

Figure 1.2: Typology of Judge Behaviors

CHAPTER 2

USING REVERSAL TO EXPLAIN COURT OF APPEALS JUDGES' BEHAVIOR

Supreme Court cases are often viewed by scholars of judicial behavior in isolation, but they are really the culmination of a series of decisions made by judges and litigants. How the Supreme Court disposes of cases (denying cert, reversing, or affirming) can offer insight into the choices made not only by the justices but also the choices made by the actors at other stages of the case. From one perspective, most every decision made in every federal court in the United States can be thought of as influenced by how the Supreme Court sees the state of the law. When lawyers decide to settle cases or try them, when judges make decisions to include or exclude evidence, and when a decision is made to appeal or not appeal an adverse outcome, the Supreme Court and its preferences always lurk in the background. If we treat the behavior of the Supreme Court as predictable, then its decisions can shed light on choices made by the litigants and judges whose decisions ultimately bring a case to the Supreme Court. Most importantly, Supreme Court reversal of court of appeals decisions can provide scholars of judicial behavior with interesting insights into the motivations of court of appeals judges.

2.1 The Logic of Using Supreme Court Reversal

One can infer from the Supreme Court's treatment of court of appeals decisions back to the actions of the judges on the lower court. If the court of appeals judges know the preferences of the Supreme Court (either individually or collectively), then they know how to avoid or invoke Supreme Court review. For example, under a conservative Supreme Court, liberal court of appeals judges know that their decisions are more closely scrutinized than those of conservative judges (Cameron, Segal and Songer, 2000; Spitzer and Talley, 1998). Accordingly, in a particular case, liberal judges know they can reach a conservative result with relatively low probability of review or reversal. But they can reach a liberal result with a higher probability of reversal. They may do this because the *absolute* probability of reversal is still quite low and there is an opportunity to influence policy, not to mention the immediate reward of reaching a result consonant with their policy preferences. Knowing how the Supreme Court disposes of a case and the sincere preferences of the judges who participated in the decision would allow us to infer something about the decisions made by the court of appeals judges in a given case. While the Supreme Court only reverses a very small fraction of court of appeals decisions, information about what motivated the judges of the lower courts can still be gleaned from both Supreme Court action and Supreme Court inaction.

It may seem unorthodox to use the behavior of one actor to study the motivations of another, but it is a relatively common tactic employed in the social sciences, particularly when interpreting the behavior of a particular actor or class of actors proves difficult. As I suggested in the previous chapter, it is often difficult to ascertain the

motivations behind the decisions made by court of appeals judges, in part because in most circumstances, different motivations may produce similar results. Looking at Supreme Court disposition of lower court cases offers an opportunity to separate the motivations that produce the behaviors.

2.1.1 Factors That Affect the Supreme Court's Decision to Grant Review

Modeling predictors of reversal of court of appeals decisions by the Supreme Court revolves around the assumption that the Supreme Court reverses cases it finds ideologically unacceptable. But understanding the Supreme Court's decision to reverse cases involves understanding the entire decision-making process of the justices. This means that one must incorporate both stages of the Court's process, as different factors can affect the decision to grant review from the decision to affirm or reverse a lower court decision. Factors that increase the likelihood of granting review increase the chances of a case being reversed.

Work on the justices' certiorari voting has identified two classes of factors that guide the voting decision. Justices tend to vote to grant review on cases they think they will win at the merits stage and vote to deny review if they think they will lose at the merits stage. These aggressive grants and defensive denials suggest that the justices calculate the expected outcome on the merits when they are voting to grant or deny review (Boucher and Segal, 1995; Caldeira, Wright, Zorn, 1999). Related to this is the ideological outcome of the lower court decisions. Conservative justices who are part of the Court's majority would be more likely to grant review to liberally decided lower court decisions, knowing they are more likely to be able to achieve a majority than their liberal

colleagues and because doing so accords with their preferences. Beyond this policy-oriented voting, there is considerable evidence that the justices also take cases to resolve conflicts among lower courts. In fact, some of the concern about the declining caseload of the Rehnquist Court is that a lower case load may leave circuit conflicts unresolved (Hellman, 1995). The Court itself occasionally notes that it grants certiorari to review conflicts between circuits (Stern, Gressman and Shapiro, 1986).

2.1.2 Factors That Affect the Supreme Court's Decision to Reverse

These factors only matter to the extent that cases that are more likely to be reviewed by the Supreme Court are more likely to be reversed. The crux of the Supreme Court decision to reverse lies in the ideological content of the lower court decision. If the only goals relevant to the decisions of the Supreme Court are their policy preferences, it follows that *the Supreme Court reverses lower court decisions that are ideologically incorrect*. Justices committed to pursuing their policy preferences are most likely to reverse decisions they find ideologically repugnant and affirm decisions that they feel represent the best opportunities to generalize from one circuit to the entire nation. Justices, particularly those that have the ability to shape the agenda, can grant review to cases they feel were wrongly decided below and have the opportunity to correct those lower court decisions by reversing them. For example, conservative justices, particularly if they control the *certiorari* voting, would be more likely to reverse liberal court of appeals decisions than conservative ones. This may represent a different way of considering the impact of lower court decisions on Supreme Court justices. Political scientists, to some degree affected by the path-breaking work of Glendon Schubert

(1962), have considered the facts of the case as a stimulus (*j*-point) and the justices' response as conditioned by their policy preferences (an *i*-point). My perspective amounts to adding the lower court's decision to the case facts. From this viewpoint, the relevant decision is not to decide in a liberal or conservative manner, as it was for Schubert, but to affirm or reverse the lower court decision.

The Supreme Court's behavior pattern along these lines is clear to lower court judges, and they can adjust their behavior accordingly if they choose to do so. If judges know a conservative Court is going to reverse liberal decisions, then they can incorporate the possible reaction of the Supreme Court into their decisions if they choose to do so. Taking this factor into account does not necessarily mean that court of appeals judges decide differently from what they might otherwise prefer, but in some circumstances it might. More generally, the Supreme Court's predictable treatment of lower court decisions means that court of appeals judges have some information about how the Supreme Court will react to their decisions and can adjust their behavior to discourage (or encourage) reversal if they wish.

The contention that Supreme Court reversal offers insight into the motivations of court of appeals judges assumes away a critical step in the process of cases making it to the Supreme Court; litigants who find themselves frustrated with the result of a lower court decision do not always appeal that decision to the Supreme Court. As a result, cases that might otherwise be reversed by the Supreme Court may never be heard by the Court, which has no power to force a review of a lower court decision. That said, litigants, like other actors in the judicial system, are rational and realize that, if there

appears to be a fair chance that the Supreme Court will take a case, it is worth the expense involved in filing an appeal. For the highest profile cases, interest groups will have assumed a fair amount of the costs of litigation by this point. For the lowest profile cases, *in forma pauperis* petitions, the cost to the appellant is generally only the time required to write the petition, something which most convicted criminals have in abundance. For the overwhelming number of cases that fall in the middle, one would expect litigants who feel the expected utility of appealing (cost of the petition x likelihood of review) exceeds accepting the declaration of the circuit court to appeal their cases.

This assumption is more rigid than is in fact the case. With rare exception, court of appeals judges make their decisions on the case prior to the decision by the litigants to appeal. As long as there is a chance either party will appeal, the judges making the decision do so knowing there is the possibility that the case will be appealed. It seems unlikely that judges will favor one side over the other simply on the grounds that one party would appeal the decision while the other would not. I do, however, argue that judges may base their decisions on the anticipated response of the Supreme Court.

2.1.3 Previous Research

Using the relationship between lower courts and the Supreme Court as a method of studying the behavior of court of appeals judges is not without precedent. However, the work that has used this relationship has focused on lower court reaction to Supreme Court reversal, which allows direct analysis of the judges' votes. Nonetheless, the findings merit some review, at least in part because the strengths and weaknesses of using

this approach have never been clearly developed. A surfeit of literature deals with lower court reaction to Supreme Court decisions and assesses the extent compliance or noncompliance by judges on the lower court reflect their policy preferences or abandonment of those preferences in favor of adopting the position dictated by the Supreme Court. While earlier work suggested that the general response was unconditional compliance, recent literature suggests that may not be the case. Much of the earlier work on compliance (Baum, 1994; Pacelle and Baum, 1992; Songer, 1987; Songer and Sheehan, 1990) argues that the appeals courts generally follow the movement of the Supreme Court quite closely, both in ideological tenor and specific applications of standards established by the Supreme Court. That said, the compliance was not uniform: Democratic-appointed judges, for example, did not appear to respond to a conservative trend in labor law cases during the Burger Court.

Broader work on patterns of compliance also suggests that courts of appeals judges respond to changes in the Supreme Court. Songer and Haire (1992) and Songer, Segal, and Cameron (1994) look at two areas of law—obscenity and search and seizure respectively—and conclude that appeals court judges are sensitive to both doctrinal and membership change in the Supreme Court. Songer and Haire focus on doctrinal change, while Songer, Segal and Cameron focus on the effect of membership change in the Supreme Court. Neither clearly account for membership changes on the courts of appeals, which may be driving the effect they observe⁵. All told, little of the research on compliance appears to closely track the myriad of possible influences on the decisions

⁵ Songer and Haire include dummy variables for the appointing president, so this has the effect of tracking change, at least to some degree as, for example, Reagan appointees replace judges appointed by Presidents Nixon and Ford.

court of appeals judges make. Cross and Tiller (1998) incorporate the preferences of the Supreme Court and the assumed preferences of court of appeals judges when looking at the DC Circuit responses to the *Chevron* decision. Recent attempts to increase the scope of research on judicial compliance (Cameron, Epstein, Segal, 2001) are almost certain to bear fruit in developing a broader understanding on the circumstances under which judges either comply with or defy the Supreme Court.

In addition, there are reasons to expect that court of appeals judges *should* comply with Supreme Court precedent. Caminker (1994a) suggests that “lower court obedience to the Supreme Court precedent is driven by Article III’s command of a centralized decisionmaker within a system of decentralized access, coupled with the values of interpretive uniformity” (866). Lower court judges should comply with Supreme Court precedent because doing so recognizes the supremacy of the Supreme Court and ensures that litigants in different districts and different circuits receive the same justice. While judges *should* comply with Supreme Court dictates, this is not to say they actually do.

The advantage of looking at compliance with Supreme Court decisions is that it allows a more direct assessment of the behavior of court of appeals judges. One simply looks at the vote of the judge in the wake of the Supreme Court decision, or one can look at the opinion written to assess the degree to which it complies with the guidelines laid down by the Supreme Court. While this approach has the virtue of looking directly at a judge’s behavior to ascertain the motivations of lower court judges and the means they use to accomplish them, it has the fundamental weakness of limiting the scope of cases available for study. This is not merely an issue of fewer data points: the issue is the

representativeness of the cases that can be studied. Cases dealing directly with issues recently decided by the Supreme Court are not a random sample of the work done on the courts of appeals. More important, there is a smaller opportunity for judges to make policy in these cases: if the courts of appeals are going to follow Supreme Court directives in any set of cases, it will be these. The lowered opportunity to follow one's own policy preferences, either sincerely or strategically, would suggest that the findings of any study of compliance would downplay a judge's interest in making policy in accordance with ideological goals.

Every research project involves tradeoffs. For the question that attracts my interest, ascertaining the scope of goals that are relevant to judges' decision making behavior, and how they accomplish those goals, it seems important to look at the decisions *prior* to Supreme Court disposition, where judges are aware of the possibility of reversal, but that is simply one component of their broader decision environment and affects all of the decisions they make. The sacrifice I make is that I have to make an inference from the Supreme Court disposition of a case to the behavior by the lower court judges that provoke the response.

2.2 An Illustration

The feasibility of this approach may become clearer with an illustration. As mentioned before, the Fifth and Sixth Circuits disagree on the constitutionality of affirmative action in higher education. The Supreme Court declined to review the Fifth Circuit decision, creating an uncomfortable state of affairs where affirmative action in higher education is constitutional in some states, while not in others. This is not a

particularly uncommon phenomenon, as the circuits occasionally adopt conflicting policies and the Supreme Court may let the disagreements exist for quite some time (see, e.g., Klein, 2002). But affirmative action is such a high-profile issue that the Sixth Circuit may have forced the hand of the Supreme Court. But by looking at the two different decisions of the lower courts, and by knowing the preferences of the lower court judges and those of the Supreme Court, and whether the Supreme Court reversed the case or not, we can find some evidence of the goals pursued by the court of appeals judges and how they choose to accomplish those goals.

The Fifth Circuit judges that decided *Hopwood*, all Republican appointees, are more likely to be opposed to affirmative action programs than their Democratic colleagues. In addition, as the Fifth Circuit represents more conservative states (Texas, Louisiana, Mississippi), one might expect the Republican appointees to that circuit to be even more conservative than Republican appointees in more liberal states. Looking at the voting records of the judges of the Fifth Circuit in comparison to the other circuits between 1980 and 1996, the Fifth Circuit was the third most conservative circuit over that time period (the Seventh and Eighth are more conservative), with 30.1% of the decisions decided in the Court of Appeals database (Songer, 1996—referred to hereafter as the Songer database) being liberal. The nationwide average over that time period is 37.3%. Looking at the judges on the Fifth Circuit, for judges who have more than 10 signed opinions, only one, Patrick Higginbotham, has fewer liberal opinions (6.7%) than the author of the *Hopwood* decision, Jerry Smith (8.3%). All of this is to say that it would be

reasonable to infer that Judge Smith opposes, as a matter of public policy, affirmative action in higher education.

If the Fifth Circuit panel was interested in pursuing its policy preferences sincerely, they would be expected to issue a sweeping repudiation of *Bakke*. If they were pursuing their policy goals strategically, they would not likely behave any differently: knowing the Supreme Court has its own concerns about affirmative action, albeit expressed in other contexts, a conservative panel need not worry about Supreme Court reversal. If, however, the judges of the Fifth Circuit had been trying to make good law, the outcome would likely have been quite different: in the absence of a clear directive to do so, lower court judges should avoid overruling Supreme Court precedent (Caminker 1994a; 1994b), though as noted in Chapter 1, they rejected the notion that Powell's opinion had precedential value.

A liberal panel, like that in the Sixth Circuit, the third most liberal circuit over the period of 1980 to 1996, making liberal decisions 43.7% of the time (the Third and DC Circuit were the only more liberal circuits), might behave differently. Assuming for the moment that their policy preferences would run in favor of preserving affirmative action (and it is an *en banc* decision), then their behavior under sincere policy preferences might more closely resemble an attempt to make good law. Both behavior types suggest that the court of appeals uphold the *Bakke* decision and the University of Michigan's affirmative action program. The behavior mode that would produce a different type of behavior for liberal judges would be strategic pursuit of policy goals. If the judges of the Sixth Circuit were concerned about the Supreme Court's express reservations about the

Bakke decision, particularly its reliance on diversity as a justification for affirmative action programs, then they would have at least acknowledged some of the Supreme Court's concerns. These options are summarized in Figure 2.1:

[Figure 2.1 here]

Observing the behavior in the cells of Figure 2.1 requires reading the decision of every case, knowing the preferences of both the Supreme Court and the court of appeals, and the state of the law in a given field. Most importantly, it requires that we know how to fill in the cells of Figure 2.1. But using Supreme Court reversal of decisions provides leverage that might not otherwise be available.

It is possible to distinguish the different types of behavior using reversal. In this situation, a conservative judge is most likely to be reversed when pursuing legal goals, and a liberal judge is *least* likely to be reversed when strategically pursuing policy goals. Perhaps most important, by knowing the judges' sincere preferences and whether the Supreme Court reversed a decision, we can infer something about the goals the judge was pursuing. We may not be able to observe a distinction between each of the three goals simply because the behavioral implications of two goals may be indistinguishable, but we can, in this particular case, separate one type from the others. For the judges of the Fifth Circuit, had the Supreme Court reversed *Hopwood*, they most likely would have been engaged in the pursuit of legal goals. For the judges of the Sixth Circuit, the Supreme Court's *failure* to reverse would most likely mean the judges had engaged in strategic pursuit of their policy goals. These options are highlighted on Figure 2.2.

[Figure 2.2 here]

The point of this example is to demonstrate the leverage reversal gives on the decisions made by court of appeals judges. While it is extremely difficult to ascertain what goals a judge seeks to accomplish when writing an opinion, incorporating Supreme Court preferences via reversal of a decision enables distinguishing amongst the possible outcomes the different views suggest. In the case of affirmative action, had the conservative panel's decision been reversed, it would most likely have been because the panel was trying to follow precedent that the Supreme Court no longer considered valid. No approach, direct or indirect, could separate sincere and strategic pursuit of policy in this context, because both types of behavior produce equivalent outcomes. But the absence of reversal suggests that one of the two was used and this has the virtue of eliminating one possible mode of behavior without looking at the actual behavior of the court of appeals panel.

The same can be said for the liberal panel that decided *Grutter*. Without knowing what the panel actually decided to do, one can infer from Supreme Court treatment of the case the decisions made by the lower court judges. In this situation, however, pursuit of legal goals and sincere pursuit of policy goals would produce the same outcome: acceptance of *Bakke* as controlling and affirmation of the University of Michigan's affirmative action program. This means that if the decision is *not* reversed, then it most likely means that the lower court engaged in strategic pursuit of policy goals—accounting for the concerns of the Supreme Court but still satisfying its desire to preserve the affirmative action program.

This kind of micro-level analysis would not prove tenable as a general research strategy. Doing so would require that circuit judges have perfect information about the reaction of the Supreme Court, which is not possible. But as the decisions of court of appeals judges are aggregated, patterns suggested by the example above would emerge. That is, tendencies in the behavior of court of appeals judges would emerge as patterns in the broader body of decisions.

This particular example, though, highlights another important component of the Supreme Court's decision to review and ultimately to reverse cases. Because decisions made in one circuit lack precedential value in another circuit, circuits often reach conflicting results on cases, and those disputes can require resolution by the Supreme Court. As a result, the Supreme Court is more likely to review, and, as a result, reverse, cases that present conflict between the circuits (Caldeira, Wright, Zorn, 1999). This prediction was recently borne out, as the Supreme Court agreed to review the Sixth Circuit's decision, in part because it presents a conflict with the Fifth Circuit's decision and the conflict is so visible to the rest of the country that the Supreme Court may feel it has no choice. That said, were the Supreme Court to reverse the Sixth Circuit decision in favor of affirmative action, it would still provide evidence that the judges of the Sixth Circuit had either pursued legal goals or attempted to make policy sincerely. If it affirmed the Sixth Circuit decision, then it would be more likely that the Sixth Circuit had engaged in strategic pursuit of policy goals.

Generally speaking, though, using Supreme Court reversal of court of appeals decisions offers an opportunity to understand the motivations of court of appeals judges

in a way that might not otherwise be feasible. In most situations, different types of behavior would produce similar outcomes. Conservative judges, for example, would generally not behave differently under a conservative Supreme Court if acting strategically or sincerely. But using reversal of lower court decisions offers a way to distinguish some types of behavior from others, which is a step toward developing and testing a theory of goals and means for court of appeals judges.

2.3 Research Strategy

Actually discovering the patterns of reversal and the behavior that may trigger them can prove a tricky task and any one test can not be considered definitive. Accordingly, I look at this question from different angles, attempting to assess the evidence from a variety of perspectives. I attempt to assemble the evidence piece by piece and sift through the results of each chapter both individually and collectively. In any given chapter, each predictor of reversal has an expected relationship for each behavior type. For example, ideological distance between the Supreme Court and court of appeals judges should be a positive predictor of reversal for judges who behave according to their sincere policy preferences. Such a relationship may not exist if judges tend to engage in strategic pursuit of their policy goals or if they try to make good law. Expectations similar to this one will be developed for each variable of interest, and the pattern of results will be compared to the pattern of predicted relationships. So if I find a positive relationship between ideological distance and likelihood of reversal, that can be considered as a piece of evidence supporting the argument that court of appeals judges

pursue their policy goals sincerely. It is this type of result I expect from each analysis, and then I will jointly consider the results of each of the three chapters.

In each analysis, there is a substantial possibility of null results. When looking at individual cases, patterns may emerge more clearly than looking at a judge's behavior over time, as chapters 4 and 5 both do. Null findings could be interpreted in two ways. First, the conventional interpretation of null results—that the independent variables do not predict variation in the dependent variable—is a plausible explanation and would imply that some other set of factors predicts the variation in the predictors of reversal. A second explanation for null results seems equally possible: that judges engage in all possible modes of behavior over a variety of cases or over time, or the number of judges for which one form of behavior predominates is balanced out by judges for whom the other forms of behavior are most prevalent. That said, this possibility could also produce significant results on all of the variables of interest, which would lead to the same conclusions, as no clear pattern would emerge from the results. In short, while the theoretical possibility exists that all three types of behavior occur with some frequency in the decisions made by court of appeals judges, the statistical analysis here does not clearly tolerate the possibility of competing explanations of the behavior of court of appeals judges to coexist, when, in reality, it should be able to do so. That said, my hope is the different research strategies produce consistent enough results to provide a moderately clear picture of the goals of court of appeals judges and the means they use to accomplish them.

Chapters 3 and 4 employ the same general logic using different units of analysis. Looking at different patterns of reversal—Chapter 3 takes the individual case as the unit of analysis, while Chapter 4 looks at patterns over time—I test a series of hypotheses designed to relate predictors of reversal to the different forms of behavior by the judges of the courts of appeals. Chapter 5 takes a somewhat different tack, using the reversal rate of the Ninth Circuit as a forum for exploring what can explain the persistence of the high number of Ninth Circuit decisions reversed over the past twenty years. All three chapters rely on the same fundamental approach: certain patterns of predictors of reversal are taken as evidence that a certain mode of behavior is used by court of appeals judges. The conclusion attempts to bring together the findings of the three chapters and assess the degree to which they can be interpreted as providing evidence for a larger conclusion. To the degree that the findings of the three chapters agree, I hope to develop a broader argument about the goals of court of appeals judges and the means they use to accomplish them.

2.4 Conclusion

Though my approach may prove somewhat unorthodox, the problems of using reversal of court of appeals decisions are somewhat smaller than those posed by looking directly at the votes of lower court judges. For the wide range of studies that assess the degree to which circuit judges comply with Supreme Court decisions, the range of cases is smaller and is not representative of the populations of decisions made by court of appeals judges. Looking directly at patterns of votes of court of appeals judges may also have its advantages, but this, too, poses several problems. The most fundamental is that

doing so places a premium on developing an issue-specific measure of ideology for both court of appeals judges and Supreme Court justices. As I argue in the next chapter, any measure which relies on the votes of court of appeals judges assumes behavior that my theory suggests should not be taken for granted. There are several other complications related to looking at court of appeals decisions themselves. First, it is difficult to assess deviation from sincere preferences and the implications of such deviations. If judges deviate from their sincere preferences, it is not immediately clear if doing so represents attempts to make good law or strategic pursuit of policy preferences. That distinction is clearer under the framework I employ. Second, one of the difficulties attached to court of appeals decision-making is interpretation of the votes by judges who did not author the majority opinion. While some research (Dubois, 1988) suggests that they are not active participants in the details of the decision, other research (Kornhauser, 1995) suggests that court of appeals decisions are more collaborative. It would be difficult to develop a framework to assess the different implications of these competing approaches by simply looking at judges' votes. Under the framework used here, some minimal comparisons might be possible.

The problems related to using reversal of court of appeals decisions are more closely related to the need to make inferences from Supreme Court behavior to behavior by court of appeals judges. In a way, this consolidates most of the objections to this approach into one potentially fatal flaw. But I have argued here that the inference is quite reasonable and the Supreme Court's behavior is predictable enough that it is tenable to argue that court of appeals judges can, if they choose to do so, manipulate opinions in

ways that either decrease or increase the likelihood of Supreme Court reversal. This permits the use of Supreme Court reversal to understand the behavior of court of appeals judges, and offers potential insight that might not otherwise be available.

	Conservative Judge	Liberal Judge
Legal Goals	Uphold <i>Bakke</i> and the Law School Admissions Policy	Uphold <i>Bakke</i> and the Law School Admissions Policy
Sincere Pursuit of Policy Goals	Reject <i>Bakke</i> and the Law School Admissions Policy	Uphold the Law School Admissions Policy
Strategic Pursuit of Policy Goals	Reject <i>Bakke</i> and the Law School Admissions Policy	Acknowledge Court's reservations with affirmative action but uphold the Law School Admissions Policy

Figure 2.1: Possible choices in *Hopwood* and *Grutter*

	Conservative Judge	Liberal Judge
Legal Goals	Uphold <i>Bakke</i> and the Law School Admissions Policy	Uphold <i>Bakke</i> and the Law School Admissions Policy
Sincere Pursuit of Policy Goals	Reject <i>Bakke</i> and the Law School Admissions Policy	Uphold the Law School Admissions Policy
Strategic Pursuit of Policy Goals	Reject <i>Bakke</i> and the Law School Admissions Policy	Acknowledge Court's reservations with affirmative action but uphold the Law School Admissions Policy


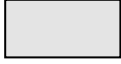

Key:  Highest probability of reversal
 Moderate probability of reversal
 Lowest probability of reversal

Figure 2.2 Likelihood of Reversal of Choices Made in *Hopwood* and *Grutter*

CHAPTER 3

COURT OF APPEALS JUDGES AND REVERSAL OF CASES

The work of court of appeals judges can prove quite challenging. As the different circuits hear a variety of cases, ranging from admiralty to environmental law to cases brought under diversity jurisdiction, the judges are expected to be able to competently render decisions that cover the range of federal law. In addition, they are often the site where appeals of federal agencies' decisions are heard: the DC Circuit, in particular, frequently hears appeals of FCC and EPA decisions regarding the implementation of proposed rules. All of the circuits hear appeals of NLRB decisions, which force all judges to confront often controversial labor-management relations.

Perhaps because the courts of appeals fulfill the right every participant in the federal legal system has to appeal the findings of a lower court case, much of the material with which the courts of appeals must deal consists of routine matters. Even a significant portion of their reversal of lower court decisions may involve routine correction of errors made by the trial court. This can make the work of court of appeals judges and their staffs monotonous and certainly could make one wonder why an appellate judgeship is such a prestigious occupation. But the prestige that accompanies a seat on the court of

appeals is often matched by the potential influence of court of appeals judges on the development of both law and public policy. While it is certainly true that only a portion of the cases present novel or important legal questions, one would certainly suspect that these cases and the opportunities they present comprise much of what court of appeals judges find rewarding about their work. But this does not necessarily indicate that the judges' behavior varies from case to case. As I suggest momentarily, only one of the possible motivations I ascribe to court of appeals judges would suggest such behavior.

In this chapter, I attempt to assess the behavior of court of appeals judges by looking at the behavior of judges on individual cases. The specific test discussed in this chapter looks at the predictors of reversal of an individual case: what predicts the Supreme Court's decision to reverse a case and what can those predictors tell us about the behavior of court of appeals judges? I argue that each of the possible types of behavior suggests that a different set of factors predict reversal of a given case. In order to more clearly lay out my expectations in this chapter, I will first present my hypothesis by variable, then by mode of behavior to more clearly explain the possible range of findings and the consequences of a given set of findings. Because this chapter and the one that follow represent different data collection efforts, I detail the process used to collect and analyze the data separately in each of the next two chapters.

3.1 Background and Hypotheses

Fundamental to all of the hypotheses developed in this section (and, really, to the entire project) are three assumptions. First, I assume that the likelihood of overturn for a judge pursuing policy preferences through sincere means is contingent on ideological

alignment with the Supreme Court: a judge aligned with the Supreme Court will not be reversed, but one whose policy preferences diverge from the Court is more likely to be reversed. Second, I assume that judges who behave strategically are more committed to adapting to circumstances and environmental change than those who behave sincerely.

Finally, I assume that judges pursuing legal goals are operating on a different dimension from the Supreme Court, and as such can not be considered to be ideologically in or out of line with the Supreme Court. One can think of this assumption as adding a dimension to the normal liberal-conservative dimension that underlies Supreme Court behavior. Spiller and Tiller (1996) suggest this possibility when they discuss the rationale for the Supreme Court to issue invitations to Congress to override a decision that uses statutory interpretation. To Spiller and Tiller this second dimension represents “choices relating to judicial rules” where “the two dimensions become linked by the circumstances of a particular case along with the legal posturing by the litigants” (510). However, it might be more accurate to consider law as a “half-dimension”, like the valence advantage that Groseclose (2001) suggests, which, in congressional races, may give one candidate an advantage in name appeal or charisma. The valence advantage represents some characteristic where the range is from 0 up, and negative values are not possible. The same idea applies here: judges would always like to make better law as long as they can also accomplish their ideological goals.

3.1.1 Hypotheses

One of the most significant changes in the environment for court of appeals judges deals with the type of case. While much of the business of the courts of appeals

involves routine error correction, some cases they deal with have significant policy implications and are therefore more likely to receive scrutiny by the Supreme Court. One would expect, then, for judges behaving strategically to anticipate this scrutiny by the Supreme Court and tailor their decisions accordingly.

Hypothesis 1: If case importance is negatively related to the likelihood of reversal, then there is evidence of strategic pursuit of policy goals. If case importance is unrelated to reversal, then there is evidence that court of appeals judges either pursue policy goals sincerely or pursue legal goals.

Factors that affect the likelihood of reversal do not depend solely on the nature of the cases judges deal with: variations may also come among judges, in the composition of the panels and the circuits on which judges sit, and in the composition of the Supreme Court. Of course, changes in the environment of judges can come from other actors as well, including Congress and the president. But the influences of these actors likely have an effect on the ideological composition of the bench, not on any given decision. As a result, this form of influence is less direct than other influences on any given vote by court of appeals judges. The more direct effects deal with the composition of the panel, the circuit and the Supreme Court.

The most obvious dimension along which court of appeals judges vary is ideological. Particularly with an increasing politicization of court of appeals nominations (Ronnie White to the Eighth Circuit and Charles Pickering to the Fifth are just two recent examples of this phenomenon), presidents seem more interested in making the courts of appeals a component of their presidential legacy, and are willing to expend political capital to see their nominees confirmed. Even if the nominees were not chosen for their ideological inclinations, it seems fair to conclude that judges appointed by Republican

presidents are more conservative than those appointed by Democratic presidents (Pinello, 1999) and to expect some variation within these two groups.

That court of appeals judges vary in their primitive preferences does not necessarily guarantee the conclusion that their behavior on the bench varies. Only under a conception of sincere behavior can one argue that judges' preferences map directly to their actions (and even under such a framework, the inference would be that the behavior reflects the preferences, not vice versa). If court of appeals judges engage in strategic behavior, they may eschew their sincere preferences in favor of finding a point near those preferences that the Supreme Court will not overturn. Legal-oriented behavior would suggest the absence of a relationship between a judge's ideological inclinations and voting behavior.

Hypothesis 2: If the ideological distance between a court of appeals judge and the Supreme Court median is positively related to reversal, there is evidence of sincere pursuit of policy preference by court of appeals judges. If there is no relationship, there is evidence of either strategic pursuit of policy goals or pursuit of legal goals.

One of the criteria on which court of appeals judges vary considerably is their competence: judges come from a wide variety of backgrounds and some are better prepared for their jobs than others. Because presidents (and senators) do not select appointees to the appellate bench solely on their legal qualifications, judges also vary considerably in their competence as judges. Different presidents approach appellate court appointments differently: some used them to provide patronage for political supporters; others sought ideologically affiliated nominees regardless of their professional qualifications. While use of the American Bar Association (ABA) has likely increased the quality of the nominees (Grossman, 1965), consultation with the ABA does not

always guarantee that a president is most concerned about a judge's competence. Not surprisingly, some judges prove themselves to be more competent than others, as measured by reversal rate or the influence of their opinions. This variation in competence suggests that some judges may be better at crafting law than their colleagues. If we are willing to assume that, *ceteris paribus*, the Supreme Court prefers to see good law made to bad, we can test to see if the judges that are better equipped to make good law actually do so. As I suggested in Chapter 2, there are reasons to expect that the Court might resolve conflict within or across circuits. This is related to the Court's interest in preferring to see good law made to bad, but remains secondary to the Court's desire to achieve ideologically suitable results.

Hypothesis 3: If a judge's competence is negatively related to reversal, then evidence exists that judges are attempting to make good law. If competence is unrelated to reversal, then evidence exists that judges are concerned about achieving policy goals (either strategically or sincerely).

Less competent judges are overturned more frequently not because they are using sincere means but simply because they make more mistakes in interpretation of law. But the number of mistakes judges make should decline as they become more experienced, while reversals related to policy disagreements with the Supreme Court will not decline as judges become more experienced. The logic here is essentially the same as that expressed in the previous hypothesis.

Hypothesis 3a: If a judge's experience is negatively related to reversal, then evidence exists that judges are attempting to make good law. If there is no relationship between experience and the likelihood of reversal, then there is evidence that judges are pursuing policy goals (sincerely or strategically).

It is possible that a judge engaged in strategic pursuit of policy goals would get better at figuring out the Supreme Court's preferences as his experience grew, but it should take less experience for a judge to assess the Supreme Court's general policy preferences than it does for a judge to learn what makes the basis for a good legal decision. As a result, if experience makes any aspect of a judge's work better, it would be the ability to craft good law and author decisions that not only treat the instant case well but develop doctrine that can be applied to other cases, perhaps in other circuits.

Each of the hypotheses contains an expectation about how a judge engaged in a particular type of behavior may behave. This leaves us with a series of possible patterns of behavior, best summarized by looking at Table 3.1.

[Table 3.1 here]

The results, then, should be interpreted in terms not only of the hypotheses individually, but how closely they resemble the patterns of behavior. That is, if the most compelling explanation of judicial behavior is conceiving of judges as sincere policy-oriented actors, we should expect no relationship between a judge's competence or experience or a case's importance and the likelihood of reversal, but we should expect a positive relationship between a judge's ideological distance from the Court and the likelihood of reversal.

3.2 Data and Measures

3.2.1 Case Selection

I look at the reversals of court of appeals published decisions from statistical reporting year 1983—July 1, 1982 to June 30, 1983. Instead of collecting data on the population of non-reversals, I conducted a simple random sample (based on their LEXIS

number) that gives each published decision an equal probability of being sampled. If a LEXIS number led to a decision that was eventually subjected to a rehearing en banc or led to an unpublished decision, I dropped the case and replaced it with another randomly drawn case. I then used rare events logit to adjust for the fact that I drew a choice-based sample--selecting the population of reversals, while only a small sample of the non-reversals.

I should note at the outset that the population of non-reversals includes three types of cases: court of appeals decisions that were never appealed to the Supreme Court, decisions that were appealed, but not granted review, and those that were affirmed by the Supreme Court. I do not distinguish between the three types, and make the assumption that any case that the Supreme Court would prefer to reverse (and is willing to expend the resources necessary to thoroughly review the case) will be appealed by the losing party. This simply means that the role of litigants in bringing the case to the Supreme Court is assumed not to affect the behavior of court of appeals judges: all they need know is if a case *might* be reversed to behave in a manner consistent with that expectation.

I used the U.S. Supreme Court Database (Spaeth, 2000) to ascertain cases that were reversed. I code cases as reversed if they received a value of 2, 3, 4, 5, or 6 in the DIS variable (having set the unit of analysis to 0). This brings in cases that were reversed, reversed and remanded, and cases that were affirmed in part and reversed in part (and remanded). The only potential controversy this invokes is using cases coded as 4, which are cases where the Supreme Court vacated and remanded the lower court decision. I reviewed each of these cases and kept cases where the Court reached a

decision on the merits of the case, counting them as reversals. Cases where the Court issued a “grant, vacate, remand” (GVRs) order were not considered reversals as these decisions are generally not considered to be merits decisions by the Supreme Court (Segal and Spaeth, 1996b). Though one could argue that GVRs still represent errors in judgment by the lower court, the safest strategy seems to be to exclude these cases.

Court of appeals decisions must be appealed within ninety days of the lower court decision, so I collected all Supreme Court cases with 1982 and 1983 docket numbers. From these cases, I collected the Federal Reporter citation for the lower court decision and checked the date of the lower court decision, all on LEXIS-NEXIS. If the lower court decision was made between July 1, 1982 and June 30, 1983, it was included in my sample. Using this method, I collected 73 reversals. King and Zeng (2001) suggest sampling 2-5 times the number of non-events as events, so I sampled 600 lower court citations, several of which could not be used for a variety of reasons, primarily due to duplication (the sample was drawn with replacement) and that the Lexis citation led to an unpublished decision, about which substantive information could not be gleaned.

A note should be made about relying solely on published decisions. Published opinions are not a random (or representative) sample of the work of court of appeals judges. Generally, publication is intended to be used when the decision has the potential to make new law within a circuit. But this is not always the case: Brudney and Merritt (2001), contend that the decision whether to publish is not always made according to objective criteria. They find more partisan disagreement in unpublished opinions than might be expected, suggesting that some decisions deal with controversial issues and

perhaps should be published. That said, the decision to not publish a decision would not render Supreme Court reversal of a court of appeals decision much more difficult. That the overwhelming majority of Supreme Court reversals of court of appeals decisions are of published opinions should be interpreted as Supreme Court focus on court of appeals decisions in emerging areas of law or making decisions that diverge from precedent, not as successful “hiding” of controversial decisions by the Supreme Court.

That published opinions are a non-representative sample of the work of court of appeals judges has implications for my theory of the behavior of court of appeals judges. Probably most important, it raises the relevance of policy-oriented goals relative to legal goals. If judges are concerned about both making good law and making good policy, their desire to make good policy would probably be most effectively expressed in cases where the opportunity exists to do so, which generally means published decisions. By the same token, a judge’s desire to make good law may trump the desire to make good policy on lower profile cases, where the decision making might be routine (even if it runs contrary to a judge’s policy preferences). This behavior is likely more common in unpublished decisions than in published ones simply because unpublished decisions are generally the outcomes of cases that are more routine.

3.2.2 Selecting A Year for Analysis

1983 may seem like an arbitrary choice of years, and might require some justification. The most important consideration was to avoid any year of the Rehnquist Court, which began in 1986. The overwhelming feature of the Rehnquist Court has been

its declining caseload: the Supreme Court decided 82 cases in the 2001 term⁶, less than half of the cases decided in the 1985 term. The Supreme Court granted plenary review on at least 140 cases in each of the terms between 1968 and 1988 (O'Brien, 1997). The low caseload of the Rehnquist Court may represent a fundamental change in the Supreme Court's perception of its workload and its role in supervising the lower courts. It may also represent a temporary aberration driven by the current Court's desire to have a reduced workload. Different justices have different perceptions about how many cases the Court should be hearing (O'Brien, 1997), and it may simply be that the current set of justices, for a variety of reasons, believe that the Court need not review and reverse every adverse decision. It may also be the case that the courts of appeals are making fewer adverse decisions—a possibility suggested by Justice Souter himself (cited in O'Brien, 1997)).

Avoiding all years from the Rehnquist Court means that I started working backward from 1985. One of the primary considerations, a desire to find ideological stability on the Supreme Court, is not particularly important in the mid-1980s. Justice O'Connor replaced Justice Stewart at the beginning of the 1981 term, but even this represented only a small shift in Supreme Court ideology. According to Bailey and Chang's (2001) measure of Supreme Court ideology, O'Connor's appointment had no effect on the median justice of the Court, which fluctuated between Justices Blackmun and White (as the former grew more liberal and the latter more conservative).

⁶ <http://www.medill.nwu.edu/docket/> Accessed July 14, 2002.

Although there was no particular reason to avoid a presidential election year, I wanted to avoid 1984 in case there were unforeseeable problems related to choosing that year. There was an expansion of the appellate bench in 1984, so that may have altered the level of experience from what might be the normal expectation of a mix of newer and more senior judges. 1983 proves advantageous for two reasons. First, it includes some of the first judges appointed under President Reagan's efforts to reshape the federal judiciary by appointing more conservative lower court judges (Goldman, 1997). This increases the mix of judicial orientations and represents one of the first explicit attempts by a president to shape the judiciary along ideological lines. Second, the *New York University Law Review* looked at all *certiorari* petitions for the 1982 term and assessed the degree to which the intercircuit conflict alleged in *cert* petitions actually existed. This represents an invaluable resource, as coding the presence or absence of conflict can prove problematic and one can certainly not rely on the claims raised in the briefs. This may explain why this term has been used in other studies of Supreme Court voting (Caldeira, Wright, Zorn, 1999). Ultimately, I did not use this benefit as I chose an alternate method of determining the presence of intercircuit conflict, which I will discuss below.

3.3 Variables

The variables of interest can prove problematic to code. Starting with the first hypothesis, I sought an objective measure of cases that are more important than others to see if court of appeals judges sought to avoid reversal on these cases. Accordingly, a measure that captures cases where the opportunity to influence policy would be ideal. One possible measure of the importance of court of appeals cases is to assess the media

coverage generated in anticipation of or in response to a decision. But this measure would pick up only a very small percentage of cases, and may be biased in favor of cases decided near major media outlets where more attention may be paid to cases, like the Second Circuit (New York) and the D.C. Circuit. Instead, I chose a measure of case importance that has worked well in previous research (Caldeira and Wright, 1988; Caldeira, Wright and Zorn, 1999). If a case is mentioned in *U.S. Law Week* or one of its affiliated publications, I code the case as important. I regard this as a more objective indicator of case importance and it represents acknowledgment by legal professionals of the case's importance. While it may be possible for a court of appeals judge to downplay or attempt to enhance the importance of a case, most cases have their importance determined before they are encountered by a court of appeals panel. Some cases are made important by the decision itself, but most present questions that, regardless of the outcome at the appellate level, will have important implications for the development of law and policy in a given area.

The second variable of interest is related to ideological distance between the Supreme Court and the court of appeals. This may prove the most difficult variable to measure: ideally, I seek measures of the true (sincere, primitive) preferences of both court of appeals judges and Supreme Court justices. Measuring the ideology of the Supreme Court actually proves far easier than measuring the preferences of court of appeals judges. I accept the argument that the merits votes of Supreme Court justices represent expressions of their sincere preferences on the issues before the Court (Segal and Spaeth, 1993; 2002). This assumption does not preclude the possibility of strategic maneuvering

amongst the justices in opinion assignment or the content of the opinion, including the scope of the opinion and the grounds on which the case is decided. At the very least, this means the justices are in fixed positions relative to one another (Pritchett, 1948; Schubert, 1962). The question then becomes how to place those fixed positions on the same dimension as court of appeals judges.

Giles, Hettinger, and Peppers (2001a, 2001b) argue that the ideology of court of appeals judges can be measured by assessing the nature of the appointment process for Article III judges. Seats within each circuit are informally allocated to the different states that comprise the circuit, and while the president constitutionally has a free hand in nominating court of appeals judges, he generally must at least solicit the views of the home-state senator as long as the home-state senator is of the same party. In addition, as the nomination process has grown more ideological (something generally attributed to the failed nomination of Robert Bork to the Supreme Court), senators have expressed a willingness to block nominations of ideologically unsuitable nominees by presidents of both parties. This gamesmanship largely postdates the period of my study (which I consider an advantage of choosing an earlier timeframe) but highlights the importance of senatorial courtesy in the appointment process of Appeals Court nominees.

There are several other possible measures of a court of appeals judge's ideology. The most simple, using party of the appointing president as a proxy for the nominee's ideology, is by far the most common measure and is still used quite frequently (Pinello, 1999; Benesh and Reddick, 2000). This measure has a series of weaknesses that become particularly evident in my study. First, the measure can not distinguish between

conservative and liberal nominees of a president—all Democrats are assumed to be the same, as are all Republicans. One might consider substituting a president's NOMINATE score for his party, but this only solves part of the problem. As argued above, the preferences of the home-state senator are also important when choosing court of appeals nominees. Using only the president's ideology under conditions of senatorial courtesy would produce a biased measure of judicial ideology.

Other measures of judicial ideology rely on demographic characteristics of court of appeals judges (Humphries and Songer, 1999; Cameron, Segal, and Songer 2000). These measures create imputed scores for judges based on some combination of the party of the appointing president, their religion, prior experience as a judge or prosecutor, and the region of the country that they come from. These measures suffer from the same disadvantages as some other measures, as the coefficients used to create the scores are coefficients from a regression where the dependent variable is some score created out of votes. My theory requires a measure of ideology that does not rely on the observed behavior of court of appeals judges, as I argue their behavior may not reflect their sincere preferences over public policy.

The remaining problem with the Giles, Hettinger and Pepper approach is putting the ideology of court of appeals judges on the same metric as Supreme Court justices. Accordingly, I propose replacing NOMINATE scores of the appointing president and senator with the scores developed by Bailey and Chang (2001) for estimating inter-institution preferences on the same metric. Bailey and Chang use presidential position on legislation in Congress to measure the relative location of the executive and the

legislature. They then use the Solicitor General's amicus participation in the Supreme Court to measure the relative location of the justices to the other two branches. While this approach may have its flaws, most particularly the question of the degree to which Solicitor General participation represents the ideological orientation of the executive branch, it does provide some fixed point on which to place the three branches on the same metric in lieu of arbitrarily choosing matching metrics for the preference measures (Segal, 1997).

Bailey and Chang's method uses a random-effects panel probit design, and has the virtue of deriving several parameters for each justice (and senator and president), allowing the preferences of the members of each institution to vary over time. That said, the votes are based on a combination of two factors: orientation on civil rights issues and random shocks, which consist of changes in a person's ideal point and the fact that some votes consist of "ideologically jumbled coalitions" (2001, 485). I use the Giles, Hettinger, and Peppers approach of giving a court of appeals judge the score of the president in the absence of senatorial courtesy and the mean of the president and the senior senator of the president's party in conditions of senatorial courtesy. But I substitute the Bailey and Chang scores for presidents and senators because they are on the same metric as the scores for Supreme Court justices, allowing me to calculate the distance from the court of appeals judge to the median justice of the Supreme Court.

My third independent variable of interest is judicial competence. One of the indicators of this is prior judicial experience, but other indicators are available, including American Bar Association (ABA) ratings of qualification. While it is likely the case that

presidents intent on nominating a particular candidate for a court of appeals position have had some influence on the ratings of that candidate, it seems that the most political interference has been at the line between “not qualified” to “qualified” (Goldman, 1997). In general, it seems that the ABA ratings may be a reasonable indicator of the competence of judges. Their one bias may be in favor of prior judicial experience, something noted by Grossman (1965). This bias, though, may serve the purposes of this paper well: judges who have prior experience on the bench are more likely to understand their environment than others who are not accustomed to serving as judges. Setting aside the current controversy over the political biases behind ABA ratings (Lindgren, 2001; Saks and Vidmar, 2002), the ratings appear to be a decent indicator of judicial quality. The only problem that remains from a measurement standpoint is that there is not much variation in the ABA ratings. Of the 169 judges who voted on cases in the data I collected, 36 (21.3%) received a rating of “exceptionally well qualified”, 81 (47.9%) received “well qualified”, 49 (29.0%) received qualified, and 2 (1.2%) received a rating of not qualified. This suggests that the actual variance is limited, suggesting either that nominees tend to have the same general qualifications or the ABA chooses not to make too fine a distinction among the categories.

The second possibility would imply that ABA ratings would be a sub-optimal measure of judicial quality. While sufficient for my purposes, there may be other measures available that more accurately measure the competence of court of appeals judges. In order to address these problems, I use an alternate measure of judicial quality, developed by Landes, Lessig and Solimine (1998). They look at the number of times a

judge's opinions are cited by judges outside their own circuit and develop scores based on a regression where each sitting judge is a dummy variable. I use these coefficients as measures of judicial quality. This incurs a cost of losing some cases—Landes, Lessig and Solimine conducted their analysis on judges who were sitting as active or senior judges in 1995, so scores are only available for 128 of the 169 judges in my database. These scores have a range of 1.61 to 4.41 with a mean of 3.065 and standard deviation of .387. I measure experience (Hypothesis 3a) as the natural log of the years of experience (+1). It does not seem plausible to consider the possibility of linear relationship between experience and the number of reversals, but it makes sense to suggest that judges gain the most in terms of their experience early in their careers and the marginal gain of the later years is somewhat smaller.

The control variables are generally related to measuring conflict at different levels of the federal judicial system. As I suggested earlier, the Supreme Court is the only court that can resolve conflicts between circuits, and can be called on to do so. Previous work on the Court's *certiorari* process suggests that conflict, both alleged, and actual, increases the probability that a case will be reviewed by the Supreme Court (Caldeira and Wright, 1998; Caldeira, Wright, and Zorn, 1999). The Supreme Court may also review cases that demonstrate lower court disagreement in other ways—when courts of appeals reverse lower courts, or when there is dissent on court of appeals panels (Caldeira, Wright, Zorn, 1999). These factors must be accounted for before looking at the relationship between decisions made by court of appeals judges and Supreme Court disposition of those cases.

I code conflict in several ways and conceive of these measures as controls to allow patterns related to court of appeals behavior to be tested. Conflict can happen in four ways: courts at different levels can disagree, members of a panel can disagree amongst themselves, there can be intracircuit disagreement about how a case should be resolved, and there can be intercircuit disagreement. The first three of these are relatively easy to recognize, and I code cases for the following characteristics: if the court of appeals reversed the lower court or agency, if there is a dissent to the court of appeals decision, and if the circuit heard the case *en banc*, suggesting there was sufficient dissatisfaction with the panel decision to merit rehearing by the entire circuit.⁷

Intercircuit conflict can be (and has been) measured in a variety of ways. More labor-intensive studies, like the NYU Supreme Court Project mentioned above and a study funded by the Federal Judicial Center (Hellman, 1995), look at the briefs requesting review by the Court to assess the degree to which lower Court decisions conflict with one another. Petitioners certainly have an incentive to contend that conflict exists with the decision they are appealing and some other case, but the conflict rarely exists. The burden of research projects is to sort out actual conflict from alleged conflict. While these undertakings are commendable, they are, at least in one sense, insufficient because they only include the cases that are appealed to the Supreme Court, which represent less than half of the published decisions made by the court of appeals. In addition, neither of them completely overlaps my time period. I choose a more easily observable method of

⁷ *En banc* hearings are relatively common in some circuits and quite rare in others. There are a number of features of the decision-making process that vary from circuit to circuit with no distinguishable pattern but with an impact on the likelihood of reversal. To help control for circuit-specific factors like this (and the diversity in cases the different Circuits hear), I include dummy variables for the circuits in one of my models.

coding intercircuit conflict. Tom Goldstein, in his “Circuit Split Roundup” columns in U.S. Law Week, reviews published opinions from the courts of appeals to see if the opinion author (and, presumably, authors of any dissent) claim to reach a holding that contradicts that of another circuit. George (1999) uses a similar measure to measure conflict—she simply assesses whether the majority or dissenting opinion claims to be in conflict with another case. I prefer a slightly modified version of this measure—I use only majority opinions as measures of conflict. Dissenting opinions may claim that the majority conflicts with existing case law, but the reliability of this assertion is debatable. On the other hand, the willingness of a majority opinion to admit conflict with another decided case will occur only when the conflict truly does exist, but is unlikely to happen every time the conflict exists. The measure I choose, then, may underestimate rather than overestimate the true degree of conflict between circuits.

There are two other control variables that I include. First, I measure whether the United States as a party loses the case at the court of appeals. Because of the resource advantages of the federal government, and the general interest in the Supreme Court of hearing cases when requested by the Solicitor General (Ditslear, 2002; McGuire, 1999; Segal and Spaeth, 1993), the Supreme Court may be more likely to reverse decisions that dealt a setback to the federal government, regardless of the ideological outcome of the lower court decision.

The final control variable is the ideological outcome of the lower court decision. I consider this a control because my theory argues for the possibility of separation of preferences and behavior. That is, a judges’ preferences and actions may not always be

in agreement: liberal judges make conservative decisions with some frequency and vice versa. The consequence of including this variable should be to attenuate the effect of ideological distance on the likelihood of reversal. If ideological distance has an independent effect beyond the direction of the decision, I can be reasonably confident in the results that are related to that hypothesis. Tables 3.2 and 3.3 present the variables in summary format and summary statistics for the data, respectively.

[Tables 3.2 and 3.3 here]

3.4 Methods

Because reversals are a relatively rare occurrence, traditional statistical techniques would not provide the leverage necessary to accurately estimate the effects of parameters. With 73 reversals of published decisions--of which there were 5,572 (Posner, 1985)--the rate of reversal is 1.31%. This would mean that a random sample of 1,000 published decisions would produce approximately 13 reversals and may produce substantially fewer. Fortunately, statistical methods have been developed to accommodate this problem, as rare events remain interesting phenomena that merit attention. King and Zeng (2001) have assessed the value of some of these techniques for problems in political science and argue that questions involving rare events can be studied with greater efficiency than previously believed. Building off works in economics and biostatistics, they argue that a dataset that consists of the population of events and a random sample of the non-events, a choice-based sample, is adequate for analysis, provided statistical corrections are made for the non-random nature of the sample. Provided that the number

of non-events in the population is known, the statistical correction is quite straightforward and involves nothing more than adjusting the constant downward:

$$\beta_0 = \hat{\beta}_0 - \ln \left[\left(\frac{1-\tau}{\tau} \right) \left(\frac{\bar{y}}{1-\bar{y}} \right) \right]$$

Where τ is the fraction of ones in the population and y is the fraction of ones in the sample (for a more detailed discussion, see King and Zeng, 2001). This method is called prior correction.⁸ Using rare events logit produces a series of problems on the other side of the coin from having too much data. As King and Zeng recommend collecting three to five times the number of nonevents as there are events, the largest possible dataset would have only 420 cases. I originally drew 600 cases with replacement, and lost some cases to being drawn twice, and other cases either not being published opinions (approximately half of the sample was lost here), panel decisions that were eventually reheard en banc. As a result, in one set of analyses, opinions that were not signed, there are only 276 nonreversals and only 64 reversals (six of the reversals were of per curiam or unpublished decisions). This means that taking the case as the unit of analysis leaves 340 signed cases. Because this is a small number of cases, I also constructed a dataset that collects data for each member of the majority in a given opinion. This allows 1271 “judge-votes”, of which 223 were reversed. This number includes votes in per curiam decisions. As my results demonstrate, there is little difference in the substantive interpretation of the two—the coefficients are generally similar but the standard errors are noticeably smaller when using all of the judge-votes and permit more confidence in the results. There is, of

⁸ To conduct the estimation and provide the post-estimation results, I use the relogit do-file available from Gary King’s webpage, <http://gking.harvard.edu>.

course, the problem of lack of independence of observations—one would expect a correlation between two judges on the same case—but I adjust the standard errors accordingly.⁹ When I use the case as the unit of analysis instead of merely the judge’s vote, the data focuses on the opinion author.

3.5 Results

My initial results are presented in Table 3.4.

[Table 3.4 here]

The test of the first hypothesis is whether judges behave differently on important cases, attempting to avoid reversal in order to influence policy. In the framework discussed here, strategic judges would endeavor to avoid reversal of important decisions because these cases represent the greatest opportunities to make policy. Judges who are concerned about making good law or decide according to their policy preferences would not behave differently simply because a case is of greater importance. The results in Table 3.4 suggest that while judges are less likely to be reversed on important cases, the result is not statistically significant, providing no real support for the vision of strategic pursuit of policy preferences, while adding some evidence to the view of judges as motivated either by an attempt to make good law or a desire to pursue policy preferences through sincere means.

The second hypothesis, built on judges and their ideological distance from the Supreme Court, provides a modest amount of additional support for the view of judges as sincerely in their pursuit of policy goals. While the measure of the sincere preferences of

⁹ By default, *religit* uses the Huber/White sandwich estimator for standard errors, which assumes correlation in the observations but does not assume the variable on which the observations are correlated. I report results of standard

the judge, the ideological distance between the judge and the Supreme Court median, is signed correctly, it is not quite significant by conventional levels ($p=.114$). Of particular interest is that the actual behavior of the judge, the ideological direction of the decision, is a strong predictor of reversal and there appears to be a modest *additional* effect attributable to the ideological distance between the judge and the Court. I would suggest that the modest effect is about all that can be expected if the actual direction of the outcome is accounted for.¹⁰ More central to my question is the finding that the Supreme Court's reversal based on both ideology of the judge and the ideological direction of the decision indicates that judges' preferences and actions align nicely. On this hypothesis, the positive relationship, though modest, seems to provide support for sincere pursuit of policy preferences over alternate motivations for court of appeals judges.

Turning simultaneously to hypotheses three and four, it is clear that judges more respected for making good law are doing so. The strong negative relationship between competence and the likelihood of reversal provides evidence that judges pursue legal goals. The relationship between experience and the likelihood of reversal is not as strong, but is signed in the correct direction and indicates that there is some evidence for more experienced judges being better at avoiding reversal by the Supreme Court. This finding can be interpreted as supportive of judges as motivated by the desire to make good law, while not performing as expected if judges are motivated by policy goals.

Taking these initial pieces of evidence together, and remembering that more than one motivation is certainly possible for court of appeals judges, there appears to be at

errors clustered by judge.

¹⁰ Excluding liberal decision as an independent variable somewhat sharpens the effect of ideological distance, though

least some affirmative evidence that judges are motivated by the desire to make good law and by expressing their sincere policy preferences. Judges who are less experienced, less competent, decide cases liberally, and are ideologically distant from the Supreme Court are more likely to be reversed. But judges who decide important cases are neither more nor less likely to have their decisions reversed by the Supreme Court. This portrait would be consistent with the hypothesized relationships between the variables of interest and reversal if the judges are attempting to make good law *and* expressing their preferences on policy.

As suggested earlier in this chapter, there is the possibility that the Supreme Court monitors particular circuits more closely than others and that intercircuit differences in procedures may enhance or depress the likelihood of reversal by the Supreme Court, all else being equal. In addition, the circuits adjudge very different types of cases: the District of Columbia Circuit, in particular, sees a very different collection of cases than the other circuits. They review far more agency decisions than any other circuit and, because the number of crimes in the District of Columbia is (hopefully) smaller than the number of federal crimes (and *habeas corpus* petitions) in the entire Ninth Circuit, the DC Circuit encounters one of the most unique mix of cases. This may affect the level of scrutiny by the Supreme Court their decisions receive. This can be generalized to the other circuits: it is possible that, between the unique mix of cases and internal circuit norms, some circuits are more likely to be reversed than others. While these factors vary from circuit to circuit, they should not affect judges within each circuit differently. The

conventional levels of significance are still not met ($p=.059$, two-tailed test)

statistical solution to this problem is to include dummy variables for each of the circuits and test for the necessity of these variables. These results are presented in Table 3.5.

[Table 3.5 here]

These results suggest that at least some of what was observed in the first model may be attributable to intercircuit differences rather than differences between judges or cases. The two notable changes are the insignificance of judge competence and the now almost-complete absence of a relationship between ideological distance and the likelihood of reversal. In a way, this is not surprising. All of the variables related to the cases (mostly controls) remain significant, but the dummy variables for the circuits split some of the judge-related characteristics (ideology, experience, competence) between the judge and the circuit. It is well known that some circuits are more prestigious than others and that some are more liberal or more conservative than others. But these reputations come from the judges on the circuit and these results suggest that the circuit-to-circuit variation may be attributable to more than just Supreme Court monitoring of individual circuits. The lack of relationship between a judge's ideological distance from the Supreme Court and the likelihood of reversal may be explained by the significant intercircuit variation in ideological distance. In the results presented in Table 3.5, one can see that the Ninth Circuit is the circuit most likely to be reversed, while the Sixth is the least likely. The rankings of likelihood of reversal suggest that the more liberal circuits (Ninth, DC, Third) are those that receive the greatest scrutiny by a moderately conservative Supreme Court. That the circuit effects prove significant where the judge-specific effects are not significant would lead one to conclude that the variation between

circuits is greater than that between judges within a circuit, and not necessarily that the results discussed earlier are an artifact of the judges' circuits. The significance of the circuit dummies and the resulting decline in the significance of judge-based variables is due to circuit homogeneity (relative to other circuits) and allows the circuit variables to pick up variation that may properly be attributed to the judges while understating the relative effects of the judge-based characteristics.

[Table 3.6 here]

As usual, interpretation of logit coefficients is not exactly straightforward. Using post-estimation commands that accompany the rare events logit do-file, I calculated first differences and predicted probabilities of reversal using the model presented in Table 3.4. The overwhelming sense one gets from reading this table is how little an impact these variables appear to have on the absolute chance a case is reversed because the likelihood of reversal in any single case is so low—I predict a baseline probability of reversal of .199%. But if one considers the magnitude of the changes, the impact of the independent variables becomes clearer. *En banc* decisions, for example, are nearly three times as likely to be reversed as panel decisions, and liberal decisions are nearly twice as likely to be reversed as conservative ones. The three variables of interest, judge competence, experience and ideological distance, appear to have smaller effects. But the change is simply from the mean up one standard deviation, which should be kept in mind when reading those values.

Nonetheless, the impact of these variables is considerable when one weighs the relative likelihood of cases decided by judges with average competence or experience

being reversed against the likelihood of cases decided by above-average judges. More competent judges are only about 1/4 as likely to have decisions reversed as decisions made by a judges of below-average competence (.052% compared to .199%). Judges who are a greater ideological distance from the Court than those who are quite close would be about 25% more likely to have decisions reversed, regardless of the ideology of the decisions themselves. Small as the changes may appear, they can have quite an impact on the relative likelihood that a given case will be reversed by the Supreme Court.

I report the change in predicted probability of reversal for more important cases relative to less important cases. It is important to recall that this effect does not appear to be “real”: the coefficient is not statistically significant so the marginal effect can not be substantively interpreted. This finding should be highlighted as one of the more compelling findings of this analysis: much of the recent literature has suggested that court of appeals judges behave strategically (Cross and Tiller, 1998; Cameron, Segal, and Songer, 2000), but the evidence here runs to the contrary.

3.5.1 An Alternative Approach

The results presented to this point rely on using the individual judge votes as the unit of analysis, while acknowledging, in a statistical sense, that the assumption of independence of observations for the standard errors was incorrect. There are a series of alternative approaches to looking at the behavior of court of appeals judges, all of which find support in the literature. The perspective used above considers the decisions made by court of appeals judges as essentially autonomous, and, in a technical sense, this is correct. Each court of appeals judge has the option, in any given case, to decide for the

appellant or appellee, and, once that decision has been made, to sign on to an opinion or write his own opinion. In a certain number of cases, after the vote has been cast, each judge will have to craft the majority opinion, but even at that point the other judges on the panel have the opportunity to write a concurrence or alter the outcome.

Two competing theories of court of appeals behavior exist. The first argues that once the panel hears the case and makes a preliminary determination as to the case outcome, the responsibility for shaping the opinion lies almost entirely in the hands of the author of the majority opinion. There is even evidence that appellate court judges, under the heavy workload, decline to dissent when they would otherwise desire to simply because of the opportunity cost involved in writing any opinion (Dubois, 1988). While one could argue that judges voting against their preferences may also be interpreted as evidence of pursuit of legal goals, it is almost certainly the case that, once judges have decided how to vote in a case, if they are in the majority they are unlikely to be as involved in crafting the opinion as the opinion authors. This suggests that the Supreme Court need only look at the majority opinion authors to determine whether or not a case merits review (Cameron, Segal, and Songer, 2000) or reversal. Accordingly, looking at only the signed opinions in my database, I replicate the analysis presented in Table 3.4.

[Table 3.7 here]

This model, like the one tested in Table 3.4, provides little support for the conception of court of appeals judges as strategically motivated pursuers of policy preferences. Unlike the initial model, the support for judges as motivated by sincere pursuit of policy goals provides very weak support. Ideological distance is still a factor, but not at conventional

levels of statistical significance. The same is true of the ideological direction of the decision. The support for judges as motivated by legal goals is a bit stronger, but still mixed: competence continues to be an important predictor of reversal, but experience can no longer seriously be considered a correlate of reversal.

In all, these results closely mirror the results found in Table 3.4. In fact, it appears that the changes in what is significant and what is not can be explained by the larger standard errors (a result of the smaller number of cases). If one compares the coefficients across the two tables, one finds that the coefficients that report on judge characteristics, which are most likely to vary based on the conception of appellate adjudication, remain very close, while the impact of case characteristics varies between the two models.

[Table 3.8 here]

This evidence suggests that the difference between the two conceptions of appellate decision making is not as great as might be suggested by previous work, not all of which has focused on court of appeals judges.

The second perspective of court of appeals decision-making treats panels as “resource-constrained teams” (Kornhauser and Sager, 1993; Kornhauser, 1995). Under this model, the best way to assess the output of court of appeals panels is as a group product. The outcome most closely resembles that of the median member of the panel majority: if the judges disagree on the specific points of an opinion, the general outcome is a compromise or may represent some deference to a judge who is more interested in a particular area of law. This perspective provides an alternate explanation for the low

level of dissent amongst appeals judges—if judges feel that they can be accommodated on some points by the majority, they will be more willing to join that opinion.

It may be the case that if this is the proper way of approaching adjudication, court of appeals judges should properly be considered as the sum of their experiences or competence, while perhaps looking at the median ideological distance as an indicator of the group’s preferences. Underlying the team approach to appellate decision-making is the assumption that the group shares a goal—making “correct” decisions. This seems to imply that the judges are more interested in what I consider legal goals than reaching a shared policy outcome, and the source of error (why their decision might be reversed) is the lack of information about the issue they are trying to decide—information that the Supreme Court is able to acquire (Cameron and Kornhauser, 2001). There may be a way, in future research, to more carefully address this possibility to facilitate a clearer understanding of the dynamics of appellate panels.

3.6 Conclusion

Because the data is presented by hypothesis and not by type of judicial behavior, it might be easiest to summarize the results by returning to the first table, which summarized the relationship between the hypotheses and the types of behavior which might be expected by court of appeals judges.

[Table 3.9 here]

The results for all four hypotheses provide support for judges who are concerned about both legal and policy goals, but they pursue those policy goals sincerely and do not adjust their behavior to avoid possible reversal by the Supreme Court. This may simply be

because they see no reason to worry about the Supreme Court, as the absolute likelihood of reversal on any given case is extremely low. It may also be due to the fact that they are concerned about other actors, but the relevant concerns are more proximate than the Supreme Court. They may be, for example, more concerned about the reactions of their colleagues than about the anticipated response of the Supreme Court.

The evidence presented here should be considered one of several pieces of the puzzle. Work on strategic behavior, particularly concerning judges, has suggested that strategic behavior can exist in two contexts. First, as assessed in this chapter, judges can vary their behavior from case to case, exploiting opportunities to make policy when they are available (Epstein and Knight, 1998; Maltzman, Spriggs, Wahlbeck, 2000; Van Winkle, 1996; Cameron, Segal, Songer, 2000). The second conception of strategic behavior suggests that strategic behavior implies that judges respond to changes in the external environment (Spiller and Gely, 1992; Segal, 1997; Spiller, Bergara, Richman, 2002). To date, this work has only looked at the Supreme Court. In the next chapter, I take this conception of strategic behavior and apply it to the behavior of court of appeals judges.

	Sincere Pursuit of Policy Goals	Pursuit of Legal Goals	Strategic Pursuit of Policy Goals	All Three Types
Case Importance (Hypothesis 1)	0	0	-/0	-
Ideological Distance (Hypothesis 2)	+	0	0	+
Competence (Hypothesis 3)	0	-	0	-
Experience (Hypothesis 3a)	0	-	0	-

Table 3.1: Summary of Expected Relationships to Reversal¹¹

¹¹ Cell entries are expected relationship between a given predictor and the likelihood of reversal.

Variable	Measure
Control Variables	
Dissent	1 if there was a dissent to the Court of Appeals decision, 0 if not.
Conflict	1 if the majority opinion expressly acknowledges conflict with another Circuit or the Supreme Court, 0 if not (George, 1998).
Reversal of Lower Court/Agency	1 if the lower court or agency was reversed by the Court of Appeals, 0 if not.
En banc	1 if the decision by the Court of Appeals was made en banc, 0 if not.
Liberal Decision	1 if the Court of Appeals reached a liberal decision, 0 if not
Sincere Pursuit of Policy Goals	
Ideological distance from the Supreme Court	The absolute value of the distance between the opinion author and the median member of the Supreme Court.
Pursuit of Legal Goals	
Judge Competence	Regression Coefficient from Landes, Lessig, Solimine (1998) measure of judicial influence
Experience	Natural log of the (# of years of judge's experience+1)
Strategic Pursuit of Policy Goals	
Important Case	1 if the case was published in <i>U.S. Law Week</i> , 0 if not.

Table 3.2 Descriptions of Variables and Measures

	Reversal=0		Reversal=1	
	Mean	s.d.	Mean	s.d.
Dissent	.0897	.2859	.4215	.4949
Conflict	.0744	.2626	.3004	.4595
Reversal of Lower Court/Agency	.4017	.4905	.7668	.4238
En banc	.0324	.1773	.2601	.4397
Liberal Decision	.4618	.4988	.8386	.3688
Ideological distance from the Supreme Court	1.1997	.7697	1.3202	.8316
Judge Competence	3.1324	.3807	3.0088	.3544
Experience	2.0891	.7160	2.0415	.6350
Important Case	.4179	.4935	.3273	.4703

Table 3.3 Summary Statistics for Reversals and Non-Reversals¹²

¹² Summary statistics are for each judge-vote.

Variable	Coefficient	Robust S.E.	P> z
Reverse Lower Court/Agency	0.9617*	0.2735	0.000
En Banc	1.0345*	0.4024	0.010
Intercircuit Conflict	1.1228*	0.2970	0.000
Dissent to Court of Appeals Opinion	1.1989*	0.3494	0.001
US Loses Court of Appeals Decision	0.8774*	0.2501	0.000
Liberal Decision	0.8499*	0.2566	0.001
Judge Competence	-0.9337*	0.2174	0.000
Judge Experience	-0.0787	0.1409	0.577
Ideological Distance	0.1800	0.1139	0.114
Important Case	-0.3260	0.2555	0.202
Constant	-3.3623*	0.7437	0.000

N = 936.¹³

* = $\alpha < .05$, two-tailed test

Table 3.4: Predictors of Reversal of Court of Appeals Votes

¹³ Most of the lost data comes from using the citation scores reported in Landes, Lessig and Solimine (1998). I'm weighing the impact of using ABA scores and comparing the results, but I like this measurement so much more I might be willing to make the sacrifice. The two measurements are barely even correlated (.00832), so I'm concerned they may be measuring different concepts

Variable	Coefficient	Robust S.E.	P> z
Reverse Lower Court/Agency	0.9788*	0.2703	0.000
En Banc	0.9194*	0.4024	0.022
Intercircuit Conflict	1.1056*	0.3150	0.000
Dissent to Court of Appeals Opinion	1.2148*	0.3445	0.000
US Loses Court of Appeals Decision	0.6453*	0.2975	0.030
Liberal Decision	0.8521*	0.2828	0.003
Judge Competence	-0.4215	0.2717	0.121
Judge Experience	-0.0234	0.1603	0.884
Ideological Distance	0.0234	0.1436	0.870
Important Case	-0.2827	0.2624	0.281
First Circuit	-0.3701	0.4863	0.447
Second Circuit	-0.1215	0.5552	0.827
Third Circuit	0.3002	0.5053	0.553
Fourth Circuit	-0.3720	0.4580	0.417
Fifth Circuit	0.1333	0.4468	0.765
Sixth Circuit	-1.6128	0.8330	0.053
Seventh Circuit	-1.0858	0.5654	0.055
Eighth Circuit	-0.5107	0.4646	0.272
Ninth Circuit	0.6855	0.3493	0.050
Eleventh Circuit	-1.0428*	0.5044	0.039
DC Circuit	0.3126	0.4393	0.477
Constant	-4.6352*	1.0257	0.000

N = 936

* = $\alpha < .05$, two-tailed test

Table 3.5: Predictors of Reversal of Court of Appeals Votes, Circuit Effects Added

Variable	Change	First Difference	Predicted Probability of Reversal
Reverse Lower Court/Agency	0 to 1	.00313	.00512
En Banc	0 to 1	.00398	.00597
Intercircuit Conflict	0 to 1	.00403	.00602
Dissent to Court of Appeals Opinion	0 to 1	.00442	.00641
US Loses Court of Appeals Decision	0 to 1	.00266	.00465
Liberal Decision	0 to 1	.00262	.00461
Judge Competence	-1 s.d. to +1 s.d.	-.00147	.00052
Judge Experience	-1 s.d. to +1 s.d.	-.00021	.00178
Ideological Distance	-1 s.d. to +1 s.d.	.00053	.00252
Important Case	0 to 1	-.00049	.00150

Note: Baseline probability of reversal (all variables at mean or median) is .199%

Table 3.6: Predicted Probabilities of Reversal

Variable	Coefficient	Robust S.E.	P> z
Reverse Lower Court/Agency	0.4060	0.4783	0.396
En Banc	1.4912	0.9414	0.113
Lower Court Conflict	1.2003*	0.5691	0.035
Dissent to Court of Appeals Opinion	0.8667	0.5417	0.110
US Loses Court of Appeals Decision	0.8556	0.4542	0.060
Liberal Decision	0.8711	0.4569	0.057
Competence of Majority Opinion Author	-1.1351*	0.4369	0.009
Experience of Majority Opinion Author	-0.0682	0.2665	0.798
Ideological Distance, Majority Opinion Author	0.1778	0.2309	0.441
Important Case	-0.6147	0.5035	0.222
Constant	-2.0581	1.4814	0.165

N=251, * = $\alpha < .05$, two-tailed test

Table 3.7: Predictors of Reversal of Court of Appeals Decisions, Majority Opinion Author Only

Variable	All Judges	Opinion Author
Reverse Lower Court/Agency	0.9617* (.000)	0.4060 (.396)
En Banc	1.0345* (.010)	1.4912 (.113)
Intercircuit Conflict	1.1228* (.000)	1.2003* (.035)
Dissent to Court of Appeals Opinion	1.1989* (.001)	0.8667 (.110)
US Loses Court of Appeals Decision	0.8774* (.000)	0.8556 (.060)
Liberal Decision	0.8499* (.001)	0.8711 (.057)
Judge Competence	-0.9337* (.000)	-1.1351* (.009)
Judge Experience	-0.0787 (.577)	-0.0682 (.798)
Ideological Distance	0.1800 (.114)	0.1778 (.441)
Important Case	-0.3260 (.202)	-0.6147 (.222)
Constant	-3.3623* (.000)	-2.0581 (.165)
N	936	251

Note: two-tailed significance in parentheses

Table 3.8: Comparison of Models Using all Judges and Opinion Authors

	Sincere Pursuit of Policy Goals	Pursuit of Legal Goals	Strategic Pursuit of Policy Goals	All Three Types	Results
Case Importance (Hypothesis 1)	0	0	-/0	-/0	0
Ideological Distance (Hypothesis 2)	+	0	0	+	+(weak)
Competence (Hypothesis 3)	0	-	0	-	-
Experience (Hypothesis 3a)	0	-	0	-	-

Table 3.9: Comparison of Expectations and Results

CHAPTER 4

REVERSALS OF COURT OF APPEALS JUDGES OVER TIME

Court of appeals judges work in a complex environment. While many of their activities draw the attention of a relatively limited audience, that audience closely scrutinizes the decisions made by court of appeals judges. In several respects, court of appeals judges need to be sensitive to their environment—they are expected to follow developments in the law within the court system and changes in laws made by Congress. Beyond actual changes in law, court of appeals judges may be sensitive to other changes in their environment—increased or decreased caseloads (often as a result of legislation passed by Congress) and changes in the political environment would be two of the most notable extra-legal changes that one might expect to generate responses from court of appeals judges.

But one should not expect all court of appeals judges to respond similarly to either legal changes or extra-legal changes. This chapter focuses on the behavior of court of appeals judges over time by comparing their behavior in periods of membership stability on the Supreme Court to periods of change on the Supreme Court. Shifts in the direction of policy charted by the Supreme Court should have a substantial effect on the behavior of court of appeals judges, though the exact nature of their response is not clearly spelled

out by the work on the behavior of appellate judges. One reason for this lack of clarity is the failure to compare periods of change to periods of stability. More fundamentally, students of the behavior of court of appeals judges have differing perspectives on what motivates court of appeals judges.

4.1 Judges and their Environment

As mentioned in Chapter 2, one of the most studied aspects of court of appeals decision-making has been the degree to which court of appeals judges respond to changes in the Supreme Court. The general consensus continues to be that court of appeals judges respond to general (member-based) and specific (issue-based) changes in the Supreme Court. This suggests that appellate judges both anticipate changes in the Court by adjusting their behavior to the new membership and react to changes in specific doctrine. While the overall picture of compliance is relatively clear, two issues remain: the first is to determine if all judges are complying with changes in Court membership or doctrine, and the second is to assess what motivation for court of appeals judges best explains compliance by court of appeals judges.

The latter issue reaches the question of motivation of court of appeals judges. Judges concerned about policy outcomes and protecting their decisions from reversal would anticipate Supreme Court change. Judges concerned about making good law would shy away from attempting to anticipate the Supreme Court's decisions and instead adhere to precedent until the Supreme Court formally overrules its own precedent (Caminker, 1994b). Sincere policy-oriented judges should not change with the Supreme Court, adhering to their preferred positions regardless of the shift in the Supreme Court.

The former question, the issue of which judges comply with Supreme Court membership or doctrine changes, is one of the means judges use to accomplish their goals. It may be that, as the Supreme Court shifts, it reverses a different set of judges: a liberal Supreme Court may be reversing conservative judges, but as the Supreme Court becomes more conservative, it may start reversing more liberal judges. The change in reversal rate or absolute number of reversals would be contingent on the distribution of the ideology of court of appeals judges. Outright compliance--as measured by an increase or decrease in the number of reversals--might not be the result of all the judges shifting their decisions to follow the Supreme Court. Instead it might be explained by the Supreme Court reversing a different set of judges than before the membership shift.

All of this suggests that court of appeals judges' compliance with shifts in the Supreme Court require better explanation than has been previously offered. In addition, the high degree of compliance can be explained by any of the three types of behavior that I have outlined for court of appeals judges. Attempting to discern which of the three (or some combination) best explains how court of appeals judges respond to the Supreme Court would advance our understanding of both the motivations of court of appeals judges and their relationship with the Supreme Court.

In this chapter, I look at two different eras of Supreme Court history and compare the behavior of court of appeals judges between the two eras, as well as looking at what factors predict reversal rate within each of the eras. I compare a period of membership stability on the Supreme Court to a period of substantial membership and ideological change to see if court of appeals judges behave differently when membership of the

Supreme Court is changing. The three different behavior types suggest differential response to change, which allows me to infer from the results which behavior pattern best explains the results. In addition to looking at change, the different behavior types predict that certain factors will explain the number of reversals each judge receives in a given year. From the pattern of predictors, we can determine which type of behavior best explains the observed results.

The appropriate approach to understanding change and its consequences for the behavior of court of appeals judges is to provide a careful comparison to the behavior of court of appeals judges when the membership and preferences of the Supreme Court are well-known. Patterns of reversal that we observe during periods of change may not be unique to those periods, but may be an effect that can be observed regardless of the status of the Supreme Court. Some of the hypotheses that I detail in the next section require an explicit comparison of results across periods: depending on what behaviors court of appeals judges choose, certain phenomena should emerge only during periods of change, while others may be expected during periods of Supreme Court stability as well as change.

4.2 Background and Hypotheses

My theory suggests that court of appeals judges may choose which goals they want to accomplish and then decide the means to accomplish the goal. This creates three possible types of behavior: strategic pursuit of policy goals, sincere pursuit of policy goals, and pursuit of legal goals. The approach of this chapter is largely an extension of that in the previous chapter. Along those lines, the measures are largely similar, and the

logic used to derive the hypotheses is similar. The difference is that factors that matter on a case-to-case basis may not matter over a longer period of time, while factors that do not vary much from case-to-case may matter more once aggregated into a longer period. In the previous chapter, I looked at the behavior of judges on individual cases to assess how judges might make the choices on individual cases, while the analysis in this chapter takes a longer view of the behavior of court of appeals judges

At the core of this analysis is determining whether judges react to changes in their external environment and under what conditions their behavior might change. Movement in the Supreme Court should not necessarily guarantee movement in the courts of appeals: even if judges are attentive to the membership changes in the Court, they may feel that it is more proper to wait until doctrine changes rather than follow the membership changes. Judges who do accommodate membership change in the Supreme Court (as opposed to doctrinal change) are likely motivated by a different set of goals from those that await the doctrinal change by the Supreme Court.

Some judges may not react to the changes in the Supreme Court at all, yet see their reversal rate increase or decrease as the Court moves relative to their preferences. Liberal court of appeals judges, for example, would find themselves reversed more frequently as the Supreme Court becomes more conservative, assuming they are motivated by their policy preferences and act sincerely. The same Supreme Court shift would decrease the number of reversals for a conservative judge who is similarly motivated.

As suggested earlier, the fact that changes in the Supreme Court do not necessarily produce substantial changes in the total number of cases reversed does not suggest that court of appeals judges universally comply with ideological changes in the Supreme Court. Even studies that find compliance with Supreme Court changes note that “the decisions of the court of appeals reflect independently both Supreme Court policy and the ideology of judges on the appeals court panel” (Songer, Segal, and Cameron, 1994). Songer, Segal and Cameron suggest that this can be construed as evidence for strategic pursuit of policy goals by court of appeals judges: their voting behavior reflects both their own ideology and recognition of the shifting external environment. But their evidence does not necessarily prove that court of appeals judges exclusively engage in strategic pursuit of policy goals. One could also interpret their results as providing support for pursuit of legal goals and sincere pursuit of policy goals. A research design that can distinguish among the three types of behavior while continuing to take advantage of the change in the Supreme Court would facilitate more in-depth understanding of the motivations of court of appeals judges.

Court of appeals judges concerned about pursuing legal goals should react not to changes in the Court membership but to changes in legal doctrine brought about after a Court's membership changes. Caminker (1994b) is the most forceful advocate of the value of lower court judges avoiding “prediction”—trying to guess the moves of a superior court instead of reacting to doctrinal changes. Caminker argues that if lower courts attempt to predict changes by the higher court, the superior court is deprived of the lower court's attempts to sort out the correct conclusion under the existing laws. That is,

a court of appeals decision may be the best application of extant law to a case and give the Supreme Court the best evidence it could hope for in deciding if the current state of the law accords with its preferences. Though not the perfect example, the affirmative action cases discussed in the first two chapters may provide an illustration of this.

Assuming, for the moment, that the Sixth Circuit followed Supreme Court *precedent* correctly, the Supreme Court benefits from the experience of the Sixth Circuit showing how precedent is applied to a current controversy, which represents a different issue than that directly under consideration in *Bakke*. If the Fifth Circuit was ignoring precedent and enacting their own policy preferences, then they deprived the Supreme Court of evidence of the conflict between *Bakke* and more recent rulings, like *Croson*.

Court of appeals judges engaged in strategic pursuit of policy goals would engage in exactly the prediction that Caminker argues is incompatible with making good law. Judges interested in shaping policy know that they must avoid reversal in order to accomplish this goal and doing so would require anticipating changes in the policy preferences of the Supreme Court. This suggests two differences in behavior with a judge pursuing legal goals. First, strategic behavior implies responding to membership change, not doctrinal change. Second, the shift by judges engaged in strategic pursuit of policy goals would not be a total abandonment of the status quo, but more of an adjustment to the new Supreme Court's preferences, while attempting to enact policy in accordance with their own preferences. Judges attempting to make good law should follow completely the dictates of the Supreme Court, and, over time, their behavior could move completely across the ideological spectrum responding to the change in doctrine by

the Supreme Court. The behavior of strategically motivated judges would be constrained by their own policy preferences: if they were moderates, the shift in their behavior would be much less pronounced over time.

Ascertaining the degree to which court of appeals judges move over their careers is beyond the scope of this project and assumes, to a greater degree than the work of this chapter, that judges are pure types. The empirical analysis below assumes that judges have a consistent response to changes in the composition and doctrine of the Supreme Court, but does not make the rigid assumption that judges can be classified according to type.

Judges who pursue policy goals sincerely would not change their behavior to accommodate the changes in the Supreme Court. Sincere behavior indicates that the actors' preferences map directly to their actions, without regard for the potential responses of other actors. Accordingly, sincere, policy-oriented court of appeals judges would not alter their behavior to accommodate changes in the Supreme Court. While judges engaged in sincere, policy-oriented behavior would not alter their behavior, one would expect their reversal rate to rise or fall depending on the direction of the shift in the Supreme Court. As the Court moves *away* from sincere, policy-oriented judges, the number of reversals that judges experience should increase. By the same token, as sincere, policy-motivated judges see the Court shift toward them, their reversal rates should decline.

This leaves a series of expectations about the relationship between court of appeals judges and the Supreme Court over time. Assuming that the reactions of the

Supreme Court to court of appeals judges are predictable and that they choose to reverse the decisions they find most ideologically extreme, we can learn about what goals court of appeals judges have and the means they use to accomplish them. Using the same strategy of inference deployed in the previous chapter, certain patterns of predictors of the numbers of reversal will allow some inference about the behavior of court of appeals judges.

4.2.1 Hypotheses

Court of appeals judges engaged in sincere pursuit of policy goals would behave in accordance with their sincere preferences. Accordingly, only if judges are behaving according to their sincere preferences will their ideological distance from the Supreme Court predict the number of reversals by the Supreme Court. For judges trying to make good law, their preferences on policy and, as a result, their ideological distance from the Supreme Court, would not be relevant. For judges who strategically pursue their policy goals, the ideological distance is not as important simply because they are aware of the ideological gap they may have with the Supreme Court and behave in a manner that would minimize the likelihood of reversal, thereby rendering that factor irrelevant. It is important to note that this is the case for periods of ideological change as well as periods of ideological stability on the Supreme Court. Judges engaged in sincere pursuit of their policy goals will do so regardless of their proximity to the Supreme Court *and* will not be particularly concerned about the movement of the Supreme Court toward or away from their preferred positions.

Hypothesis 1: If the ideological distance between court of appeals judges and the Supreme Court is positively related to the number of times a judge is reversed in a given

year, then there exists evidence of sincere pursuit of policy goals on the part of court of appeals judges. If ideological distance and the number of reversals is unrelated, then there exists evidence of either strategic pursuit of policy goals or pursuit of legal goals.

The logic for the first and second hypotheses closely matches the logic employed in the previous chapter. There may be a relationship between a judge's qualifications and the likelihood of being reversed by the Supreme Court. If so, it should be interpreted as evidence that judges are pursuing legal goals. The logic behind this argument is that if judges who are better qualified to make good law actually do so, then there exists some evidence that judges are concerned about goals unrelated to policy and seek to make good law.

Hypothesis 2: If judges who are more experienced or are considered to be better qualified are reversed fewer times, then there is evidence that judges are attempting to make good law. If judge experience or competence is unrelated to the number of reversals, then there exists evidence of pursuit of policy goals (pursued strategically or sincerely).

There is an alternative perspective on this particular hypothesis. Judges who make good law are expected to respond to shifts in doctrine, not changes in Supreme Court membership. Accordingly, they may be the judges reversed more often after a membership change, as I suggest in the next hypothesis. If more competent or more experienced judges are more likely to pursue legal goals, then they may be reversed *more often* following an ideological shift by the Supreme Court. Their natural ability to avoid reversal by crafting good law may be undermined by a Supreme Court that views existing precedent with more disdain, and judges better at following that precedent may be reversed more often in the event of a shift by the Supreme Court. It is not clear if this tendency might override the ability of judges who make better law to avoid reversal.

When the ideology of the Supreme Court undergoes a significant shift, different types of motivations suggest different responses. Judges who are engaged in sincere pursuit of policy goals would not be affected by the shift itself—the frequency with which they are reversed would be contingent on the direction of the shift. Judges engaged in strategic pursuit of policy goals would also not be affected by the shift itself—they would anticipate the shift in their own behavior and would adjust to the new ideological direction of the Court. Judges who pursue legal goals would be obligated to follow the precedent of the previous regime until new law is laid down to which the judge pursuing legal goals adjusts. As a result, a judge who is pursuing legal goals would be reversed more frequently shortly after the shift in ideology, but that frequency should decline over time. Related to this hypothesis, one would expect there to be no increase or decrease in reversals over a time of membership (and ideological) stability in the Supreme Court.

Hypothesis 3: If there are a greater number of reversals immediately after an ideological shift in the Supreme Court, then there is evidence that judges are pursuing legal goals. If there is no increase in the number of reversals, then there is evidence that judges are pursuing policy goals (sincerely or strategically).

As I suggested, Hypotheses 2 and 3 present somewhat competing expectations. They suggest that for judges attempting to make good law, the shift in the Supreme Court will increase the number of reversals but, simultaneously, that more competent and more experienced judges would be reversed less often if judges are pursuing legal goals. It may be the case, though, that contrary to the expectations of Hypothesis 3, more competent and more experienced judges may be reversed *more* often following a change in the Supreme Court and this could be interpreted as pursuit of legal goals. The logic in

this chapter (and the previous chapter) is that the fewer the reversals of more competent and more experienced judges, the stronger the evidence of pursuit of legal goals. But the countervailing expectation, that legal judges react to doctrine change and not membership change, may increase the number of reversals of more experienced and more competent judges. This complication is important to bear in mind as I look at the results.

If judges pursue policy goals sincerely, those for whom reversal rates will change most drastically due to a change in the Supreme Court would be judges who find themselves ideologically distant from the Supreme Court. Judges who find themselves ideologically aligned with the Supreme Court need not choose between sincere and strategic behavior: both produce the same outcome. Even if judges toward whom the Supreme Court has shifted wanted to calculate the anticipated response of the Supreme Court, their strategic calculations would be that they need not move from their sincere preferences in order to avoid reversal by the Supreme Court. Only judges who find themselves ideologically distant from the Supreme Court would behave differently if pursuing their policy goals sincerely or strategically. Judges who find the Court moving away from them are forced to decide if they want to accommodate the change of the Supreme Court or adhere to their preferences. Both of these choices would produce divergent behaviors, which would be clearest after the Supreme Court shifts its ideological orientation.

For judges trying to make good law, the increase in reversals should not be contingent on their ideological distance from the Supreme Court, old or new. If their decisions are liberal, it should reflect the liberal decisions of the Supreme Court of the

recent past. The same should be true for conservative decisions by judges trying to make good law—they are rooted in following the precedent laid down by the Supreme Court.

Hypothesis 4: If judges who are ideologically distant from the (new) Supreme Court experience an increase in reversals following a shift of the Court, there is evidence of judges engaging in sincere pursuit of policy goals. If ideological distance does not play a role in the wake of the Court's change, then there is evidence of strategic pursuit of policy goals or pursuit of legal goals.

Table 4.1 presents the expected relationship between the predictors of number of reversals and the types of behavior that are possible for a judge.

[Table 4.1 here]

The column that rates the most attention is the behavior type that is, to this point, the least discussed. Judges engaged in strategic pursuit of policy goals should move smoothly along with changes in the Supreme Court. They, of all the behavior types, would be the least likely to experience changes in their reversal rates as a result of changes in the Supreme Court. The question that remains unanswered to this point is how to distinguish strategic behavior in this situation. One possibility is that in times of significant change, strategic, policy-oriented judges may be less likely than other judges at the same ideological distance to be reversed, simply because they react (move from their sincere preferences) more quickly than other judges. But being less likely to be reversed in this circumstance may mean the absence of a relationship between ideological distance and reversal rate, or it may mean a negative relationship. The negative relationship makes sense only under two conditions. First, judges who weren't previously behaving strategically would have to decide to do so. This is more plausible than it may sound, as judges may have not been required to behave strategically because they agreed with the

Supreme Court and now find themselves considering the consequences of the Court's movement for the likelihood of reversal of their decisions for the first time. Second, this assumes there is some other constraint on the Supreme Court's caseload, like an upper bound on the number of cases that it can decide. This constraint would force the Court to substitute some cases it was reversing for others, instead of reversing all of the cases it would like to. I will address this issue at more length when I discuss the selection of periods that I study.

4.3 Methods

As I suggested at the beginning of this chapter, the proper approach to understanding the behavior of court of appeals judges over time is to compare periods where the external environment is relatively stable with periods of external change. Accordingly, I chose two five-year periods and counted the number of decisions made by court of appeals judges in those periods that were reversed by the Supreme Court.

Cases were selected from the Spaeth database, based on the docket number of the Supreme Court case where possible¹⁴, which indicates when the case was filed with the Supreme Court. This is a better indicator of the time of the lower court decision than using cases decided by the Supreme Court in a particular term. According to Stern, Gressman, and Shapiro (1986), the appellant has no more than 150 days after the lower court decision is entered to register an appeal or a writ of certiorari with the Supreme Court. This means that cases decided between July 1, 1970 and June 30, 1974 must be

¹⁴ The Supreme Court changed docket numbers at the beginning of October Term 1971, including a 2 digit prefix to match the term of the Court. Prior to this date, the docket number started at 1 for each term and did not indicate what term it was from, so multiple cases decided by the Court had the same docket number. This caused a small problem, but all I needed to do was look at the date of the lower court decision for all the Supreme Court cases from October Terms 1969 and 1970 to solve this problem. The new docket numbers are permanent, so it does not matter how long it

appealed to the Supreme Court no later than December 1, 1974 (and not before July 1, 1970). Cases were counted as reversals if the Supreme Court reversed the entire decision or any part of the decision, or if the Supreme Court vacated and remanded the lower court decision. Decisions where the Supreme Court simply ordered a "grant, vacate, remand" (GVR) were not counted as reversals. Having selected this pool of cases for each time period, I looked at the decision date of each lower court case to see if the case was eligible for the time period of my study. I used the merits decision date of each case, so for cases where a rehearing was denied, I used the date of the original decision. If a case was reheard, I used the dates of the new decision to determine eligibility. The only other reason to exclude a case would be if the lower court decision was unpublished, which meant the names of the judges participating was not easily available.

For each eligible case, I collected information on all of the judges in the majority and counted them as being reversed. For judges who concurred in part and dissented in part, I looked at the holding of the Supreme Court case to determine if they had concurred with the part of the decision that the Supreme Court reversed. If they did, they were counted as part of the majority. This means that, for each case, there might be several judges who were reversed by a Supreme Court decision. I then counted the number of times each was in the majority of a case that was reversed in a given year, and used that as the dependent variable for my analyses.

Like the analysis presented in the previous chapter, there is the possibility that the votes made by judges in a court of appeals case are correlated with one another, which, in a statistical analysis, can produce unreliable standard error estimates. In that situation, a

takes for the Supreme Court to decide a case.

correction can be made to the standard errors, something not possible here. But the similarity of results between looking at the individual votes and simply looking at the opinion author in the previous chapter suggests that the problem of correlation of standard errors is not very big, so I am not worried about my inability to control for that correlation here. As I discuss in greater detail below, there are other correlation issues and I adopt appropriate and flexible statistical techniques to handle the problem where I can.

4.3.1 Selection of Time Periods

Choosing the time periods for analysis requires a period of relatively abrupt ideological change where court of appeals judges have to choose to move along with the membership change in the Court, adhere to the precedent of the Court until the new members formally alter it, or follow their own preferences. A comparison can be made to a period of ideological (if not membership) stability where judges are not forced to choose between following the Court's preferences or precedent: they would have already made the decision and would not be forced to move again in the absence of a shift in the Supreme Court's preferences.

While the most obvious period of stability is the current Court--the second longest natural Court in American history--I continue to hope to avoid analysis of the Rehnquist Court to stay away from problems caused by the Court's declining caseload. For a period of ideological stability, I chose the late 1970s and early 1980s. I sought some separation from my period of ideological change in hopes that there would be little doubt where the Court's preferences lay during the period of membership stability. Finding a period of

complete membership stability is not particularly easy, so I opted for a period of ideological stability, looking at the period from July 1, 1978 to June 30, 1983. The only membership change in that period was Justice Stewart's retirement and the appointment of Justice O'Connor to the Court.

While there ultimately may have proven to be some ideological change, the perception was that Justice O'Connor's appointment would do little to alter the ideological orientation of the Supreme Court. According to *Time's* profile of then-nominee O'Connor, "O'Connor is generally expected to fit into that shifting middle, as her predecessor Stewart did; thus her appointment, at least initially, is likely to be less decisive a factor than if she had replaced one of the men on either the left or the right" (Magnuson, 1981). From the perspective of judges of the courts of appeals, particularly those who attempt to anticipate the ideological direction in which the Supreme Court will move, perception plays an important role. It is probably more important that O'Connor be perceived as ideologically akin to Justice Stewart than actually causing little change in the Court doctrine.¹⁵ Court of appeals judges who attempt to anticipate the movement of the Supreme Court would follow their perception of the new Justice's ideology (and its implication for Supreme Court outcomes).

Warren Burger's nomination for Chief Justice was announced on May 23, 1969, and he was confirmed less than three weeks later, taking his seat on June 23. This means that court of appeals judges would know by the beginning of the 1970 fiscal year (July 1,

¹⁵ An informal assessment of the coverage of O'Connor's nomination and confirmation indicates that *Time* magazine is representative of the perception of observers of the nomination. Most of the coverage was devoted to the fact that Justice O'Connor would be the Court's first female justice and her record on abortion.

1969)¹⁶ that the Court would be a very different one from the one they had previously been part of. The median justice on the last Warren Court was Justice Black, with a score of -1.11 on a scale that ranges from -3 to 3, with higher scores being more conservative. Following Abe Fortas' failed promotion to Chief Justice, the Warren Court lost Chief Justice Warren and Justice Fortas in a very short time. The 1969 term had only 8 justices, and the median justice was Justice Stewart, with a score of .69. After President Nixon's two failed nominations, (Haynsworth and Carswell), Justice Blackmun was confirmed in May, 1970.

Shortly thereafter, Justices Black and Harlan were replaced by Justices Powell and Rehnquist, giving President Nixon four appointments to the Supreme Court in 18 months. The appointment that shifted the balance for the Supreme Court was that of Justice Burger, who had the most significant effect on the median location of the Supreme Court, though the following appointments substantially reinforced this conservative shift. It should be noted that the judges of the courts of appeals should be, as a group, as familiar with the preferences of Justices Blackmun and Burger as any set of actors in the national government. Both had served for a time on the courts of appeals—Burger for 13 years in the DC Circuit and Blackmun for nearly 11 in the Eighth Circuit. Of course, they also were familiar with the inclinations of Judge Haynsworth, who was Chief Judge of the Fourth Circuit at the time of his nomination, and, to a lesser degree, Judge Carswell, who was technically a court of appeals judge at the time of his nomination.

¹⁶ I use fiscal years primarily because they line up with October Terms, though they are ahead by one year (the 1970 fiscal year lines up with October Term 1969).

There are several issues beyond the ideological composition of the Court at the time periods I study that could impact my results; foremost among these is the issue of how many cases the Court hears. While both periods fall within Warren Burger's tenure as Chief Justice, they are at opposite ends of his tenure. In the first five years, the Court decided an average of 140.4 cases with signed opinions, and an average of 156.8 cases in the latter period (Epstein, Segal, Spaeth, Walker 1996). In addition, there was a shift away from the Warren Court's predisposition for reviewing state court cases toward reviewing cases that arose out of the courts of appeals (Spaeth, 2001). All of this would suggest that the Supreme Court's review of court of appeals decisions in the early years of Chief Justice Burger's tenure may not have been a true indicator of the number of cases that merited reversal. That is, assuming, for the moment that there were no more (in an absolute sense) cases that the Supreme Court found merited reversal in 1980 than 1970, the number of court of appeals decisions reversed in 1970 would be constrained relative to the number of cases reversed in 1980.

The consequences of this are difficult to judge. I essentially assume that the Supreme Court reverses the cases it feels are most in need of being reversed. But this does not mean that the Court need be unconstrained—it simply requires that the constraint be the same across time. Within each of the time periods, this does not appear to be much of an issue—the change in the caseload and its composition is gradual. Perhaps the safest conclusion is that when comparing results across time periods, caution should be used.

4.3.2 Data Collected

Judges who were on regular, active service for any full year of the time period were considered. Using the Federal Judicial Center's online biography of federal judges¹⁷, judges were assumed to be on active status the entire time between receipt of commission and the date they assumed senior status. Only judges who were on active service for the entire year (give or take one month on either side) for any given year were eligible to be counted in the database. Any judge who only served actively for less than 11 months was excluded from the database for that year. For example, a judge who received his commission on December 1, 1971 and served actively until January 1, 1993 would be included in the 1973 (starting July 1, 1972) and 1974 fiscal years in the first time period, and all of the fiscal years (1979-1983) of the second time period.

Once the data was collected for the dependent variable, I collected the independent variables, most of which are similar to those discussed in the previous chapter. While the use of citation scores as a measure of judicial competence was possible for judges on active service in 1983, using citation scores, particularly for the 1970-1974 period, would severely limit the number of cases available for analysis. Accordingly, I use ABA ratings in this chapter as the measure of judicial competence. This only costs a few judge-years, for the three judges still on active service appointed by Presidents Roosevelt and Truman.

I used two measures to assess the degree to which time might play a role in the number of times the Supreme Court might reverse a court of appeals judge. The first is simply an indicator of significant change, coded 1 for fiscal year 1970 (July 1, 1969 to

June 30, 1970) and 0 for all other years. If different judges are reversed by the Court following a shift (Hypothesis 4) or all judges find themselves out of step with the Court (Hypothesis 3), then this variable is necessary. To properly test the relationship between court of appeals ideology and a significant shift in the Supreme Court, I interact this dummy variable with the ideological distance measure.

The second measure intended to capture the change in the Supreme Court simply counts the number of years from the beginning of the time period under study (1970 for one period, 1979 for the other). If judges react to the change in precedent and not the change in membership, then they should find themselves better aligned with the Supreme Court once they begin to follow the change in doctrine. If judges are behaving this way, the counter should matter for the period of ideological change (July 1969-June 1974) but not for the period of ideological stability (July 1978-June 1983).

As a control for the workload of the cases, I counted judge participations using Lexis-Nexis for each year.¹⁸ Most variation in workload can be attributed to inter-circuit differences, but there can be substantial intra-circuit variation based on health, pace of work or other factors that may cause some judges do substantially more or less work than their circuit colleagues. This method caused a couple of problems (at one time, the Fifth Circuit had 2 Johnsons and 2 Clarks), but the general result is a more reliable measure of the caseload of each judge than simply substituting circuit averages.

Finally, some of the hypotheses assume a constant distribution of the judges. Supreme Court ideological shifts do not occur in isolation: membership change on the

¹⁷ <http://www.fjc.gov>. Accessed several times, March-October 2002.

courts of appeals alters the preferences of the colleagues of a court of appeals judge. The direction of the shift in the court of appeals should be the same as that of the Supreme Court, given that both stem from presidential appointments. As a result, shifts in Supreme Court ideology may be exacerbated by shifts in the courts of appeals. A liberal judge may find himself increasingly liberal relative to the Supreme Court and to his colleagues, which may increase his reversal rate independent of the effect of his behavior and the changes on the Supreme Court. Accordingly, I control for the distribution of the ideology of court of appeals judges. For each year, I calculate the mean ideology score for the judges in my sample and include that as an independent variable to help clarify the relationship between the variables of interest and the number of reversals a court of appeals judge receives in a year.

4.3.3 Statistical Methods

The data under analysis are properly considered panel data, which suggests correlations between the observations, which can alter both the standard errors and the estimates of the coefficients. Noting also that the dependent variable is an event count, caution must be exercised when choosing the appropriate statistical technique. To properly analyze a count variable in this format, I use one of a class of generalized estimating equations (GEEs). Zorn (2001) argues that GEEs “allow for a range of substantively-motivated correlation patterns within clusters and offer the potential for valuable insights into the dynamics of that correlation” (471). GEE also allows for a more flexible, unspecified correlation between observations within a cluster, which

¹⁸ For both time periods, Lexis-Nexis only offers information on judges for opinions that were published, so the variable measures number of published opinions.

proves useful for the research question at hand. It seems possible that there is an autoregressive relationship in the dependent variable—that there is a correlation between the number of reversals in year t with the number of reversals in year $t-1$. It is also possible that there is a more general correlation among the five years in each panel. Using a GEE structure allows flexibility that avoids imposing a correlation on the data.

While one improves the efficiency of GEE estimates by specifying the correlation matrix (α) *a priori*, GEE1 estimators (those which assume conditional independence of α and β) remain consistent even in the absence of a proper specification of α (Zorn, 2001). GEE1 estimators also treat the correlation matrix as a nuisance parameter, which means that one can not perform hypothesis tests on the correlations themselves. For this particular analysis, I do not find the correlations to be of substantive interest: they do not seem to offer added insight into the relationship between the covariates and the number of reversals a judge experiences in a given year.

4.4 Results

4.4.1. Ideological Shift by the Supreme Court

I estimate the following models: a normal Poisson model, a GEE1 model with an unstructured correlation matrix, and a GEE1 model with an AR(1) structure. For the most part, the results are quite similar, likely attributable to the fact that there turns out to be a very low degree of correlation. But there are important differences as well. Table 2 presents the results of the GEE model for the first time period, July 1969-June 1974.

[Table 4.2 here]

My hypotheses predict that, in a period of instability, judges who are pursuing legal goals will be more likely to be reversed as their doctrine lags behind a policy shift made by the Supreme Court. I also predict that judges who behave sincerely in pursuit of policy goals who, at one point found themselves ideologically aligned with the Supreme Court, may find themselves disagreeing with the new Supreme Court. The results here prove quite interesting in their lack of support for either of these general views of response to change by the Supreme Court.

Looking at the first hypothesis, suggesting sincere pursuit of policy goals if there is a positive relationship between ideological distance and the number of reversals, there is simply no evidence that there is a relationship between the two. Court of appeals judges who are further away from the Court than their colleagues are no more likely to experience more reversals. In fact, the coefficient is negative (though far from significant), suggesting, if anything, that judges closer to the Supreme Court experience a greater number of reversals. This provides support for considering court of appeals judges as either strategic pursuers of policy goals or motivated by legal goals.

The results for Hypothesis 2 prove quite interesting. At levels that approach statistical significance, judges who are more experienced and more competent experience more reversals, contrary to any of my hypothesized relationships. Raising a judge from well qualified, the median value, to exceptionally well qualified *raises* the predicted number of reversals per year from .97 to 1.04, an increase of 7%. As I suggested during the discussion of Hypothesis 2, this may not be entirely surprising. During periods of ideological change, judges who follow legal goals may be reversed more often as they

adhere to the dictates of an earlier Court, and respond to doctrine changes, not membership changes.

Turning to hypothesis 3, there is also little evidence that the immediate aftermath of an ideological shift by the Supreme Court results in an increased number of reversals. I argued that judges who pursue legal goals may find themselves constrained to follow a shift in doctrine, not a shift in membership. If this is the case, then the immediate repercussions of an ideological change would be to increase the reversal rate regardless of the ideology of the judge.

The final point to be made before considering the results from the other time period is that the interaction between significant change and ideological distance, the test of Hypothesis 4, also did not prove significant. A significant relationship here would have indicated that judges further from the Supreme Court were more likely to be reversed after the Court had shifted, suggesting that judges occupy their sincere positions in the face of a changing external environment. Lack of evidence of this relationship can be considered an indicator of judges not adhering to their preferred ideological positions in the face of a shift by the Supreme Court.

Table 4.3 presents the results of the alternative specifications of the correlation structure. Column 1 presents the results previously discussed, while Column 2 presents the results of the AR(1) correlation structure, and Column 3 presents the results of a regular Poisson regression.

[Table 4.3 here]

The consistency of these results suggests that they are not generally sensitive to the specification of the correlation matrix, suggesting some degree of robustness even in the absence of proper specification.

[Tables 4.4 and 4.5 here]

Looking at the estimated correlations between years for each judge (Table 4.4), the numbers are generally low though substantially higher than the values in the correlation matrix in Table 4.5. This suggests that there is, at best, limited correlation between years. It appears that specifying an autoregressive correlation matrix reduces the amount of correlation, but it is not clear how this aids my estimation in that GEE results should be robust in the presence of the correlation.

Finally, I included effects for the individual circuits, considering the possibility that, all else being equal, some Circuits may have greater or smaller reversal rates. One might also expect that caseload may become less of a factor, as the workload of the Circuit tends to govern how many cases judges decide. The results are generally the same, with judge experience and competence becoming smaller factors. There appears to be more intercircuit variation than was the case in the previous chapter, but all of the coefficients are positive, suggesting all of the Circuits that vary from the Tenth Circuit experience higher reversal rates than the Tenth Circuit.

[Table 4.6 here]

To this point, there is little evidence to support the findings of the previous chapter—that judges who are ideologically distant from the Supreme Court appear to occupy those positions when deciding cases and the Supreme Court takes note by

reversing their decisions. This can be considered evidence of the sincere pursuit of policy goals. I also found that more competent judges were less likely to be reversed, suggesting the pursuit of legal goals by court of appeals judges, is not sustained in this analysis. To the contrary, the behavior pattern observed to this point suggests that judges do pursue policy goals, but do so strategically. Judges who behave strategically with respect to the Supreme Court would not allow their ideological distance from the Supreme Court to affect their reversal rate, nor would one expect them to be reversed more often as the Supreme Court undergoes an ideological realignment.

Such an interpretation likely reads too much into null results. As mentioned earlier, there are several possible interpretations of null results. Add to the list the possibility of measurement error reducing the efficiency of the estimates and it becomes clear that additional evidence should be presented before concluding that these results suggest that court of appeals judges are responsive to membership changes in the Supreme Court.

4.4.2 Period of Ideological Stability

Turning to analysis of the latter period, the results are different in a few noticeable respects.

[Table 4.7 here]

First, caseload, which was a strong predictor of the number of reversals during a period of ideological realignment by the Supreme Court, fails to help predict the number of reversals. Second, ideological distance is a strong predictor of the number of times the Supreme Court reverses court of appeals judges in a given year. This provides evidence

that court of appeals judges are pursuing policy goals by behaving in a manner consistent with their preferred positions, and the Supreme Court is reacting accordingly. The predicted probabilities reported in Table 4.8 confirm the magnitude of this effect.

[Table 4.8 here]

All else equal, a judge quite close to the Supreme Court could expect about 1.21 reversals in a year, while a judge quite distant could expect 1.64—a full third more reversals.

Two observations about this model are in order. First, it is clear that there is overdispersion in the data, which means that there is a contagion effect—being reversed once in a year makes it more likely that a judge will be reversed again. This was not the case in the analysis of the period of ideological change. Second, the overall significance of the model is highly dubious, suggesting that, aside from ideological distance, the independent variables are not aiding explanation of the number of reversals court of appeals judges experience. Given the value of the test statistic for the Wald Chi-square, 5.56, one can not reject the null hypothesis that this model provides no better fit to the data than a constant-only model. This can be interpreted as a solid rejection of any expectation of significant results on the other variables.

Table 4.9 demonstrates that these results can be expected regardless of the specification of the correlation matrix. In all three models, the only significant predictor of the number of reversals is the degree of ideological distance between the Supreme Court and the court of appeals judge.

[Tables 4.9, 4.10 and 4.11 here]

Tables 4.10 and 4.11 show the estimated correlations within each judge over the period under analysis. They are uniformly quite small, and the robustness of the results suggests that they are not overly sensitive to the specification of the correlation between years for judges.

Before turning to comparison of the results between ideological shift and ideological stability, a brief glimpse at Table 4.12 may prove illuminating.

[Table 4.12 here]

The Fifth Circuit split into the Fifth and Eleventh Circuits in September, 1981, as the Fifth Circuit had grown unwieldy. Interestingly, the circuit split was not accompanied by an increase in judgeships (though the Fifth Circuit had been granted 11 new judgeships in 1978), demonstrating that the problem was one of administration of a circuit of 26 judges (Barrow and Walker, 1988). Accordingly, I do not include a variable for reversals made by judges on the Eleventh Circuit—since my period covers only a year and a half of the circuit split (September 1981 to June 1983), and no new judges were appointed to the Eleventh Circuit in that time, I treat all of the judges on the Fifth and Eleventh Circuit as members of the same circuit for the entire time period.

There are a couple of interesting differences between these results and those presented in Tables 4.7 and 4.9. One that is not clear simply from looking at the results is that these are from a Poisson, not a Negative Binomial, regression. The test for overdispersion indicated that once the circuit variables were added, the data was not overdispersed.¹⁹

¹⁹ α , the test statistic, had a value of .000000714.

Most interestingly, once controls are added for the different circuits, caseload becomes a significant predictor of the number of reversals. Not surprisingly, the more cases judges hear, the more decisions that will be reversed. This remains interesting because the number of cases which judges decide is almost entirely a function of the Circuit of which they are members. These results suggest, though, that caseload has an independent effect. Second, the ideological distance between a judge and the Supreme Court, while still signed correctly, continues to prove significant. This remains true despite the degree of ideological homogeneity within circuits, so the fact that entire circuits are reversed more often than others may still say something about judges acting according to their sincere policy preferences.

Finally, it proves noteworthy that the five circuits that can expect significantly more reversals per judge than the baseline Tenth Circuit include two of the most liberal circuits at the time, the Ninth Circuit and the DC Circuit. They also include one of the most conservative circuits, the Fourth Circuit. This may reflect a balance by the Supreme Court between extreme poles.

As I discuss in the next chapter, the relationship between the Supreme Court and the Ninth Circuit has been a difficult one for several years, but their interaction also offers an opportunity for scholars to better understand appellate judging. While the Ninth Circuit may be considered an extreme example of the attenuated relationship between the Supreme Court and the courts of appeals, its behavior remains a phenomenon that merits attention and may be more illustrative of the behavior of judges on other circuits than one might expect.

4.4.3 Comparing Ideological Shifts and Ideological Stability

The primary focus of comparison between the two periods selected for study was to be the reaction to the evolution of the Court's ideology and doctrine as a shift in membership came to be reflected by a shift in policy. It should be noted that this hypothesis was not based on any belief that a new, more conservative Court would instantly toss out the accrued body of precedent that represents perhaps the most significant revolution in civil rights and civil liberties in this century. Moreover, the Burger Court did no such thing—they generally respected many of the landmark decisions laid down by the Warren Court's activist justices—a fact noted by commentators at the time of the nomination of Justice O'Connor, President Reagan's first Supreme Court nominee (Crewdson, 1981; Magnuson, 1981). It was expected, however, that the Court would move enough law in a conservative direction for a discernible trend, at least in some areas, to carry through to a broader pattern of more conservative decisions by court of appeals judges. As discussed earlier, there is no evidence on this point. It may simply be the case that a longer period of time is needed for such an effect to be noticed. It may also be the case that revolutions in some areas of law may not necessarily be discernible in looking at aggregate trends of decision making by court of appeals judges. Whatever the reason, the approach taken here failed to uncover any evidence of macro-level adjustment by judges on the courts of appeals to the Supreme Court.

While this finding is interesting for not meeting one of my expectations, I was surprised to find that ideological distance, which does not explain the number of reversals

in the period of ideological change, is an important predictor of the number of reversals in the period of ideological stability. This finding remains difficult to interpret—if anything, one would expect the reverse to be true as a Court looking to figure out its own orientation might seek shortcuts in a period of change. This would make a more conservative Court more likely to reverse liberal judges (and vice versa) regardless of the actual ideological outcomes of their decisions if the Supreme Court relies on the ideology of the judge rather than the decision to help decide which cases to select and, ultimately, to reverse.

Instead, the findings here point in the opposite direction. It may simply be the case that, as the Supreme Court shifts, it is less certain about what is happening amongst those it is supposed to be supervising than it is when its own membership and collective preferences are stable and well-known. Put another way, justices making decisions in a period of ideological adjustment may be more concerned about learning about their new colleagues than they are about paying attention to changes in the lower ranks of the judiciary. Regardless of the explanation, this is an important finding that should be kept in mind when attempting to understand the goals and motivations of court of appeals judges.

4.5 Conclusion

Perhaps the most coherent way to pull together the results of this chapter is to look at the results compared to the expectations, looking at the results from the two different time periods separately before considering them together. It is safe to say that court of appeals judges do not act as I thought they might in a period of uncertainty. One

might consider the evidence to point in the direction of strategic pursuit of policy goals, but the complete reliance on null results necessary to reach this conclusion and the absence of any other evidence to support strategic behavior should mitigate against making such an argument with too much confidence. The most difficult finding to interpret is the higher reversal rate of more competent judges. The only plausible explanation for this phenomenon actually comes close to some of my original expectations about judges who are more oriented toward making good law. If the judges that are more qualified are the ones trying to make good law and adhere to precedent instead of reacting to Court ideological swings, then it stands to reason that more competent and more experienced judges would find themselves reversed more often in a period of ideological change on the Supreme Court. I suggested this possibility when looking at the competing tensions law-minded judges might face in a period of ideological change. Nonetheless, it seems difficult to make this claim given that the expectation would be for judges who are more competent and more experienced to be reversed less often, a finding supported by the results of the previous chapter.

There is little clear evidence about how judges behave under conditions of change, but the picture becomes somewhat clearer when one looks at a period of ideological and membership stability. Judges who are ideologically distant from the Supreme Court are reversed more often than their colleagues closer to the preferences of the Supreme Court, suggesting that judges are behaving in accordance with their sincere preferences on policy issues. On all of the hypotheses relevant to a period of Supreme Court stability, the behavior of court of appeals judges complies. Of course, only two of

the hypotheses provide direct predictions for this era, but this evidence is somewhat stronger than the other pieces of evidence that have been gleaned from this particular level of analysis.

This chapter provides evidence that is both complementary and contradictory of the findings discussed in the last chapter. In that chapter, there was strong evidence for pursuit of legal goals by court of appeals judges and only modest evidence for viewing court of appeals judges as motivated by sincere pursuit of policy goals. The evidence here is the flip-side of those findings: somewhat stronger evidence that court of appeals judges are engaged in sincere pursuit of policy goals, but only weak evidence that court of appeals judges might be motivated by legal goals. Even then, a bit of *post hoc* rationalization is necessary to make the evidence fit. But neither chapter provided solid evidence for a view of court of appeals judges as strategic in pursuit of policy goals. That was admittedly a difficult task for this chapter if all null findings are not given substantive interpretation, but there still remains little, if any, evidence that judges pursue policy goals but do so strategically.

Hypothesis	Sincere Policy	Strategic Policy	Legal
1. Ideological distance	+	0	0
2. Experience/Competence	0	0	- in stability + in change
3. Change in Reversals immediately after ideological shift	0	0	+
4. Ideological Distance after Shift	+	0	0

Table 4.1: Expected Relationship Between Behavior Forms and Number of Reversals

Variable Name	Coefficient	Standard Error	P> z
Caseload	0.0047*	0.0010	.000
Distribution of CA Ideology	0.4375	1.6030	.785
Judge Ideological Distance	-0.0128	0.0390	.743
Judge Competence	0.0679 [†]	0.0410	.098
Judge Experience	0.0991 [†]	0.0512	.053
Counter from Supreme Court Shift	0.0072	0.0833	.931
Dummy for Significant Change (OT 1969)	-0.4684	0.3619	.196
Ideological Distance*Significant Change	0.0992	0.1180	.401
Constant	0.1071	2.2356	.962

* $\alpha < .05$, [†] $\alpha < .10$, two-tailed tests.

N=418.

$Wald\chi^2_8 = 37.91$ $Pr > \chi^2 = .0000$

Table 4.2: GEE1 Model of Number of Reversals, 1970-1974²⁰

²⁰ I ran a negative binomial to test for the possibility of overdispersion. α , the test-statistic, was .046, and the X^2 test statistic was significant at .187, not enough to reject the null hypothesis of overdispersion. Because overdispersion is a problem for my other time period, I discuss the implications more fully there.

Variable Name	GEE	GEE-AR(1)	Poisson
Caseload	0.0047* (.0010)	0.0042* (.0013)	0.0044* (.0013)
Distribution of CA Ideology	0.4375 (1.6030)	-0.0318 (1.5734)	0.2955 (1.5401)
Judge Ideological Distance	-0.0128 (.0390)	0.0127 (.0445)	0.0172 (.0462)
Judge Competence	0.0679 [†] (.0410)	0.0863 [†] (.0517)	0.0880 [†] (.0533)
Judge Experience	0.0991 [†] (.0512)	0.0515 (.0594)	0.0565 (.0598)
Counter from Supreme Court Shift	0.0072 (.0833)	0.0115 (.0842)	0.0035 (.0830)
Dummy for Significant Change (OT 1969)	-0.4684 (.3619)	-0.1100 (.3413)	-0.2340 (.3398)
Ideological Distance*Significant Change	0.0992 (.1180)	-0.0216 (.1167)	0.0196 (.1169)
Constant	0.1071 (2.2356)	-0.4344 (2.1982)	-0.0474 (2.1577)

* $\alpha < .05$, [†] $\alpha < .10$, two-tailed tests.
N=418 (403 for the AR(1) Model)

Table 4.3: Comparison of Different Models of Number of Reversals, 1970-1974

	1970	1971	1972	1973	1974
1970	1.0000				
1971	-0.1936	1.0000			
1972	0.1778	-0.1210	1.0000		
1973	-0.3567	-0.3374	0.0608	1.0000	
1974	0.0173	-0.1749	-0.0417	0.0645	1.0000

Table 4.4: Correlation Matrix for GEE1 Model, 1970-1974

	1970	1971	1972	1973	1974
1970	1.0000				
1971	-0.0497	1.0000			
1972	0.0025	-0.0497	1.0000		
1973	-0.0001	0.0025	-0.0497	1.0000	
1974	0.0000	-0.0001	0.0025	-0.0497	1.0000

Table 4.5: Correlation Matrix for GEE-AR(1) Model, 1970-1974

Variable Name	Coefficient	Standard Error	P> z
Caseload	0.0040*	0.0015	0.009
Distribution of CA Ideology	0.5131	1.6396	0.754
Judge Ideological Distance	-0.0040	0.0431	0.926
Judge Competence	0.0502	0.0405	0.215
Judge Experience	0.0715	0.0509	0.160
Counter from Supreme Court Shift	0.0006	0.0849	0.995
Dummy for Significant Change (OT 1969)	-0.4105	0.3691	0.266
Ideological Distance*Significant Change	0.0742	0.1214	0.541
First Circuit	0.3742 [†]	0.1995	0.061
Second Circuit	0.2523	0.1676	0.132
Third Circuit	-0.1452	0.1975	0.462
Fourth Circuit	0.2738	0.1795	0.127
Fifth Circuit	0.3814*	0.1725	0.027
Sixth Circuit	0.2151	0.1652	0.193
Seventh Circuit	0.4319*	0.1722	0.012
Eighth Circuit	0.1348	0.1681	0.423
Ninth Circuit	0.2608	0.1647	0.113
DC Circuit	0.2439	0.1713	0.154
Constant	0.1347	2.2842	0.953

* $\alpha < .05$, [†] $\alpha < .10$, two-tailed tests.

N=418. Tenth Circuit is the excluded variable.

$Wald\chi^2_{18} = 66.85$ $Pr > \chi^2 = .0000$

Table 4.6: Circuit Effects Added, 1970-1974

Variable Name	Coefficient	Standard Error	P> z
Caseload	0.0012	0.0016	0.475
Distribution of CA Ideology	-0.1273	0.5262	0.809
Judge Ideological Distance	0.1530*	0.0722	0.034
Judge Competence	0.0754	0.0886	0.395
Judge Experience	0.0009	0.0755	0.990
Counter from OT 1978	0.0555	0.0630	0.378
Constant	-0.4119	0.6818	0.546

* $\alpha < .05$, † $\alpha < .10$, two-tailed tests.

N=551.

$Wald\chi^2_6 = 5.56$ Pr > $\chi^2 = .4746$

Test for Overdispersion

$\alpha = .0810$ Pr > $X^2 = .038$ (can reject the null hypothesis of no overdispersion)

Table 4.7: GEE1 Model (Negative Binomial) of Reversals, 1979-1983

Ideological Distance	Value	Predicted Number of Reversals	95% C.I.
.7636	mean – 1 s.d.	1.2059	1.0600 to 1.3692
1.7386	mean	1.4068	1.3040 to 1.5152
2.7136	mean + 1 s.d.	1.6441	1.4809 to 1.8227

Table 4.8: Predicted Reversal Rate by Ideological Distance, 1979-1983

Variable Name	GEE1	GEE-AR(1)	Negative Binomial
Caseload	0.0012 (.0016)	0.0008 (.0016)	0.0007 (.0010)
Distribution of CA Ideology	-0.1273 (.5262)	0.0976 (.5433)	-0.2526 (.3764)
Judge Ideological Distance	0.1530* (.0722)	0.1873* (.0712)	0.1577* (.0435)
Judge Competence	0.0754 (.0866)	0.0814 (.0871)	0.0774 (.0526)
Judge Experience	0.0009 (.0755)	-0.0859 (.0787)	-0.0211 (.0470)
Counter from OT 1978	0.0555 (.0630)	0.0626 (.0669)	0.0625 (.0438)
Constant	-0.4119 (.6818)	-0.0870 (.7029)	-0.4802 (.4722)

* $\alpha < .05$, † $\alpha < .10$, two-tailed tests.

N=551 (528 for the AR(1) Model)

Table 4.9: Comparison of Models, 1979-1983

	1979	1980	1981	1982	1983
1979	1.0000				
1980	0.1466	1.0000			
1981	0.0355	0.0632	1.0000		
1982	0.0744	0.2407	0.1942	1.0000	
1983	-0.1058	0.1958	0.0608	0.1238	1.0000

Table 4.10 : Correlation Matrix for GEE1 Model, 1979-1983

	1979	1980	1981	1982	1983
1979	1.0000				
1980	0.1195	1.0000			
1981	0.0143	0.1195	1.0000		
1982	0.0017	0.0143	0.1195	1.0000	
1983	0.0002	0.0017	0.0143	0.1195	1.0000

Table 4.11: Correlation Matrix for GEE-AR(1) Model, 1979-1983

Variable Name	Coefficient	Standard Error	P> z
Caseload	0.0056*	0.0017	0.001
Distribution of CA Ideology	-0.2505	0.3655	0.493
Judge Ideological Distance	0.1141*	0.0439	0.009
Judge Competence	0.0147	0.0509	0.772
Judge Experience	-0.0305	0.0444	0.492
Counter from OT 1978	0.0598	0.0416	0.150
First Circuit	0.2465	0.2645	0.351
Second Circuit	0.3713 [†]	0.2220	0.094
Third Circuit	0.8949*	0.2029	0.000
Fourth Circuit	0.4790*	0.2195	0.029
Fifth Circuit	0.2245	0.1984	0.258
Sixth Circuit	0.2161	0.2244	0.335
Seventh Circuit	-0.0330	0.2337	0.888
Eighth Circuit	0.2571	0.2478	0.300
Ninth Circuit	0.8534*	0.1848	0.000
DC Circuit	1.1786*	0.2020	0.000
Constant	-1.2950 [†]	0.5116	0.011

* $\alpha < .05$, [†] $\alpha < .10$, two-tailed tests.

N=551.

$Wald\chi^2_{16} = 106.85$ $Pr > \chi^2 = 0.0000$

Table 4.12: Circuit Effects GEE Poisson Model, 1979-1983

Hypothesis	Expectations			Results	
	Sincere Policy	Strategic Policy	Legal	Court Shift (1969-1974)	Court Stability (1978-1983)
1. Ideological distance	+	0	0	0	+
2. Experience & Competence	0	0	+/-	+	0
3. Change in Reversals immediately after ideological shift	0	0	+	0	N/A
4. Ideological Distance after Shift	+	0	0	0	N/A

Table 4.13: Comparing Expectations of Relationship Between Behavior Forms and Number of Reversals with Findings

CHAPTER 5

THE NINTH CIRCUIT

The Ninth Circuit Court of Appeals experiences a reversal rate that far exceeds other circuits and the problem can not be explained simply by looking at the number of cases decided by the Ninth Circuit as a proportion of all cases decided. Some have suggested that the problems with the Ninth Circuit lie in its size (Posner, 2000; U.S. Congress, 1998). While acknowledging that size does not alone explain the difference between the reversal rate of the Ninth Circuit and those of other circuits, they reiterate the common argument that the large size of the circuit makes it more difficult for judges to know the status of the law of the circuit when they reach their decision on a given case. This argument seems tenuous at best, for a series of reasons that I will lay out later in the chapter.

The views of judges and legal scholars do not square with those of journalists and political scientists. The recent Ninth Circuit decision that forcing students in public schools to either say or watch their classmates recite the Pledge of Allegiance violated the Establishment Clause of the First Amendment (*Newdow v. US Congress*) only reinforced claims that the Ninth Circuit is far more liberal than the Supreme Court and the other

circuits. What seems to be missing is a thorough examination of the Ninth Circuit's record before the Supreme Court over the past twenty years or so. While journalists' assessment of the Ninth Circuit can be influenced by one sensational decision, legal scholars seem to be, at the least, reluctant to admit that the rocky relationship between the Supreme Court and the Ninth Circuit is motivated largely by ideological disagreement.

I attempt to use the framework of goals and means for court of appeals judges to assess the reason for the high reversal rate of the Ninth Circuit. In part, I seek additional evidence to clarify the results presented in the previous chapters: that judges do attempt to make good law and they are also concerned about their policy preferences, but pursue their policy preferences sincerely rather than strategically. As I have mentioned before, it is no doubt the case that judges do engage in some strategic behavior, but this does not appear to be the primary behavioral mode for court of appeals judges.

This chapter takes a somewhat more refined approach, looking at the pattern of cases decided by the judges of the Ninth Circuit that generated Supreme Court reversals. I look at the pattern of cases reversed by the Supreme Court and compare them to a larger sample of cases decided by the Ninth Circuit to determine if there are any obvious patterns on which the cases that are reversed differ from the rest of the cases decided over roughly the same time period. I test a couple of general hypotheses about the differences that may or may not be expected given a certain mode of behavior by court of appeals judges.

5.1 The Relationship Between the Ninth Circuit and the Supreme Court

The most effective way to get leverage on the relationship between the Supreme Court and the Ninth Circuit is to look at the dynamics of that relationship and assess how changes on both benches have affected the relationship between the two. Different types of behavior by Ninth Circuit judges suggest different patterns of reversals in different eras. Exploring the patterns of reversal will hopefully provide more micro-level evidence than the previous chapters and have the potential of revealing the source of the tension between the nation's largest circuit and the Supreme Court. Before delving into the details of the problem, it makes sense to provide some sense of the scope of the problem. Figure 5.1 presents the number of Ninth Circuit decisions reversed for each term between 1980 and 2000. Figure 5.2 highlights the proportion of total reversals for which the Ninth Circuit is responsible over the same time period.

[Figures 5.1 and 5.2 here]

While the total number of reversals remains fairly constant (with the obvious exceptions of 1983 and 1996), the proportion of reversals that are of Ninth Circuit decisions has continued to grow.

Change in the output of any given Circuit has three possible causes. First, change can come about in the Supreme Court, primarily due to membership change. This change can produce a response by the judges of the Ninth Circuit as they adapt to the change in the preferences of the justices of the Supreme Court. As discussed in the previous chapter, there are reasons to expect that the adjustment by the appellate judges might come immediately after an adjustment in the Supreme Court or that it comes at some lag

after the shift in the Supreme Court. Second, there can be turnover on the court of appeals, producing an output change by the circuit. If conservative judges replace liberal or moderate judges, or some other generational replacement (where generations are marked by appointing president), the output of the circuit can change independent of any shift in the Supreme Court.

Finally, a possible source of behavior change relates to issue change independent of membership change on a circuit or the Supreme Court. If judges' goals vary across different types of cases, issue change may alter the proportion of cases in which a judge might, for example, pursue policy goals strategically. This possibility is probably outside of the scope of this study: establishing the existence of some combination of goals for appellate judges and the means they use to accomplish them necessarily precedes differentiation into issue areas. It is also possible that variation in goals across issue areas would not change the collective output of a circuit if judges respond differently to issue change. Finally, issue change is gradual, particularly for the courts of appeals, so it may prove difficult to pick it up in any particular time period.

This leaves two primary sources of change: membership change on the Supreme Court and membership change on the Ninth Circuit. There is little doubt that, over the past twenty years, the Supreme Court has become more conservative, with the pivotal appointment (in terms of output) being that of Clarence Thomas to replace Thurgood Marshall at the beginning of the 1991 term. This appointment, coupled with Justice Souter's replacement of Justice Brennan, signaled the development of a critical mass of

what were supposed to be conservative jurists. Figure 5.3 shows the change in the output of the Court over the past twenty years.

[Figure 5.3 here]

While the impact of Thomas' appointment does not appear to be substantial, it gave the conservative justices a majority (Thomas, Kennedy, Rehnquist, Scalia, O'Connor) that they had not previously had. More important than the actual output of the Court may be the *perception* that the Republican appointees had achieved a majority. In addition, looking directly at the output of the Court does not take into account the evolution of the Court's docket. Baum (1995) notes that, in the Court's civil liberties docket, the actual change in output, in terms of liberal and conservative decisions, may appear negligible, but that indicator may hide a shift in the *type* of cases that the Court is deciding. If one accounts for this change in content, the shift in the Court produced by Souter and Thomas' appointments is the greatest shift in fifty years.

Change on the Ninth Circuit has been somewhat more gradual. A major expansion of the Circuit in 1978 gave President Carter the opportunity to appoint 10 new judges to the Circuit, expanding the size of the Circuit from 13 to 23 judgeships. Many of the Carter appointees are either still active or retired during President Clinton's two terms. The Reagan Revolution replaced Nixon and Ford appointees more than any other group of judges, but both of these changes (Clinton replacement of Carter nominees, Reagan/Bush replacement of Nixon/Ford nominees) should have the effect of making the Ninth Circuit incrementally more conservative. Using the Ninth Circuit cases drawn from the Songer court of appeals database, I plotted the number of signed opinions

decided by Democratic appointees and Republican appointees in Figure 5.4. Figure 5.5 presents the results broken down by set of appointing presidents.

[Figures 5.4 and 5.5 here]

The Songer database takes a random sample of 30 published opinions from each Circuit in each year, so one might expect considerable variation from this sample to reality.

Accordingly, I looked at the proportion of active judges appointed by each set of presidents (Nixon/Ford, Carter, Reagan/Bush, and Clinton) to confirm that the sample was not a gross distortion of the true composition of the Ninth Circuit. I report the results in Figure 5.6.

[Figure 5.6 here]

Figure 5.6 demonstrates that the Songer database, by stopping in 1996, underestimates the influence of the Clinton appointees. By 2000, half of the judgeships are occupied by Clinton appointees. But the noteworthy trend is that, through the first half of the Clinton presidency, all of his appointments replace Carter appointees. In the second half, there is a lag of some period (a couple of years, representing, in part, the Senate delay in confirming Clinton's nominees) before Reagan/Bush nominees are replaced by more liberal judges. If there is a recent spike in the number of reversals, then it may be attributable to Clinton's remaking of the Ninth Circuit. The Circuit currently has 3 Carter appointees, 6 Republican appointees, and 14 Clinton appointees on active duty²¹. There are five vacancies.

Against this background, I offer some tentative hypotheses about the consequences for output one might expect given a set of behavior by the judges on the

Ninth Circuit. That is, assuming a certain behavior type for Ninth Circuit judges, what might one expect the consequence (in terms of number of cases reversed) of a shift in Supreme Court ideology or Ninth Circuit membership to be? In this case, I can assume that change in the Supreme Court will make it more conservative, so the hypotheses need not relate to the possibility of the Supreme Court moving in a liberal direction. The general argument is that change at either level has the potential to induce output change, resulting in variation in the number of times the Ninth Circuit is reversed.

5.2 Hypotheses and Data

I collected data on the decisions of the Ninth Circuit that were reversed between the 1980 and 2000 terms of the Supreme Court. To provide a rough comparison, I also pulled the cases from the Songer Court of Appeals database decided by the Ninth Circuit between 1979 and 1996 (the ending date of the Songer database). That database randomly draws 30 published opinions from each circuit in each year (Songer, 2000). Generally speaking, I confine the cases that I compare in both sets of data to signed, published opinions. The hypotheses that I test do not generally permit regression analyses, as it seems unnecessary to predict either the likelihood of reversal or the number of reversals. In addition, one would expect a much smaller variance on some of the variables, including the ideology of the judges. The judges of the Ninth Circuit are a more homogeneous group than the entire appellate bench, and many of the appointments are influenced by the California senators. As a result, any measure of ideology that does not rely on the votes of the judge would demonstrate a lack of variance because those involved in the appointment process tend to be the same individuals.

²¹ <http://www.ce9.uscourts.gov>. Accessed September 25, 2002.

I attempt to determine what distinguishes reversals from other cases decided by the Ninth Circuit. I ask if the cases that are reversed vary in judges participating, ideological direction, and a series of other criteria. Comparisons between the two datasets should be interpreted with caution for several reasons. First, one represents a sample of cases decided by the Ninth Circuit, while the other represents the population of published cases that were reversed. In both cases, I limited my work to signed opinions and focus on the opinion author when discussing ideology, but the results would not differ significantly if I looked at the entire majority in both datasets. Second, some of the coding schemes vary slightly. The Songer database does not match up perfectly with the Supreme Court database on its coding of issues or the ideology of decision, though they are very close. Finally, as with each of the other chapters, nothing can be said to be definitive. Like the other chapters, I look for evidence of certain patterns of behavior using the lens of reversal. Though the empirical strategy might be more distinct here than in the other chapters, any findings should certainly be considered in light of the other findings presented in previous chapters.

5.2.1 Sincere Pursuit of Policy Preferences

Change in the Supreme Court would produce different responses by judges engaged in different types of behavior. Judges who behave according to their sincere policy preferences would be, as I have argued before, unresponsive to changes in the Supreme Court, which would indicate no change in their decision making as the environment around them changed.

Hypothesis 1a: If judges of the Ninth Circuit behave in accordance with their sincere policy preferences, liberal judges would be reversed more often and conservative judges less often as the Supreme Court becomes more conservative.

This hypothesis assumes, for the moment, that the membership of the Ninth Circuit remains constant. At the very least, though, it seems implausible to argue that the Supreme Court would be becoming more conservative as the Ninth Circuit becomes more liberal, at least in terms of sincere preferences. That is, the same political forces that increase the conservatism of the Supreme Court would also be expected to make the Ninth Circuit more conservative. Simultaneous movement might pose some problems for interpretation of the results, but the changes on the Supreme Court are more abrupt while those on the courts of appeals are more gradual, particularly for a circuit as large as the Ninth. Changing the median member of the Ninth Circuit would not necessarily alter the output of the circuit like it would the output of the Supreme Court, because the panels and the limited *en banc* procedure combine to make it unlikely that the outcome of the circuit can be pegged to the median member of the circuit.

In addition, one might argue that there is an upper limit to the number of cases the Supreme Court can hear in a given term, so that one might not expect the Supreme Court to take more cases from a given circuit unless the other circuits produce fewer decisions they feel merit reversal. But, particularly over the past ten years or so, the Supreme Court has substantially reduced the number of cases it hears in a given term, from 162 in 1982 to 82 in 2001²² (Posner, 1985). With a Supreme Court working under such a low caseload, it should be considered evidence that the Supreme Court *could take more cases*

²² <http://www.medill.nwu.edu/docket/> Accessed July 14, 2002

if it wanted to and is taking all of the cases it feels it should. Accordingly, it seems to be the case that the Supreme Court has the capacity to take (and reverse) as many Ninth Circuit decisions as it feels necessary.

There should be two noticeable changes on the Ninth Circuit over the time period which I study. Reagan/Bush nominees replace mostly Nixon/Ford nominees through the 1980s, and Clinton nominees replace Carter nominees over the course of the 1990s. *Both replacement effects should make the Ninth Circuit more conservative.* Haire, Humphries, and Songer (2001) confirm this possibility. They find that, particularly in criminal and labor/economic cases, “Clinton judges generally adopted positions that were strikingly similar to those taken by judges appointed by moderate Republicans (Ford and Nixon).” (2001, 278). In general, Carter appointees, at least those still on active duty in the 1990s, were more liberal than Clinton appointees, while Reagan and Bush nominees were more conservative than Nixon and Ford appointees.

Given this consistent trend on the Ninth Circuit, one would not expect there to be significant periods where the Supreme Court and the Ninth Circuit find themselves either farther away or closer to one another than the general trend. That is, the Supreme Court and the Ninth Circuit may consistently find themselves at odds, but the degree of separation should not be any greater or smaller for any extended period of time.

Hypothesis 1b: If judges engage in sincere pursuit of policy preferences, then change in the Ninth Circuit should make its decisions more conservative and reversed less often (assuming, for the moment, a constant Supreme Court).

Particularly after the Thomas appointment, the median of the Supreme Court should not shift much, and after Clinton’s two appointments, starting with the 1994 term, there are

no changes in the preferences (though there may be year-to-year changes in the output) of the Supreme Court.

5.2.2 Strategic Pursuit of Policy Preferences

The behavior of judges who are pursuing policy preferences strategically would be somewhat different: one would expect them to react to the changes in the Supreme Court by making more conservative decisions. Accordingly, one would expect no increase in the number of reversals of court of appeals decisions if judges pursue their policy preferences strategically.

Hypothesis 2a: Under strategic policy preferences, Supreme Court change should not produce more reversals, but there should be fewer liberal decisions, particularly by liberal judges.

This hypothesis rests on the assumption that, holding the composition of the Ninth Circuit constant, conservative judges will feel freer to make conservative decisions because the likelihood of reversal by the Supreme Court is lower. Liberal judges, who find themselves ideologically distinct from the Supreme Court, should respond by adjusting their behavior to more closely align with the Supreme Court. In terms of reversals, then, there should be no marked increase or decrease if the judges are anticipating the policy shift on the Supreme Court that will follow the membership shift. But in terms of the cases decided by the Ninth Circuit, the outcome should become more conservative if all of the justices behave strategically.

It is important to note that it may be the case that only a certain set of judges may respond to the changes in the Supreme Court: not all liberal judges, for example, may change their behavior to accommodate the changes in the Supreme Court. It should still

be the case, though, that movement by some proportion of the liberal judges to accommodate the Supreme Court would decrease the number of liberal decisions, even though the possibility of a rise in reversals is contemporaneously possible.

The same logic applies to changes in membership of the circuit. If judges engage in strategic pursuit of policy preferences, instead of allowing the gap between the Supreme Court and the Ninth Circuit to persist, the judges would endeavor to close the gap, particularly if the sincere preferences of the Ninth Circuit left it as an outlier relative to the other circuits. That said, strategic pursuit of policy preferences would suggest that the judges of the Ninth Circuit would never have allowed the gap to emerge. Unless it is the case that different judges have different goals and strategic-minded judges replace sincere-minded judges, one would not expect either the persistent high reversal rate of the Ninth Circuit or for that rate to decline over time. Assuming, for the moment, however, that judges who are more sensitive to their environment do replace judges less concerned about Supreme Court reaction, then one might expect an effort to reduce the number of reversals by making more conservative decisions.

Hypothesis 2b: If judges engage in strategic pursuit of policy preferences, then change in the Ninth Circuit decisions would produce a shift in decisions *even greater* than the shift in the actual ideology of the circuit.

In one way, this can be thought of as the circuit-level analog of the judge-level expectations for strategic pursuit of policy preferences. An individual judge attempting to avoid reversal yet influence the final policy outcome would move from his preferred position toward the Supreme Court's preferred position—the exact distance to be determined by the absolute probability of Supreme Court reversal. The more cases the

Supreme Court reviews as a percentage of court of appeals decisions decided, the closer the judge would move to the Supreme Court's preferred position. The analogy, then, is that the circuit as a whole would move closer to the Supreme Court than its own preferred position would suggest. If the Supreme Court demonstrates an ongoing heightened interest in a particular circuit, the circuit should be even more likely to accommodate the Supreme Court's preference—if it is using strategic means to accomplish policy goals.

5.2.3 Pursuit of Legal Goals

Finally, as suggested previously, court of appeals judges who are trying to make good law react not to a membership change on the Supreme Court, but to incremental policy changes that are a result of sustained ideological shifts. The problem with this conception of reaction to behavior is that the shift in the Supreme Court was already well underway by the time Thomas took his seat on the Court. If judges are trying to make good law, and follow shifts in policy rather than shifts in membership, one of the primary changes in lower-court jurisprudence would come as a result of the evolving doctrine on the relationship between the federal government and the states.

If Ninth Circuit judges follow changes in doctrine, the Supreme Court's renewed respect for state sovereignty should be reflected in Ninth Circuit decisions. One of the signature cases on the issue of state-federal relationships is *Printz v. United States* (1997), a case concerning the constitutionality of provisions of the Brady Bill requiring states to conduct background checks on purchasers of handguns. The Ninth Circuit decision, *Mack v. United States* (1995), argued that the requirements imposed by the Brady Bill were not unconstitutional infringements on state sovereignty. But it was clear

that the Supreme Court, as demonstrated in *New York v. United States* (1992), was concerned about the federal government imposing obligations on the states. The majority opinion in *Mack* takes care to distinguish the requirements imposed by the Brady Bill from those under review in *New York*, arguing that “The Brady Act is not the kind of a federal mandate condemned by *New York*”. Judge Farris, in his defense of the Ninth Circuit decision in *Mack*, contends that the Ninth Circuit should not be faulted for its decision in *Mack*, saying that “one might reasonably conclude that the solution was less than obvious” (Farris 1997, 1468) because the Supreme Court was deeply divided on the issue—the decision in *Printz* was 5-4 and involved two concurrences and three dissenting opinions. Farris’ point is undoubtedly valid, but it should be noted that Judge Fernandez, who dissented in *Mack*, was aware that the Brady Act’s imposition on the states was an unconstitutional violation of the Tenth Amendment.

On a broader front, some of the expectations advanced about the relationship between experience and competence may continue to exist, though in a smaller group, they become more sensitive to individual judges who may not fit the pattern.

Hypothesis 3: Under legal goals, there may be a negative relationship between quality and likelihood of reversal that is *weakened* after an ideological shift as more qualified judges are reversed more often as the Supreme Court changes.

While individual judges may complicate finding a pattern between judge quality and reversal rate, the possibility remains that judges who are better at making good law than their colleagues will be reversed less often, particularly in the wake of a change in the Supreme Court. That said, Chapter 4 seems to suggest that judges who try to make good law are reversed *more* often in the wake of a membership change on the Supreme Court.

This seems plausible because these would be the judges most attached to legal goals, and would follow doctrinal changes more closely than membership changes, meaning they are more likely to be reversed in the wake of a membership change on the Supreme Court.

There should not be much direct effect of membership change within the Ninth Circuit on reversals if judges are pursuing legal goals. Membership change should not, of itself, change the output of a circuit if the dominant decision-making mode is that of attempting to make good law. There are two possible (and important) exceptions to this proposition. First, if there are a significant number of new judges replacing experienced judges at any one time, one might expect more reversals due to the membership change. Relatedly, if more qualified judges replace less qualified judges, there may be fewer reversals (and vice versa).

5.3 Results for Change on the Supreme Court

At the risk of adding difficulty to interpreting an already-muddled picture, I present the results for the hypotheses related to change in the Supreme Court (1a, 2a, 3) by behavior type. The two hypotheses that relate to change in the composition of the Ninth Circuit predict a similar pattern (fewer reversals as the Ninth Circuit becomes more conservative), so I consider them jointly.

5.3.1 Sincere Pursuit of Policy Preferences

Turning first to the sincere pursuit of policy preferences, one would expect a series of changes in the reversal pattern as the Supreme Court becomes more conservative. If Ninth Circuit judges are pursuing their policy goals sincerely, then the

Supreme Court would reverse more liberal judges than previously. Though there are some concerns about using party of appointing president as a proxy for ideology, it provides a simple way to take a first cut at the results. It should be noted that, when looking at the proportions in the Songer database, an overwhelming majority of the data on Democratic appointees is for Carter appointees.

[Figures 5.7 and 5.8 here]

Between 1980 and 1990, decisions signed by Democratic appointees account for 82 of 123 reversals (66.7%). Between 1991 and 2000, 55 of 97 (56.7%) reversals are of decisions signed by Democratic judges. Using a difference of proportions test, the test statistic for the hypothesis that the two proportions are significantly different from one another is 1.518, not enough to reject the null hypothesis that the two populations are not significantly different from one another. At any rate, the obvious finding is that decisions by Democratic judges actually account for a *smaller* proportion of the reversals after Thomas' appointment. This turns out to be an artifact of the number of decisions being made by judges appointed by Democratic and Republican presidents. Using the data from Figure 5.6, Democratic appointees served 57.6% of the judge-years between 1979 and 1990, but only 50.2% of the judge-years between 1991 and 2000. The percentage of reversals, then, is roughly proportionate (though a little higher) to the number of judge-years served. This finding is, in itself, important. One would expect, if judges were adhering closely to their sincere preferences, for Democratic appointees to have their decisions reversed more often than Republican appointees, and that this trend would be even stronger after Thomas' appointment to the Supreme Court. That neither of these

happens suggests that liberal judges are not being reversed out of proportion of their more conservative colleagues.

A related question relates not as much to the judges as to the decisions themselves. One would expect, regardless of the ideology of the judge, that a conservative Supreme Court would reverse liberal lower court decisions. In the period before Thomas is appointed to the Court (1980-1990), 83.7% of the Ninth Circuit decisions reversed were liberal decisions. By comparison, only 42.6% of decisions in the Songer sample over roughly the same time period were liberal.²³ After Thomas' appointment, 74.2% of the Ninth Circuit decisions reversed were liberal decisions; 38.4% of the cases in the Songer sample (1992-1996) were liberal decisions. In both cases, liberal decisions were more likely than conservative decisions to be reversed, but it is not clear that the proportion of reversals that were of liberal lower court decisions *increased* after Thomas' appointment. If the Supreme Court is moving in a more conservative direction, then one would expect a greater proportion of the reversals to be of liberal lower court decisions. Again, the proportion of cases that were reversed that were decided liberally by the Ninth Circuit *decreased* after Thomas' appointment. As suggested earlier, this may be explained by Democratic appointees making a smaller percentage of the decisions. But that would only be the case if, as suggested in Hypothesis 1a, judges follow their sincere policy preferences.

²³ Here, comparison of results should be met with even greater caution than other sections. The Songer variable, *direct1*, is not quite the same as the variable, *lctdir*, in the Spaeth database. Most importantly, Songer codes cases with mixed results and has substantially more missing data than does Spaeth. For purposes of comparison, I dropped both categories from the Songer results. I do *not* use the year-to-year weights provided by Songer, which means that cases later in the dataset have a slightly smaller probability of being sampled. Again, there is no reason to suspect this affects the results in any substantial way.

The interesting finding is that the trends in reversals generally follow the trends in decisions. Of course, the percentage of liberal decisions reversed is considerably greater than the percentage of cases that have liberal outcomes, but the proportion of reversals that are liberal does not increase as the Supreme Court becomes more conservative. This suggests that the problem of reversal might not be simply explained as liberal judges making liberal decisions and being reversed by the Supreme Court.

5.3.2 Strategic Pursuit of Policy Preferences

Hypothesis 2a suggests that a shift in the Court's alignment would produce a shift in the behavior of the judges on the Ninth Circuit. Figure 5.9 provides some evidence that the overall behavior of the Ninth Circuit does, indeed move in a more conservative direction. However, Figure 5.10 suggests that this movement is not a result of judges changing their behavior. This should allow us to conclude that the general pattern can be better explained by the replacement of more liberal judges by more conservative ones.

[Figures 5.9 and 5.10 here]

Accordingly, there does not appear to be any support for the argument that judges change their behavior in response to changes in the Supreme Court. If the Ninth Circuit judges were responding to this perception, their decisions would have become more conservative independent of the change caused by the replacement of judges. Again, there is no real evidence that this actually occurs.

5.3.3 Legal Goals

Turning briefly to Hypothesis 3, there are two possibilities that might be expected. First, more qualified judges may be reversed less often than less qualified judges.

Second, the relationship might be weakened by a significant change in the Supreme Court. Even if a relationship does not appear to emerge in the general pattern, it may exist in the one or two terms after the Court's membership changes. Figure 5.11 reports a comparison of the ABA ratings of judges whose decisions were reversed to those of the cases in the Songer sample.

[Figures 5.11 and 5.12 here]

A comparison of the mean rating for the values in Figure 5.11 suggests that, while the average ABA rating of judges who are reversed is lower than that of the decisions sampled in the Songer database, the value of this test statistic (-1.091) is insufficient to reject the hypothesis that the mean score in one sample is different from the mean of the other sample (treating the reversals as a sample for the moment). The difference is smaller in the wake of Supreme Court change, as noted in Figure 5.12 and suggested by Hypothesis 3. Given the results of Chapter 4, one might expect this weakened relationship between competence and the likelihood of reversal. It may be appropriate to suggest that better-qualified judges are reversed less often, but this pattern is *not* the case in the wake of the change in Supreme Court membership. This is, to some degree, what might be expected by Hypothesis 3. A negative relationship between competence and the probability of reversal is washed out in the wake of a Supreme Court change. But the limitations of this test are too great to attach very much importance to them. At the end of this chapter, I suggest one way that one might be able to observe the presence of the pursuit of legal goals on the Ninth Circuit.

5.4 Results for Change in the Composition of the Ninth Circuit

It is difficult to isolate the effect of changes in the Ninth Circuit from changes in the Supreme Court. But the data presented to this point suggest that a substantial proportion of the variation in court of appeals behavior can be explained by membership change. This does not explain the generally constant reversal rate, and certainly does not provide much explanation of the rising proportion of reversals for which the Ninth Circuit is responsible. That said, neither of the hypotheses I have proffered about reaction to changes in composition of the court of appeals (1b, 2b) suggest that there should be *more* reversals of Ninth Circuit decisions. President Clinton's first nominee took the bench in September, 1994, but his first four appointments (Judges Hawkins, Tashima, Thomas, and Silverman) all replaced judges appointed by President Carter (Tang, Alarcon, Dorothy Nelson, and Canby, respectively). A Clinton nominee did not replace a Republican appointee until Judge Graber was confirmed in March, 1998. If there were to be a shift in the overall direction of the decisions of the Ninth Circuit vis-à-vis the Supreme Court, it should not happen until at least 1998. But the data seem to indicate that, with the exceptions of the 1983 and 1996 terms, the Supreme Court's reversal of the Ninth Circuit occurs at a fairly regular rate, and that rate persists despite the Supreme Court's declining workload.

Hypotheses 1b and 2b suggest that, even holding the membership of the Supreme Court constant, the court of appeals should become more conservative in its behavior, at least until 1998. With data that only goes through 1996, there should still be evidence of the court of appeals decisions becoming more conservative. According to hypothesis 2a,

this should happen for one reason: the replacement of more liberal judges with more conservative judges. The data reviewed previously suggest that evidence for this is fairly solid: most of the shift in the Ninth Circuit prior to 1996 can be attributed to more Republican judges relative to Democratic judges. Hypothesis 2b suggests an additional effect of judges already on the Circuit becoming more conservative as they adapt to the preferences of their colleagues.

Isolating this second effect would prove tricky. But if one looks at the behavior of Democratic appointees between 1981 and 1994 (the years reserved to Carter appointees) in Figure 10, one would expect strategic behavior to suggest that they become more conservative due to either a change in the Supreme Court or a change in the makeup of the appellate bench. Neither proposition receives any support—it appears that Democratic appointees maintain behavior that is consistently more liberal than their Republican colleagues. While the behavior of the Republicans may become slightly more conservative, this is likely due to replacement effects. Analysis of the voting behavior of the Ninth Circuit judges over the entire 1993-2001 interval would provide clearer evidence of their adjustment to change, but Clinton’s impact on the Ninth Circuit was really not made until late in his second term.

In one respect, this may feel like squeezing blood from stones—asking too much of too little data. But an assessment of the judges appointed by Carter would demonstrate that their voting behavior would not be likely to change with the appointment of more conservative colleagues. Of the Carter appointees, Judges Reinhardt, Canby, Schroeder, Pregerson, Poole, Nelson, Fletcher, Farris, Alarcon, Wallace, Tang, Hug, and Browning

were still on active duty by the end of 1992 (Judge Alarcon took senior status on November 21, 1992, three weeks after President Clinton was elected). Several of these judges have received considerable attention for their rulings (Carlsen, 1996; Egelko, 2002; Rees, 1997). Interestingly, the author of the *Newdow* opinion was Judge Goodwin, a Nixon appointee. Stephen Reinhardt, who joined Goodwin in *Newdow*, has probably received the greatest attention of all of Carter's appointees, in part due to his strident opposition to the death penalty, a view that became particularly public after the execution of Robert Harris in April, 1992 (Paddock, 1992). In the wake of Harris' execution, Reinhardt claimed that "the [Supreme] Court has made it plain that the Bill of Rights is no longer its primary concern." (Reinhardt, 1992; 206). The 9th Circuit was routinely criticized in the early 1990s for its handling of death-row cases (Chiang, 1992, 1993; Greenhouse, 1992). Tony Mauro even called Judge Reinhardt "the most liberal judge on the most liberal court of appeals" (Mauro, 1996) in the wake of his decision in *Compassion in Dying v. Washington* (1996), the decision that was reversed in *Washington v. Glucksberg* (1997).

While this is undoubtedly anecdotal evidence, Reinhardt's extreme position may be an indication of some of the Ninth Circuit's problems vis-à-vis the Supreme Court. The fairly persistent rate of reversal may be driven, in substantial part, by the Carter nominees, who, even at senior status, can cause problems for the Supreme Court. There is some evidence that this is the case. Plotting reversals between 1980 and 2000 by appointing president of the opinion author, the effect of the Carter appointees proves persistent, even as fewer of them are on the Court.

[Figure 5.13 here]

In 1984, the Supreme Court reversed 15 decisions authored by Carter appointees, but 15 of the 23 judges at the time were Carter appointees. Congress expanded the Circuit from 23 to 28 judges in 1984. In the 1996 term, 9 opinions authored by Carter appointees were reversed, but there were only 6 active Carter appointees left on the Ninth Circuit.

It would come as no surprise to conclude that the relationship between Carter's appointees and the Supreme Court may lie at the heart of the persistently high reversal rate of Ninth Circuit decisions. But it does indicate several things. First, it may be a mistake to classify all judges as belonging to one type or another. Clinton appointees would be expected to be more moderate in their preferences than Carter appointees, but their lack of responsibility for the Ninth Circuit's persistent reversal rate may also be explained by a different orientation. They may be avoiding reversal by behaving strategically or by pursuing legal goals, while their Democratic colleagues have chosen a different approach to decision-making.

5.5 Size, Error Correction, and the Ninth Circuit

Much has been made, particularly in the debate surrounding restructuring of the Ninth Circuit, of the problems caused by the large size of the Circuit. At 28 authorized judgeships, the Ninth Circuit is nearly twice as large as any other Circuit (the 5th Circuit has 17 judgeships), and is the only one that uses a limited *en banc* procedure, where 10 randomly selected judges and the chief judge of the Circuit review cases that a majority of active judges of the entire Circuit decide merit rehearing (Hellman, 1989, 2000). This limited *en banc* procedure, it is argued, denies the entire Ninth Circuit the opportunity to

harmonize cases to the law of the circuit. Assuming for the moment that judges pursue legal goals, which is the only framework under which this argument holds, it still seems unlikely that the *en banc* procedure will do much to resolve a case that was decided in conflict with circuit precedent. That is, the informational advantage of an 11-member panel is not proportionately greater than that of a 3-member panel. Furthermore, the Supreme Court generally does not view itself as responsible for resolving intra-circuit conflicts, but for resolving disagreements among the circuits.

There may be legitimate reasons for considering the effect of circuit size on performance. It can be difficult for the judges of any circuit to keep track of the development of law within the circuit, but the more acute problem would seem to be keeping current on the development of law in other circuits. Judges have resources to facilitate this process. One of the most important must be the role of competing counsel in informing the judges on any panel. The competing parties have every incentive to inform the panel before which they argue their case of relevant decisions that provide support for their cause. In short, I do not see size as a plausible explanatory factor for any substantial proportion of the Ninth Circuit's reversal rate. If it were the case that size was related to likelihood of reversal, the previous chapters would have indicated a correlation between circuit size and likelihood of reversal, evidence that my findings, at least to this point, do not support.

One way to look at size is to assess the number of "errors" made by the Ninth Circuit. This can be done by looking at unanimous reversals. Justice Scalia, in particular, contends that the high number of cases where a Ninth Circuit decision is

reversed unanimously suggests that the lack of error correction within the Ninth Circuit is problematic. He argues that “the disproportionate segment of this Court’s discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments, and to reversing them by lop-sided margins, suggests that [the limited *en banc*] error reduction function is not being performed effectively.”²⁴ While his note does not explicitly link the size of the Ninth Circuit to the problems of error correction, the implication is that the limited *en banc* procedure evidently fails to accomplish what full *en banc* hearings accomplish in other, smaller circuits. But a high rate of unanimous reversal has another explanation. If the panels whose decisions are being reversed unanimously are liberal panels (and more liberal than the Circuit), it is not size that is creating their “error”, but ideology. That is, given that few would describe *any* of the current Supreme Court justices as liberals in an absolute sense, it may be the case that there are more Ninth Circuit decisions that are more liberal than the entire Court than other circuits produce.

Looking briefly at Figures 5.14 and 5.15, it is clear that some of the problem which Scalia notes is, in fact, real.

[Figures 5.14 and 5.15 here]

The late 1980s showed a lull in the number of unanimous or near-unanimous reversals (the data here include decisions reversed by 9-0, 8-1, and 8-0 votes). That the number of unanimous reversals (5.14) and the proportion of unanimous reversals that are of Ninth Circuit decisions (5.15) remains high in light of the decline in the number of cases the Supreme Court hears suggests the portion of their docket devoted to reversing what the Supreme Court sees as errors by the Ninth Circuit increases, perhaps prompting Scalia’s

²⁴ <http://app.comm.uscourts.gov/hearings/submitted/pdf/Scalia1.pdf>. Accessed October 14, 2002

concern. If it were the case that the error correction was not a function of the ideological direction of the lower court decision or the judge that authored the opinion, then one would expect there to be no pattern of one type of case being reversed more often than the other.

[Figures 5.16 and 5.17 here]

Figure 5.16 shows that there is no clear, consistent pattern of Democratic appointees being reversed more often than Republican appointees, at least after 1990. Part of this may be due to the fact that some Republican appointees turned out to be more liberal than expected (Judges Noonan and Goodwin, for example). This becomes particularly clear when one looks at Figure 5.17. There is clearly a trend from 1994 on to unanimously (or nearly so) reverse more liberal Ninth Circuit decisions than conservative decisions. While it is difficult to align precisely the judges of the Ninth Circuit with the justices of the Supreme Court, the moderation of the Supreme Court, particularly with the departures of Justices Brennan, Marshall, and Blackmun, may have caused the rise in the number of unanimous reversals more than the size of the Ninth Circuit.

5.6 Conclusion

Though cautions about the definitiveness of the evidence presented should be particularly strong with the limited data employed in this chapter, one might interpret the evidence in this chapter in two ways. First, the replacement of Carter appointees by Clinton appointees may do more to improve the relationship between the Ninth Circuit and the Supreme Court than any structural reforms might. It appears that the recent error correction that has caught the attention of several of the justices may be a function of the

increasing moderation of the Supreme Court, particularly vis-à-vis liberal Ninth Circuit judges. The evidence reviewed in this chapter seems to provide at least a bit more evidence for judges pursuing their policy preferences through sincere means. If the argument about increased unanimous reversals is attributed to ideology rather than complications related to circuit size, and the persistent disagreement between Carter appointees and the Supreme Court remains isolated to Carter appointees, the most logical conclusion may be that the Ninth Circuit's persistently high reversal rate is a function of ideology more than any other factor.

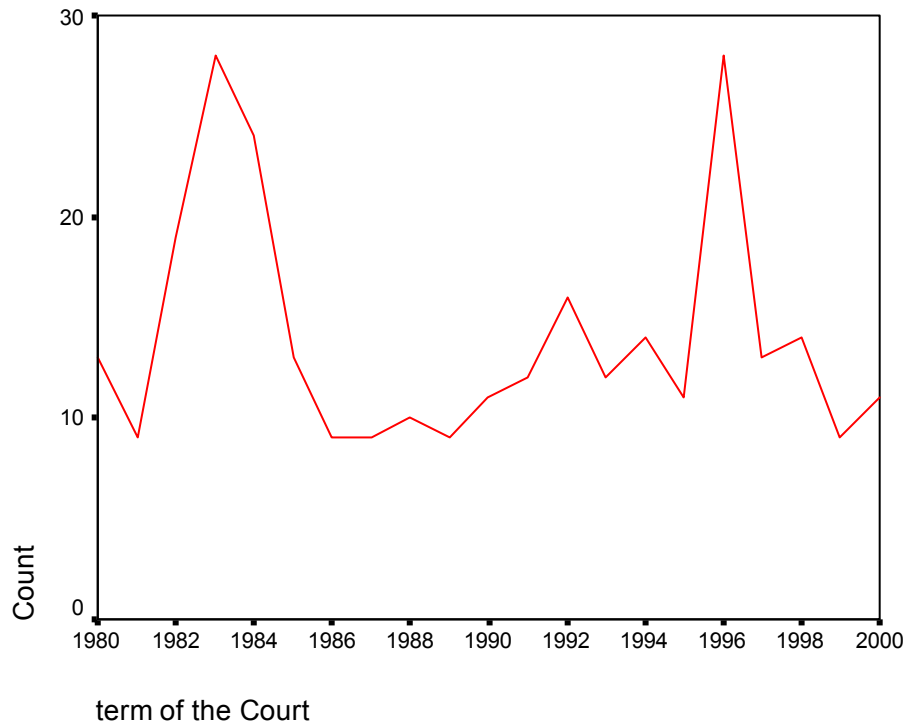


Figure 5.1: Reversals of Ninth Circuit Decisions by Term, 1980-2000

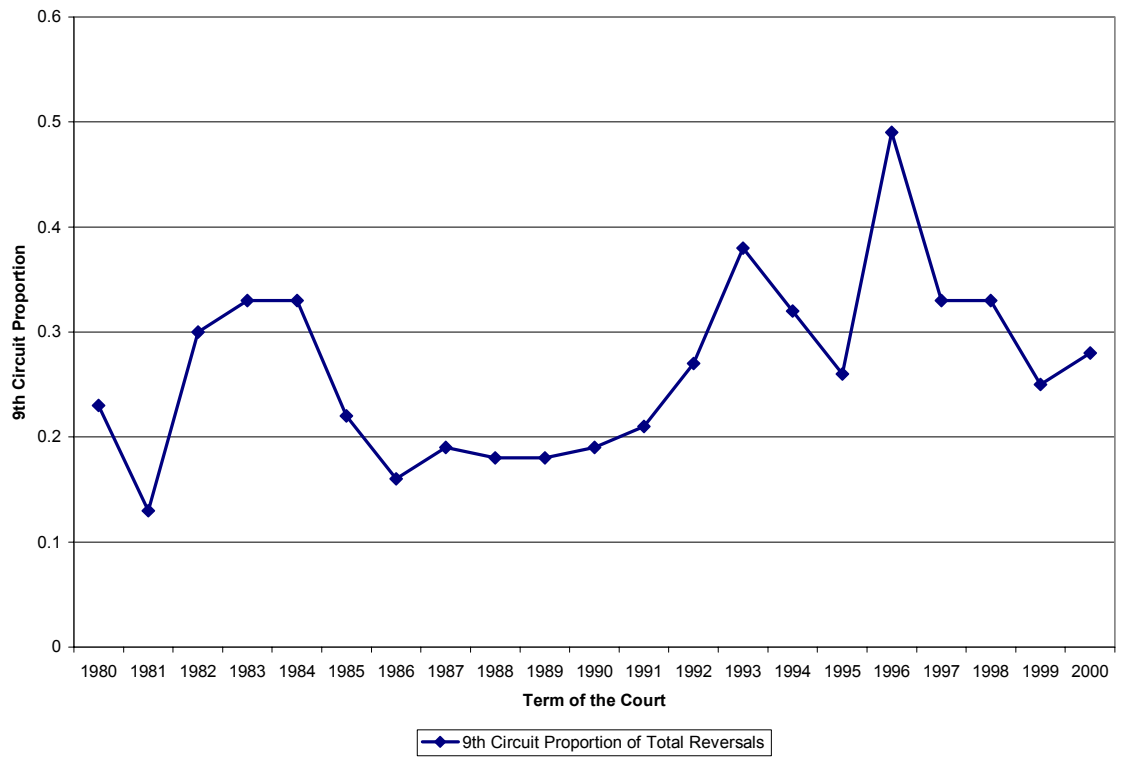


Figure 5.2: Proportion of Reversals that are of Ninth Circuit Cases

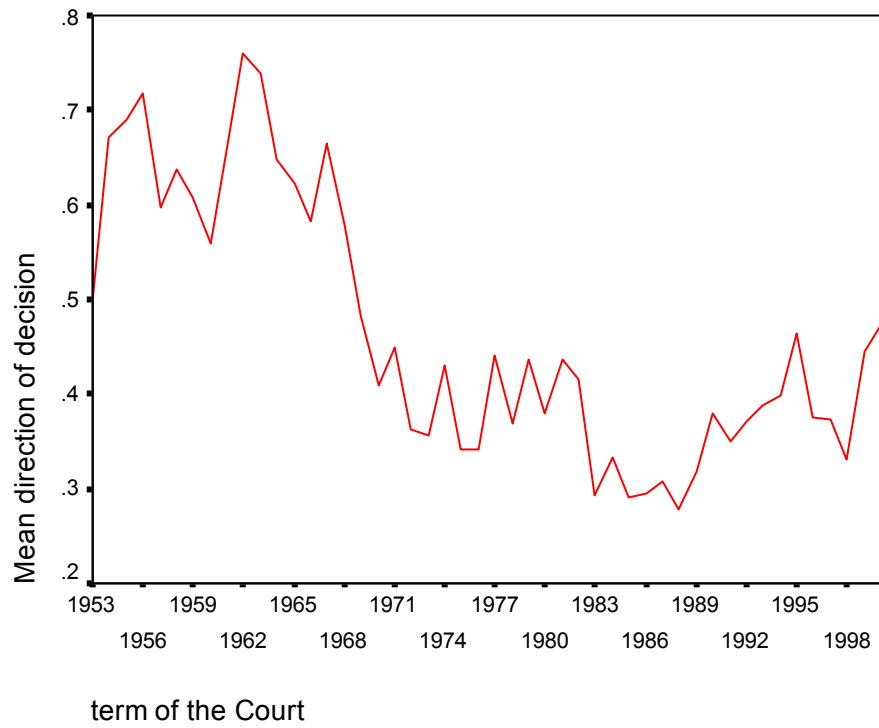


Figure 5.3: Output of the Supreme Court by Term, 1980-2000

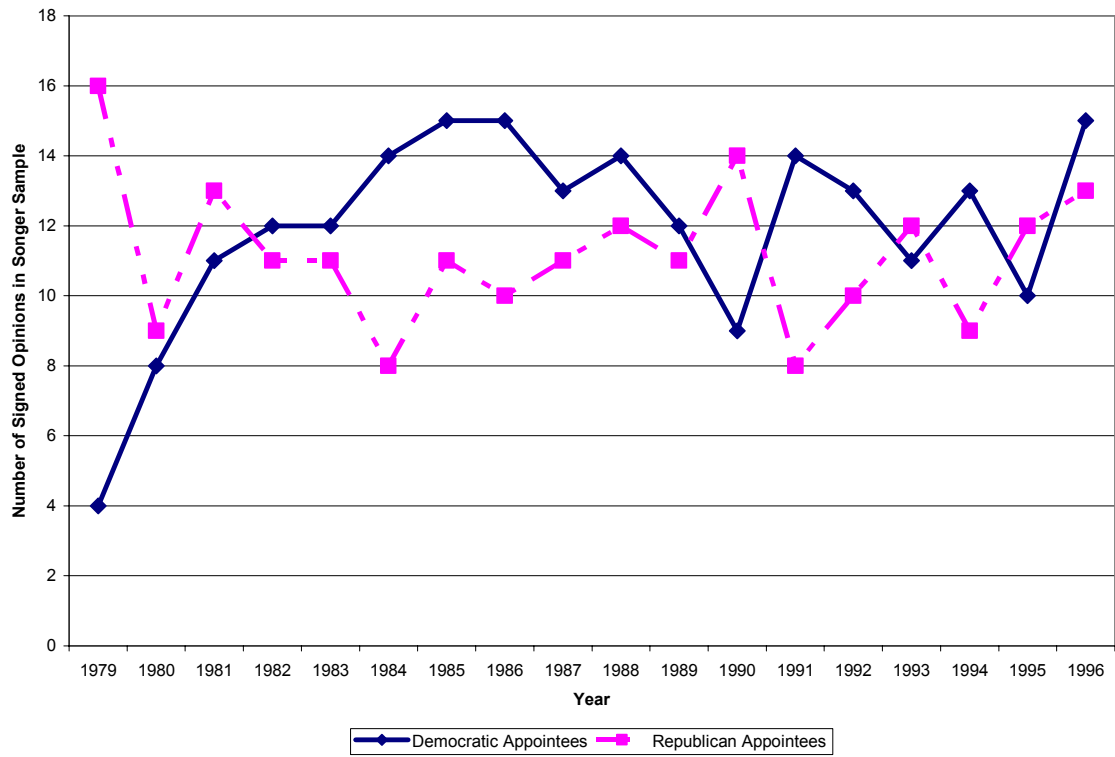


Figure 5.4: Ninth Circuit Signed Opinions by Party of Appointing President

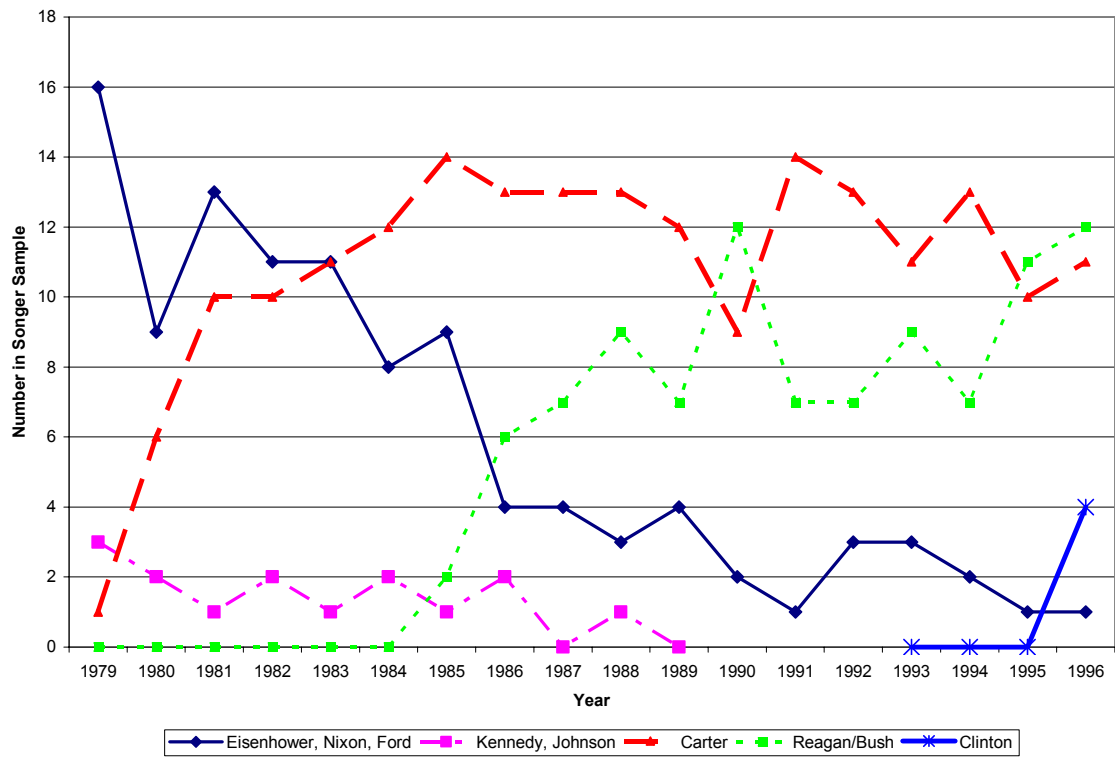


Figure 5.5: Ninth Circuit Signed Opinions by Appointing President

YEAR	Kennedy/Johnson	Nixon/Ford	Carter	Reagan/Bush	Clinton
1979	3	7	13		
1980	1	7	15		
1981	1	7	15		
1982	1	7	15		
1983	1	7	15		
1984	1	6	15	3	
1985	1	5	15	7	
1986	1	5	15	7	
1987	1	5	12	9	
1988	1	2	12	10	
1989	1	2	12	12	
1990	1	2	12	13	
1991	1	1	12	14	
1992	1	1	12	14	
1993	1	1	11	14	
1994	1	1	11	14	
1995	1	1	7	14	1
1996	1	1	6	14	3
1997	1		5	11	3
1998	1		5	9	8
1999	1		4	8	10
2000	1		4	7	14

Figure 5.6: Number of Judges on Active Duty by Appointing President

Decisions Before Thomas' Appointment (1979-1991)

Decision	Conservative	Liberal	Total
PAP of Author			
Republican	104 (35.1%)	60 (20.3%)	164 (55.4%)
Democrat	66 (22.3%)	66 (22.3%)	132 (44.6%)
Total	170 (57.4%)	126 (42.6%)	296 (100.0%)

Reversals Before Thomas' Appointment (1980-1990)

Decision	Conservative	Liberal	Total
PAP of Author			
Republican	10 (8.1%)	31 (25.2%)	41 (33.3%)
Democrat	10 (8.1%)	72 (58.5%)	82 (66.7%)
Total	20 (16.3%)	103 (83.7%)	123 (100.0%)

Note: Percentages are percent of total
PAP=Party of Appointing President

Figure 5.7: Comparison of Sample of Cases Decided and Reversals Before Thomas' Appointment

Decisions After Thomas' Appointment (1992-1996)

Decision PAP of Author	Conservative	Liberal	Total
Republican	43 (38.4%)	17 (15.2%)	60 (53.6%)
Democrat	26 (23.2%)	26 (23.2%)	52 (46.4%)
Total	69 (61.6%)	43 (38.4%)	112 (100.0%)

Reversals After Thomas' Appointment (1991-2000)

Decision PAP of Author	Conservative	Liberal	Total
Republican	15 (15.5%)	27 (27.8%)	42 (43.3%)
Democrat	10 (10.3%)	45 (46.4%)	55 (56.7%)
Total	25 (25.8%)	72 (74.2%)	97 (100.0%)

Figure 5.8 Comparison of Sample of Cases Decided and Reversals After Thomas' Appointment

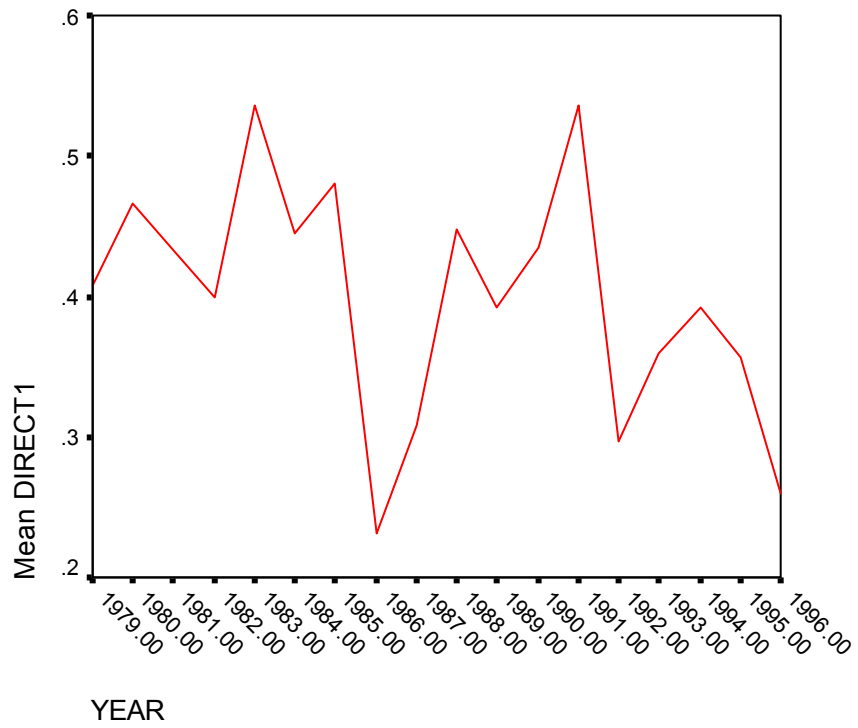


Figure 5.9: Overall Pattern of Ideology of Ninth Circuit Decisions, Songer Sample

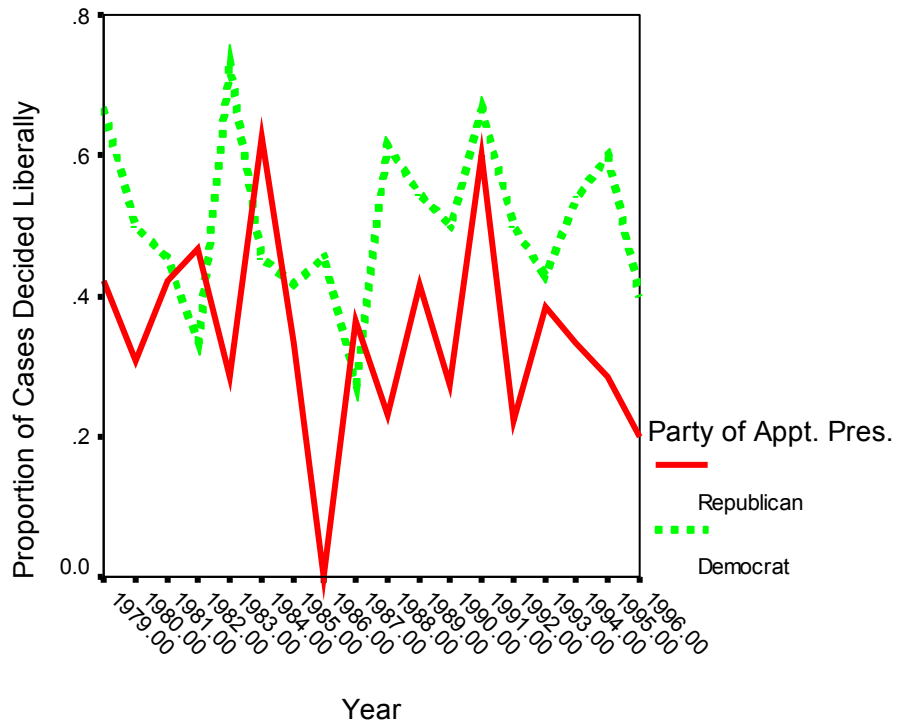


Figure 5.10: Decision Pattern of Ninth Circuit Judges, by Party of Appointing President

ABA Rating	Author of Cases Reversed, 1980-2000	Author of Cases in Songer Sample, 1979-1996
Exceptionally Well Qualified	20 (9.26%)	60 (14.7%)
Well Qualified	117 (54.17%)	197 (48.3%)
Qualified	75 (34.72%)	148 (36.3%)
Not Qualified	4 (1.85%)	3 (.7%)

Test statistic for the hypothesis that the mean score of each column is different is -1.091.

Note: Percentages are column percentages.

Figure 5.11: Comparison of ABA Ratings between Reversals and Random Sample of Court of Appeals Decisions

ABA Rating	Author of Cases Reversed, 1991-1992 terms	Author of Cases in Songer Sample, 1992-1993
Exceptionally Well Qualified	2 (9.5%)	7 (15.2%)
Well Qualified	12 (57.1%)	20 (43.5%)
Qualified	7 (33.3%)	19 (41.3%)
Not Qualified	0	0

Test statistic for the hypothesis that the mean score of each column is different is .2244.

Figure 5.12: Comparison of ABA Ratings in the Wake of Thomas Appointment

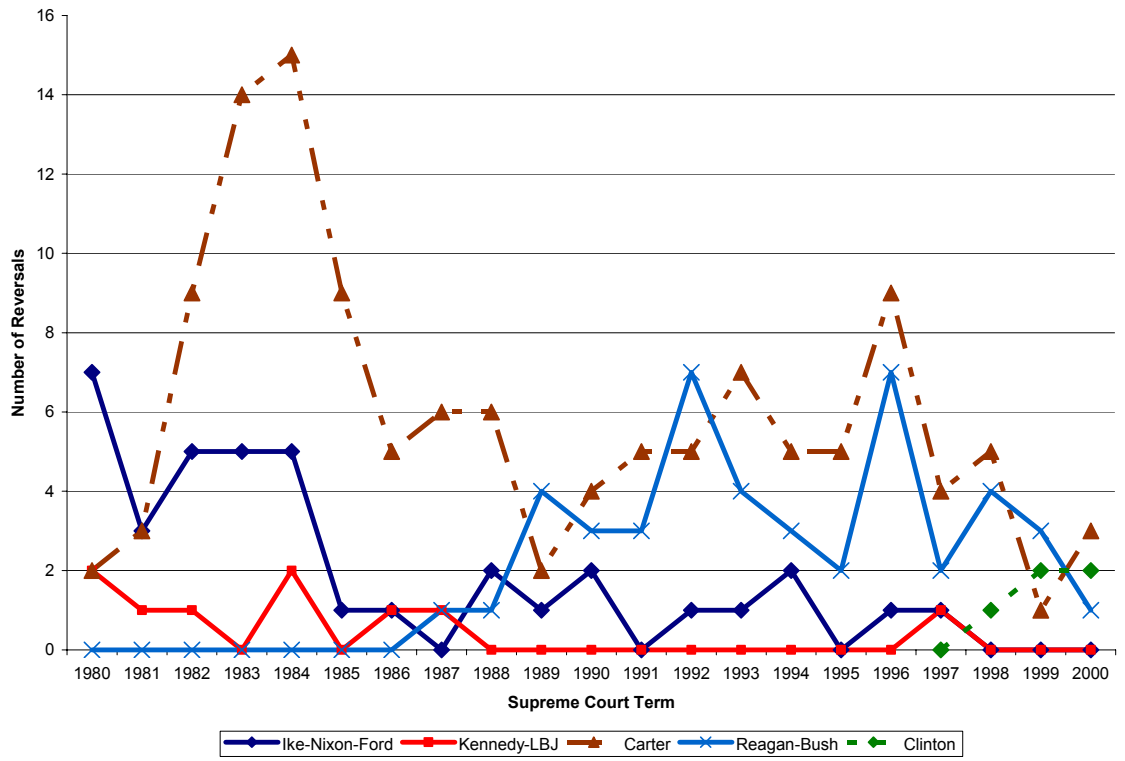


Figure 5.13: Reversals By Group of Appointing Presidents

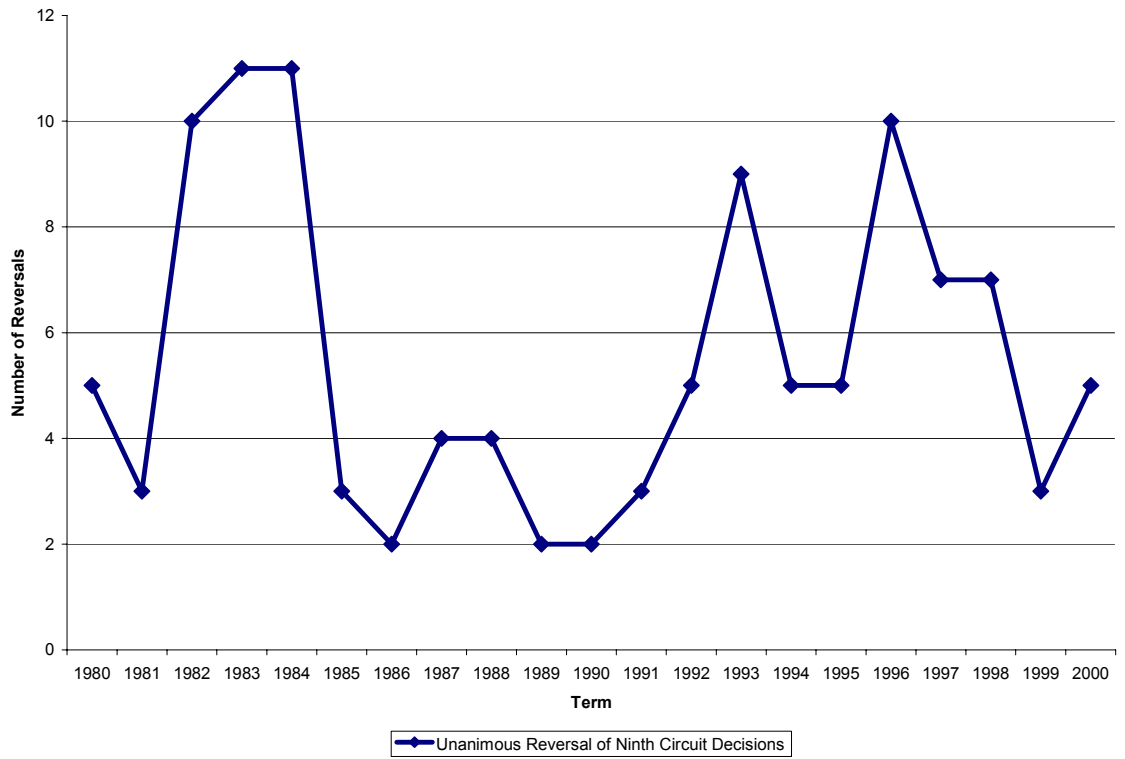


Figure 5.14: Unanimous Reversals of Ninth Circuit Signed Opinions, 1980-2000

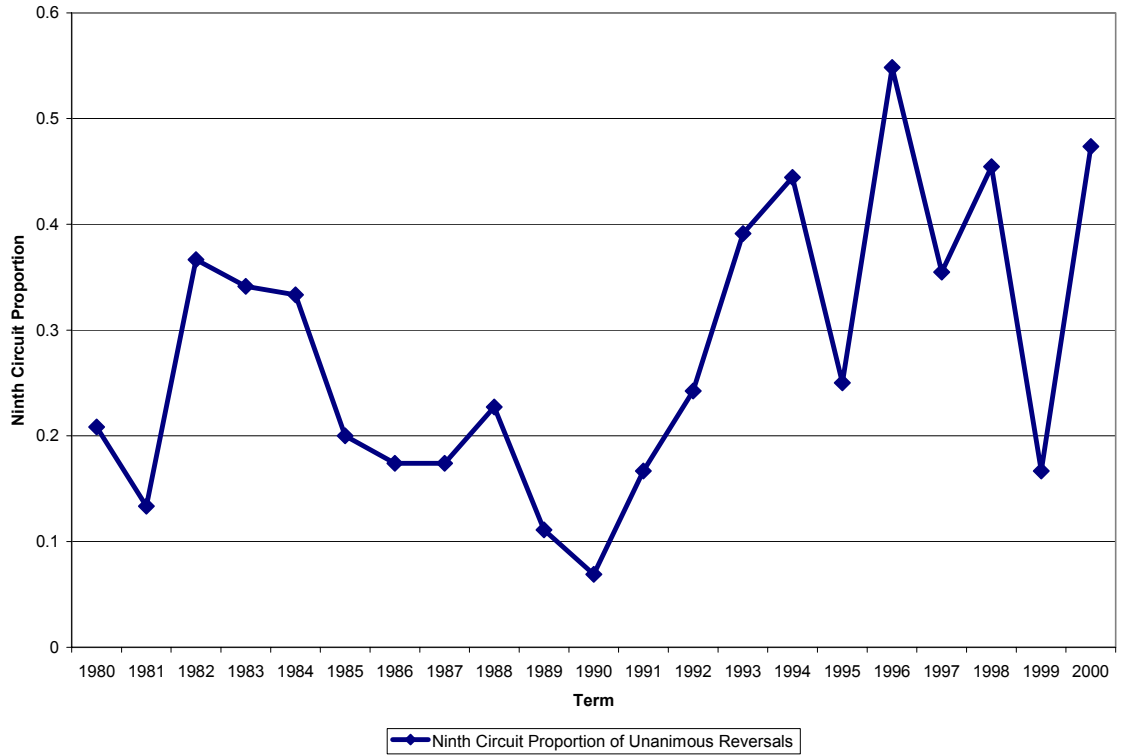


Figure 5.15: Ninth Circuit Unanimous Reversals as a Proportion of All Unanimous Reversals, 1980-2000

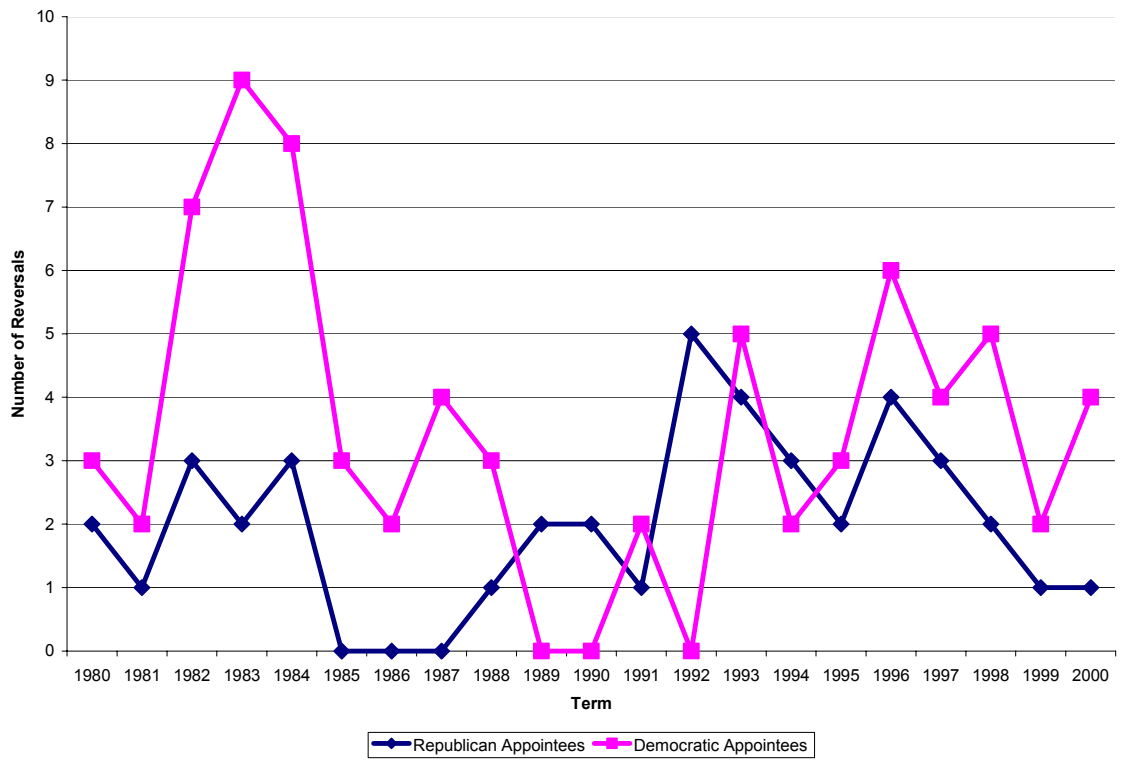


Figure 5.16: Unanimous Reversals by Party of Appointing President of Opinion Author, 1980-2000

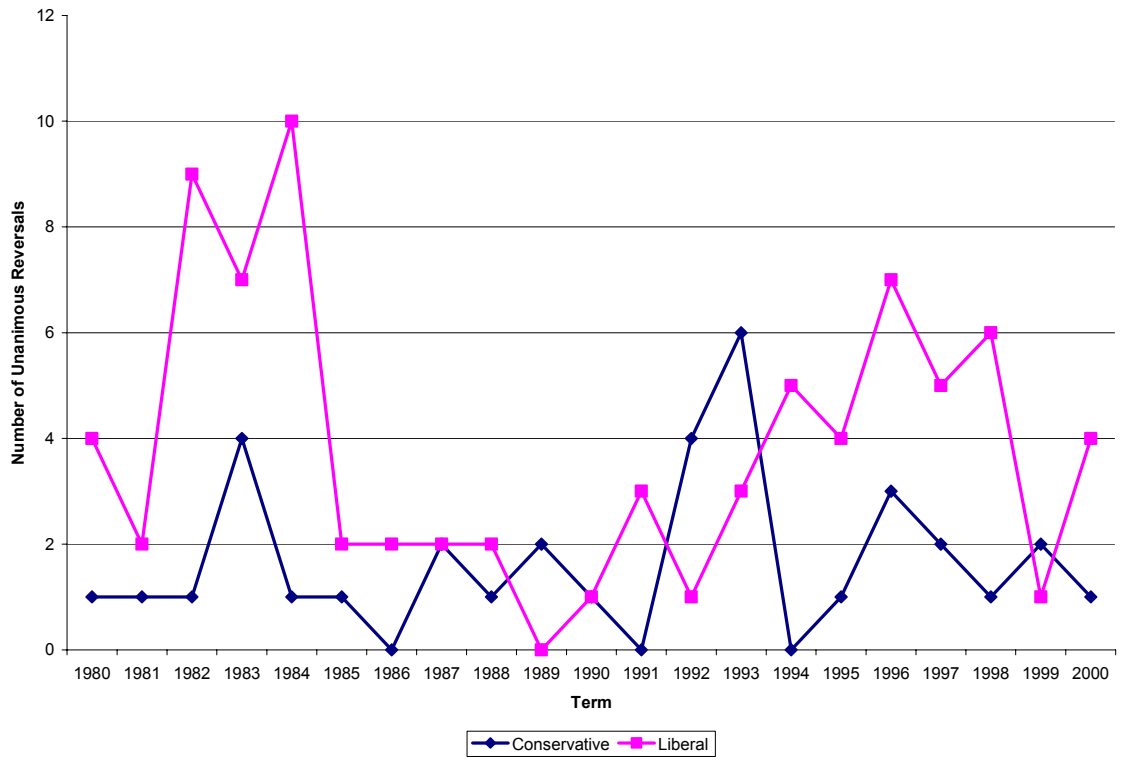


Figure 5.17: Unanimous Reversals by Direction of Lower Court Decision

CHAPTER 6

CONCLUSION

Court of appeals judges represent a particularly interesting class of actors for several reasons. The structure of their environment imposes constraints on their decisions that Supreme Court justices do not experience. At the same time, the low rate of review of their decisions by the Supreme Court offers them opportunities not available to other judges to shape the development of both the law and public policy on a myriad of issues. Because court of appeals judges have life tenure, and need not worry about reelection, they have the opportunity to focus on the development of law and policy over a longer horizon than legislators. This, and the importance of the federal judiciary in the development and application of government policy, gives judges a status that should rank them as some of the most important policymakers in the federal system.

Despite this, political scientists have paid relatively little attention to the courts of appeals, focusing much more closely on the Supreme Court. One of the recent trends in political science scholarship, though, has been to look at court of appeals judges, clearly a recognition of the questions for which evidence can be gathered by studying court of appeals judges. Their role in the federal judiciary makes them worthy objects of study in

their own right. I use their relationship with the Supreme Court as an approach to asking questions about the goals of court of appeals judges and what means they use to accomplish those goals. The evidence gathered from three different approaches suggests, more than anything, that the picture of court of appeals judges remains incomplete.

Reversals of court of appeals decisions by the Supreme Court follow predictable patterns. While the Supreme Court endeavors to fulfill its role as arbiter of disagreements within and between circuits, as well as resolving vertical disagreements within the federal judiciary, it also reverses court of appeals decisions it finds ideologically unacceptable. Court of appeals judges know this, and have the option of actively avoiding reversal by the Supreme Court. But there are several reasons to expect that they may not do so. First, the Supreme Court's limited capacity (or willingness) to review cases, may constrain its ability to hear and subsequently reverse the lower court decision, regardless of the outcome. Second, the court of appeals judges may find themselves ideologically aligned with the Supreme Court, so adjusting behavior to avoid reversal is unnecessary. Third, the judges may feel it appropriate to follow the law, regardless of how the current Supreme Court views the state of the particular law at issue. Finally, the judges may find themselves ideologically distant from the Supreme Court, but may simply choose not to comply with the Court's preferences because they feel the action which maximizes their utility is to express their policy preferences.

Reversals, then, may be governed by the decisions made by lower court judges more than anything else. This argument does not contradict the myriad literature that contends that Supreme Court decisions are driven by ideology—it instead takes this

argument as a fact and uses it to provide a lens into why court of appeals judges behave the way they do. Putting the pieces of evidence together from the previous chapters will hopefully provide at least some clarity to the goals of court of appeals judges and the means they use to accomplish them.

6.1 Evidence Reconsidered

The three pieces of evidence gathered in Chapters 3 through 5 merit reconsideration individually, and should also be considered collectively. In one way, they are three separate projects in that the data collected is separate, and the specific hypotheses differ. But what should be clear by now is that the logic that underlies all three is the same and that one way of looking at the three projects is simply different evidence brought to bear on the same question. The question in all three chapters remains the same: what do the patterns of reversal of lower court decisions reveal about the decisions made by court of appeals judges?

Taking first the evidence from Chapter 3, where the individual reversal was the unit of analysis, the findings seem relatively consistent, regardless of the unit of analysis, judge vote or opinion author. Judges ideologically distant from the Supreme Court are more likely to be reversed than those closer to the Supreme Court. Judges who are more competent and more experienced are also less likely to be reversed than their less competent and less experienced colleagues. These results suggest evidence for judges pursuing policy goals sincerely and pursuing legal goals. The lack of relationship between important cases and the likelihood of reversal can be interpreted in two ways. In the strictest possible interpretation, this can not be considered evidence of strategic

behavior: court of appeals judges seeking to influence policy outcomes should be reversed *less* often on important cases, where the opportunity to make an impact on the development of policy is greatest. But given the Supreme Court's well-established propensity to take important cases, the ability of court of appeals judges to nullify this relationship suggests that there might also be evidence of strategic pursuit of policy goals. The evidence here is certainly weaker than the evidence in support of sincere pursuit of policy goals and pursuit of legal goals, but it is certainly worthwhile to consider as part of the bigger picture.

Turning to the evidence from Chapter 4, the results and interpretation become somewhat more complicated. While there is some evidence for sincere pursuit of policy goals, given the strong relationship between ideological distance and the number of reversals, this relationship is only observed under periods of Supreme Court stability. This finding is difficult to interpret in terms of the types of behavior that might be expected by court of appeals judges. If they preferred to engage in sincere pursuit of their policy goals, it would seem more likely that this might be easiest to do when membership (and doctrine) of the Supreme Court is undergoing a change. The Supreme Court's ability to monitor the circuit courts during periods of change may be weaker simply because the justices are adjusting to one another and pay less attention to the behavior of circuit court judges. But reading too much into the results is particularly dangerous in this context. The safest conclusion is simply to note the relationship between ideological distance and number of reversals between 1979 and 1983 (the Court's 1978-1982 terms).

The evidence of pursuit of legal goals is also somewhat mixed in Chapter 4. During the period of Supreme Court change, court of appeals judges who were more experienced and more competent were *more* likely to be reversed than their colleagues. This might be interpreted as evidence that judges who are most capable of pursuing legal goals do so, but unlike the expectation in Chapter 3, pursuit of legal goals in a time of Supreme Court change means they may be reversed more often. This would happen because these would be the judges least likely to anticipate the change in the Supreme Court and the most likely to be affected by it, regardless of their ideology. These results may provide support for the argument advanced by Caminker (1994b) that judges should engage in a precedent-based model of decision-making, even if the Supreme Court provides indications that it no longer views those precedents as favorably as it once did. This finding might be considered particularly interesting once the argument deployed in the previous chapter about judges making good law is considered. If legal-oriented behavior is practiced by more competent or more experienced judges, then one would expect *fewer* reversals of those judges, regardless of shift in the Supreme Court. The results of this chapter suggest that the change in policy by the Supreme Court may override the normal state of affairs where these judges are reversed less often. That is, the effect of the Supreme Court's shift may outweigh the effect of competence and experience on the part of circuit judges.

The evidence for strategic behavior from Chapter 4 is both omnipresent and questionable. Court of appeals judges attempting to avoid reversal by the Supreme Court would alter their behavior to avoid being reversed by the Supreme Court. This behavior

would be particularly important for judges who find themselves ideologically distant from the new Supreme Court membership where they were ideologically aligned with the old Court membership. In this particular context, liberal judges who at one time could express themselves sincerely without real fear of reversal by the Warren Court would be forced to decide if they wanted to continue making liberal decisions at the same rate and risk reversal by the more conservative Burger Court, or if they moderate their behavior to avoid reversal by the more conservative Burger Court. If they do moderate their behavior, one would expect ideological distance to be a non-predictor of reversal, as liberal judges would no longer behave according only to their sincere preferences. This is confirmed in the period of ideological shift between the Court's 1969 and 1973 terms.

Chapter 5 takes a different approach from either of the previous two chapters, focusing more closely on the decisions made by the judges on the Ninth Circuit and the effect of their behavior on their relationship with the Supreme Court. Particularly because the continuing controversy over the high reversal rate of the Ninth Circuit may be one of the most important issues in study of the courts of appeals, this relationship may offer insight into the choices made by court of appeals judges. The evidence for sincere pursuit of policy goals proves surprisingly limited in this context. Journalistic (and political science) accounts of the high reversal rate of the Ninth Circuit focus on the liberal judges of the circuit, both Republican and Democratic appointees. The focus certainly has some basis in fact: individual judges like Judge Reinhardt capture a lot of attention for their steadfast reliance on their principles, regardless of the consequences (Chiang 1992; Greenhouse, 1992). Democratic appointees, however, authored a smaller

proportion of cases that were reversed before Thomas' appointment than after he was appointed, a pattern not reflected in the overall sample of decisions made on the Ninth Circuit (as represented by the sample of cases drawn from the Court of Appeals database). The likely reason for the difference is the increasing proportion of decisions made by Clinton appointees, who largely replaced Carter appointees.

Looking at the prospect of strategic pursuit of policy goals, there is little if no evidence available from the study in Chapter 5. The lack of response by Ninth Circuit judges to shifts in the Supreme Court and to shifts in the makeup of the circuit suggest that there is little aggregate evidence that the behavior of the Ninth Circuit judges can be regarded as strategic. But the judges of the Ninth Circuit may be the least likely to engage in strategic behavior. At the core of the justification for strategic behavior by court of appeals judges is the argument that they seek to avoid reversal by the Supreme Court. But it seems clear that, particularly for the Carter appointees, the prospect of reversal by the Supreme Court was not much of a concern. This is not to say that the Carter appointees are solely responsible for the Ninth Circuit's high reversal rate—Reagan and Bush appointees certainly account for their share of offending decisions, particularly throughout the 1990s.

Finally, the ability to test for pursuit of legal goals in the context of the Ninth Circuit's problems is quite limited. I establish that there may be some evidence of less-qualified judges being reversed more often than one might expect if reversals were a representative sample of cases decided by the Ninth Circuit, but this does not extend to a period of change by the Supreme Court. The tensions judges who are trying to make

good law likely feel as the Supreme Court shifts are considerable. From one perspective, if the direction of the Supreme Court is clear and the Supreme Court has had the opportunity to adjust the direction of legal precedent (e.g., either expanding or contracting the rights of criminal defendants), then judges who try to make good law are less likely to be reversed in long periods of stability and more likely to be reversed as the Supreme Court changes. The alternate possibility is that judges trying to make good law might weather changes in the Supreme Court better than those who are committed to pursuing policy goals, and be reversed less often in periods of Supreme Court change.

A different kind of test of the pursuit of legal goals may be developed by looking at some of the implications of the size of the Ninth Circuit. Critics of the Ninth Circuit have asserted that its size prevents the judges from correcting the errors made by panel decisions. Those critics generally point to the large number of unanimous reversals of Ninth Circuit decisions as an indicator of this particular problem. But the overwhelming majority of the Ninth Circuit decisions that have been reversed unanimously or nearly unanimously since the beginning of the 1994 term are of liberal lower court decisions. This suggests an alternate source of the high number of unanimous reversals: the near-uniform moderation of the Supreme Court relative to the Ninth Circuit means that it is possible for Ninth Circuit panels to be more liberal than any justice of the Supreme Court. The retirements of Thurgood Marshall and Harry Blackmun in the early 1990s may explain the emergence of the ideological split in unanimous reversals, as well as the increase in the number of unanimous reversals of Ninth Circuit decisions.

6.2 Putting the Evidence Together

All three substantive chapters reach similar conclusions: some evidence exists for each type of behavior, but that evidence is not conclusive on any point. In all, this conclusion may be a fair representation of the decisions court of appeals judges make. The goals relevant to their decisions encompass both the desire to impact policy and to aid in the development of the law independent of those policy preferences. In situations where policy preferences guide their decisions, they choose between sincere and strategic means to accomplish that goal. It is not always the case that they act to avoid reversal by the Supreme Court, and it is not always the case that they simply act in accordance with their preferences, regardless of the potential reaction by the Supreme Court.

The frustrating component of interpreting these results has been the lack of strong evidence pointing in any one direction. If it were the case that the only explanation that withstood multiple tests was that circuit judges engaged primarily in a single form of behavior, one would expect the evidence on that point to be nearly overwhelming. For example, if court of appeals judges behaved in accordance with their sincere policy preferences, one would observe liberal judges making liberal decisions and conservative judges making conservative decisions. The pattern of reversals would depend on the Supreme Court's preferences: a conservative Supreme Court would concentrate most of its efforts on reversing liberal decisions made by liberal judges, and one would expect the opposite from a liberal Supreme Court. But the results do not indicate that one behavior type clearly dominates over the other, so the results should not clearly favor one type of behavior over the other. The results presented here might be the best one can hope for in

a situation where court of appeals judges actually engage in all three types of behavior. If it is the case that there are competing demands on court of appeals judges in the decisions they make, and they respond by choosing different types of behavior under different circumstances, then one would expect, depending on the distribution of factors that affect their choices, that each mode of behavior is chosen with some frequency. This distribution of choices by court of appeals judges need not be perfectly even to produce the results of the sort that this project indicates.

6.3 Implications

Despite the lack of strength, the findings should produce evidence that the scholarly literature on court of appeals judges should reconsider how it views court of appeals judges. The dichotomy between goals related to policy and goals related to making good law is a real one, and political scientists and legal scholars have long focused on one side of this dichotomy while ignoring the other. But my research suggests that an accurate portrait of court of appeals judges should include attention to both goals as relevant to the decisions made by circuit judges. There is a long tradition of reliance on models of Supreme Court decision-making to assess the behavior of lower court judges. Sheldon Goldman, in some of the earliest work on the voting behavior of court of appeals judges, noted that his study followed similar patterns of work on Supreme Court justices (1966, 374). The question that has driven much of the study of the courts of appeals since Goldman's pioneering work has been the extent to which ideology influences the behavior of circuit judges. But this work generally shares the same fault—little attention is paid to the constraints imposed by the law and, until

recently, there was little interest in the constraint imposed by the Supreme Court. Goldman argued that while his findings did not produce cleavages as clear as might be expected on the Supreme Court, the “center of gravity of the [judges appointed by the] Democratic party is more ‘liberal’ than that of [judges appointed by] the Republican Party” (1966, 382).

More recent work on the behavior of court of appeals judges underscores the timelessness of Goldman’s initial findings (Pinello, 1999). But recent work has also introduced a new dimension to the decisions of court of appeals judges. Though judges may have policy goals, the question of how they pursue the goals now attracts the interest of most researchers studying the courts of appeals. Exemplars of the recent work on court of appeals judges (Cameron, Segal, Songer, 2000; Klein, 2002; Van Winkle, 1996) devote considerable attention to the question of the role of other actors in the decisions made by court of appeals judges. The premise of this recent work is that court of appeals judges may adapt their behavior to accommodate the potential response of their colleagues or the Supreme Court. Both Van Winkle and Cameron, Segal and Songer argue that court of appeals judges adapt their behavior to the context. But to simply find evidence of strategic behavior does not imply that the dominant mode of behavior for lower court judges is strategic pursuit of policy goals. To that extent, at least, my conclusions do not conflict with the extant literature. The problem with the direction of the work is not that it introduces the much-needed dimension of strategic versus sincere behavior, but that it does not really acknowledge that both strategic and sincere behavior can and do coexist, as I argue here.

The legal scholarship generally does not even consider the premise that court of appeals judges can be motivated by policy goals even though the evidence may be indisputable. Two recent exemplars of this, the work by Evan Caminker on the doctrine of hierarchical precedent (1994a, 1994b) and the literature surrounding the report of the Commission on Structural Alternatives for the Federal Courts of Appeals, demonstrate the emphasis legal scholars and, to some degree, policymakers, place on judges following the dictates of the law when reaching their decisions. Even in cases where law may not provide clear guidance, lower court judges are assumed to attempt to apply the law as closely as possible. To suggest that the high reversal rate of the Ninth Circuit is a function of its size is to ignore at least anecdotal evidence that the high reversal rate has at least something to do with the ideology of the judges on the circuit, particularly vis-à-vis the preferences of the Supreme Court. Interestingly, there is a strain in this literature that might acknowledge the debate over sincere and strategic means, though in service of legal goals, not policy goals (Kornhauser and Sager, 1995; Caminker, 1999).

Integrating these two literatures is not a difficult task per se. To argue that judges pursue both policy and legal goals should not offend those who suggest the dominance of one set of goals over another. Though the evidence on this point is limited, I suggest that judges pursue both policy and legal goals and they use both sincere and strategic means to accomplish those goals. Future research by scholars in both disciplines should develop a more robust conception of the goals of court of appeals judges and the means they use to achieve those goals. The disconnect between the two literatures does not appear to be intentional, but both certainly have something to gain from the other, and I hope to have

provided a framework for this integration as well as some initial evidence that a broader framework of goals and means is appropriate for the study of court of appeals judges.

6.4 Directions for Future Research

The research here has hopefully provided some initial evidence for a framework that allows court of appeals judges to have multiple goals and means for achieving those goals. In addition, I hope to have overcome some obstacles to research of court of appeals judges created by lack of available evidence of the decisions made by lower court judges. Looking at the reversal of court of appeals decisions offers an opportunity to gain leverage on questions that have otherwise proven difficult. Reversal offers a way to approach some of the questions that are central not only to the study of court of appeals judges but also to the study of political elites in general: the diversity of goals relevant to their decisions, as well as the means they use to accomplish those goals.

The most direct continuation of this project is to increase the time period under study. There is no way to know if, for example, 1983 is an unrepresentative year without collecting data from other years. By the same token, the relationship between the Supreme Court and the courts of appeals may be one that is better analyzed over a longer period of time. In particular, any shift in Supreme Court doctrine has to be long-term. It would follow that circuit judges who react to change in doctrine rather than change in personnel would only change their behavior over a long period of time as well. I attempted to differentiate between judges who might respond to personnel change from those who respond to doctrine change, but it may be the case that the distinction is clearer over a longer time horizon.

More broadly, a future research agenda would adapt the framework of goals and means suggested here to the broader study of court of appeals judges. Because court of appeals judges offer an opportunity to understand political phenomena that few other actors in the American political system afford, study of their behavior should extend beyond merely looking at reversal of court of appeals decisions. Court of appeals judges are interesting independent of their relationship with the Supreme Court. Political scientists should take advantage of the overwhelming data available to them from the courts of appeals. The large number of judges and the incredibly large number of decisions, published and unpublished, represent a resource that remains largely untapped. The importance of the courts of appeals in the American legal system should justify continued scholarly inquiry, and that inquiry should both test the argument that court of appeals judges have a variety of goals and means and, assuming further evidence, integrate a framework that acknowledges these multiple modes of behavior into their work.

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