Dear Gentle Reader,

What follows is a brief overview of a project that I've only recently started, concerning the extent to which Article III judges are "national" as opposed to what I'm calling "regional." As you'll see, "regional" isn't exactly the right word here, as many of the relevant divisions run along state lines. I'd be grateful for suggestions on terminology, other potential examples of judges being "national" or "regional," and everything else.

With thanks,
MKL

Are Federal Judges "National" Judges?

Marin K. Levy

Federal judges are often described as "national" judges: selected through the same national-level process, often applying the same national-level law, and having little connection to a particular sub-national geographic region (other than the limits of their jurisdictions). On this account, "the federal judiciary is, by its nature . . . a very nationalistic institution" and "federal judges are national officials[.]"[1]

The nationalism norm reflects important facts—some of them constitutionally-imposed—about how federal judges are selected and how they perform their jobs once on the bench. The constitution provides that federal judges are appointed by the president and generally confirmed by the Senate;[2] state officials (governors, state senators, and the like) play no formal role in the process.[3] Moreover, unlike, say, Congressional representatives, who must be inhabitants of the state from which they are elected, there is no constitutional requirement that federal judges be tied to a particular state or even region.[4] After federal judges are confirmed, their work continues to be, in important respects, the work of a "national official." Regardless of where they sit, federal judges are steeped in largely the same body of law—interpreting the same constitution, federal statutes, and much of the same precedent—and they often cite each other for persuasive authority. The decisions of individual federal judges can even have nationwide impact, as we have recently seen with the issuance of national injunctions in several high-profile cases,[5] including *Texas v. United States*[6] and *Washington v. Trump*.[7]

One particularly clear reflection of the nationalism norm is the simple fact that federal judges have never been completely tethered to their own courts. From the circuit-riding Supreme Court Justices[8] to the Commerce Court judges who went on to join other courts,[9] there are consistent historical examples of federal judges being shuffled around from court to

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[1] *See, e.g.*, Steven Calabresi, *Relimiting Federal Judicial Power: Should Congress Play a Role?* 13 J.L. & POL. 627, 631 (1997).

[2] U.S. CONST. art. II, § 2.

[3] *See* Calabresi, *supra* note 1, at 631.

[4] U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative . . . who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."). By contrast, the more recent requirement that appellate judges be residents of the circuit to which they are appointed (and thereafter while in active service) is statutory. *See* 28 U.S.C. § 44(c).

[5] Whether or not there should be such reliance on national injunctions is a matter of some debate. *See, e.g.,* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

[6] Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd* by an equally divided Court, 136 S. Ct. 2271 (2016) (mem.).

[7] Washington v. Trump, No. C17-0141, 2017 WL 462040 (W.D. Wash. Feb. 2017) (granting a temporary restraining order).

[8] *See generally* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 U. MINN. L. REV. 1710 (2007).

[9] *See Commerce Court*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/commerce-court. Specifically, Judge Knapp was reassigned to the Fourth Circuit Court of Appeals in 1916, *see U.S. Court of Appeals for the Fourth Circuit: Succession Chart*, FED. JUD. CTR., https://www.fjc.gov/history/courts/u.s.-court-appeals-fourth-circuit-succession-chart, and Judge Mack was reassigned to the Second and Sixth Circuits in 1929, and then to the Second Circuit alone in 1929, *see U.S. Court of Appeals for the Second Circuit: Succession Chart*, FED. JUD. CTR., https://www.fjc.gov/history/courts/u.s.-court-appeals-second-circuit-succession-chart..

court in location to location. The practice remains alive and well today with the heavy reliance of many circuit courts on visiting judges for caseload assistance.[10] It is not uncommon, for example, to see a judge of the Second Circuit round out a panel of the Ninth Circuit to help decide appeals and even author opinions—this occurred in approximately 1,400 cases in the federal appellate courts from September 2016 to 2017 alone.[11] When commenting on the related practice of having district judges sit by designation on the courts of appeals,[12] the Supreme Court has made plain that all is fair so long as the visiting judges have Article III status.[13] In other words, one important account of the nature of federal judges is that to a large extent there is, and should be, Article III interchangeability.[14]

Yet the nationalism norm is directly at odds with the way the courts are structured and the way judges are selected for those courts. In critical ways, federal judges are also *regional* judges. This is plain enough in some respects. With the exception of the Federal Circuit, the federal courts of appeals are all divided into "regional circuit courts"; and with the exception of the D.C. Circuit, all regional circuit courts are comprised of at least three, usually contiguous, states.[15] The link to the various states is also seen in the organization of the district courts, the boundaries of which do not cross state lines—a deliberate design dating back to the Judiciary Act of 1789.[16] And of course, the judges work for these particular courts; they are United States judges for the district of X or for Y circuit.[17] As noted already, federal judges can visit other federal courts, but their commission remains tied to the district, or circuit, to which they were appointed. That is, in the absence of constitutional direction as to how the lower federal courts should be structured, Congress created a system that was regionally, and state-oriented, thereby orienting the judges along the same lines.

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[10] *See* Marin K. Levy, *Visiting Judges*, 107 CAL. L. REV. (forthcoming, 2019). The ability of a circuit to draw upon assistance from outside its borders comes from statute. *See* 28 U.S.C. § 291(a) (providing that the Chief Justice of the United States may designate any circuit judge to act as a circuit judge in another circuit if so requested by the chief judge of that circuit).

[11] Specifically, in the twelve-month period ending September 30, 2017, twelve active appellate judges and twenty-four senior appellate judges helped to decide 1,373 cases. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2017 ANNUAL REPORT OF THE DIRECTOR, ADMIN. OFF. U.S. CTS., at tbl.V-2 (2017), http://www.uscourts.gov/sites/default/files/data_tables/jb_v2_0930.2017.pdf.

[12] *See* 28 U.S.C. § 292 (a) (providing that the chief judge of a circuit may designate a district judge within the circuit to sit on the court of appeals when the business of the court so requires).

[13] *See* Nguyen v. United States, 539 U.S. 69, 80 (2003) (in which the Supreme Court vacated the judgment of the Ninth Circuit on the ground that the appellate panel, which included an Article IV judge from Guam sitting by designation, had been improperly constituted).

[14] By contrast, it is difficult to identify—or even to imagine—examples of state court judges sitting by designation on the courts of other states, let alone "riding circuit."

[15] JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 6 (1995).

[16] *See* Russell Wheeler & Cynthia Harrison, *Creating the Federal Judicial System* (created for the Federal Judicial Center) (2005). As the authors note, by tying the federal courts to the states, they were intentionally created to not be free of the "influence of the politics and legal culture" of the states in which they operated. *Id.*

[17] As one example, President Donald Trump's recent announcement of judicial candidate nominations specifically noted each nominee and the court on which they would serve if confirmed by the Senate. ("If confirmed, Mark J. Bennett of Hawai'i will serve as the Circuit Judge on the U.S. Court of Appeals for the Ninth Circuit . . . If confirmed, Nancy E. Brasel of Minnesota will serve as a District Judge on the U.S. District Court for the District of Minnesota." *See* The White House, Office of the Press Secretary, "President Donald J. Trump Announces Judicial Candidate Nominations" available at: https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eleventh-wave-judicial-nominees/ (Feb. 12, 2018).

But Congress helped to create a regionalism norm in other ways as well—ways that are less obvious though potentially more important. Although the constitution is silent on where judges should reside when selected and then once active, Congress has established a residency requirement by statute (echoing the constitutional requirement for representatives noted above),[18] thereby necessarily tying judges to particular geographic areas. Additionally, there is the time-honored (or at one time honored) custom whereby individual senators could veto presidential nominees from their home state—withholding the famous "blue slip"[19]—further connecting federal judges to states.[20]

Perhaps most importantly, though little discussed in the literature, there is a practice of "state representation" in the appellate courts. Following this practice, the seats of each circuit are allotted to the states that comprise those circuits[21] based roughly on relative population.[22] And so, it is understood that the Fourth Circuit has so many "Virginia seats," so many "Maryland seats," and so on,[23] and the judges themselves almost invariably bear some preexisting connection to the state and circuit. This practice is as old as the modern circuit courts themselves, and presidents have by-and-large respected it.[24] The rare instances in which administrations have contravened the norm have often resulted in controversy, with senators decrying the lack of "representation" their state will now receive on the court.[25] In fact, Congress codified a soft version of the state representation norm in the Fairness in Judiciary Appointments Act of 1997, which requires that in each circuit, "there shall be at least one circuit judge in regular active service appointed from the residents of each state in that circuit."[26] In

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[18] *See* 28 U.S.C. § 44(c) ("Except in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service").

[19] *See, e.g.*, Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 74 (2001).

[20] Salvador Rizzo, *Are Senate Republicans Killing "Blue Slip" for Court Nominees?*, WASH. POST. (Feb. 21, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/02/21/are-senate-republicans-killing-blue-slip-for-court-nominees/?utm_term=.4b5ed3bbd5c9

[21] *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 136 (1997); Susan Navarro Smelcer & R. Sam Garrett, *"State Representation" in Appointments to Federal Circuit Courts*, Congressional Research Service 1 (March 30, 2011).

[22] *See* Statement of Sen. Paul S. Sarbanes, in U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Claude A. Allen, of Virginia, to be Circuit Judge for the Fourth Circuit*, 108th Cong., 1st Sess., 7 (noting the possibility of basing judgeships on the number of appeals from each state, but that "the traditional criteria has been population").

[23] *See id.* at 6 (describing how, since Maryland has twenty percent of the population of the Fourth Circuit and there are fifteen authorized judges, Maryland is clearly entitled to three of those seats).

[24] *See* Smelcer & Garrett, *supra* note 21, at 3 (finding that, between 1891 and 2009, "slightly more than three-quarters of confirmed nominations did not change state representation."). If anything, this figure overstates the degree of changing state representation as, when the circuits were smaller and there were fewer judgeships than states in some circuits, it was not unusual to rotate seats among the smaller states. *Id.* at 4. Focusing on the time period from the Johnson Administration through the end of the study, 2009, only 13% of confirmation nominations changed state representation. *Id.*

In this respect, the strength of the state-representation norm seems to provide a particularly clear example of the relationship between historical practice and the federal judicial power. *See generally* Curtis A. Bradley & Neil Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017).

[25] *See* Statement of Sen. Barbara S. Mikulski, in U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Claude A. Allen, of Virginia, to be Circuit Judge for the Fourth Circuit*, 108th Cong., 1st Sess., 8–9 (stating that "[w]e feel that an injustice has been done to the State of Maryland in selecting a Virginian to occupy a Maryland seat on the Fourth Circuit . . . This injustice hurts Maryland's representation on the Court of Appeals.").

[26] 28 U.S.C. § 44(c).

other words, there is a view of federal judges that casts them as regional and even local actors—something that is critical for the courts, and the areas they come from.

This apparent tension between the accounts of federal judges raises important questions. How can a commitment to Article III regionalism be justified against a backdrop of Article III nationalism? Given the sense that there is a fair degree of interchangeability between the appellate judges of different circuits, are there good reasons to tie those judges to particular regions or states? More generally, why have regionalism within our nationwide court system?

The espoused argument for ensuring that a certain number of judges come from each region, and ultimately each state, is based on a notion of representation. Specifically, in the legislative history of the Fairness in Judiciary Appointments Act, representation plays a key role. When introducing the bill in the House of Representatives, its sponsor emphasized that requiring every circuit to have at least one judge from every state in that circuit would ensure that "all States [ ] always have representation on the bench."[27] Likewise, when the legislation was introduced in the Senate, Senator Akaka of Hawaii (at the time without a Ninth Circuit seat) stated that it would "ensure that all citizens of every State in the Nation are represented by an active circuit judge on each of the circuits," thereby creating an "impact on the measure of fairness and justice [that] would be long-term and far-reaching."[28] The arguments are similar when a president threatens to transfer a seat. For example, when Senator Barbara Mikulski spoke against the nomination of Claude Allen to the Fourth Circuit—a nomination that entailed Virginia gaining a seat at Maryland's expense—she appealed to representation: "This injustice hurt[s] Maryland's representation on the Court of Appeals…[i]f Maryland loses this seat, they lose a voice."[29]

It is tempting to dismiss such statements as political posturing by elected officials who are at least partially interested in their *own* voice and power. As noted above, senators have historically enjoyed the privilege of being able to veto presidential nominees from their home state, making it plain enough that they should be loathe to lose a home seat. Yet recognizing the realpolitik of judicial nominations does not diminish what is potentially a strong argument in favor of ensuring that judges hail from each region and even each state. Though not fully fleshed out by the representatives themselves, the underlying theory seems to be one of descriptive representation—it is important that we have one of "our own" on the bench to render decisions.[30]

Indeed, there are good reasons to think that the kind of representation these elected officials describe might increase public acceptance of legal judgments—another argument in favor of regionalism. The Federal Judicial Conference, in evaluating whether the circuit courts should be restructured two decades ago, concluded that the credibility of the federal judiciary is

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[27] Hon. Neil Abercrombie, *Introduction of a Bill Requesting Fair Representation on Federal Judicial Circuit Court of Appeals*, 143 Cong. Rec. E 379 (March 5, 1997) (emphasis added).

[28] *See* Statement of Sen. Daniel Kahikina Akaka, in U.S. Congress, *States on Introduced Bills and Joint Resolutions*, 105th Cong., 1st Sess., 1796 (Feb. 28, 1997).

[29] *See* Statement of Sen. Barbara S. Mikulski, *supra* note 25.

[30] *See* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967) and the works of others.

enhanced when judges are selected from the "region they will serve."[31] One prominent example supporting this argument is the historical treatment of the old Fifth Circuit in the aftermath of *Brown v. Board of Education*. The liberal wing of that court was able to press ahead with desegregation rulings, and, it has been argued, a key reason their decisions were ultimately accepted by the public was that the judges were themselves southerners.[32] In other words, Louisianians might think it important, ex ante, to have a judge from Louisiana on the circuit court representing their interests; having that judge might make it easier, ex post, for them to accept that court's rulings.

Though this argument has intuitive appeal, it should be noted that it is not without its complications. Specifically, it creates a significant tension with the way we generally think about federal judges. Indeed, federal judges are celebrated for their independence, particularly when compared to their state counterparts, in large part because federal judges have life tenure and a salary that cannot be reduced[33]—that is, the very things that would make them *un*-accountable to any particular group.[34]

Returning to other arguments in its favor, Article III regionalism may also reflect pragmatic concerns. Ensuring that federal judges are dispersed throughout the various regions of the country plainly reduces costs to the litigants and the judges themselves by limiting the distance any party (including the judge) will need to travel for court. This does not necessarily mean that every *state* must be represented, of course. Given that many circuits have one central location for holding court, requiring that there be judges scattered throughout—including the less populated states, where court often is not held—may actually add to the expense, at least to that of the judiciary.[35]

Another argument concerns the quality of decisions. According to the most recent statistics, diversity-of-citizenship filings recently comprised just under one third of all civil filings in the federal courts[36]—a significant portion of cases, many of which then make their way to the courts of appeals. As a result, the judges on those courts must contend with a great deal of state law. Providing each circuit court with at least one judge from every state within its jurisdiction presumably helps to ensure a baseline of knowledge about state law. Indeed, when the Fairness in Judiciary Appointments Act was introduced in the House, one of the arguments made in its

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[31] *See* JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS, *supra* note 15, at 43. Similarly, Senator Akaka, when introducing the legislation in the Senate, stated that "representation would add to the credibility and legitimacy of the Federal appellate courts and the decisions they render." *See* Statement of Sen. Daniel Kahikina Akaka, *supra* 28.

[32] When speaking of the post-*Brown* accomplishments of the liberal wing of the old Fifth Circuit—Judges Elbert Tuttle, John Minor Wisdom, John Robert Brown, and Richard Rives (also known as the "Fifth Circuit Four"), historian Jack Bass noted: "[T]hey proved that change can come from below…By pressing forward, the Fifth Circuit allowed the Supreme Court to escape much of the heat, but the Justices also believed that desegregation law shaped by *southern* judges would be more acceptable to the South." JACK BASS, UNLIKELY HEROES 17 (1981).

[33] *See* notes on the parity debate, *infra* notes 39 & 40 and accompanying text.

[34] For more on accountability and representation, see Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929 (2017).

[35] *See* Marin K. Levy, *Where Do Judges Sit?* (in progress).

[36] Specifically, the Administrative Office noted that for the year ending September 30, 2017, there were 289,595 cases terminated in federal district court, out of which 89,480 were based on diversity of citizenship. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS, *supra* note 11, at tbl.C-4.

favor was that it would ensure that there be "at least one judge representing and understanding its State law, business, and customs."[37] To be sure, there are limits to this argument—there is, for example, only one Montanan on the Ninth Circuit; Chief Judge Thomas will not be on most panels hearing cases that involve Montana state law. Still, having at least one judge from the state will help in some instances, and the other judges of the circuit may be able to consult with that judge informally when matters of that state's law arise.[38]

All told, there are arguments one can marshal in favor of maintaining a commitment to Article III regionalism, though they come with their own complications. And complicating matters further, accepting the role of regionalism in the federal judiciary only brings to light other points, and even tensions, about the nature of the courts and their judges.

First, as stated at the outset, it has long been argued that federal judges are nationally focused, and ultimately more sympathetic to federal constitutional claims than are state judges. Such arguments are at the heart of the so-called parity debate, assessing whether state courts can provide a forum that is equal to that of the federal courts.[39] Part of the reasoning for why state courts may fall short is that their selection process—often an election—leaves them beholden to the people of their state, and therefore overly concerned with state interests.[40] To be sure, the fact that federal judges enjoy life tenure and a salary that cannot be diminished insulates them from some of these concerns.[41] That said, if federal judges really are meant to "speak for" their home state, the divide between state courts and federal courts might be narrower than one might think.

In a related vein, there is the matter of diversity jurisdiction. Under 28 U.S.C. § 1332, district courts have original jurisdiction over all civil actions where the amount in controversy exceeds the relevant threshold and where the parties are citizens of different states.[42] The rationale for such jurisdiction is well known to any student of Civil Procedure: there is the fear that if such cases are heard in state court, there will be the risk of bias against "foreign" litigants.[43] But again, if federal judges are now understood to be representing, at least to some extent, the interest of the state that they are from, it is more difficult to conceive of the federal court as the neutral forum.

Ultimately, whether judges act any differently *because* they come from a particular state is

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[37] *See* Statement of Hon. Neil Abercrombie, *supra* note 27.

[38] Another limitation of this argument is that the courts of appeals can also certify a particular question of state law to the supreme court of the state in question (thereby lessening the need for a judge on the federal bench from each state). *See, e.g.*, John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411 (1988). That said, not all states accept questions and the process can be a lengthy one, slowing down the appeals process considerably.

[39] *See* works such as Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis f Judicial Parity*, 10 HASTINGS CONT. L.Q. 213 (1983); Erwin Chemerinsky, *Ending the Parity Debate*, 71 BOSTON U. L. REV. 593 (1991).

[40] *See, e.g.*, Neuborne, *supra* note 39.

[41] Indeed, this is in large part the Supreme Court's reasoning in the *Nguyen* case. *See Nguyen*, 539 U.S. at 72.

[42] *See* 28 U.S.C. § 1332.

[43] *See, e.g.*, Scott Dodson & Philip A. Pucillo, *Joint and Several Jurisdiction*, 65 DUKE L. J. 1323, 1324 (2016).

an empirical question, which has yet to be answered. This brings us to the next point—a critical one about judges. Despite the vast sea of literature on judicial decision-making—including numerous studies that explore the relationship between a judge's ideology,[44] sex,[45] and ethnicity,[46] and case outcomes—there have been no studies to date on whether one's own geographical orientation makes a difference when deciding appeals. Interestingly enough, the judges themselves have been known to discuss how their regional ties affect some aspects of court practice. Judge J. Harvie Wilkinson, for example, discussed how the Fourth Circuit is a court of "uncommon courtesy" to litigants, which he attributed in part to "representing the South and mid-Atlantic regions where courtesy is a characteristic of the bar and the people."[47] But it remains unanswered whether that kind of representation influences court practice alone or whether it affects case outcomes as well.

This brings in one final point on judges. As noted above, scholars have identified several characteristics that have an impact on how judges decide at least certain categories of cases—most notably again, a judge's ideology,[48] sex,[49] and ethnicity.[50] If the government is willing to require that representation be formally taken into account in the judicial selection process—for that is what the Fairness in Judicial Appointments Act does—then there is something odd about beginning with geography of all things. That is, if the system accepts that it rightfully matters to the citizens of Louisiana to have a certain number of Louisianians on the bench, then perhaps there should be a more formal accounting of characteristics that are known to be salient as well.

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[44] To name just a few, *see, e.g.*, Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit,* 83 VA. L. REV. 1717 (1997); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review,* 75 U. CHI. L. REV. 761 (2008).

[45] *See, e.g.*, Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010); Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425 (1994); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005).

[46] *See, e.g.*, Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM L. REV. 1 (2008); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167 (2012).

[47] *See* J. Harvie Wilkinson III, *The Fourth Circuit and Its Future*, 61 S.C. L. REV. 415 (2010). Judge Wilkinson went on to say, "One circuit is not identical to another. It is true that we don't have a Fourth Circuit song or bird or flower, but that doesn't mean that the Fourth Circuit isn't a very special place." *Id.*

[48] *See, e.g.*, Revesz, *supra* note 44, at 1719 (finding ideology effects in certain environmental law cases); Miles & Sunstein, *supra* note 44, at 767 (finding ideology effects in certain administrative law cases).

[49] *See, e.g.*, Boyd, Epstein & Martin, *supra* note 44, at 390 (finding sex-based effects in cases implicating sex discrimination); Donald R. Songer, Sue Davis & Susan Haire, *supra* note 44, at 425 (finding sex-based effects in employment discrimination cases); and Peresie, *supra* note 44, at 1776 (finding sex-based effects in Title VII sexual harassment and sex discrimination cases).

[50] *See, e.g.*, Cox & Miles, *supra* note 46, at 1 (finding that "panel effects" of race are strong in a set of cases arising under Section 2 of the Voting Rights Act); Kastellec, *supra* note 46, at 167 (finding race-based effects in cases involving affirmative action programs).