Designated Diffidence: District Court Judges on the Courts of Appeals

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Since 1980, District Court Judges, designated pursuant to federal statute, have helped decide over 75,000 court of appeals cases—nearly one of every five merits decisions. Although scholars and judges have warned that the presence of these visitors on appellate panels may undermine consistency, legitimacy, or collegiality, little empirical evidence exists related to such concerns. Working with an especially complete data set of labor law opinions, the authors found that district court visitors perform in a much more diffident fashion than their appellate colleagues. They contribute notably fewer majority opinions and dissents. In addition, their participations do not reflect their professional or personal backgrounds to nearly the same degree as their appellate colleagues do when voting on labor law matters. The authors' findings and analyses regarding the behavior of designated district judges should be of interest to appellate courts considering the challenges of caseload management and to scholars studying processes and outcomes in the courts of appeal.

Introduction

Over the past two decades, district court judges—designated pursuant to federal statute (28 U.S.C. § 292 [1994])—have participated in nearly one out of every five cases decided on the merits by the United States Courts of Appeals. The circuits invite such participation principally because there are not nearly enough active and senior appellate judges to meet the demands of a burgeoning appeals court docket (Baker 1994, McKenna 1993). Responding to this imperative, designated trial court visi-

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tors have helped decide more than 75,000 court of appeals cases since 1980.

Scholars in law and political science have on occasion questioned the role played by these judicial invitees. Some have contended that the pre-judicial backgrounds and trial-oriented experiences of district judges differ in material respects from those of "regular" appellate judges (Saphire & Solimine 1995; Slotnick 1983; Carrington 1969). Others have worried that district judge visitors may jeopardize the consistency-of-law values that inform the circuit courts' role in creating and clarifying legal precedent, or that participation by these same judges may compromise the collegiality and vitality of appellate court deliberations (Green & Atkins 1978; Saphire & Solimine 1995; Wasby 1981). It also has been suggested that district judge participation may undermine perceptions of legitimacy, as the appellate courts' presumptively neutral function of declaring the law shades into more prescriptive policymaking (Alexander 1965; Green & Atkins 1978; Note 1963).

Surprisingly, little empirical analysis exists regarding how these trial court visitors behave in their secondary appellate role. There is a dearth of information as to whether designated judges participate or vote distinctively from their appellate brethren on substantive law matters. It also is unclear whether district judges bring their individual values and experiences to bear on the judicial enterprise to the same extent as their panel colleagues, or whether they reflect those values and experiences in the same way as they do when serving on the trial bench.

This study provides insights into the role of district court judges in appellate decisionmaking. We examine district judge participations in more than 1,100 published and unpublished court of appeals cases reviewing decisions by one federal agency—the National Labor Relations Board (NLRB)—during a recent seven-year period. Our database encompasses all appellate cases decided between October 1986 and November 1993 that resolve unfair labor practice claims under the National Labor Relations Act (NLRA [1994]).[1] We have identified the 223 appellate judges and 105 district judges who participated on the court of appeals panels, and how they voted on more than 2,000 substantive labor law issues as to which appellate courts either affirmed or reversed the Board. For each of the 328 participating judges, we also coded the nature of judicial participation on every issue (e.g., authoring majority opinion, joining majority, authoring dissent), as well as a range of biographical factors that

[1] The NLRA, Pub. L. No. 74-198, 49 Stat. 449 (1935) is codified as amended at 29 U.S.C. §§ 151-169 (1994). Our database derives from one analyzed in previous articles by one of the authors (Brudney et al. 1999; Brudney 1996). The 1999 article includes a detailed discussion both of how the database was constructed and of the variables it contains.

reflect personal attributes, educational preparation, and pre-judicial political and professional experience.

Our results indicate that designated district court judges keep a low public profile, writing fewer signed majority opinions and dissents than their appellate peers. They also do not vote in a substantively identifiable way on labor law issues; we found that district judge status was not significant in predicting votes for or against the union's legal position. Nor do these designated visitors reflect their personal or professional backgrounds to the same degree as their appellate colleagues do when it comes to voting on labor law matters, or as they themselves seem to do when serving on the trial bench.

Given their relatively muted participation on appellate court panels, district judges' presence would seem to pose little threat to the values associated with consistency-of-law or to the perceived legitimacy of judicial outcomes. At the same time, the apparently self-effacing nature of such participation does raise concerns regarding district judges' contributions to collegiality and robust deliberation on appellate courts. Our results and analyses therefore carry both encouraging and cautionary messages that should be of interest to appellate courts considering the challenges of caseload management and to scholars studying processes and outcomes in the courts of appeals.

In Part I of this article, we set forth our premise that individual values and experiences matter to good appellate judging. Social scientists have long asserted empirically the importance of individual values in the judicial process, but it is worth highlighting how policymakers, leaders of the bar, and judges themselves have come to acknowledge their normative importance as well. Part I also examines the justifications for using designated district judges on court of appeals panels and discusses the concerns expressed by scholars regarding their use.

Part II describes the database used in our study, including how we coded issues and judges. We rely on an unusually diverse set of background and control variables, and then apply logistic regression, supplemented by predicted probability calculations, for variables that achieve significance. These methods enable us to compare in depth the effects of various personal and professional experiences for district judge visitors as distinct from regular appellate court judges.

Part III presents our findings. The district judges in our data set differed in numerous intriguing respects from their appellate colleagues. For instance, district judges participating on appellate courts in our 1986 to 1993 time frame were significantly more likely to be older and to have been appointed by Democratic presidents, yet significantly less likely to be Catholic or Jewish or to have graduated from an elite law school. We also found, as noted above, that district judges seldom author opinions, and

that their votes for or against the union's legal position are associated with far fewer personal or professional background factors than are the votes of regular appellate judges.

In the final part of the article we discuss our findings, relating them to prior concerns regarding designated judges and considering some limitations on our results. Elaborating upon our findings regarding the modesty of district judge invitees, we consider whether our NLRA data set—encompassing review of decisions by a federal agency in a specialized area of substantive law—might not be representative of the entire appellate court docket. We also recognize that our results may overlook other contributions to the appellate process made by these visitors. At the same time, we suggest reasons for thinking that district judges' conduct here may not be atypical of their broader performance on appellate courts, while identifying possible areas for further study that might help address the matter of typicality.

I. Courts of Appeals and Their Designated Guests

A. Individual Values and Appellate Court Judging

The United States Courts of Appeals have been aptly referred to as the "vital center" of our pyramidal federal judicial structure. (Lumbard 1968). Acting through three-judge panels to resolve over 20,000 cases each year,[2] the circuit courts alter or sustain rulings made by trial judges or regulatory agencies and in the process establish consistent legal norms covering a geographic region. Moreover, by providing the final word on important matters of public law, largely immune from the Supreme Court's exercise of discretionary jurisdiction,[3] the courts of appeals play a distinctive policymaking role as well.

Divergent views exist regarding the extent to which appellate judges engage in routine error correction, as distinct from somewhat discretionary law declaration or more expansive policymaking, when fulfilling their responsibilities under Article III of the

[2] See *Annual Reports*: Table B-1 (1990 through 2000). In addition to cases resolved on the merits following oral argument or submission of briefs, the courts of appeals dispose of thousands of cases on a prepanel basis, through procedural terminations such as dismissals, settlements, or transfers to another circuit, and also through consolidations.

[3] The Supreme Court in the 1920s reviewed 10% of all circuit court decisions; the review rate since the mid-1980s has been less than one half of one percent (Baker 1993, 19; Songer 1991, 47). The Supreme Court in its 1999–2000 term decided 74 cases by opinion after argument; 62 of these opinions reviewed circuit court decisions as opposed to state court or federal district court judgments. Assuming *arguendo* that the Supreme Court develops its annual docket from 12 months' worth of appellate court dispositions, one can conclude that the Court reviewed 0.2% of the 27,516 merits decisions by circuit courts in 2000. Even in subject matter areas that trigger the Court's more frequent exercise of its certiorari jurisdiction, such as civil rights, appellate court decisions are left undisturbed more than 98% of the time (Songer 1991).

Constitution.[4] Notwithstanding the debate as to how these complementary functions are apportioned, there is now broad underlying agreement that each judge's "personal makeup" influences her decisionmaking on all three fronts (Baum 1997; Cardozo 1921; Edwards 1983). In sifting through the competing parties' often plausible arguments based on plain meaning, doctrine, and precedent, judges inevitably draw upon their individual experiences and attitudes as part of their effort to render a just result under the law.

Certain judges expressed at an early point their understanding of the role played by "the complex of instincts and emotions and habits and convictions, which make the man" (Cardozo 1921, 167; also Frank 1932). More recently, among 35 appellate court judges from three circuits who were interviewed on background between 1969 and 1971, almost all acknowledged that they considered their personal views of justice important in deciding cases even when there was clear, relevant precedent (Howard 1981). If the legal rules were uncertain, itself a matter involving varied individual perceptions, these judges ranked their personal views of justice as "very important," according them slightly more weight than the closest applicable circuit court ruling (Howard 1981, 164–65).

Since the early 1980s, appellate judges have become more open in stating their views that individual values are, and ought to be, part of their decisionmaking enterprise. Written decisions based on analysis of language and precedent and the application of settled interpretive rules are essential if the judiciary is to maintain its legitimacy (Abrahamson 1993; Coffin 1980). In varied settings, however, these judges also recognize that their individual perceptions of justice and fairness, and the background experiences that helped shape such perceptions, will inform their own reasoning as well as the dynamic of deliberation among colleagues.

Some judges advocate resorting to personal beliefs and value judgments to help them decide hard cases in which the legal arguments are inconclusive, although they may disagree as to how often such legal indeterminacy occurs (Edwards 1983; Kaye 1988). Others refer to a specific role for the value of compassion in good judging—whether through expansive construction of a compassionate statute (Schroeder 1990) or compassionate consideration of individual cases (Reinhardt 1999; Posner 1995; also

[4] Compare, e.g., Clark & Trubek (1961, 256), reporting Judge Clark's estimate that for 300 appeals that he reviewed on the Second Circuit over a two-year period, "clear one-way cases comprised at least 70%, while around 10% were highly original cases giving scope to the method of social values [and i]n the remaining 20%, the outcome actually proved certain, but counsel might be forgiven for thinking they had a bare chance of success" with Posner (1986, 190–91), maintaining that in appellate litigation, unclear cases—with textual uncertainty and credible contextual arguments for both sides—outnumber the clear cases.

Cross 1997). Judges have candidly acknowledged that their personal backgrounds and experiences influence how they decide cases (Reinhardt 1999; Wald 1984) and that they are, on occasion, affected by the experiences of their colleagues in the course of group decisionmaking (O'Connor 1992). Indeed, they have pointed to how this very diversity of intellectual capital, born in part of divergent personal experiences and value preferences, creates a "balance of eccentricities" that helps generate more reliable legal standards (Abrahamson 1993, 985, quoting Cardozo 1921).

The belief expressed by so many appellate judges that individual human values are an integral part of resolving cases (Kaye 1988) is further reflected in the widespread support for increased diversity on the federal bench. Political leaders and key members of the bar have cited the inclusion of more female and minority judges on federal courts as improving both the reality and the public perception of our judicial system.[5] Their position rests on the notion that judges who bring contrasting personal backgrounds and experiences to the federal bench will express those diverse perspectives as part of the intense collegial interchange that ultimately produces a stronger and more respected set of legal standards.[6]

Finally, quite apart from the normative dialogue as to whether individual values *should* influence appellate court judging, a number of social scientists studying judicial behavior have long maintained that, as a practical matter, individual values *do* make a difference in the judicial process. Specifically, they contend that pre-court life experiences play a prominent role in

[5] See Clinton (1999), highlighting the diversity of his appointments to the federal bench; Shepard (1992), reporting President Bush's and candidate Clinton's urging to pursue and appoint qualified women and minority candidates to the federal bench; Bushnell (1995), discussing the American Bar Association's recent passage of a resolution encouraging the appointment of people of color to the judiciary, and reporting the National Bar Association president's statement that "[a] more diverse judiciary will minimize prejudice and insensitivity from judges, and engender more respect from the public." See also Schafran (1991), reporting Justice Brennan's statement that "there should be diversity in many respects" on the Court, including geography, politics, race, gender, and religion, and adding that "[t]hese are all segments of our pluralistic society and I think people are a little more comfortable when they see a broadly representative group. It is more than a symbol. People bring different experiences and insights to their work."

[6] See "Report" of the Working Committees of the Second Circuit Task Force (1997, 180–81), concluding that greater diversity on the federal bench enables judges to amplify areas of rational disagreement when applying legal rules; enhances the understanding of all judges about subtle influences of race, ethnicity, or gender; and enriches the judicial conversation by adding less familiar points of view; and Beiner (1999), contending that diversity increases the prospect that judges will be able to see and assess the differing perspectives of the many parties to federal litigation. See also Working Committees (1997, 179–80) "Report," contending that minority or female litigants, jurors, and attorneys will have greater confidence in the legal system if the bench is more diverse; and Ninth Circuit Gender Bias Task Force (1994, 784), reporting that 58% of female judges and 65% of female lawyers surveyed believe the male-dominated bench in the Ninth Circuit favored male practitioners, whereas 9% of male judges and 14% of male attorneys shared that belief.

shaping the personal values and policy preferences of judges, and that such biographical factors can be useful in predicting judicial decisions (Aliotta 1988; Baum 1997; Glick 1993; Tate 1981). While the evidence from empirical analyses of appellate court judges is decidedly mixed, many studies indicate that a judge's political party affiliation provides a strong link to judicial voting behavior in discrete subject matter areas (Brudney et al. 1999; Carp et al. 1993; Goldman 1975; Gryski & Main 1986; Nagel 1961; Songer & Davis 1990). Other background characteristics, including gender, age, experience in elected office, and status of college or law school attended, also have been shown to make a difference in some studies. (Brace & Hall 1990; Brudney et al. 1999; Crowe 1997; Davis et al. 1993; Goldman 1975; Nagel 1974; Ulmer 1970).[7]

Notwithstanding the individual values and personal background that each judge brings to the decisional process, there is no suggestion—from the bench, the bar, or the academy—that judges are or ought to be platonic guardians proclaiming their ideal versions of the law. Whether one characterizes them as driving forces or broad constraints, statutory language, Supreme Court precedent, and the law of the circuit impose meaningful limits on judicial behavior. Still, reliance on individual values is an important component of appellate judging, and we have made it part of our baseline for assessing how designated district judges perform their functions on the appellate bench.

B. The Practical Role of Designated District Judges

District judges have been regular contributors to appellate court panel decisionmaking since before 1980. As indicated in Table 1, they participated in more than 25% of cases decided on the merits by three-judge panels from 1980 to 1986. Their relative level of participation declined to 17% for the period of our study, a decline that may be related to a noticeable rise in the availability of appellate judges during the mid and late 1980s.[8]

[7] With respect to attributes and experiences other than political party affiliation, there also are numerous studies finding no significant relation to voting patterns by federal judges (Brudney et al. [1999, 1685, n.29; 1751, n.234; 1754, n.240]).

[8] See *Annual Reports* (1980–2000). As Table 1 indicates, district judges' absolute level of participation has remained relatively steady for two decades, while the overall appellate court caseload has virtually doubled. The sharp decline in district judge participation rates between the 1980 to 1986 period and the 1987 to 1993 period was accompanied by a 17% increase in the number of active and senior appellate judges between 1984 and 1991 (from 195 to 228), see "Judges of the Federal Courts" section of West's Federal Reporter, 710 F.2d vii–xxviii (1984), 914 F.2d vii–xxx (1991). Perhaps related to this increase, a number of circuits that had relied more heavily on district judge participations in the early 1980s (DC, 2d, 3d, 7th, 9th) cut back substantially by the late 1980s and early 1990s. See *Annual Reports* (1980–1991), Tables B-1, S-1 (*en banc* cases excluded), and V-2. There may be a slight overstatement as to the percentage of cases with district judge participation, because a very small number of cases include two district judges on a single

District judges' level of participation has averaged nearly 15% since the end of 1993.

Table 1. District Judge Participations in Court of Appeals Panel Cases

Year	All Merits Cases Decided By Panels		District Judge Participations in Panel Decisions		Cases with District Judge Participations (%)
	Total	Avg. Per Yr.	Total	Avg. Per Yr.	
1980–86	96,462	13,780	24,982	3,569	25.9
1987–93	149,423	21,346	25,470	3,639	17.0
1994–00	186,668	26,536	27,833	3,976	14.9

There has been considerable variation among circuits with regard to reliance on district judges, as illustrated in Table 2. During the seven-year period from which our database is drawn, the Sixth and Tenth Circuits made use of these visitors in more than 30% of panel decisions. By contrast, the D.C. Circuit and Fifth Circuit utilized district judge visitors in fewer than 5% of merits cases.

Table 2. Circuit Variations in Use of District Judges, 1987–93

Circuit	Panel Merits Decisions	Decisions with DJs (%)
D.C.	5,460	3.8
1	5,087	13.8
2	9,434	19.9
3	10,792	20.0
4	14,008	22.6
5	18,622	4.4
6	16,154	33.0
7	9,246	13.1
8	11,506	16.3
9	23,336	13.2
10	10,107	31.2
11	15,691	11.8

The relevant statutory language authorizes district judge service on a court of appeals "whenever the business of that court so requires."[9] This spare text includes no standards for determining when such service is appropriate or how district judges are to be selected. One can find occasional references to the selection process in local circuit rules[10] or informal circuit

panel. Four cases out of the 307 decisions in our district judge data set included participation by two district judges.

The 25.9% participation rate for the years 1980–86 appears to represent a slight increase from the 1970s. Although data were not kept as systematically prior to 1975, district judges participated in 23% of the merits cases decided by appellate court panels both in 1975 (2,070 participations; 9,077 cases) and in 1977 (2,602 participations; 11,400 cases).

[9] 28 U.S.C. § 1292(a) (authorizing chief judge of a circuit to designate or assign a district judge within that circuit). Subsection (d) authorizes temporary designation or assignment of a district judge from another circuit "upon presentation of a certificate of necessity by the chief judge . . . of the circuit wherein the need arises."

[10] See, e.g., Ninth Circuit Rules, Introduction, E.5, observing that court policy is for district judges not to participate in disposition of appeals from their own districts.

guidelines,[11] but the circuits have not adopted written policies governing the selection of individual judges or their overall frequency of use.

We conducted a series of telephone interviews with Circuit Executives from all courts of appeals in late 1999, early 2000, and mid 2001, in an effort to identify the courts' principal reasons for relying on district judges.[12] Not surprisingly, the primary reported rationale is efficiency: District judges are asked to serve when there are not enough appellate judges to fill all panels due to vacancies, emergencies, or the sheer volume of cases. In that context, most Circuit Executives identified a range of workload-related selection criteria, such as favoring experienced or senior district judges, judges whose trial dockets left them enough time to serve, and judges who previously had completed their work promptly when serving on the appellate court. Some circuits invoke the supplemental rationale of orientation to the circuit, asking new district judges to serve once within six months to a year of their appointment.[13]

With regard to advance planning, the circuits designate district judges for scheduled panel sittings many months before cases are briefed or argued. The actual cases are assigned to these long-constituted panels anywhere from four to twelve weeks in advance of argument. Cases are assigned to three-judge panels on a random basis, although a judge may be excluded from a certain case due to conflict of interest. One such conflict identified by Circuit Executives is that a district judge will not be assigned to review a case from his or her own district.

C. Concerns about the Use of Designated District Judges

Scholars in law and political science have expressed reservations about the role of district judges on appellate court panels. Available evidence suggests that, in recent decades, appellate judges come to the bench from more prestigious backgrounds than their district court colleagues. They are more likely to have attended Ivy League colleges and law schools, to have served as

[11] See, e.g., Sixth Circuit Memorandum entitled "Panel Composition and Assignment of Cases" at 2, observing that chief judge's selection of district judges is based *inter alia* on prior performance in sitting with the appellate court and also current workload burdens as a trial judge (copy on file with authors).

[12] Susanna Marlowe, Research Librarian at The Ohio State University College of Law, conducted telephone interviews with Circuit Executives (or, in two cases, Assistant Circuit Executives) and Calendaring Clerks for all 11 regional circuits and the D.C. Circuit in November 1999, January 2000, and June 2001. She was repeatedly advised that there was no written policy governing the designation process. Notes of these conversations are on file with the authors.

[13] Professors Sapphire and Solimine (1995) gathered similar information by using a formal questionnaire in 1993. The responses they received were comparable to ours, identifying the dual objectives of meeting workload concerns and educating/orienting new judges, though with perhaps less emphasis on the former.

law clerks, to have had a federally oriented law practice, and to have been elevated to the bench from a law school professorship (Goldman et al. 2001; Goldman & Slotnick 1999; Goldman 1991, 1997; Slotnick 1983). Recognizing, or perhaps anticipating, these differences in education and training, the ABA Standing Committee on the Federal Judiciary has distinguished between trial and appellate court nominees in its evaluation criteria, stating that appellate judges "should possess an especially high degree of scholarship and academic talent and an unusual degree of overall excellence [including t]he abilities to write lucidly and persuasively, to harmonize a body of law, and to give guidance to the trial courts for future cases" (American Bar Assn. 1991, 3–4; also American Judicature Society 1988, 612). Such differences in intellectual background and expected performance have led some to suggest that designated district judges may not be well suited to resolving appellate-level cases that often carry broad and nuanced public policy implications (Saphire & Solimine 1995; Slotnick 1983).

A related issue is whether participation by district judge visitors on appellate court panels undermines consistency of doctrine within a circuit. An early study based on judicial interviews reported that a minority of Ninth Circuit judges felt their district court fellow panel members contributed substantially to intracircuit inconsistency (Wasby 1981). There is modest subsequent evidence indicating that district judge participation in a panel decision may make it somewhat more likely the decision will be granted *en banc* review.[14] If such an effect exists, it may reflect litigating attorneys' belief that district court visitors tend to depart from the circuit's prevailing legal standards. Alternatively, perhaps some appellate judges are more prone to view district judge participation as compromising the perceived legitimacy of close or controversial panel decisions.

A somewhat different type of concern is the belief that substantial district judge participation weakens collegiality on the

[14] See Sapphire & Solimine (1995, 372–75), reporting on an unpublished 1979 study involving 297 split decisions in which the district judge or the senior or visiting circuit judge wrote the majority opinion, and an unpublished review of 224 *en banc* decisions published in the years 1985–87. Two earlier articles asserting a link between district judge panel participation and *en banc* reversal similarly address the combined effect of visiting or senior circuit judges as well as district judges; in addition, they are based on a very small number of cases from a single circuit. See Alexander (1965, 596), discussing 32 panel decisions reviewed *en banc* by the Second Circuit between 1956 and 1964, 18 of which involved participation by a district judge or a senior or visiting circuit judge; Note (1963, 879), discussing seven *en banc* reversals by the Second Circuit between 1956 and 1963, and reporting that six of the panels involved a visiting or senior circuit judge and one included a district judge.

Unlike designated district court judges, senior or visiting circuit judges do not differ in intellectual background or general judicial experience from their appellate court colleagues, and senior judges are not even outsiders to the culture of the circuit they are serving. Accordingly, the prior studies that grouped all three types of judges together for analytic purposes are somewhat suspect.

courts of appeals. While the crux of the unease over consistency is that district judges may be too active or independent, the essence of the collegiality issue is that district judges may not be independent enough (Green & Atkins 1978; Saphire & Solimine 1995). Frequency and intensity of communication among judges is part of a collegial working relationship within a circuit (Seitz 1991). It may be that the press of their trial court workload, combined with the reality of their subordinate status, makes district judges unduly willing to defer to their circuit court colleagues, thereby helping to undermine the vitality of panel deliberations. In short, concerns over judicial collegiality as well as doctrinal consistency have been raised when district judge visitors serve on appellate court panels.[15]

Each of these matters merits closer attention. Empirical study can help address contentions that designated district judges are at once quicker than their appellate colleagues to depart from doctrinal norms and more submissive when those norms are being debated. Analysis of our data set yields important insights on these matters.

II. The Database

The courts of appeals adjudicated 1,224 decisions involving unfair labor practice (ULP) claims under the NLRA between October 28, 1986, and November 2, 1993.[16] We obtained a complete list from the Appellate Division in the National Labor Relations Board's Office of General Counsel. Almost one-quarter of the appellate decisions (22.9%) reversed, remanded, or modified a Board order; we coded all 280 of these "reversals" using a detailed issue coding approach. Of the remaining 944 cases that wholly enforced or affirmed a Board order, we analyzed a random sample of 275 decisions stratified by year. We then weighted these sampled affirmances to reflect their presence in the full population.

[15] In an e-mail letter to one of the authors, Judge Harry Edwards of the D.C. Circuit indicated that "ensuring (1) timely opinions, (2) consistency in the law of the circuit, and (3) improved collegiality among the members of the court" contributed to his court's decision in 1991 to stop using visiting judges either from the D.C. District Court or from other circuits. Judge Edwards noted that visitors were sometimes uncomfortable with the size and complexity of administrative law cases that are a staple of the D.C. Circuit. In addition, the fact that the Circuit encompasses only the District of Columbia itself meant that district judges sitting by designation had to review cases decided by their colleagues on the trial court, something they were often reluctant to do. See e-mail from Hon. H. T. Edwards to J. Brudney, Oct. 17, 2000, on file with the authors.

[16] Those cases include three major categories of claims: allegations that an employer engaged in an unfair labor practice (ULP) under section 8(a); charges that a union committed a ULP under section 8(b); and disputes under section 10(c) regarding the nature and scope of relief against employers found liable for section 8(a) violations. For further discussion of these categories, see Brudney et al. (1999).

The 1,224 decisions we analyzed include nearly 2,200 issues on which the appellate courts either affirmed or reversed results reached by the Board.[17] Because each appellate court decision reflects results rendered by a three-judge panel, our data set includes more than 6,500 judicial participations on NLRA issues. Each judicial participation consists of one judge's vote on a specific issue in a case appealed from the Board.

We omitted from our analyses about 450 judicial participations because they involved procedural, jurisdictional, or constitutional matters that differed substantially from the core doctrinal issues we analyze here. We also omitted votes from three summarily affirmed cases for which we could not identify the participating judges. With these omissions, our database consists of 6,034 votes on unfair labor practice claims arising under the NLRA. District judges cast 571 of these votes, roughly 9% of the total.[18]

The dependent variable for most of the analyses in this article is whether a judge voted to support the union's legal position on a specific issue in a given case.[19] We employ logistic regression models to analyze the dichotomous nature of this dependent variable (Aldrich & Nelson 1984; Greene 1997).[20] In addition, we present the predicted probabilities of the vote for the union based on changes in the values of the independent variables.[21]

For our initial analysis, examining types of judicial participation by each judge on each issue, we employed a different depen-

[17] A single case often involves two or more issues; for instance, the appellate court may review two different Board findings of employer misconduct, or an employer may appeal both a finding of liability and the remedy prescribed by the Board. Unanimous decisions result in coding all three panel judges identically on the issue(s). When individual judges dissent, their statement of reasons identifies the issue(s) on which they disagree with the majority. The ULP issue codes are set forth, and the coding process is described in greater detail, in Brudney et al. (1999) and Brudney (1996).

[18] District judges participated in 307 of the 1,140 cases (26.9%) that involved ULP claims during this period. This case participation rate is three times their issue participation rate because district judges almost always are paired with two appellate judges on a panel; thus their votes on issues reflect one-third of their presence in cases.

[19] Our study addresses associations between various judicial background variables and the union's legal position. Often, the union's legal position will have been endorsed by the Labor Board in the decision being reviewed by the appellate court. We could have focused on judicial disagreement with the Board (rather than the union) as our dependent variable. We chose not to do so because we were more interested in the substantive and historical tensions between courts and unions than the formal administrative law exchanges between courts and government agencies. See Brudney et al. (1999). Still, in order to take account of correlations between pro-union and pro-Board outcomes, we added a control variable addressing the Board's result for each issue. See n.29.

[20] In all but one of our analyses, we examine judicial attributes that may impact the probability that a judge will vote for or against the union position. We use STATA version six software for all our multivariate analyses.

[21] Unlike coefficients in ordinary least squares regression, where a coefficient represents a change in Y as a result of a one-unit change in X, coefficients in logistic regression do not lend themselves to easy interpretation. To facilitate understanding of the impact of the different variables, presentation of predicted probabilities is helpful. Predicted probabilities represent the likelihood of a pro-union vote given a certain set of values for the independent variables (Long 1997).

dent variable that is broken down into four categories: authoring an opinion, authoring a separate concurrence, authoring a separate dissent, or joining the opinion of another judge. We compare each of the first three categories against the reference category of joining another judge's opinion.

For the rest of our analyses, we coded more than a dozen independent variables for each decided issue, reflecting demographic, educational, and professional characteristics of each judge. The first variable indicates whether each judge was appointed by a Republican or Democratic president. We coded four basic demographic attributes: the judge's age at the time of decision; the judge's gender, as well as an interaction effects variable for being a female Democrat;[22] the judge's religion, comparing Catholic and Jewish judges together to the predominant category of Protestant judges;[23] and the judge's race, comparing first African American and then Asian and Latino judges to the reference category of White judges.[24] Two variables designate each judge's educational background. The first reports the prestige of the judge's undergraduate institution, which has been shown to be a proxy for socioeconomic status (Brudney et al. 1999) The second indicates whether the judge graduated from one of 15 elite law schools.[25]

We also included eight variables reporting each judge's law-related work experiences before appointment to the court of appeals. These include elected and nonelective political experience, as well as prior judicial experience and prior experience as a law professor. They also include four variables identifying distinct varieties of corporate, labor, and workplace law experience. One variable denotes judges who represented corporations or business clients but did not have experience on any workplace-related matters. A second designates judges who had experience

[22] With respect to appellate court judges, we had previously discovered that female judges tend to favor unions more often than their male colleagues do and that Democratic appointees tend to register pro-union votes more often than do their Republican counterparts. While the difference between Republican women and Republican men was substantial on this score, Democratic women and Democratic men did not differ significantly in their propensity to support the union. We included a female/Democrat interaction term here as well, allowing us to assess the relationship between gender and political party. See Brudney et al. (1999).

[23] Earlier analyses of appellate court judges showed that Catholic and Jewish judges voted similarly (and differently from Protestant judges) once we controlled for other variables. See Brudney et al. (1999). Grouping the Catholic and Jewish religions also reflects their relative outsider position compared to the majoritarian status of Protestants.

[24] Prior analyses of appellate court judges showed that Asian and Latino judges in this population voted in similar patterns, and that these patterns differed significantly from both African American and White judges (Brudney et al. 1999).

[25] The 15 schools are Harvard, Yale, Berkeley, Chicago, Columbia, Cornell, Duke, Michigan, NYU, Northwestern, Pennsylvania, Stanford, Texas, UCLA, and Virginia (The Cartter Report 1977; Brudney et al. 1999).

representing management clients in NLRA cases.[26] The third marks judges who had experience under the NLRA that involved no representation of management, i.e., they were labor law academics or they represented unions or the government on NLRA matters.[27] Our last workplace law variable designates judges who had experience on workplace-related matters other than those arising under the NLRA.[28]

Finally, we included a variable denoting the status of being a designated district judge. While our rich array of judicial background variables will illuminate differences between district and appellate judges in how they resolve NLRA issues, the basic district judge variable indicates whether this status predicts union support or opposition when controlling for our background factors.

We also included a series of control variables that signal the doctrinal and litigation context in which a case is adjudicated, as distinct from the individual background and experiences that a judge brings to the case. These include controls for the Board outcome (for or against the union) regarding each issue raised on appeal,[29] for claims arising under five separate provisions of the NLRA, for the circuit in which the case was decided,[30] and for the year in which each vote was rendered. These control variables enable us to assess potential biases for or against the union in varying doctrinal settings, in different circuits, and across time. We modified some independent variables to test specific hypotheses. Nonetheless, our basic analyses adhere to the coding scheme outlined above.

All of our findings address only unfair labor practice claims under the NLRA; different relationships might emerge if one ex-

[26] Judges in this category included both those whose exclusive NLRA experience was on behalf of management and those whose experience included union, government, or academic work as well as management representation.

[27] We excluded from this category judges who combined union, government, or academic experience involving the NLRA with management experience under that statute. Judges with such mixed experience were grouped with purely management attorneys in our previous variable.

[28] We actually constructed two versions of this final variable. First, we linked the variable to both of our "NLRA experience" variables; it therefore included judges with experience on other workplace matters (such as employment discrimination, pensions, or safety and health) but no NLRA experience of any kind. Next, we contrasted the variable only with our "NLRA management experience" variable; accordingly, it included the judges from our first version and also judges with NLRA experience that never involved representing management. In our analyses of appellate court judges, we had relied principally on this second version, though we also reported some results under the first (Brudney et al. 1999). For ease of comparison we discuss both versions here as well.

[29] This variable enabled us to control for deference to the administrative agency, which is one of the most important doctrinal influences on a judge's vote. See, generally *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[30] The circuit variables controlled for possible differences in the types of controversies arising in each circuit; the overall ideology of the court on which each judge served; and the possibility that forum-shopping might affect the caseload reaching each circuit (Brudney et al. 1999).

amined other fields of law. Yet there are advantages to exploring a discrete area of substantive law, especially one featuring decisions that are numerous and (in relative terms) doctrinally coherent. Our study identifies the role played by district judges undisturbed by the possible conflating effects of other federal law matters. Moreover, as we discuss in Part IV, our findings are unlikely to apply only in the NLRA area.

III. Results

A. Comparing District Judges and Appellate Judges: Attributes and Experiences

Our full database consists of 5,463 NLRA issue-specific votes by appellate judges and 571 such votes by district judges. Table 3 reports the separate means for appellate and district judges, both for our dependent variable (a vote for the union) and for all independent and control variables in this universe. As the table reflects, appellate and district judges favored the union at virtually identical rates (76% v. 77%). With regard to judicial characteristics, however, district judges differed from their appellate colleagues in a number of intriguing respects.

District judges serving as appellate court visitors were significantly more likely to have been appointed by Democratic presidents who held office prior to Presidents Reagan and Bush. These district judges also were significantly more likely to have been appointed earlier and to be older than their appellate judge colleagues. On average, district judges were appointed four years earlier, and were five years older, than their fellow panel members at the time they decided issues. District judges also had more "pure" experience representing only government or only unions in NLRA matters before joining the bench.

On the other hand, district judges were significantly less likely than their appellate colleagues to be female, African American, or Catholic or Jewish. They also were less likely to have graduated from an elite law school, though they were about as likely to have attended a prestigious undergraduate institution. Finally, district judges were significantly less likely to have had any type of nonelective political experience, to have held prior judicial office, or to have represented management at all in NLRA matters.

In terms of our control variables, a comparison reveals that circuit-by-circuit reliance on district judges for NLRA decisions is broadly consistent with the appellate courts' use of district judges in all contexts. The D.C., Fifth, and Ninth Circuits had significantly fewer instances of district judge participation than would be predicted based on their share of NLRA issues, while the Fourth and Tenth Circuits had significantly more participations

Table 3. Means for All Variables: Comparing Appellate Judges and District Judges

Variable	Appellate Court $N = 5,463$	District Court $N = 571$
Vote for Union	0.76	0.77
Judicial Characteristics		
*Democratic appointee	0.34	0.43
*Year appointed	80.01	76.37
*Age	60.25	65.35
*Female	0.11	0.02
*Female/Dem. interaction	0.07	0.004
*African American	0.06	0.02
Latino or Asian	0.02	0.01
*Catholic or Jewish	0.47	0.38
College selectivity	61.35	61.92
*Elite law school	0.57	0.47
Elected office	0.22	0.17
*Nonelective position	0.73	0.66
*Prior judicial experience	0.57	0.41
Legal academic exp.	0.27	0.27
Workplace law exp.	0.28	0.34
Corporate law exp.	0.47	0.43
*NLRA mgmt. exp. (any)	0.14	0.08
NLRA mgmt/bd interact.	0.12	0.08
Pure mgmt. exp.	0.11	0.08
*Pure union exp.	0.05	0.10
*Pure govt. exp.	0.01	0.03
Control Variables		
Board for union	0.88	0.91
Section 8(a)(1) and (3)	0.45	0.44
Section 8(a)(5)	0.34	0.38
Other section 8(a)	0.02	0.02
Section 8(b)	0.08	0.06
Section 10(c)	0.11	0.10
*D.C. Circuit	0.14	0.03
First Circuit	0.01	0.01
Second Circuit	0.09	0.09
Third Circuit	0.10	0.08
*Fourth Circuit	0.06	0.20
*Fifth Circuit	0.05	0.02
Sixth Circuit	0.19	0.24
Seventh Circuit	0.10	0.09
Eighth Circuit	0.06	0.09
*Ninth Circuit	0.12	0.07
*Tenth Circuit	0.03	0.07
Eleventh Circuit	0.04	0.02
Year of decision	89.83	90.04

* Indicates difference of means between appellate and district judges is significant at ≤0.05, for continuous variables, and difference of proportions is significant at ≤0.05 for dichotomous variables.

by district judges. Our earlier presentation of overall circuit variations (Table 2) indicated that the D.C. and Fifth Circuits made almost no use of district judge visitors during this seven-year period, and the Ninth Circuit was similarly a low-use circuit. By contrast, the Fourth and Tenth Circuits were among the three appel-

late courts relying most heavily on district judges to address their general caseload between 1987 and 1993.[31]

B. District Judges' Low Profile Role in Writing Opinions and in General Voting Patterns

1.

In assessing the role played by district judges as members of an appellate panel, we first examined differences in types of judicial participation between district and appellate judges. For these analyses only, we employ a multinomial logistic regression model to account for the four types of participations engaged in by appellate and district judges. When compared to the baseline category of joining a decision, district judge visitors are significantly less likely to author signed majority opinions, or to dissent from majority opinions, than are their appellate colleagues.[32] An appellate judge has a 12% probability of authoring a majority opinion. For a district judge this probability drops to 8%, a substantively significant difference.[33] Although the low number of dissenting participations warrants a cautious approach, the probability that a panel member will write a dissent similarly declines from 0.9% to 0.3% when we compare appellate and district judges, again a substantively significant difference.[34] District judges tend not to be outspoken or to assume leadership roles when it comes to the form of their panel participation. Although the difference in predicted probabilities for joining in an opinion is not substantively significant, it is noteworthy that 87% of all district judge participations in our data set involved the judge joining another panel member's opinion, as compared with 81% of appellate judge participations.

[31] The Sixth Circuit, which used district judges most often during this period (33% of all its panel decisions on the merits), also made liberal use of these visitors to decide NLRA issues: approximately one-fourth of all district judge participations on NLRA matters occurred on Sixth Circuit panels.

[32] District judges are not more or less likely to write concurrences than their appellate colleagues. However, there are so few concurrences in NLRA cases at the appellate court level, and even fewer with district judge participations, that results regarding concurrences must be interpreted with caution. Results for all these multinomial regressions are on file with the authors.

[33] When we talk about substantive significance based on predicted probabilities, we are referring to the relationship of the 95% confidence ranges around the predictions for the profile judge (appellate judge) and the judge with the altered characteristic (district judge). Where the ranges indicate that the judge with the altered characteristic is predicted to be less likely to write an opinion than the profile judge, we can say that the difference is substantively significant. The range for an appellate judge to write an opinion is 8% to 18%, whereas the range for a district judge is 4% to 11%.

[34] The range for an appellate judge to dissent from an opinion is 0.2% to 3%, whereas the range for a district judge is 0% to 0.85%. Because there are only 89 total dissenting participations in the entire data set, one must exercise caution when interpreting these results.

The reduced likelihood that district judges will author opinions might be related to panel dynamics involving the presence of these designated outsiders. If mixed panels, comprised of two appellate judges plus a district judge invitee, are for some reason more inclined to reach unanimity and also are more likely to agree upon issuing unsigned *per curiam* decisions, then the overall disparity in opinion-writing between appellate judges and district judges could be due to the behavior of different types of panels rather than to the reticence of district judges. In order to test this possibility, we compared mixed panels and "pure" appellate judge panels with regard to opinion-writing. We found, however, that the mixed panels were significantly *more* likely to issue signed majority opinions than panels without a district judge member, even as district judges were significantly *less* likely to author those majority opinions than their two appellate panel colleagues. Panels that included district judges also were *more* likely to dissent than pure appellate judge panels (though this finding only approached significance), yet district judges on those mixed panels were significantly *less* likely to author a dissent themselves.[35]

The greater propensity of mixed panels to issue majority opinions might reflect an inclination by the two appellate judge panel members to claim "credit" for handling a disproportionate share of the more serious opinion-writing work. In addition, some of the cases assigned to district judge visitors as majority opinions might have been issued as *per curiam* opinions if decided by a pure appellate judge panel. This could occur because presiding panel judges may wish to accord respect, and participatory credit, to their district judge guests without imposing the full responsibility of authoring majority opinions in more complex or controversial cases. Either of these two explanations, or their combined effects, could account for the tendency of mixed panels to author more majority opinions.

The higher likelihood that such mixed panels will produce a dissent could relate to the absence of a third "coequal" member engaged in the same long-term relationships. The collegial give-and-take of pure appellate judge discussions may help panel members work through their potential areas of disagreement, or agree to let minor differences go unremarked. Further, as part of the subtle interactive process among three repeat players, appellate judges may occasionally agree that if an opinion remains unpublished they will forgo their inclination to dissent.[36] In the

[35] For majority opinions, mixed panels were more likely to have a signed majority opinion (coeff. = 0.626; $p = 0.000$), while district judge members of those panels were less likely to author such opinions (coeff. = −0.912, $p = 0.000$). For dissents, mixed panels were more likely to dissent (coeff. = 0.720, $p = 0.085$), while district judge members were less likely to be the authors of said dissents (coeff. = −1.913, $p = 0.005$).

[36] Judge Wald, a former member and chief judge of the D.C. Circuit, refers to having observed "wily would-be dissenters go along with a result they do not like as long as it

end, however, regardless of what might account for the stronger opinion-writing tendencies of these mixed panels, district judges' reticence in authoring both majority and dissenting opinions remains noteworthy in comparison with their panel colleagues.[37]

Another possible factor that could help explain district judge diffidence in opinion-writing involves the prospect that district judges seeking promotion to the court of appeals wish to avoid a "paper trail," lest they provide ammunition for critics or opponents during a future confirmation process (Cohen 1991; Sisk et al. 1998) In that regard, we identified five district judges who served on appellate panels as part of our data set and who subsequently have been elevated to the appellate bench. These five reviewed a total of 25 NLRA issues, for which they did not author a single signed majority or dissent.[38] For several reasons, however, we are reluctant to attribute particular meaning to their silence. The five judges involved here served on the district court for between five and seventeen years before being "promoted," and almost every appellate court decision in which they participated as visitors preceded their elevation by a period of from two to six years. It seems unlikely that these men and women would have developed a long-range plan to maintain strategic opinion-writing silence as invitees in order to enhance their prospects for a permanent seat at the appellate table. Assuming *arguendo* that district judges may at times consider the possible career-related implications of their conduct on the bench,[39] such consideration seems especially unlikely to influence the decision whether to author an opinion on this class of low-visibility NLRA cases that generally involve routine review of agency decisionmaking. Further,

is not elevated to a precedent" (1995, 1374). Although Judge Wald adds that such strategic behavior is not a regular occurrence, even occasional instances may contribute to the disparity in dissent-writing between pure and mixed panels.

[37] A number of judicial scholars have reported that since the 1970s, most circuits have adopted various forms of case management techniques, including the use of staff attorneys to conduct pre-panel screenings and to draft proposed short form opinions in certain "routine" cases that are then issued as unsigned per curiam decisions (Meador & Bernstein 1994; Robel 1990; Stienstra & Cecil 1989). Because cases are assigned to panels on a random basis, however, there is no reason to believe that the presence of a district judge guest on such panels should be associated with a higher number of short form opinions drafted by staff attorneys.

[38] The actual decisions we coded included three per curiam affirmances; two unanimous affirmances and one unanimous reversal with signed opinions; and one per curiam affirmance with a signed dissent. One affirmed case involved two distinct issues; all other cases addressed only one issue. We factored in the weighted value of the six affirmances.

[39] For discussion of the complexities of using "promotion potential" as a variable, see Cohen 1991, 188–89; Sisk et al. 1998, 1487–93. Both Cohen and Sisk utilized a promotion potential variable when analyzing the likelihood that district judges, acting authoritatively in their trial court roles, would uphold the politically popular sentencing guidelines as constitutional. They found the variable significant and positively correlated with a ruling in favor of constitutionality. By contrast, we analyze here the conduct of district judges who are acting as one-third of an appellate court panel in reviewing a politically unimportant set of cases. Given this low-profile setting, a district judge contemplating future promotion might well opt for anonymity, rather than a signed opinion that could attract attention.

given the very small number of Board issues reviewed by these district judges, who comprise less than 5% of the district judges in our data set, one must be cautious in interpreting the results. Even when these five identified judges are removed from our analysis, district judge visitors remain significantly less likely than their appellate colleagues to author majority opinions or dissents.

Finally, as we have adverted to previously, one might ask whether district judges' modest role as authors of majority decisions reflects their own choices or those of the presiding panel judges who assign opinions. Almost all NLRA appellate court cases involve direct appeals from final agency determinations, and district judges have relatively little exposure to federal labor relations doctrine while serving on the trial bench.[40] Perhaps presiding judges choose not to burden district court visitors with the task of drafting majority opinions in an unfamiliar area of law, particularly given that these visitors often are serving as a favor to an overextended appellate court. On the other hand, insofar as district judge participation reflects an effort to minimize workload demands for the circuit court, one might well expect district judges to be assigned their fair share of opinion-writing. Moreover, precisely because NLRA cases do not require district judge visitors to review the work of their trial court colleagues, presiding judges may find it easier to assign them majority opinions in this area, especially in the cases deemed relatively routine.

In order to determine whether district judges' comparatively infrequent authorship of majority opinions is imposed from above, one would need to conduct a particularized inquiry into panel practices with regard to assigning opinions. The answer may well vary among the 12 circuits, or even from one presiding judge to another. On the surface, however, it does not seem unreasonable to believe that designated district judges are assigned their fair share of NLRA opinions to write. If this is true, the dearth of signed majority opinions suggests they are more willing than their appellate colleagues to issue unsigned *per curiam* decisions. Further, even if it is the case that presiding appellate judges are withholding opinion-writing responsibilities more than district judges are declining to exercise such conferred powers, the result is that these visitors play a distinctly subordinate role in authoring majority opinions. In addition, the significantly smaller number of district judge dissents is necessarily a matter of judicial choice, as these are written on a purely voluntary basis.

[40] See 29 U.S.C. § 160(e), (f) (1994), authorizing Labor Board to seek enforcement of its orders in U.S. courts of appeals, and aggrieved persons to seek review of Board orders in same courts. The NLRA provides for district courts to review substantive labor relations matters in limited circumstances, particularly the rare occasions on which injunctive relief is sought. See 29 U.S.C. § 160(j), (l) (1994).

2.

The pattern of district judges performing as followers receives further support when we examine the impact of being a district judge on votes for or against the union's legal position (Table 4).[41] The status of district judge visitor is never close to significant when added as a distinct independent variable to our set of judicial characteristics. The lack of significance is evident when we remove all private practice experience variables from our equation.[42] The finding also obtains regardless of how we adjust the equation to take account of judges' workplace experiences.[43]

The fact that district judges do not differ in their support for the union's legal position when compared with appellate judges is not surprising given the trends we identified with respect to judicial participation. If district judges are authoring few majorities or dissents and are largely following the lead of appellate judges on their panels, one might expect that their pattern of votes for or against the union would not differ significantly from that of appellate judges.

It is possible that district judges took a distinctive position regarding unions that was not apparent when our analysis combined all their votes. One could, for instance, hypothesize that district judges were less favorably disposed toward union legal positions. This proclivity might show up in the minority of instances when district judges author an opinion, but that pattern could be concealed by the overwhelming majority of instances (nearly nine-tenths) in which they simply vote to join a panel opinion, most of which affirm pro-union Board results. To test this hypothesis, we analyzed separately the effect of district judge status when district judges wrote their own opinions and when they joined the opinion of another judge. For each subset of partici-

[41] In Tables 4–6, we follow the common social science convention of designating results with a p-value of 0.05 or less as "significant" (Lee & Maykovich 1995, 281–82; Moore 1997, 507). We designate results with a p-value of 0.10 or less as "approaching significance." Social scientists sometimes treat such results as identifying relationships that are suggestive or at least that warrant further exploration (Moore 1997, 414–20; Sirkin 1995, 195–96). This is particularly true if the results form a consistent pattern with other results that approach or achieve significance. To understand which of these statistically significant variables are also substantively significant, we assess the predicted probabilities for each variable that has a p-value of ≤ 0.10. See Table 7.

[42] As explained in n.28, we classified workplace law experience in two different ways. Regression analyses based on these two versions produced somewhat disparate results for district judges, which we discuss below. Because the two versions yielded some differences in terms of which background variables were significant, we ran our regressions without private practice experience as well as including it.

[43] Table 4 presents workplace law background separating judges with any NLRA experience representing management from judges with all other types of NLRA-related or non-NLRA workplace law experience. When we ran the equation coding separately for judges with union, government, or academic experience under the NLRA, district judge status still was not close to significant (coefficient = 0.016, p = 0.919).

Table 4. Logistic Regression for Supporting the Union: District and Appellate Judges Combined (N = 6,035)

Variable	Omitting Private Practice Experience	Including Private Practice Experience
Judicial Characteristics		
District judge	−0.017	0.006
Democratic appointee	0.579***	0.607***
Year appointed	−0.009	−0.013
Age	−0.015*	−0.017**
Female	0.718**	0.727**
Female/Democratic interaction	−0.918**	−0.870**
African American	0.160	−0.026
Latino or Asian	−0.919***	−0.936***
Catholic or Jewish	0.205*	0.189*
College selectivity	−0.018***	−0.020***
Elite law school	0.089	0.038
Elected office	0.032	0.034
Nonelective position	−0.034	0.040
Prior judicial experience	−0.057	−0.048
Legal academic experience	0.052	0.060
Workplace law experience	—	−0.378**
Corporate law experience	—	−0.281*
NLRA mgmt. experience (any)	—	0.585
NLRA mgmt./bd. interaction	—	−0.764**
Control Variables		
Board for union	2.938***	3.040***
Section 8(a)(5)	−0.219**	−0.219**
Other section 8(a)	−1.607***	−1.602***
Section 8(b)	−1.376***	−1.439***
Section 10(c)	−0.880***	−0.872***
D.C. Circuit	−0.011	0.066
First Circuit	−0.423	−0.419
Second Circuit	0.570***	0.617***
Third Circuit	0.936***	0.947***
Fourth Circuit	0.307	−0.383**
Fifth Circuit	−0.928***	−0.911***
Seventh Circuit	0.214	0.148
Eighth Circuit	0.024	−0.036
Ninth Circuit	0.789***	0.751***
Tenth Circuit	0.680**	0.653**
Eleventh Circuit	0.201	0.142
Year of decision	−0.014	−0.011
Constant	2.524	3.019
Pseudo R^2	0.243***	0.245***

***$p \leq 0.01$, **$p \leq 0.05$ *$p \leq 0.10$

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pations, district judge votes did not differ significantly from the votes of their fellow panel members.[44]

C. The Role of Social Background Factors in District Judge Performance

We turn next to a comparative analysis of judicial characteristics and control factors in order to assess more fully the performance of district judges. By separately analyzing district judge and appellate judge behavior toward unions, we can determine whether such background factors are as important in predicting district judge votes on NLRA issues as they have been shown to be for appellate judges. A negative answer would provide support for the hypothesis that district judges sitting as circuit court visitors rely less than their appellate colleagues on the individual experiences and attitudes that have helped shape their personal views of justice.

We begin with a regression equation (Table 5) that excludes our three private practice variables; that equation reveals a sharp difference between the predictive import of background factors for appellate and district judges. When we add the three private practice variables (Table 6), the contrast remains substantial, although several additional factors become significant for district judges. By proceeding in this sequence, we demonstrate *ex ante* how most of the attributes or experiences significantly associated with district judge behavior toward unions achieve significance in conjunction with the addition of the three private practice variables. As we suggest below, some of these changes can be explained based on strong correlations with certain types of prejudicial workplace law experience.

[44] In order to test the hypothesis that district judges might be less favorable to the union position when they write opinions than when they join opinions, we split the model including workplace experience variables from Table 4 into the instances of judges writing opinions and judges joining opinions. We then ran the regressions once again. The district court variables were not significant in either regression model ($p = 0.113$ for written opinions and $p = 0.119$ for joining an opinion). In each case the p-level is a considerable jump from what we found for the district judge variable in the full model ($p = 0.887$). The signs of the coefficients help to explain this result. Whereas we hypothesized that district judges might be less favorable to the union position when they write an opinion, the coefficient indicates that they tend to be more favorable. Further, district judges tend to be less favorable when they join an opinion. Upon reflection, one can see that these results are consistent with the conception of district judges as followers. District judges are often given routine affirmances to write, which are heavily weighted in the union's favor, resulting in the appearance of greater support for the union position. The subtraction of these routine affirmances inevitably results in the appearance of less support for the union in the remaining instances when district judges are joiners. In the end these results must be regarded with caution because of the lack of statistical significance of the district judge variable in either model.

1.

Prior analyses of appellate judge participations from this data set indicate that many different social background factors played a role in judges' propensity to support or reject the union's legal position. Appellate judges appointed by Democratic presidents were significantly more likely to support the union, as were female judges appointed by Republicans and also judges who had held elected office. Conversely, older judges, those who had graduated from elite colleges, and more recent appointees from both parties were significantly more likely to reject the union.[45]

In explaining this wide array of significant associations between social background and judicial behavior, we suggested *inter alia* that Democratic appointees traditionally favor employees' interests over employers, that older judges are generally more likely to support conservative (pro-employer) outcomes, and that attendance at an elite college is likely to reflect more privileged socioeconomic status and consequently less familiarity with or sympathy for the challenges faced by unions. (Brudney et al. 1999).

Judicial attributes and experiences, however, played virtually no role in predicting the votes of district court visitors. Political party, age, year of appointment, and college selectivity were not significant; only prior elected office was significantly associated with a district judge's propensity to support or oppose union legal positions.

The contrast between appellate and district judges was equally stark with respect to our control variables. Judges in both groups were more likely to support the union when the Board had reached the same result; this reflects the important role played by agency deference. For appellate judges, however, the mix of substantive issues and the differences in circuit culture also were important in predicting judicial votes. Appellate judges were less likely to favor the union when the parties presented bargaining-related claims against the employer under section 8(a)(5), or claims alleging union misconduct under section 8(b), than when the litigants sought review of issues arising under sections 8(a)(1) and (3), the provisions according basic protections for union organizing activities (and our reference category). Judges on the Second, Third, Ninth, and Tenth Circuits all were

[45] See Brudney et al. (1999). As the data in Table 5 reflect, the coefficients for Democratic party affiliation, age, and college status are strongly significant, while the coefficients for year appointed and elected office experience approach significance. The analyses reflected in Table 5 included variables for the gender and race of each judge (both African-American and Latino/Asian variables), and also a female/gender interaction term. We do not report results for gender or race because of perfect prediction problems in the district court universe; there were not enough cases with a female or minority district judge sitting by designation to produce reliable results. We also omitted variables reflecting private practice experience; these are added to the equation in Table 6.

Table 5. Logistic Regression for Supporting the Union: Appellate Judges Versus District Judges, Private Practice Experience Omitted

	Appellate Judges	District Judges		Appellate Judges	District Judges
Judicial Characteristics			**Control Variables**		
Democratic appointee	0.613***	−0.056	Board for union	2.943***	3.334***
Year appointed	−0.020*	0.020	Section 8(a)(5)	−0.205*	−0.074
Age	−0.022**	0.031	Other section 8(a)	−1.449***	−2.238**
Catholic or Jewish	0.157	0.382	Section 8(b)	−1.364***	−1.673
College selectivity	−0.020***	0.002	Section 10(c)	−0.919***	−0.632
Elite law school	0.042	0.304	D.C. Circuit	0.055	−1.084
Elected office	0.208*	−1.486***	First Circuit	−0.056	##
Nonelective position	−0.148	0.669	Second Circuit	0.548**	−0.053
Prior judicial experience	−0.059	−0.080	Third Circuit	0.874***	1.998
Legal academic experience	0.071	0.062	Fourth Circuit	−0.468**	−0.053
			Fifth Circuit	−0.976***	−0.987
			Seventh Circuit	0.275	−0.328
			Eighth Circuit	−0.064	0.556
			Ninth Circuit	0.838***	0.470
			Tenth Circuit	0.688**	1.020
Constant	4.059*	−3.449	Eleventh Circuit	0.079	#
Pseudo R^2	0.247***	0.306***	Year of decision	−0.014	−0.023

*$p \leq 0.10$
**$p \leq 0.05$
***$p \leq 0.01$
Variable dropped because it perfectly predicts a pro-union outcome.
Variable dropped because it perfectly predicts an anti-union outcome.

significantly more likely to support the union than were judges on the Sixth Circuit (our reference category), while judges on the Fourth and Fifth Circuits were more likely to vote against the union.

Once again, district judges displayed little or no variation related to the mix of issues or the culture of particular appellate courts. These visitors did not vote distinctly with respect to either of the important substantive areas of law,[46] nor did their positions toward unions vary significantly among any of the circuits. In sum, it would appear that district judges were considerably less likely than their appellate colleagues to be affected by their experiences before joining the bench, by the types of legal issues they faced, or by the circuit in which they sat.

Intriguingly, prior experience in elected office for appellate judges was associated with votes *favoring* the union, but the same variable was linked to votes *opposing* the union by district judges. We examined the nature of the elected office experience acquired by the two groups in an effort to account for these divergent associations. Appellate judges who held elected office had served in Congress, as big city mayors or city council members, or on school boards, far more often than their district judge coun-

[46] District judges, like their appellate colleagues, were less likely to support the union when litigants presented claims under the miscellaneous § 8(a) category. These claims were low in volume and importance when compared with claims arising under §§ 8(a)(5) or 8(b).

terparts.[47] These elected positions are more likely to demand regular and constructive interaction with unions, and service in them would tend to produce familiarity with and respect for the role played by union representation. On the other hand, the majority of district judges who held prior elected office had served as city or county attorneys or as rural state legislators.[48] These were positions in which encounters with unions were likely to have been less frequent, and we hypothesized that—especially at the local prosecutorial level—they may well have involved adversarial and hostile exchanges.

We proceeded to test our hypotheses by replacing the elected office variable with two separate variables—one for congressional, big city, and school board experience, and the second to reflect local prosecuting attorney and rural legislative experience. For appellate judges, the signs of the two variables pointed in the expected directions (pro-union for congressional and big city, anti-union for local prosecutors), and the congressional and big city variable was significant ($p = 0.027$) though the local prosecutor variable was not ($p = 0.607$). For district court judges, the local prosecutor variable was in the expected anti-union direction and was also significant ($p = 0.006$), but the congressional and big city variable was significant in an unexpected anti-union direction ($p = 0.014$). The latter result, however, must be interpreted with caution. Nine of the 13 participations by district judges with congressional, big city, or school board elected experience were by a single judge; this makes it more difficult to generalize about district judges who had such experience. In any event, the distinctions drawn here demonstrate that elected office experience is not homogeneous. As a complex composite of different political exposures, it may have diverse effects on judicial attitudes.

2.

When we added our three private practice experience variables to the comparative logistic regression equations, the results were virtually unchanged for appellate judges with respect to the prior variables (Table 6).[49] Looking at the new variables, we

[47] Of the 1,183 judicial participations by appellate judges who had held elected office, 22.7% were by judges elected to Congress, 11.5% by former big city mayors or city council members, and 13% by former elected school board members. The corresponding proportions for the 96 judicial participations by district judges who previously had been elected to public office were 11.5% (Congress), 1% (big cities), and 1% (school boards).

[48] District judges who served as elected city or county attorneys, or as representatives in a rural state legislature, contributed 56.2% of all participations by district judges with elected office experience (28.1% each for city or county attorneys and rural state legislators). For appellate judges, the comparable proportion was 30.5% (18% for local attorneys, 12.5% for rural state legislators).

[49] Year appointed moved from approaching significance to being significant for appellate court judges when the workplace experience variables are included. All statutory

found that appellate judges with NLRA management experience were more likely to support the union than appellate judges who lacked such management-side experience.[50]

For district judges, the larger equation resulted in new significance for additional background factors. District judges who were Democratic appointees, judges who graduated from an elite law school, judges who had been law professors, and those with nonelective political experience all were now more likely to favor the union position. Conversely, judges in the D.C. Circuit and Fifth Circuit were more likely to vote against the union, as were judges who had workplace law experience other than management-side representation in NLRA matters.[51]

Certain new results for district judges seem attributable to the addition of the variable identifying judges who had any NLRA management-side experience (as distinct from those who lacked such experience but had worked on other workplace law matters, or on NLRA matters without representing management). When we reconfigured the workplace law variables for district judges to distinguish among different types of NLRA practice (e.g., management-only, government-only, union-only), Democratic appointment and law professor experience were no longer factors associated with votes for or against the union.[52]

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and circuit control variables retained their significance levels (or lack thereof) with the addition of the workplace experience variables.

[50] This relationship applied only for cases in which the Board decision had favored the employer's legal position. For discussion of why the impact of management-side NLRA experience may signify that familiarity with the Act breeds greater respect for its protective doctrinal scope, see Brudney et al. (1999, 1720, 1741–50).

[51] At the same time, district judges reviewing miscellaneous section 8(a) issues no longer show a significant tendency to oppose the union when we add the workplace experience variables. As indicated in Table 6, the coefficients for Democratic party status, graduation from an elite law school, and service on the D.C. Circuit all approached significance; coefficients for the other four new factors were all significant.

We also ran analyses of district judges based on our alternative version of workplace law variables (see n.28). The results are very similar to those in Table 6 with two exceptions: graduation from an elite law school became significant and party no longer even approached significance. Two of the alternative workplace variables also are significant: District judges with union or government experience on NLRA matters were more likely to vote against the union. Given ease of comparison with previously published results for appellate judges, as well as the modestly stronger explanatory power of the predicted probabilities, we report in table form only the results for our equation using the NLRA management-side experience variables.

At the bottom of Table 6, we note that we dropped one interaction term because it was perfectly collinear with one of its component variables for district judge participation. We did test all models that appear as tables for collinearity based on the Variance Inflation Factor, and we found that no other variables reached a critical factor as defined by Fox (1991).

[52] The data in Table 5 indicate that the party of the appointing president is significant for appellate judges ($p \leq 0.001$), while for district judges the party variable does not even approach significance ($p = 0.896$). When we add the workplace experience variables in Table 6, the party variable does not change for appellate judges, but there is a very large shift for district judges ($p = 0.061$). To try to understand this change we used our more detailed analysis of workplace variables, broken into each specific type of NLRA experience (union, government, and management). We found that by separating the

Table 6. Logistic Regression for Supporting the Union: Appellate Judges Versus District Judges, Private Practice Experience Included

	Appellate Judges	District Judges		Appellate Judges	District Judges
Judicial Characteristics			**Control Variables**		
Democratic appointee	0.631***	0.841*	Board for union	3.069***	3.465***
Year appointed	−0.023**	0.029	Sec. 8(a)(5)	−0.206*	−0.213
Age	−0.024***	0.031	Other sec. 8(a)	−1.454***	−1.854
Catholic or Jewish	0.149	−0.019	Sec. 8(b)	−1.445***	−2.015
College selectivity	−0.022***	−0.002	Sec. 10(c)	−0.920***	−0.850
Elite law school	0.019	1.231*	D.C. Circuit	0.113	−2.013*
Elected office	0.211*	−1.504***	First Circuit	−0.045	##
Nonelective position	−0.162	1.289**	Second Circuit	0.569**	−0.420
Prior judicial experience	−0.046	−0.442	Third Circuit	0.894***	1.423
Legal academic experience	0.061	1.243**	Fourth Circuit	−0.534**	−0.901
Workplace law experience	−0.282	−2.723***	Fifth Circuit	−0.993***	3.085**
Corporate law experience	−0.285	−0.667	Seventh Circuit	0.213	−0.117
NLRA mgmt. experience (any)	0.640*	2.017	Eighth Circuit	−0.091	−0.607
NLRA mgmt./bd. inter.	−0.896**	###	Ninth Circuit	0.792***	0.421
			Tenth Circuit	0.670**	0.553
Constant	4.511*	−6.020	Eleventh Circuit	0.025	#
Pseudo R^2	0.250***	0.381***	Year of decision	−0.012	0.006

*$p \leq 0.10$
**$p \leq 0.05$
***$p \leq 0.01$
Variable dropped because it perfectly predicts a pro-union outcome.
Variable dropped because it perfectly predicts an anti-union outcome.
Variable dropped because it was perfectly collinear with another variable in the model.

Nonelective political experience, elite law school background, and other workplace law experience remain positive and

workplace experience in this way, the party variable still did not change for appellate judges, but it once again did not approach significance for district judges ($p = 0.137$).

The explanation for this vacillation regarding district judges appears to be related to the strong correlation between district judges who were Democratic appointees and who also had non-management-side NLRA experience. Every district judge with NLRA union-side experience and 75% of those with NLRA government experience were appointed by Democrats, and each group was, surprisingly, strongly disposed *against* the union. By contrast, district judges with management-side NLRA experience were all Republican appointees; their coefficient indicates support for union positions, though it does not quite approach significance ($p = 0.126$). When private practice experience variables were omitted entirely (Table 5), the strong anti-union associations of Democratic appointees with union-side or government-related NLRA experience and the strong pro-union tendencies of Republican appointees with management-side NLRA experience apparently acted in combination to prevent the party variable from achieving significance. When we then grouped these anti-union Democratic appointees in a workplace variable that included district judges with state labor law experience or federal non-NLRA experience (where party was an important predictor in the expected directions), their anti-union tendencies were masked by the expected party-line voting of other judges, apparently resulting in the increased significance of the party variable.

Whatever the explanation, it is noteworthy that the party variable remains strongly significant for appellate judges under all three models. By contrast, the most that can be said for district judges is that this same variable approaches significance in only one of the three models. Further, the party variable turns out not to be substantively significant for district judges when we assess predicted probabilities (Table 7).

Finally, the significance of legal academic experience may be an artifact of grouping all legal academics with workplace experience into one variable in opposition to all legal academics without such experience. When the workplace law variable is altered to separate out those with union and government experience, this relationship disappears.

significant under either version of our NLRA practice variables. We discuss possible reasons for some of these pro-union associations in Part IV below. Finally, for both the D.C. Circuit and the Fifth Circuit, our findings are tempered by the fact that these two appellate courts used the smallest number of district judges. The significance results for such a limited number of district judge participations (two cases in one circuit and four in the other) should be regarded with caution.

To aid interpretation of the statistical findings, we conclude our analyses by calculating the predicted probability for each variable with a significant regression coefficient.[53] These predicted probabilities illustrate the extent to which each variable is associated with a change in the likelihood that a judge will vote in favor of the union. The predicted probabilities assume a baseline of a "profile judge" with the predominant (modal) characteristic for each bivariate variable and the mean value for each continuous variable. Our profile district judge was *inter alia* appointed in 1976, was about 65 years old, attended a fairly selective college but a nonelite law school, had no NLRA or other workplace law experience, and was sitting on the Sixth Circuit, reviewing a section 8(a)(1) or (3) claim that the Board had decided in favor of the union.[54] Using the predicted probabilities, we compare judges with other characteristics to our profile judge.[55]

For district judges, only three judicial attributes that were significant in Table 6 also make a substantial difference in predicting outcomes. As the predicted probabilities in Table 7 indicate, the profile district judge has a 75% chance of voting for the union. If the judge had attended an elite law school, the predicted probability of supporting the union would rise to 86%. Conversely, if the profile judge had prior elected office experience, the predicted probability of favoring the union would drop

[53] All predicted probabilities were run using the Clarify program with techniques as explained in King et al. (2000).

[54] Our profile appellate judge differed slightly from this district judge, in that *inter alia* he was younger (age 60), appointed later (1980), and attended an elite law school.

[55] We calculate the predicted probabilities by first using our regression equation to compute the probability that a "profile judge" (one holding the modal value for bivariate variables and the mean value for continuous variables) would vote in favor of the union. We then calculate a series of values for Z and probability, changing a single characteristic of the profile judge for each calculation. For example, we first change the value for Democratic appointment from its modal value (0 = Republican) to the nonmodal value (1 = Democrat) while retaining the profile values for all other variables. For two continuous variables (college selectivity and year of appointment), we altered the value from the mean to the high. For the third continuous variable, age, we used a "high" of 76, which was the oldest age of a judge fitting other aspects of the profile. We report these probabilities in the predicted probabilities table, comparing them to the baseline probability. The predicted probabilities we report show the first differences between the prediction for the profile judge and the prediction based on the change in one of the independent variables. These probabilities are calculated to indicate the 95% confidence range for the prediction, allowing us to assess whether our prediction provides substantively useful information (Greene 1997; King 1998; King et al. 2000; Liao 1994).

Table 7. Predicted Probability of Votes for the Union for Significant Variables: District and Appellate Judges

	District Judge	Range+	Appellate Judge	Range+
Profile Judge	0.75	0.70–0.80	0.84	0.79–0.88
Judicial Characteristics:				
Democratic appointee	0.80	0.75–0.85	0.91@	0.88–0.99
Most recent year appointed	—	—	0.81	0.77–0.84
Older age (76)	—	—	0.78@	0.73–0.82
Most selective college	—	—	0.81@	0.78–0.82
Elite law school	0.86@	0.81–0.90	—	—
Elected office	0.51@	0.41–0.61	0.87	0.84–0.90
Nonelective position	0.76	0.69–0.81	—	—
Legal academic experience	0.68	0.61–0.75	—	—
Workplace law experience	0.61@	0.54–0.68	—	—
Female	—	—	0.92@	0.87–0.97
Latino or Asian	—	—	0.64@	0.48–0.77
Board against union	0.06@	0.00–0.19	0.20@	0.14–0.28
Section 8(a)(5)	—	—	0.81	0.77–0.85
Other section 8(a)	—	—	0.56@	0.41–0.71
Section 8(b)	—	—	0.56@	0.45–0.67
Section 10(c)	0.71	0.57–0.80	0.68@	0.61–0.73
D.C. Circuit	0.60	0.33–0.80	—	—
Second Circuit	—	—	0.90@	0.86–0.95
Third Circuit	—	—	0.93@	0.88–0.97
Fourth Circuit	—	—	0.75@	0.67–0.82
Fifth Circuit	0.61	0.26–0.85	0.66@	0.56–0.75
Ninth Circuit	—	—	0.92@	0.89–0.96
Tenth Circuit	—	—	0.90	0.83–0.97

— Indicates the variable was not significant in earlier regression analyses; see Tables 4 and 6.

+ The Range is the 95% confidence interval for the prediction.

@ Indicates results for which the 95% confidence intervals for the predictions reasonably exclude the possibility that the profile judge's predictions are the same as the judge with the altered characteristic. While the ranges do on occasion overlap, the actual prediction for the profile judge does not fall within the range for the prediction of the altered characteristic. We can feel confident that the results are substantively significant and trustworthy where the small degree of overlap between the two ranges would suggest a true difference.

to 51%, and it dropped to 61% for judges who had workplace law experience other than management-side NLRA representation. With respect to other background factors, if the Board had voted for the employer, the probability of this judge supporting the union dropped dramatically—to just 6%. For the remaining five variables that were significant in Table 6, the predicted probabilities do not provide enough confidence to conclude that district judges with such attributes or experiences vote in ways meaningfully different from the profile judge.[56]

By contrast, the predicted probabilities for appellate judges indicate that many more of the statistically significant characteris-

[56] Both party and legal academic experience are close to being substantively significant, but we still cannot reject the null hypothesis that these variables have no effect on votes for the union. Nonelective office is not substantively significant, having only a potential 1% impact on votes for the union. And for the two circuit controls, the range of the 95% confidence interval is so large that almost anything is possible, providing further indication that we do not have enough cases to make a reliable prediction.

tics from Tables 4 and 6 also are important in this substantive setting. The data in Table 7 reveal that five separate judicial attributes that were significant in Tables 4 or 6 for appellate judges make a meaningful difference in predicting outcomes.[57] The profile appellate judge has an 84% chance of voting for the union. Switching that profile judge from a Republican to a Democrat raises the predicted probability of union support to 91%. Similarly, if the profile judge is female, the chance that she will favor the union position rises to 92%. On the other hand, the probability that the profile appellate judge will support the union drops to 81% when the judge is older or when he attended an elite college, and to 64% when the judge is Latino or Asian.[58]

With respect to other judicial experiences, the differences are even more notable. Appellate judges who served on the Second, Third, or Ninth Circuits have a substantially higher probability of supporting the union than the profile judge from the Sixth Circuit; for appellate judges from the Fourth or Fifth Circuits there is considerably less chance of support for union positions. If the profile judge considered a miscellaneous section 8(a) claim or a section 8(b) claim alleging union misconduct, rather than the more prevalent section 8(a)(1) or (3) claim that is the profile, the predicted probability of supporting the union dropped to 56% in each instance. If the profile judge reviewed a section 10(c) claim for relief, the probability of union support declined to 68%. Finally, if the Board voted for the employer, the probability of appellate judge support for the union plunged to 20%. Overall, from a substantive perspective, appellate judges' decisions to vote for or against the union are associated with more than three times as many background factors as the votes of their district judge colleagues.[59]

3.

There is one further set of observations to report before we turn to a discussion of our findings. As we did with respect to opinion-writing, we reran our analyses on background variables, analyzing appellate judge votes on "pure" panels separately from appellate participations on "mixed" panels. We found that the significant background and control variables showed up strongly for appellate judges participating on pure panels. Appellate

[57] Female and Latino/Asian are included here even though they are not in Table 6; they were significant for appellate judges in Table 4.

[58] One should interpret results on Latino or Asian appellate judges with caution, given the low number of their participations in the appellate judge database. Predicted probabilities for two variables that were statistically significant for appellate judges in Table 6—year appointed and elected office experience—are not substantively significant here.

[59] For appellate judges, five attribute variables plus nine control variables are substantively significant under the predicted probabilities analysis; for district judges three attribute variables plus one control variable are substantively significant.

judges serving on mixed panels reflected some but not all of these significant variables in their voting behavior. Notably, political party affiliation and many of the circuit control variables dipped below established levels of significance for appellate judges on mixed panels, although the coefficients still pointed in the same directions.[60]

These findings could be invoked to support the hypothesis that appellate judges behave in a more circumspect fashion when sitting with district judge "outsiders" than they do when reviewing cases with their regular appellate colleagues. Such a hypothesis would be consistent with contentions by some scholars of judicial politics that the presence of a judge who differs in an important respect from other appellate panel members may exert a type of "whistleblower" effect, subtly influencing the behavior of his panel colleagues (Cross & Tiller 1998; Revesz 1997; Tiller & Cross 1999). For several reasons, however, we believe it is premature to reach such a conclusion here.

First, it is worth noting that the whistleblower effects argument is itself hotly contested, having been thoughtfully challenged by two federal appellate court judges (Edwards 1998, Wald 1999). Second, an earlier article by one of the authors examining the same set of appellate judge participations on NLRA matters found no whistleblower effects, though on a different issue (Merritt & Brudney 2001). In that article, the presence of a "whistleblower"—i.e., a judge whose political, educational, or professional experience differed from that of his two colleagues—was found not to affect the likelihood that a panel opinion would be published. The fact that these same appellate judges did not behave strategically, based on panel composition with regard to decisions about whether to publish, counsels for a cautious approach to inferring panel-related strategic behavior here. Third, the likelihood of a whistleblower effect is very difficult to assess given the complex nature of panel dynamics when so many different judicial background variables are being simultaneously analyzed. It is possible, for instance, that certain prejudicial experiences may operate at times to *facilitate* agreement on pure appellate panels, rather than reinforcing more distinctive voting behaviors. An appellate judge initially inclined to support the union's legal position might change his mind after listening to and taking seriously the contrary views of his

[60] For example, with respect to variables no longer significant for appellate judge participations on mixed panels, Democratic appointees were still more inclined to support the union (coeff. = 0.673, $p = 0.158$), appointees from the Third and Ninth Circuits were still more likely to support the union (3d Cir.: coeff. = 0.746, $p = 0.232$; 9th Cir.: coeff. = 0.672, $p = 0.212$) and appointees from the Fourth and Fifth Circuits remained less likely to support the union (4th Cir.: coeff. = –0.58, $p = 0.169$; 5th Cir.: coeff. = –0.897, $p = 210$). Elected office experience was the one background variable that changed coefficient signs as well as losing significance for appellate judges on mixed panels (coeff. = –0.054, $p = 0.857$).

colleagues. This prospect may be enhanced, at least at the margins, by the presence of *two* fellow appellate judges with whom he shares some presumptively pro-union background experience or characteristic, such as Democratic political affiliation or graduation from a nonelite college.

Notwithstanding these and other uncertainties associated with analyzing panel dynamics, it remains true that appellate judges who participate together in reviewing Labor Board decisions reflect numerous background traits and experiences in ways that district judge visitors do not. The fact that the same appellate judges seem to reflect these traits and experiences less distinctly when in the presence of a district judge co-panelist may warrant further examination, but such additional inquiry is beyond the scope of this article.

IV. Discussion

Our examination of judicial behavior reviewing NLRB adjudications over a seven-year period reveals that designated district judges differed in notable respects from regular appellate judges. The fact that they were on average older and more senior than their appellate colleagues may in part reflect the previously identified general propensity to invite senior district judges and those with prior appellate court service when selecting judges to fill out panels. That the judges who were chosen to serve often had attained senior status or accrued many years on the federal trial bench may also help explain why during this particular period (the years 1987 to 1993) they were more likely to be Democratic appointees (i.e., appointed in the years 1961–68 or 1977–80) and less likely to be female.[61] Further, the fact that our district judges were less likely to have graduated from elite law schools, or to have had management-side litigation experience with this federal statute, comports with other studies reporting differences in education and training between district and appellate judges (Goldman et al. 2001; Goldman & Slotnick 1999; Goldman 1991, 1997; Slotnick 1983).[62]

As panel participants, district judges were markedly less assertive than their appellate colleagues. They did not vote distinctively for or against unions when compared with appellate counterparts. They also were less likely to author signed majority opinions or to issue dissents. As we noted earlier, this low-profile approach to opinion-writing may be attributable in part to presiding panel judges' preferences not to overload invitees who are

[61] Only eight females had ever been appointed to the federal bench at circuit or district court levels before 1977 (Singer 1999).

[62] On the other hand, previously identified differences between appellate and district judges in terms of college background and law professor experience are not manifested here.

already performing a service simply by helping to decide cases. At the same time, such preferences may be encouraged by the tendency of district court guests to be comfortable with the role of filling out panel composition while not necessarily assuming coequal voice or responsibilities. The possibility of this latter tendency receives some support from our findings that district judges' personal backgrounds and experiences are associated with their voting stance toward unions markedly less often than was the case for regular appellate judges.

Admittedly, district judges who graduated from elite law schools were more likely to favor the union; that association is consistent with perceptions of elite law school faculties—and their graduates—as ideologically liberal and inclined to favor government regulation (Posner 1993; Sisk et al. 1998; Williams 1996). In addition, district judges with elected office experience were more likely to reject the union. As discussed earlier, this tendency may well reflect the rural and prosecutorial shading of such experience, fostering a perception of unions as "foreign" entities or even troublemakers warranting litigation challenges. District judges with workplace law experience other than management representation in NLRA matters also were more likely to vote against the union. Such experience generally involved matters affecting individual employee rights outside the NLRA ambit. Judges who typically litigated for or against the rights of individual employees may perhaps have developed less sympathy or appreciation for a federal statutory scheme premised on collective bargaining and other forms of group action rather than individual rights (Brudney et al. 1999).

Even recognizing the role played by these three factors, however,[63] a more robust and varied range of background characteristics is associated with the votes of appellate judges for the same NLRA issues. Fundamental life experiences or attributes such as college background, political party affiliation, gender, age, and race each played a distinctive role.[64] The culture of individual

[63] District judges with nonelective political experience were more likely to support the union in the equation that included private practice variables (Table 6), though there was no significant association when those variables were excluded (Table 4). Nonelective experience is an unusually hybrid variable. The 65 district judges with such experience had served in appointed positions at the local, state, or federal level, in executive or legislative capacities. In addition, many had acquired multiple experiences at different levels or capacities. We have been unable to develop a satisfactory explanation for the pro-union results associated with such experiences. In any event, the variable was not substantively significant under our predicted probability analyses (Table 7).

[64] Some of these life experiences may not be constant across time; political party affiliation is a classic example (Tate & Handberg 1991). In an earlier article, we found that the political saliency of union issues among appellate judges is declining on a bipartisan basis (Brudney et al. 1999, 1737–39). Political party affiliation effects also may not be constant across groups. Goldman's data indicate a somewhat higher level of prejudicial party activism and congressional membership among appellate judges appointed over the past four decades than among district judges appointed during the same period (Goldman 1997, 349, 355). Nonetheless, it is notable that, as indicated in the text, district

circuits and the mix of substantive labor law issues also were meaningful in accounting for appellate judge voting patterns.[65]

There is evidence to suggest that when district judges address labor-related matters in their traditional trial court role they tend to vote in a manner consistent with some of these formative experiences (Rowland & Carp 1996; Carp et al. 1993; Vines 1964). While the findings regarding district court decisionmaking are not uniform (Ashenfelter et al. 1995; Sisk et al. 1998), the presence of studies linking district court decisions in the workplace law area to party affiliation and other background factors raises the possibility that these judges may perform differently when they sit on their own court rather than as visitors to an appellate bench.

At one level, our results are reassuring. Designated district judges play the part of dutiful followers on labor law matters. They seldom author panel opinions, they even more rarely dissent, and they do not vote in any distinctively pro-union or anti-union fashion. Nor do their votes strongly reflect their partisan affiliation or personal life experiences, even though such background factors do appear to have some influence on appellate judge approaches to NLRA issues. By providing a needed service to circuit courts while they themselves remain in the background, these visitors can be viewed as promoting judicial efficiency without threatening the development of legal precedent by their more experienced colleagues.

There are, however, some troubling implications to this picture of judicial performance. Appellate judges develop legal doctrine primarily through reasoned elaboration of language and precedent, but those elements alone are not sufficient. Appellate courts have considerable discretion in deciding particular cases, and the exercise of such discretion is, and ought to be, informed by a judge's individual experiences and beliefs as well as her legal training and analytic skills. Given that human value judgments play some role in appellate adjudication, an individual judge's background and perspectives contribute in important respects to her formation and exercise of independent thought during a decisionmaking process that is meant to be intellectually vigorous as well as collegial.

Measured against this standard, the district judges in our data set performed in a much more diffident fashion than their appellate colleagues. The scarcity of signed opinions suggests a willingness to assume or accept a relatively modest appellate role. Moreover, in the aggregate, the individual characteristics and

judges' conduct as district judges addressing labor law matters seems more closely linked to party affiliation than their performance as appellate court guests.

[65] Five different circuits (2d, 3d, 4th, 5th, 9th) were statistically and substantively significant, as were three different statutory subsections (miscellaneous § 8(a), § 8(b), and also § 10(c)).

convictions of these visitors appear to figure less prominently when deciding NLRA issues than was true for regular appellate judges.

It is possible that designated district judges do not perform in such reserved fashion when participating in other substantive law areas. Perhaps their lack of judicial experience on NLRB matters engenders a lack of confidence regarding their sensitivity to the current law of labor-management relations. This absence of judicial experience and familiarity on NLRA issues may lead presiding panel judges to assign them fewer majority opinions. It may also incline district judge visitors to defer more readily to colleagues who have acquired such experience, and to rely less on their own beliefs and instincts. By contrast, there are areas of federal law—criminal procedure or employment discrimination, for example—in which a district judge visitor can help educate his panel colleagues on the intricacies associated with conducting a trial or developing an evidentiary record. Performing this collegial function may in turn encourage the visiting judge to participate more fully as a panel member, which includes volunteering more often for majority opinion assignments and reflecting his own personal and professional experiences during the deliberative process.

On the other hand, it may be that district judges are generally more reserved when serving on appellate panels. Such adaptability could be attributable in part to their temporary status, combined with the rational perception that their subsequent decisions as trial judges will continue to be reviewed by these same appellate actors. Indeed, given that appellate review under the NLRA does not require district judge visitors to pass judgment on the work product of their trial court friends or colleagues, one might even expect a more outspoken approach to the appellate enterprise in those settings.

Whether district judge behavior in NLRA matters is representative or atypical cannot be determined without further empirical study. It would be useful to examine designated district judge performance in other fields of substantive law, including fields in which appellate panels primarily review judgments of trial courts rather than federal agencies. Another area that warrants additional inquiry involves possible differences between the behavior of active and senior district judge visitors. Of the 105 district judges in our data set, slightly over one-third were on senior status at the time they participated in appellate decisionmaking. When we reran our equations to take account of this senior status, our results were inconclusive. With regard to opinion-writing, it was seniors, not actives, who were significantly less likely than their appellate colleagues to issue signed majority opinions, but it was actives, not seniors, who were significantly less likely to dissent. In terms of the association with background

factors, seniors and actives behaved identically: Both were significantly less likely than regular appellate judges to reflect their personal or professional backgrounds when voting for or against the union's legal position. Examination by judicial behavior scholars of other appellate decisions may shed more light on the impact of visiting judges with senior status.

Finally, it is noteworthy that district judge visitors participated in 27% of NLRA-related appellate court decisions during our seven-year period, substantially above their 17% participation rate for all cases as discussed above.[66] The unusually high level of district judge inclusion for a category of cases that involves review of agency decisions may in part be indirectly attributable to the policy followed by many circuits of not assigning district judges to review cases decided by their trial court colleagues.[67] The possibility of variations in district judge participation rates based on such neutrally applied circuit court assignment practices is another area that warrants further exploration.

[66] See Table 1. Of the 1,140 cases we examined in which appellate court panels reviewed unfair labor practice adjudications between October 1986 and November 1993, 307 (26.9%) included a district judge visitor sitting by designation. For three circuits—the 4th, 8th, and 10th—more than half of all NLRA cases had district judges sitting by designation. Moreover, for seven circuits the district judge participation rate on NLRA cases was at least twice as high as for cases in general, and for only one circuit was it lower. The following circuit-by-circuit comparison is based on Table 1 figures plus compilations from the database, on file with authors.

Circuit	Overall DJ%	NLRA Cases DJ%
D.C.	3.8%	1.5% (2/131)
1	13.8%	36.8% (7/19)
2	19.9%	27.5% (28/102)
3	20.0%	27.0% (30/111)
4	22.6%	56.3% (40/71)
5	4.4%	8.2% (4/49)
6	33.0%	32.8% (62/189)
7	13.1%	26.7% (35/131)
8	16.3%	50.8% (32/63)
9	13.2%	19.8% (36/182)
10	31.2%	53.8% (21/39)
11	11.8%	20.4% (10/49)

[67] See, e.g., interview notes, n.12 for Circuit Executive from the 7th Circuit. (When asked if he could think of a reason why district judge visitors had sat on NLRA cases in disproportionate numbers, he suggested that because cases from the Chicago district made up a substantial portion of the appellate docket in the years 1986–93 [and still do today], the practice of not having district judges review cases from their own district meant that district judge invitees from Chicago were somewhat limited in the cases they could review; NLRA cases constituted one eligible category of cases). Circuit Executives in the 3rd and 10th Circuits also recognized that district judges who were "conflicted out" of reviewing cases from their own district might be assigned to review agency decisions in disproportionate numbers for some panel sittings. Other Circuit Executives, when asked if they could account for the higher levels of participation in NLRA cases by district judge visitors in their circuit, either had no ready explanation or attributed it to coincidence or chance. See interview notes, n.12. In many circuits, the total number of NLRA cases reviewed over a seven-year period is low enough to lend support to this "coincidence or chance" response.

Meanwhile, some appellate courts may decide to follow the D.C. Circuit's example and discontinue the use of designated district judges. Many others, however, will continue to rely on these visitors to help manage their caseloads. Assuming that district judges are included based on neutral selection criteria,[68] the high level of district judge participation indicates that these visitors may play a disproportionate role in shaping appellate court decisions—and consequent policy directions—in the labor law area. The results of our study suggest that there is a need to consider more clearly the possible tradeoffs between efficient judicial administration and a less robust decisionmaking process.

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[68] We found no evidence that particular judges were preassigned to certain cases with a view toward influencing outcomes. Compare Brown & Lee (2000), discussing evidence that the 5th Circuit in the 1960s made judicial panel assignments in some civil rights cases in an effort to influence outcomes.

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