

**The Effect of Ideology and Litigant Advantage on
Appeals to, and Grants of *Certiorari* by, the US
Supreme Court**

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Abstract

Scholars examining the relationship between the federal appellate courts and the US Supreme Court have heretofore explored a myriad of explanations for how the Supreme Court determines which cases it will accept for review, including the ideological relationships between the justices and the circuit judges (and courts) and the resource statuses of the petitioning and responding parties. What scholars have overlooked is why some litigants appeal to the Supreme Court at all, given the low rate of review by the Court and the high costs (financial and otherwise) of an appeal. Scholars have also overlooked how changes in these relationships over time, and across circuits, affect both the rates of appeals, and the rates of review by the Supreme Court, in the aggregate. I hypothesize that greater ideological disagreements between the circuits and the high court increase the rates of appeals over time, and I hypothesize that increases in the resource divide between the “haves” and “have nots” will depress appeals over time. Similarly, I hypothesize that greater ideological disagreements between the circuits and the Supreme Court, as well as an increase in resource discrepancies between Supreme Court petitioners and respondents, will increase and decrease, respectively, grants of *certiorari* review by the high court. Using the Court of Appeals Database for the years 1983 to 2009, I conduct a pooled time series analysis, and after controlling for other factors I find mixed support for my hypotheses – including the possibility that the signals sought by litigants in determining whether to appeal are not the same signals sought by the justices in determining whether to review a lower court decision. I conclude by discussing reasons for these findings, as well as recommendations for future research inquiries.

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Chapter 1:

Introduction

If someone is convicted based on evidence obtained during an illegal search, or if he or she is injured due to a defective product, or if he or she believes they were fired because of their race or gender – more often than not that person wants to win in court and receive legal satisfaction (release from prison, a significant fine against the offending company, etc.).¹ In addition to the immediate gains made through a favorable contemporary decision, many litigants also want to establish a favorable long-term precedent, for various reasons (future litigation, advancing group interests, etc.). Because of this logic, litigants losing in the federal courts of appeals should seek a redress of their grievances through an appeal to the US Supreme Court. However, this logic belies reality: of the over 50,000 decisions by the circuit courts per year, fewer than 8,000 cases are appealed to the Supreme Court.² Furthermore, the docket for the Supreme Court has declined since the 1980s, from 150 grants of *certiorari* in the mid-1980s to approximately 80 grants today,³ due in part to the continued legacy of William Rehnquist and his desire to reduce the Supreme Court’s caseload (George and Solimine 2001).

Despite the decline in petitions and the long odds of a successful petition, thousands of litigants still petition the Court for a review of the lower court decision⁴ each year – including those litigants with fewer resources (financial or otherwise) than others. The literature heretofore has examined individual case reasons litigants appeal to the Supreme Court, and why the justices accept some of these petitions but not others, but with so many cases appealed – and so few granted

¹ As detailed in Chapter 2, this assumption does not encompass all objectives by litigants.

² <https://www.supremecourt.gov/faq.aspx> .

³ http://www.nytimes.com/2009/09/29/us/29bar.html?_r=0 .

⁴ There are several ways in which the Supreme Court may review a lower court decision, but the focus of this study is on the most common form of review: a writ of *certiorari*. Consequently, the reader should infer that “Supreme Court appeal” and “Supreme Court petition” are synonymous with “petition for *certiorari*.”

review – the circumstances of the individual cases fails to address the question of whether litigants attune themselves to the changing litigation trends in the federal system. How do strategic litigants respond to changes in litigation trends over time?

The purpose of this dissertation is to explore the changing relationship between the different federal judicial actors over time, specifically the relationship between litigants, federal appeals courts, and the US Supreme Court, and how these changes potentially serve as cues for more appeals to the Supreme Court and greater review of certain circuits by the Court. I posit that there are two significant factors affecting increases and decreases in appeals and *certiorari* grants over time and across circuits: the changing ideological characteristics of the courts and the changing resource divides among the litigants. As circuits’ preferences depart from the preferences of the high court over time, appeals and grants of *certiorari* will increase, and as the resource gap – defined as the ability of a litigant to hire a more prominent or more experienced legal team and to otherwise possess the capability to more readily sustain a presence in an appellate proceeding (Songer, et al 1999; Black and Boyd 2012) – between the “haves” and the “have-nots” increases over time and across circuits, appeals and grants of *certiorari* will decrease.

As discussed below, rational litigants must contemplate several “costs” in deciding whether to appeal, and one of the principal costs is the interactions among the decision-makers of the federal court system – and their shaping of public policy and future litigation. One of the more common theoretical accounts of this interaction is the principal-agent theory.⁵ Principal-agent theory of hierarchical decision-making posits that the principal makes the rules, the intermediaries interpret the rules, and the agents enforce the rules, and there are clear sanctions for failing to

⁵ For examples of principal-agent theory applied to the judiciary, see Lindquist, et al (2007b) and Westerland, et al (2010).

comply with the principal's decisions. To apply this account to the federal courts, the Supreme Court makes the rules (via interpretation of the Constitution and precedent), the courts of appeals interpret the rules, and the district courts enforce the rules, and there are sanctions for not complying with the Supreme Court's rulings, such as a higher rate of audit by the Court and the reversal of the appellate court's decision.

The principal-agent account of the judiciary is a solid theoretical foundation for the study of the federal court system, particularly regarding the possibility that some circuit courts will be reviewed more than others. Nonetheless, there are several reasons the principal-agent account of decision-making may be less than optimal for the study of appeals to the Supreme Court and grants of *certiorari* by the Court. There are literally thousands of cases decided by the appeals courts each year, and, for various reasons, many of these decisions go against the preferred policies of the high court, yet the Supreme Court chooses so few cases for review and will exclude many cases decided contrary to the policy preferences of the Court. In addition, not all the twelve primary federal circuits (the eleven regional circuits and the DC Circuit) are treated equally: some circuits have more decisions appealed than others, independent of the total number of cases decided by that circuit in a given year.⁶ Even if the Supreme Court seeks to monitor a specific circuit more than others, the Court is constrained by the quantity, and quality, of the decisions appealed to it (policy issues raised, et al). Additionally, there may be other factors necessitating less review even of a "disagreeable" circuit: if the Ninth Circuit's policy preferences are distant from those of the Court, but the Second Circuit's preferences are even more distant, the Court may use its limited resources

⁶ In Perry's (1991) account of Howard's (1981) book regarding decisions in the 2nd, 5th, and DC circuits, Howard found that approximately 30% of the cases from these circuits were appealed to the Supreme Court, and, as Perry points out, this percentage may be different in other circuits. In the data herein, between 1983 and 2009, the 4th Circuit had an average of 31.9% of its cases appealed to the Supreme Court each year, while the 1st Circuit had an average of 19.8% of its cases appealed each year.

to review the Second more than the Ninth. Furthermore, some litigating groups (federal government, et al) have more success – in terms of obtaining grants of *certiorari* – than other litigants, regardless of whether the appeals of the “haves” are more meritorious than those of the “have nots”. Finally, changes over time in the characteristics of both the appellate courts and the Supreme Court may impact appeals for, and grants of, *certiorari* more than others. Consequently, the principal-agent model may not account fully for the nature of appellate review by the high court. The question remains which characteristics of decisions and courts affect appeals to the Supreme Court and grants of review by the Court over time?

The underlying theory for this study is that Supreme Court justices pay attention to changing cues from the circuit courts as institutions, rather than just the facts of the individual case. Discussed in more depth below, cue theory posits that justices seek important legal or policy signals, in order to receive greater information as to which appellate court decisions should be scrutinized more by the high court. If the signals sent by the circuit courts (adherence to precedent, the political ideology of the case outcomes, etc.) change over time, strategic litigants should seek to alert the Court to such changes, in order to increase the likelihood of review by the Court.

I further posit that both litigants and justices examine the aggregate, institutional outcomes of a circuit, rather than just the individual case or the behavior of individual judges, as cues in making their respective decisions: litigants seek to examine the forest of litigation in a circuit in deciding whether to appeal to the high court, and Supreme Court justices examine the totality of the circuits’ policy outputs in deciding whether a specific circuit warrants greater scrutiny than others. The eternal debate in the study of judicial politics is whether it is most appropriate to analyze judicial behavior either from the standpoint of individual actors (judges, justices, etc.) or from the standpoint of institutional relationships (Supreme Court-Congress interaction, et al). The

reality is that the "best" level of study depends on the research questions posed, but the principal reason I examine the aforementioned relationships as institutional variables is that the decisions made by judges and justices are in groups. At the circuit and Supreme Court levels, a judge or justice cannot make decisions alone; they must make their decisions in conjunction with at least two other judges (in the case of the circuits) or eight other justices (in the case of the Court). The consequence, I posit, is that justices must have sufficient reason for alerting their colleagues as to why the appeals from a particular circuit warrant a closer look than the appeals from other circuits. In addition, strategic litigants (in theory) understand that their individual case may have cause for Supreme Court review, but if the case is not emerging from a circuit with a history of conflict with the Supreme Court, then the likelihood that the petition will be noticed by the justices is significantly reduced. Consequently, litigants seek ways in which to use institutional characteristics to make accurate decisions regarding appeals to the Supreme Court.

There are two general groups of cues used by the justices and litigants, both for appealing to the Supreme Court and for granting *certiorari*: broad signals coming from the aggregate output of the circuits, and individual signals coming from the characteristics of individual cases. As previously stated, the focus of this research is of the former types of cues. One broad cue examined by the Supreme Court is the ideological direction of the decisions of the lower courts. Although the Supreme Court is mindful that too much review will weaken circuit legitimacy, the justices will vote to review a circuit decision too distant from the ideological median of the Court, in order to increase compliance and protect the legitimacy of the Court itself (Cameron, et al 2000; Scott 2006b; Lindquist, et al 2007a).⁷ Similarly, appeals of these circuit decisions will increase because

⁷ It can be inferred that justices eye *certiorari* if they have the requisite votes to prevail on the outcome itself, regardless of the theoretical reason for granting *certiorari*. Unfortunately, we lack data regarding justices' votes at the *certiorari* stage, so this explanation must remain theoretical.

strategic litigants should be aware of the ideological proclivities of the justices (Black and Boyd 2012). Because the Supreme Court uses lower court conflicts as cues of conflict, dissents in circuit court decisions provoke higher rates of appeals to the Supreme Court and higher degrees of review by the high court because the rarity of such opinions serve as blown “whistles” to get the justices’ attention as to, for instance, a circuit’s deviation from established precedent or to dissensus among lower court judges (Hettinger, et al 2003a; Black and Boyd 2012). There is also the possibility that more reversals of the lower courts by the appellate courts will serve to increase both appeals to the Supreme Court and grants of *certiorari*, in the name of uniformity among the lower courts, but the evidence for this relationship is mixed, with Lindquist, et al (2007a) finding that Supreme Court review increases as circuits issue more reversals of the lower courts but Black and Boyd (2012) finding no significant relationship compared to the effect of litigant advantage.

There is another factor impacting the rates of appeal and the rates of *certiorari* grants, one heretofore underexplored as a cue: the relative resource advantages of litigating parties resources. More advantaged litigants are better able to take the indices of the circuits (dissents, policy outcomes of decisions, etc.) and frame those cues in such a way as to capture the attention of the Supreme Court justices. Resource-heavy, strategic litigants can take the aggregate outputs of the circuits and use those outputs to present a litigant’s individual case as representative of the broader policy decisions of a circuit. Additionally, more advantaged, strategic litigants are more selective in their decisions to appeal because they possess the resources necessary to accurately calculate the odds of success (however defined) on a request for *certiorari*. It is in these ways that litigants in the aggregate signal the justices as to the “merits” of reviewing some circuits more than others and to signal the justices that the public and legal policy characteristics of a circuit have changed significantly from years prior.

For the quality and expanse of the extant literature, there is a crucial component of study missing: how changes in resource advantages impact decisions to appeal to the Supreme Court. The judiciary is a unique institution within American politics in that it is not a self-starter; those groups seeking a redress of grievances must be the ones who bring the problem to the courts. If litigants in the lower federal courts are unsatisfied with the outcome, they must be the ones to petition the higher courts for relief from the judgment or appeal. As with almost all methods of grievance petition, such measures cost time, money, and other resources. Although prior research has examined how differences in party resources impact the decisions of the Supreme Court, no prior examination of resource advantage has adequately determined (or even attempted to determine) whether changes in resources increase or decrease appeals to the highest court in America. With changes in the characteristics of litigating groups – the rise in interest group participation in the legal process, the expansion of criminal legislation inevitably pitting weak defendants against strong governments, etc. – there is at least circumstantial evidence to suggest that the resource divide between the “haves” and “have nots” is growing, but the question is whether this divide is growing over time and – more importantly – whether this growing divide over time affects Supreme Court appeals and grants of *certiorari*.

Research Questions

- 1). How do changes in the resource gap between litigants affect appeals to the Supreme Court over time?
- 2). How do changes in the resource gap between litigants affect grants of *certiorari* by the Supreme Court over time?
- 3). How do ideological differences between the federal circuit courts and the Supreme Court affect appeals over time?
- 4). How do ideological differences between the federal circuit courts and the Supreme Court affect grants of *certiorari* over time?

Chapter 2:

Theories of Judicial Decision-Making

Abstract

This chapter discusses the different theoretical accounts of judicial decision-making at the federal circuit court and US Supreme Court levels. Scholars have previously examined the role of litigant resource status, and the ideology of judges and justices, as cues for both appeals to the Supreme Court and grants of *certiorari* review by the Court. Despite these important studies, several critical questions remained unanswered or underexplored in the extant literature. In particular, scholars have failed to account for how longitudinal trends affect appeals and grants of *certiorari*, and scholars have under-studied the specific calculations litigating parties make, in determining whether to appeal to the Supreme Court. This chapter lays the foundation for the theories and hypotheses presented in Chapter 3.

Cue Theory and the Judiciary

Before outlining the broader ways in which judicial cues are used – as well as their importance – it is necessary to explain (succinctly) the underlying theory of cues. Judges and justices are identical to other political actors in that they are boundedly rational: they have limited cognitive capacities preventing them from considering every available option in making decisions, and consequently they must rely on certain cognitive shortcuts – cues – to compartmentalize and readily recall important information (Peterson 1985; Simon 1985; Baum 1998; Clark and Kastellec 2013). The specific cues valued by an individual judge will vary depending on the case at hand and the different weights different judges place on certain aspects of the law and legal decision-making (role of the court in American political life, the “correct” way to interpret the Constitution, etc.). At the Supreme Court level, “justices...employ cues as a means of separating those petitions

worthy of scrutiny from those that may be discarded without further study” in deciding whether to grant *certiorari* (Tanenhaus, et al 1963).⁸

There are numerous sources for cues, both institutional (aggregate policy preferences, et al) and for individual cases (alteration of precedent, et al), but the focus of this research will be on the former, as such cues are underserved by the extant literature. The two most germane cues for this study are litigants (Baird 2004; Black and Owens 2011; et al) and federal circuit court decisions (Kastellec 2007; Lindquist 2007b; et al). The goal of strategic petitioners to the high court is to convince at least four justices that a decision of the federal appellate court merits review, while the goal of strategic respondents is to convince at least six justices that the Court should not review a federal appeals court decision. To accomplish these goals, litigants frame their arguments in such a way to appeal to the most justices possible, by highlighting the legal importance of a case or how the decision is (not) an affront to the established public policy of the Court (George and Solimine 2001; Black and Owens 2012, 2013). As discussed more in the subsequent discussion, I also posit that litigants use the changing characteristics of the appeals courts as a signal that an individual decision is part of a broader trend in decision-making in the federal circuits, with petitioners attempting to signal that these trends are in a manner antithetical to the policy preferences of the justices and respondents attempting to signal that these trends are congruent with the policy preferences of the justices.

In addition to the behavior of petitioners and respondents, circuit judges, directly and indirectly, prime the Court through the ideological output of appellate decisions, as well as through various cues within those decisions (dissents, mixed outcomes, etc.). Through these methods in individual decisions, the judges may try to inform the Supreme Court (or at least the other judges

⁸ As quoted in Ulmer, et al (1972).

on the circuit court) that a three-judge circuit panel is part of a deviation from the established policies of the Supreme Court. Regardless of the source of the signal, the Supreme Court pays attention to some cues more than others, and the purpose of this chapter is to highlight the most important cues used by the relevant judicial actors – and the effect of these cues of appeals to the Supreme Court and grants of *certiorari* by the Court.

Theories of Circuit Court Decision-Making

Litigant Advantage

Since Galanter's (1974) groundbreaking study, many judicial scholars have turned to the resource advantages of certain classes of litigants to explain the success rate of litigants in the circuit courts as well as in the Supreme Court. The theoretical reasons some litigants win more often than others are: 1) they have more resources and can afford to go through the entire legal process; and 2) they can more accurately assess the likelihood of victory and adjust their strategies accordingly (appealing versus settling with the other side, et al). An important consequence of resource advantage is the ability to overcome the general tendency of federal appeals courts to affirm lower court decisions, because more advantaged litigants possess the experience and resources necessary to convince the appeals court that the lower court erred and because more advantaged litigants can afford to play the entire appeals "game" (Davis and Songer 1988-89; Lindquist, et al 2007a).

The most prominent example of the consequences of resource advantage is regarding criminal cases. In criminal cases, the federal government almost never loses a case, both because of its status as the national government and the resource advantages of the Solicitor General's and District Attorney's offices (Davis and Songer 1988-89; Songer and Sheehan 1992; Black and

Owens 2011). In contrast, criminal defendants represented by public defenders are significantly less likely to prevail at either the trial level or the appeals level because these attorneys often lack the financial resources or experience to conduct the research necessary to achieve a favorable court decision (Carp, et al 2016). Consequently, appeals to higher courts decline both because litigants lack the resource capabilities to overcome the predispositions of the appellate courts and because litigants cannot afford to mount an appeals campaign.

Although criminal cases involving the federal government are the most dramatic example of litigant advantage in action, the general literature discusses numerous other instances in which litigant resource advantage affects appeals to the circuit courts. For instance, Black and Boyd (2012) find that when the resource advantage enjoyed by one litigant to the US Supreme Court is sufficiently great, *amicus curiae*⁹ filings for the weaker side have no significant effect on the likelihood of *certiorari*. In general, more advantaged litigants – particularly those groups appearing before federal courts consistently (“repeat players”) – can hire better counsel and understand the judicial process better than less-advantaged litigants. As a result, more advantaged parties can better assess the likelihood of going to trial versus settling out of court, and if the odds of success are better with the use of alternative dispute resolution (arbitration, et al) more advantaged litigants will use this process and avoid using the trial courts altogether – thereby reducing the likelihood of appeal.

Litigants are also strategic should they lose in the district courts. Although appeals to the circuit courts are appeals by right, not all lower court decisions proceed to the appellate courts. Strategic litigants understand that the appeals courts generally uphold district court decisions

⁹ *Amicus curiae* translates to “friend of the court” and are briefs filed by interested outside parties in support of one side, or to provide more information to the court as to the effect of an outcome on the general public.

(Davis and Songer 1988-89), and the Supreme Court generally denies *certiorari*. If the decision of the district court is affirmed, that decision is now binding precedent for that federal circuit – harming the chances of “repeat player” litigants to achieve success in future cases. Consequently, strategic litigants will either accept their loss in the trial court or settle with the other party should the likelihood of success on appeal be too low (Barclay 1997). More advantaged litigants are more likely to accurately calculate the odds of a successful appeal because they can conduct the research necessary to obtain optimal information as to whether the circuit court is likely to overturn the district court decision (Songer, et al 1995; McGuire, et al 2009).

The use of court cases and laws to limit the use of the judiciary by litigants (and possibly limit the ability of courts to favor less-advantaged groups) can also explain why more advantaged litigants are more successful in the federal judiciary, as such court rulings reduce the ability of the “have nots” to use the federal courts as a way of redressing grievances. One (albeit indirect) example of case law making it harder for the “have nots” to succeed is the *Chevron*¹⁰ doctrine, in which the courts are expected to defer to federal agencies in the agencies’ interpretations of their rules. By limiting the ability of the federal judiciary to overturn bureaucratic rules, the federal government – the most advantaged litigant actor in the judiciary – has a powerful resource at its disposal to prevent less-advantaged groups from overturning federal agency decisions. In this manner, *Chevron* deference is a signal from the Court that non-agency litigants are more likely to be shut out of the Supreme Court process. However, other Supreme Court decisions in the years analyzed – such as determining that state citizens lack the standing to pursue challenges to state tax laws in federal court¹¹ and limiting the ability of environmental groups to challenge joint

¹⁰ 467 U.S. 837 (1984).

¹¹ *DaimlerChrysler Corp v. Cuno* (547 U.S. 332 (2006)).

agency regulations¹² – also placed jurisdictional restrictions that further inhibited the ability of less advantaged organizations and individuals to turn to the courts for relief.

In addition to the barriers placed on the less advantaged through case law, Congress has also placed limits on the ability of groups with fewer resources to turn to the judiciary for relief. The Private Securities Litigation Reform Act of 1995, which placed restrictions on who can join a class action lawsuit, and the Prison Litigation Reform Act of 1997, which placed time limits and other restrictions on suits by federal prisoners, are two examples of laws limiting the success of disadvantaged litigants in the federal judiciary. Though the ostensible purpose of these laws was to reduce “frivolous” lawsuits, in practice such laws served to shut less advantaged groups out of the federal court system by placing stricter conditions on their ability to turn to the judiciary for a redress of grievances.

The civil lawsuit “reforms” passed by Congress also serve to stack the proverbial deck against less advantaged litigants, even when the divide between the “haves” and “have nots” is not great. For example, large corporations (such as Koch Industries) suing the Environmental Protection Agency over environmental regulations are at a greater disadvantage than they were in the past, not because they have a significantly higher resource disadvantage than the federal government (compared to, for example, a small interest group or a homeowner) but because the *Chevron* Doctrine makes it less likely that the corporations will be able to convince courts that an agency’s action was too broad. In other words, because of changes in case law and congressional statutes, changes in resource advantages are not as much about an absolute difference between the “haves” and “have nots” as much as an institutional structure which makes some resource advantaged groups “havier” than others.

¹² *Lujan v. Defenders of Wildlife* (504 U.S. 555 (1992)).

Despite this probable decline in appeals to the federal circuit courts, modern developments in the federal legal system may also cast doubt on a decrease in appeals to the appellate courts by inadvertently increasing the rate at which even less advantaged groups turn to the federal appellate system for relief. One development is the “tough on crime” movement of the 1980s and early 1990s. The creation of the US Sentencing Commission, mandatory minimum sentences, and other punitive measures increased the number of criminal cases in the federal system – and the subsequent number of criminal appeals, in an effort to avoid long sentences. Another development is the increased availability of public defenders for criminal defendants in the federal appellate courts, as well as efforts by the American Bar Association and other legal groups to make a *pro se* (self) representation of higher quality than in the past (Kim 1987). The greater availability of low-cost representation makes appeals to the circuit courts less of an expenditure for litigants. Despite these developments, the general tendency of the federal appeals courts to affirm lower court decisions – and the comparatively poor quality of public attorneys versus private attorneys – may still prevent appeals to the circuits from increasing, as the likelihood of victory is slim.

Strategic Choice among Judges

Although judges do have personal policy preferences, Gibson (1983; page 9) summed up circuit judge decision-making best when he wrote that judicial decisions are the product of “what judges would like to do tempered by what they think they ought to do constrained by what they perceive is feasible to do.” As with the individual justices on the Supreme Court, individual appellate judges do not make the final decision in a case: they act in accord with at least two other judges, randomly assigned to the panel by either the chief judge of the circuit or a circuit administrator. Because judges do not choose which other judges sit on that panel, a judge may be placed with other judges with different policy preferences, different interpretations of law and

precedent, and different understandings of the role of the federal courts in American society (Kim 2009). In addition, each circuit has a different expectation of collegiality among its members, leading to judges modifying their own policy goals in the name of maintaining a good working relationship with their colleagues – reducing the tolerance for dissents in a circuit and fostering more compliance with the majority’s conclusions (Hettinger, et al 2003a; McGuire 2004). Furthermore, there is the possibility of *en banc* review of a circuit panel decision, in which the entire circuit will decide a case. In such situations, a judge must balance his or her preferences with four or more other judges’ preferences. In addition, a judge understands that *en banc* review is considered a strong signal of the importance of a case, as *en banc* may only be used in “important” cases and when the decision of a panel deviates significantly from established policy,¹³ and often the deviation from established policy is based on the ideological preferences of the individual panel versus the entire circuit – also a key signal to the Supreme Court (George and Solimine 2001; Zorn 2002; Giles, et al 2007; Lindquist 2007b). Because of these factors, judges may modify their own preferences to comply with the outcome favored by most their colleagues, in order to achieve the strongest coalition possible for a decision or to comply with norms of harmony (Epstein and Knight 1997; Fischman 2011).

There is also the effect of the circuits’ dockets on the decisions made by appeals court judges. In contrast to their counterparts on the Supreme Court, circuit courts cannot set their own docket: they must grant at least summary disposition to every appeal submitted to the court. For the reasons previously mentioned, not all original jurisdiction decisions will be appealed, but the

¹³ Under Rule 35 of the Federal Rules of Appellate Procedure, an appeals court may rehear a case if *en banc* is needed “to secure or maintain uniformity of the court’s decisions” or the case “involves a question of exceptional importance.” Unfortunately, the lack of change in *en banc* proceedings over time in the data sample used herein prevents the use of *en banc* decision-making as an explanation of changes in appeals and *certiorari*. Chapter 6 will discuss ways to account for *en banc* in the analysis.

consequence of this lack of docket control is that circuit judges hear both the substantive (e.g., whether an abortion restriction is constitutional) and the comparatively mundane (e.g., whether the confiscation of a toothbrush by corrections officers constitutes cruel and unusual punishment). Circuit judges do not always vote for their policy preferences, either because the judges do not have the resources necessary to accurately determine whether a decision will pose a challenge to their preferences or because the facts of the case are so straightforward that it is impossible for judges to vote their policy preferences. Coupled with the expectation of collegiality, the decisions of the appellate courts are more likely to be unanimous, and this greater unanimity, in turn, may reduce the likelihood of appeal to the Supreme Court, as well as reduce the likelihood of *certiorari*, because the signals sent by the lower courts are not informative (Perry 1991; Cameron, et al 2000).

Judges may also mask their policy preferences in order to avoid signaling the Supreme Court that a case should be reviewed. Supreme Court justices view appeals court dissents as a “cheap” but informative signal of conflict, and *en banc* decisions are more likely to be reviewed by the high court because such decisions can be considered representative of the policy preferences of the entire circuit, rather than an individual panel (Perry 1991; George and Solimine 2001; Hettinger, et al 2003a; Lindquist, et al 2007a, 2007b; Black and Boyd 2012). Furthermore, district courts are less likely to abide by circuit preferences if that circuit is reversed more by the Supreme Court (Haire, et al 2003). Because judges are strategic and do not want their decisions repeatedly reviewed by the high court, judges may vote against their policy preferences in the name of keeping the contemporary Supreme Court (for lack of a better word) ignorant of the true policy preferences of the judges. Consequently, circuit decisions are more likely to be unanimous, for the purposes of avoiding both having more of their decisions appealed to the Supreme Court and a greater likelihood of review by the Court.

In addition, the circuit courts are technically not the courts of last resort in the federal system. Unsuccessful litigants may appeal to the Supreme Court (most often via a petition for a writ of *certiorari*), and if four of the Court's justices grant *certiorari*, the Supreme Court may affirm or reverse a circuit decision (or a combination thereof). Because repeated reversal harms the legitimacy of the circuits, circuit judges make their decisions with an eye to whether the Supreme Court might accept the case for review (Klein and Hume 2003; Moriss, et al 2005).¹⁴ Even considering the position of the federal courts of appeals as the *de facto* court of last resort – as Supreme Court review has declined precipitously since the mid-1980s, more policy-making power has fallen to the intermediate courts – circuit judges may still modify their policy preferences in the name of keeping the courts' position as the *de facto* final arbiter of federal legal disputes. The presence of greater ideological diversity in a circuit may also lead to the altering of decision-making, partially in the name of collegiality and partially because decisions made by ideologically mixed panels (i.e. two Democratic-appointed judges and one Republican-appointed judge) are less likely to be reviewed by the Supreme Court, on the basis that decisions made by ideologically heterogeneous panels are more likely to have made their decisions based more on applicable law or precedent, rather than attitudinal preferences (Scott 2006b; Kestellec 2011a, 2011b).¹⁵ The consequence of these factors is judges may modify their decision-making to avoid consistent audits by the Supreme Court, particularly if a circuit court's decision is in ideological disagreement with the Court's (Cameron, et al 2000).

¹⁴ Working against this account is the likelihood of the decision being reviewed: Bowie and Songer (2009) find that interviewed judges admitted they did not know for certain whether their decisions would be reviewed by the Court and consequently did not take the possibility of review into consideration when making their decisions.

¹⁵ The Kestellec studies did find that the adjustment of preferences was somewhat asymmetrical: while the presence of a Democrat-appointed judge increased the likelihood of a liberal panel vote by 15%, an all-Republican panel was only 7% more likely to vote conservatively, and all-Democrat panels still vote conservatively almost 50% of the time.

Despite these considerations, judges still have their own policy preferences and under certain conditions will act to further these policy preferences, especially as they receive promotion in the judicial hierarchy (Zorn and Bowie 2010). An example is with regard to dissents. Although Kastellec (2011b) finds that Supreme Court review declines when an ideologically diverse panel makes the lower court decision, this finding applies only when the diverse panels are unanimous in their decision. The paradox of an ideologically mixed panel is that the likelihood of dissent increases because the likelihood of "mixed" outcomes (affirming in part, reversing in part; et al) increase, despite the greater likelihood of Supreme Court review when there is a dissent (Lindquist, et al 2007b; Black and Owens 2012). An increase in these split decisions over time will result in higher levels of review by the Supreme Court, both because dissents serve as “fire alarms” for Court intervention (Hettinger, et al 2003a; Black and Boyd 2012) and because one of the goals of Supreme Court decision-making is to create uniformity in the application of case law (Ulmer 1984). If dissensus increases in the aggregate, a lack of uniform legal application will likely increase, causing the Court to increase its interventions over time. Consequently, an increase in ideologically mixed decisions over time will increase the likelihood of aggregate review of a circuit by the Court over time.

The theories behind strategic choice at the individual case level can be transferred to the macro level. The ideological interaction between the circuit courts and the Supreme Court also impacts changes in the likelihood of review because the Supreme Court is likely to “trust” some circuits more than others. When the policies of the circuits and the Supreme Court are in sync, the Court is more likely to trust the signals coming out of that court (Cameron, et al 2000; Black and Owens 2012). Part of the reason the federal *certiorari* docket has decreased in recent decades, according to Justice David Souter, is due to ““diminished levels of philosophical division”” in the

federal system (Scott 2006b). If circuits' preferences are becoming more closely aligned with those of the Supreme Court, the Court may be able to tolerate some individual decisions that depart from the Court majority's policy preferences, so long as the circuit overall is behaving in a manner consistent with the Supreme Court's preferred policies. However, a more deviant circuit will be audited more because the Court has no reason to trust the decision-making of the appeals court since the appeals court refuses to conform to the preferred policies of the Court (Cameron, et al 2000; Lindquist, et al 2007b).

As a product of these factors, judges engage in a balancing act, attempting to find a “happy medium” between their individual preferences and the perceived preferences of the Supreme Court, in order to avoid higher rates of review and a consequential likelihood of being reversed. As individual case decisions shift in response to this balancing act, the aggregate output of the circuit itself will shift. If the Supreme Court is content with the overall behavior of an appeals court, the Court is likely to grant fewer writs of *certiorari* over time. Conversely, if the circuit court's decision-makers do not engage in this balancing act and favor personal preferences incongruent with those of the Court's, there will be more grants of *certiorari* over time because the aggregate output of the circuit is shifting away from the preferences of the Court – signaling that the high court should take a closer look at the decisions emerging from a particular appeals court.

Theories of Supreme Court-Circuit Court Interaction

The Supreme Court is a very selective institution, in terms of whether it will review lower court decisions. In addition to an overflow of litigation to the high court, the Supreme Court is committed to reviewing few cases in a term, due to a belief among justices that too much review of a circuit weakens the legitimacy of that court – potentially weakening legitimacy in the judicial system as a whole (Ulmer 1984; Klein and Hume 2003). The Supreme Court strives to avoid review of lower court decisions unless the justices believe a review is absolutely necessary. Consequently, justices seek certain cues as to which lower court decisions warrant attention. The effect in the aggregate is that justices should pay attention to changes over time in the cues sent by the circuit courts. I posit that the principal cues for justices' decisions regarding *certiorari* are both the contemporary conditions of the federal judiciary and the previous conditions of the judiciary.

One key aspect of changing cues is change in the justices themselves. Although the judiciary is an institution, it still consists of individuals, and these individuals can reshape the institution based on changes over time. This phenomenon is most evident with Justice O'Connor during the 1990s: as demonstrated in Epstein, et al (2007a)'s cut point model, had the *Gruter*¹⁶ case (upholding affirmative action in law school admissions) come to the Court a term prior, the affirmative action program would have been struck down, but because O'Connor moved firmly to the ideological left by the 2001 term she provided the "swing" vote in favor of the program. Similarly, Justice White's pro-police view with regard to warranted searches of homes pushed the Court's doctrine to a more conservative view of the Exclusionary Rule (Songer 1996).

¹⁶ 539 U.S. 306 (2003).

While much of the literature focuses on whether ideological “drift” affects legal doctrine over time, it is not unreasonable to assume that such shifts affect the likelihood of a case being granted review by the high court. At the micro level, there is evidence that litigants frame their arguments to reflect the median Supreme Court justice, particularly when it appears that the final decision will be close (Black and Owens 2011). Furthermore, the likelihood of a grant of *certiorari* increases if there is a significant degree of ideological distance between a circuit panel or *en banc* median and the Supreme Court’s median (Cameron, et al 2000; Scott 2006b; Lindquist, et al 2007b). In addition, as the Court’s median justice shifts left or right in the aggregate, so will the Court’s preferences (Lindquist, et al 2007a; Meinke and Scott 2007).

Although the studies discussed heretofore are micro-level (individual cases), many of the above findings translate into the macro (for institutions). Because many of the justices shift their ideological positions over time, and because of changes in membership over time, temporal shifts in ideological preferences can produce dramatic consequences for litigation to the Supreme Court. Individual justices make *certiorari* decisions with an eye on whether there are at least five votes available for the justice’s favored policy to prevail on the merits (Black and Owens 2012; Clark and Kastellec 2013). Consequently, if there is an aggregate change in the Court’s overall preferred policies, there is the probability that the individual justices will adjust their *certiorari* votes to account for the shifting policy preferences of their colleagues. Put simply, as the majority of Supreme Court justices shift to more conservative (liberal) policy positions, there will likely be a shift in the ideological direction of the aggregate cases decided by the Court – and an aggregate change in the types of decisions granted *certiorari*. Working against a longitudinal account of this change is the findings of Lindquist, et al (2007b): when an overall median circuit judge’s preferences are closely aligned with those of the high court, the Supreme Court will be more

interested in “deviant” panel decisions, rather than the output of the entire circuit – making longitudinal analysis extremely difficult.

Another important macro-level cue in whether the Supreme Court will review a lower federal court more than others is a change in the composition of the circuits. Presidents and senators appoint judges in part on the basis of whether the judge will make decisions in line with the president or senator’s favored policies, particularly since the Reagan administration, and there is at least partial evidence that circuit judges are more predictable than their Supreme Court counterparts, in terms of ideologically consistent voting patterns¹⁷ (Giles, et al 2001; Epstein, et al 2013). As previously stated, there is also evidence in the literature that the Supreme Court justices do monitor changes in the policy preferences of the median judges on appellate courts over time, as a cognitive shortcut for determining the overall preferences of the circuit (Lindquist, et al 2007b), and are more likely to review decisions emerging from ideologically incompatible circuits because the median policy preferences of the circuits and panels give the Court little reason to trust the signals sent, in terms of the policy outputs (Scott 2006b; Black and Owens 2012). Consequently, the Supreme Court views shifts in the median judge on a circuit over time as indicative of cumulative changes in the decision-making of the overall circuit, and if this change is in a direction in sync with the Court’s preferences a circuit is less likely to be monitored closely. Conversely, if the median judge’s preferences shift in a direction antithetical to the preferences of the Court, the circuit is likely to be audited at a higher rate.

There is also the ideological homogeneity (or lack thereof) in a circuit over time. As previously discussed, the Supreme Court is less likely to reverse those cases decided by

¹⁷ The literature is far from conclusive, however: Kaheny, et al (2008), for instance, finds that as judicial careers progress, judges undergo changes in their policy preferences (at least through their mid-career period). Future research will seek to develop a measure of ideology that will determine whether judges’ preferences are static or dynamic over time.

ideologically-mixed panels, *ceteris paribus*, because the signals are considered more trustworthy (Scott 2006b), and review by the Court thus may decline for the same reason, given that the Court takes cases with a predisposition to reversing the lower court decision. To extend this theory longitudinally, as the circuits become more diverse over time, there will be not only a shift in the overall preferences of the appeals court but also changes in the ideological diversity of the individual panels. As these changes in ideological diversity occur, grants of *certiorari* will decline because the Supreme Court is less likely to review decisions made by ideologically mixed panels.

Despite the possibility of ideological heterogeneity decreasing appeals, I posit that it is more likely that this longitudinal decline in *certiorari* is contingent on whether the decisions of the circuits mirror the established policy preferences of the Supreme Court. If a circuit is more ideologically heterogeneous, but it is making decisions contrary to the preferred policies of the Court, then grants of *certiorari* will increase because these circuits are not behaving as the Court believes they should. There is the possibility of ideological heterogeneity increasing the likelihood of review because ideological heterogeneity may signal the justices that a circuit court is less willing to go along with the preferred policies of the Court (Scott 2006b) – indicating that a circuit’s overall signals are not to be trusted, even when an individual decision is congruent with the Court’s preferences.

Regardless of whether ideological shifts increase or decrease grants of review, the product of these shifts in policy is that justices will pay closer attention to litigation from some circuits more than others. To provide a hypothetical, in a given year there may be an equal number of petitions emerging from the Fifth (traditionally conservative) and Ninth (traditionally liberal) circuits. Many of the petitions coming from the Fifth Circuit may be as meritorious as many of the petitions from the Ninth Circuit, but the justices and clerks will take a closer look at the petitions

from the Ninth because the Ninth's ideological disposition is further to the left (more liberal) than the ideology of the Supreme Court. If these preferences were to change over time (the Ninth becomes more conservative, and the Fifth more liberal), then this situation could reverse itself. In summation, the reason more cases are accepted from the Ninth rather than the Fifth is that the past and present policy conditions of those circuits, rather than the merit of the individual cases, serve as more informative cues for the Court.

Working against these macro-level accounts of the circuit court-Supreme Court relationship is the nature of decision-making in the lower courts and the types of cases reviewed by the appeals courts. Almost all of the circuit courts have more judges than the nine justices on the Supreme Court, the majority of cases before the circuits are non-controversial, and there is a greater expectation of collegiality in the majority of the circuit courts (Hettinger, et al 2003a; Kastellec 2011a; Epstein, et al 2013). As a consequence, the Supreme Court may ignore the overall policy output of a circuit and focus on specific cases in which a circuit deviates from established policy or the Court's preferences – making temporal trend analysis impossible.

The same information overload that may produce critical cues for the justices may also inhibit the use of ideology as a singular account of the appellate review of circuit court decisions. Literally, thousands of cases are appealed from the federal appeals courts each year, and many of those cases have merit. The consequence of information overload, however, is that justices (and their clerks, who generally view these petitions before the justices do) reject many meritorious cases because the justices and clerks lack the cognitive ability to process all of these appeals. Even when the clerks and justices do find a circuit decision contrary to the justice's preferences, there may not be the three other votes necessary to grant *certiorari* because the lower court decision is not (as) offensive to the preferences of the other justices. In addition, justices do not want to vote

for *certiorari* if they do not have a chance of victory on the merits. The consequence of these factors is that ideology may not matter as much to the justices as other cues.

Litigant Appeal Strategies

It is erroneous to assume advantaged litigants who lose in the circuit courts will always appeal. In situations in which the “have-nots” win, there is the risk to the “haves” that an appeals court will uphold the lower court decision, creating an adverse precedent for the advantaged litigant. Consequently, this litigant will either settle with the less-advantaged litigant or will cut its losses and avoid an appeal altogether (Cross 2003). In this way, the resource advantage by litigants may **reduce** appeals, because these litigants have greater knowledge of the ideological and policy proclivities of the justices and use those benchmarks to determine whether to appeal a lower court decision (McGuire, et al 2009; Yates and Coggins 2009). More advantaged litigants **winning** at the circuit level may be more willing to settle with the less advantaged litigants, in order to avoid a loss at the Supreme Court level, assuming there is a strong likelihood the Court will grant review.

Strategic litigants calculate several factors, in determining whether to appeal an adverse lower court decision. One factor is the signals sent by the justices themselves, based on recent case law. Although the moray of the judiciary is never to state explicitly how a judge or justice will rule in a specific situation, justices can use dissents and concurrences to signal that they will rule a different way under certain circumstances (e.g. “Had the search transitioned from the basement to the upstairs, this court would be more hesitant to consider the search valid”) (Jacobi 2008).

Another factor is the likelihood of success should the case be reviewed (Davis and Songer 1988-89; McGuire, et al 2009; Black and Owens 2013; et al). In this factor, the majority of the literature finds that the federal government reigns supreme: during the Rehnquist Court era, the

Solicitor General for the federal government won 62% of the cases it argued and 66% of the cases in which the federal government filed an *amicus* brief (Black and Owens 2011). The reasons for the success of the federal government are that the Solicitor General's office possesses a wealth of information regarding case precedent, the office has the most resources available to go through the entire appeals process, and the federal government is often the one "making the rules of the game", through congressional statutes, agency rulemaking, and the like (Pacelle 2003; Lindquist, et al 2007a; Black and Owens 2013). Consequently, the Solicitor General is better able to "play the odds" and appeal a negative circuit court decision than other litigants, assuming conditions are favorable to the Office.¹⁸

In addition, the Solicitor General's office appears the most frequently before the Supreme Court, both as a litigating party and as an information source, and as a consequence the Solicitor General can best tailor its arguments to encompass the widest swath of justices possible (George and Solimine 2001; Black and Owens 2012, 2013).¹⁹ Furthermore, the Solicitor General's office brings its cases on behalf of only one client, and the Office has the discretion to choose which cases it wishes to bring before the high court (Pacelle 2003; Black and Owens 2013). Consequently, the Solicitor General's office picks those cases for which there is a substantial constitutional or statutory question that the federal government can win (Zorn 2002). Furthermore, courts are concerned about encroaching on federal government space, because of the separation of powers, and will consequently defer to federal government action (Bailey and Maltzmann 2008;

¹⁸ For example, the Solicitor General will not likely appeal if the legal cues do not favor the Solicitor's office (Black and Owens 2011).

¹⁹ These arguments can include the political as well as the legal, but the evidence for an effect is mixed: Bailey, et al (2004) find that the Solicitor has a tremendous amount of success when the SG and the Court are ideologically in sync, but Black and Owens (2011) find that even conservative justices will vote against a conservative Solicitor should the legal cues be weak or erroneous.

Black and Owens 2011). Similarly, the courts will defer to federal action to avoid reprisals from the other branches, such as the removal of jurisdiction (Calvin, et al 2011; Harvey and Woodruff 2011).

Regardless of whether the litigant is the federal government, litigants strategically calculate their likelihood of success on appeal – measured as both the likelihood of review by the Supreme Court and the likelihood of success on the merits (Songer, et al 1995). There are two transaction costs litigants calculate in deciding whether to appeal an unfavorable lower court decision: the cost of judicial services (briefs, attorneys, etc.), and delays in resolution (the longer it takes to receive a ruling, the lower the utility by the prevailing litigant) (Posner 1985; Barclay 1997). In addition, there is the likelihood of victory: if litigants are not likely to win – or if there is the serious risk that the appealing litigants will be successful – they will either give up (if the litigants lose in the lower court) or settle (either litigant) (Cross 2003; Brace, et al 2012). More resource-advantaged litigants are more likely to be successful in part because they can make a more accurate determination of their likelihood of success on appeal, and they can absorb the transaction costs better (McGuire, et al 2009; Yates and Coggins 2009; Brace, et al 2012). A final cost for litigants is their ability to signal the Court successfully. In this regard, resource advantages matter, as more advantaged litigating parties can tailor the cues they use to help the justices “separate the chaff from the wheat” (Black and Boyd 2012; p. 289): for example, by alerting the justices to a deviation from established precedent.

The theory of strategic litigants is compelling, but this theory may not be true universally because of the various methods of public representation. Courts – including the Supreme Court – will appoint attorneys for those litigants incapable of affording private counsel on appeal, particularly in criminal cases (Carp, et al 2016). If litigants believe they will be granted leave to

proceed *in forma pauperis*, then the transaction costs for proceeding with an appeal decline regardless of the likelihood of victory. In addition, interest groups and legal aid societies will volunteer their services to litigants.²⁰ In such situations, the aforementioned economic model of appeals will not apply, as litigants will likely appeal regardless of their chance of victory because the transaction costs are much lower (Barclay 1997; Epstein, et al 2014). This fact also works against the theory of ideology with regard to lower court decisions: the votes cast by judges may not reflect their policy preferences but instead reflect the lack of conflict in the case at hand (Epstein, et al 2014) – impacting, in turn, the aggregate ideology of the circuit in a given year, assuming there are a sufficient number of such cases.²¹

The degree of advantaged litigant success in appealing successfully to the Supreme Court may be further mitigated by the ideological position of the justices. Although Ulmer (1984) and Black and Owens (2012) find that the federal government as petitioner is a better predictor of *certiorari* grants, Black and Boyd (2012) find that the likelihood of Supreme Court review is affected by the ideology of the justices: more liberal justices tend to favor “underdog” (black employees claiming discrimination, et al) petitioners because these litigants often represent ideological positions favorable to more liberal justices (expansion of civil rights protections, et al), while more conservative justices favor more advantaged petitioners. Alternately, a less-advantaged petitioner seeking an outcome different from the ideological position of the justices may not receive as favorable a consideration. The consequence of ideology is that victory by a group is

²⁰ In the data used in this dissertation, 15.84% of all circuit court appellants and 2.60% of all circuit court appellees were represented *pro se*, represented by a public defender or legal aid society, or represented by a court-appointed attorney. 1.34% of all circuit appellants and 0.62% of all circuit appellees were represented by interest groups.

²¹ It must be noted that no attempt is made in this dissertation to filter out these possible cases, due to the macro level of the analysis and the subjective bias in determining “non-controversial” cases.

contingent on whether their preferred outcome meshes with the majority on the Court, regardless of their degree of resource advantage over the other group. An individual case example is the *Citizens United*²² decision on campaign money restrictions: ideologically conservative justices favored a more expansive interpretation of the Free Speech Clause, while ideologically liberal justices favored a more restrictive interpretation of the Free Speech Clause. Even though the federal government, in this case, had more resources than the Citizens United organization, the federal government's policy positions were incompatible with the conservative majority on the Court.

The product of these different accounts is that strategic litigants pay attention not only to their specific case but also to the overall ideological and litigation trends across time and across other circuits. If strategic litigants believe that the Court is becoming more conservative, for example, then even advantaged litigants will hesitate to appeal if they believe unfavorable circuit outcomes are in ideological directions congruent with the contemporary Court. Alternately, if strategic litigants believe that their circuit of origin has moved in an ideological direction antithetical to that of the Supreme Court, then litigant appeals will increase (assuming unfavorable outcomes), based on the belief that the Supreme Court is paying close attention to the litigation emerging from the offending circuit. The sum consequence of these considerations is more appeals will spring forth from a particular circuit over time.

Gaps in Literature

Although the scholarship regarding appeals and *certiorari* is legion, significant deficits in scholarship remain. One significant gap in scholarship is the longitudinal study of both appeals

²² 558 U.S. 310 (2010).

and *certiorari*. There are several studies examining the relationship between the circuit courts and the Supreme Court over time (Songer, et al 1999; Westerland, et al 2010), but these studies use pooled cross-panels rather than time series, and these studies do not account for the theoretical effects of changing trends. The drawback to conducting this type of analysis is that the nature of the relationship between two variables may be misconstrued because of shocks. If two variables are cointegrated, then a change in one variable (the Supreme Court, et al) will not become permanent unless there is a change in another variable (median justice, et al) (Sobel and Coyne 2011). Cross-sectional, non-temporal analysis may not accurately report a relationship between two factors because of a sudden change to one that is (not) permanent. To provide a hypothetical, the 5th Circuit's ideology and the Supreme Court's ideology may be cointegrated over time, but if there is a sudden shock to the relationship (the Supreme Court moves further to the left, et al) the ideology of both courts may drift apart before returning to its previous relationship. A cross-panel analysis, however, may determine that the relationship between the two courts is negative (as the ideology for the Supreme Court becomes more conservative, the ideology of the 5th Circuit becomes more liberal) when in actuality the relationship is still positive (Sobel and Coyne 2011).

One of the few studies to conduct a true time series analysis is Peters (2007). This study focused on issue salience via legal mobilization. Furthermore, the Peters (2007) study addresses ideology only with regards to the median justice, not the ideological direction of the lower court decision – omitting an important consideration. Furthermore, there has been no longitudinal examination of the relationship between changes in the nature of the resource advantages of the litigants and both the decision to appeal to the Supreme Court and the decision to grant *certiorari*. As demonstrated in Chapter 5, during the Rehnquist Court era grants of *certiorari* declined precipitously over time before increasing in the initial years of the Roberts Court, yet appeals to

the Supreme Court continued to increase. The upsurge of appeals to the Supreme Court during the initial Roberts Court era is intuitive – litigants are likely trying to gauge the new regime – but the continued increase in appeals during the Rehnquist Era is puzzling, given the aforementioned desire of the Rehnquist Court to reduce the Court’s workload. This relationship between the litigants and the Supreme Court justices must be explored temporally, to understand why litigants alleged to be strategic continue to seek an audience with an institution until recently less willing to grant an audience – or whether our understanding of litigants as strategic actors is erroneous.

Closely related to this concern is the lack of examination of temporal trends from a cross-sectional standpoint. There has never been a pooled time-series examination of the relationship between the Supreme Court and the federal appeals courts. This omission is problematic for several reasons. To provide another hypothetical: suppose the relationship between litigant advantage and *certiorari* is cointegrated over time and across circuits, but the effect of a shock to this relationship (i.e. change in Court makeup) is different across circuits initially. Consequently, even though the relationship between litigant advantage and *certiorari* will remain in the long run there may be a short period where not all of the circuits feel this effect. In a cross-sectional (non-time series) analysis, the regression analysis may show no relationship between litigant advantage and *certiorari* when there is, but a pooled time series analysis controls for the possibility of different effects in the short term (Sobel and Coyne 2011).

Similar to this concern regarding the need for pooled time series analysis is the fact that not all circuits are created equal: circuit size (Scott 2006a), past audits of circuits (Klein and Hume 2003), and collegial norms (Lindquist, et al 2007b; Kastellec 2011b) are different for each circuit. As a consequence, longitudinal analysis without consideration of these differences is likely to downplay the different ways in which litigants and the Supreme Court decide on how to proceed

with a lower court decision. This downplay is problematic because we are not only failing to account for changes in judicial behavior across time but also failing to account for changes in how the Supreme Court and the individual circuits interact with one another over time. My dissertation seeks to resolve this issue by conducting a pooled time series analysis, demonstrating how changes in different variables affect litigant and Supreme Court decision-making over time and across circuits.

One reason to examine the data at the macro level, as opposed to testing the hypotheses at the individual case level, is such an examination lends potential credence to the notion that more advantaged litigants have greater success. In deciding whether to appeal, strategic litigants examine the metaphorical forest of general litigation trends, as opposed to the metaphorical trees of the individual case at hand. If litigants are strategic in their decision to appeal, then the litigants' counsel should be conscious of trends in litigation coming from other circuits, as well as litigation trends from previous years²³ and the proclivities of both the circuit judges and the Supreme Court justices, and accurately determine whether a definite loss at the circuit level is preferable to either a rejection of a *certiorari* petition or a loss in the Supreme Court. Additionally, strategic interest groups seek cases for which victory is likely, and as a consequence litigant successes over time may hinge on bringing cases in circuits to which the Supreme Court has paid closer attention. Although the types of cases appealed to the Supreme Court are of great importance to strategic litigants, there may be an understanding that the likelihood of success on appeal is at least somewhat dependent on how closely the Supreme Court has monitored a circuit in the past.

²³ I have no formal theory as to how far back litigants follow litigation trends, but the conclusions of the unit root tests suggest that the relationship between appeals and losses by advantaged litigants is stationary up to 3 years onward.

Furthermore, if the resource advantages of the litigants matter independent of other concerns, then litigant advantage should matter regardless of individual case characteristics.

Another reason to examine macro level trends is because of shifts in ideology in the circuit courts. Although the courts have become more conservative overall, this trend differs across circuits, in terms of extreme direction, how long it takes for the ideological median of a circuit to shift, and the appointments made by different presidents or senators. If ideology matters, then it should matter regardless of the individual characteristics of a case; the Supreme Court should examine the circuit as a whole. This theory is justified by the work of Scott (2006a), who finds that the reversal of circuit decisions by the Supreme Court is partially the product of the ideological distance between the entire circuit and the Court, as opposed to the individual panels and the Court.

A final reason to examine decision-making at the macro level lies in changes in rates of dissent and changes in circuits' reversals of lower courts over time. If one of the preferences of the Supreme Court is uniformity in law, then the Court should be concerned if there is an increase in non-unanimous decisions coming from the circuit, or if circuits begin reversing the trial courts at greater rates. There is also the possibility that these changes affect the decision of litigants to appeal to the Court, as more advantaged litigants may have enough experience and resources to observe these changes across the federal courts – influencing the likelihood of filing an appeal for *certiorari*. Examining these changes provides further control for the differing ideological and resource advantage factors in the circuits: the justices may be responding more to an increase in dissensus in a specific court, rather than any changes in litigant resources or policy preferences.

Although I have mentioned the empirical importance of a temporal, cross-sectional study, there is a normative reason for the importance of studying changes in resource advantages over time. There is a great concern in the United States that moneyed interests are gaining more than

their fair share of influence on politics, and this undue influence may present itself in the judiciary as well. Furthermore, there is a growing concern that income inequality may erode support for the democratic process.²⁴ If more resource-advantaged litigants are becoming more and more successful in the judicial process – and that success is coming at the expense of less-advantaged groups – there is the possibility that support for the judiciary will erode because less-advantaged groups will no longer turn to the courts for assistance in legal matters.

Conclusion

Chapter 2 provides the foundation for a pooled longitudinal study of the relationship between federal circuit courts, litigants, and the Supreme Court, with regard to appeals to the Court and grants of *certiorari*. I posit that the relevant actors are strategic, taking account of changes in the germane levels of the judiciary and adjusting their decisions to appeal and grant *certiorari* accordingly. The process of appealing to the Supreme Court, as outlined in the extant literature, is as much driven by the strategy of litigants as it is driven by the ideological attitudes of the circuits and Supreme Court. The process of granting *certiorari*, in contrast, is driven primarily by the relationship between the circuit judges and Supreme Court justices, particularly with regard to ideology. Having established the theoretical framework for this study, and the importance of it, Chapter 3 turns to the formal hypotheses and the methodological framework for evaluating them.

²⁴ For examples of inequality's impact on democratic politics, please see Soss (2005), Kelly (2009), and Bulman-Pozen and Pozen (2015), among others.

Chapter 3:

Hypotheses and Methods

Abstract

Chapter 2 discussed the theories and findings of the previous scientific literature, while also discussing the research “gaps” in the literature and why these gaps need to be filled. Chapter 3 outlines the hypotheses for this study, and the theories of judicial behavior underlying these hypotheses. Chapter 3 also discusses the data used in the subsequent analyses, how the research variables were conceptualized, and the process by which decisions were made regarding the competing ways to conceptualize the research variables. The chapter concludes with an account of the quantitative method used in the analyses and how the method used is superior to competing methods. The conclusion also accounts for the limits of this study and a defense of the use of longitudinal analysis.

Introduction

During the 2014 term, the United States Supreme Court received 8,066 petitions for review, from all levels of the judiciary. Of these petitions, 7,006 were disposed of without comment, and of the 1,060 remaining cases on the Court docket, just seventy-five were disposed of with a full opinion from the Court.²⁵ The Supreme Court keeps its docket small – and gives the federal appellate courts the final say on the majority of matters.

One area of the Supreme Court receiving significant attention in the past two decades is the issue of why the Supreme Court decides to hear a case. Officially, the Court considers a justiciable case to be one in which there is an injury to at least one party, there is a real and ongoing

²⁵ <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/A01Sep12.pdf> .

conflict between the litigants, and the judiciary is the appropriate venue for resolving the dispute.²⁶ However, the Supreme Court is not required to accept a case for review, in contrast to the federal circuit courts, and the Court rejects the majority of appeals. The question asked by scholars heretofore is why the Supreme Court decides to review Case A but not Case B?

What scholars have overlooked is how the pattern of petitions for, and grants of, *certiorari* have changed over time; what are the causal characteristics underpinning these changes (the changing membership on the Court, the changing docket, etc.); and which elements of a case generate appeals from the lower federal courts? In this chapter, I present a research design for answering these questions, including hypotheses, data, and empirical methods. I posit that changes in the competitiveness of the litigants and the ideological shifts of the circuit courts reduce the volume of appeals to the Supreme Court, and these same factors affect the Court's *certiorari* review of the circuit courts.

Theory and Hypotheses

The theory that more resource-advantaged litigants are more successful than their less-advantaged counterparts is well-established: the resource advantages of the litigants influence the decision to appeal to the Supreme Court and whether the Court grants *certiorari* because more advantaged litigants have the resource and financial capabilities to pursue appeals to the highest court in the land, and more advantaged litigants have the resource and financial capabilities to hire the legal staff best able to overcome the tendency of the Supreme Court to deny *certiorari*. Because less advantaged litigants are theoretically cognizant of the other side's advantages, they will be less likely to appeal to the Supreme Court because resource-deficient litigants are less likely

²⁶ <http://www.law.cornell.edu/wex/justiciable> .

to overcome the aforementioned barrier. What is left unanswered is whether – and how – the relationship between the “haves” and “have nots” changes over time. I posit that the resource “gap” between litigants is growing over time because of changes in the cases being heard in the federal court system. The rise of tougher criminal laws (Federal Sentencing Guidelines prior to *Booker*,²⁷ et al) and the general rise in torts and other economic litigation are more likely to involve one side that is more advantaged than the other, as these cases most often have the widest gulf between the more and less advantaged in the legal system, in terms of resources. As these types of cases increase, the resource gap between litigants will naturally increase – particularly as criminal appeals cases increase, as these generally constitute the greatest resource gap among litigants.

As shown in Figure I, criminal appeals increased precipitously between 1989 and 1991 and overall consistently constituted approximately one-third of all appellate cases heard during this time period. Although they constituted the majority of cases appealed to the circuit courts, the percentage of labor and economic cases heard by the appeals courts consistently declined during this time period, such that by 2007 criminal appeals came to consist of the largest single portion of federal appeals court cases heard. Because the cases likely to feature the greatest gap between the “haves” and “have nots” are increasing, the resource gap between litigants should increase over time as well.

Having established the likelihood that the resource gap between litigants is increasing, I turn my attention to operationalizing litigant resource status. Collins (2008) and Black and Boyd (2012) provide a foundation for the measurement of litigant resource status. Both studies use a 9-category measurement of litigant resource status, with poor individuals rated as possessing the fewest resources and the federal government as possessing the most resources. Collins (2008) and

²⁷ 543 U.S. 220 (2005).

Black and Boyd (2012) rank individuals as the least advantaged, because these parties generally have the fewest resources and (according to these authors) the most to lose in appeals and litigation. Interest groups are ranked higher than individuals because these groups by definition can pool resources to mount a more effective litigation process, but they still do not have the resource capacity of businesses, which are ranked as the second-most advantaged group. Finally, governments are ranked as the most advantaged because of their “nearly limitless pool of resources and frequency with which they litigate” (Black and Boyd 2012; p. 293).²⁸ Although there are concerns regarding the arbitrariness and overgeneralization of scaled rankings (e.g. why minority individuals are considered less advantaged than other individuals, as in the Sheehan, et al (1992) rankings that form a foundation for subsequent resource scalings), there is little disagreement among scholars as to the overall rankings of parties: poor individuals are the least advantaged because they often cannot obtain quality counsel or formulate high-quality briefs, while the federal government is the most advantaged for the reasons previously discussed.

Although not inaccurate overall, this measurement does oversimplify resource advantage by failing to account for the different types of counsel arguing cases. One example regards civil rights cases: a poor African-American represented by the NAACP Legal Defense Fund is likely not at as significant a disadvantage as a middle-class African-American represented by private counsel. My solution is to employ the same methodological concept as Collins and Black and Boyd but expand the categories and use the litigants’ counsels to calculate a score for litigant

²⁸ The Black and Boyd (2012) rankings subdivide both governments and businesses into different categories for different types (local government, small business, etc.). Although I do subdivide government into federal, state, and local governments, for the sake of simplicity – and to avoid the arbitrariness of classifying “big” and “small” businesses – I classify business as one category.

advantage.²⁹ Values range from 1 to 18, with a score of 1 indicating the least amount of resources and a score of 18 indicating the highest amount of resources. As an important aside, I do not include *amicus curiae* participation in the calculations for litigant advantage, both because of the dearth of such briefs at the petitioning level in the data, and because the advantages gained by less-advantage petitioners is marginal, after controlling for ideology (Black and Boyd 2012). These rankings far from perfect, as the need to create a general scale eliminates some of the nuances that may occur with individual cases: the city of Coalfield, TN, is likely not going to be as well-resourced as Apple Computers, yet on this scale Coalfield would be rated as more advantaged than Apple when Coalfield is represented by a city attorney. Despite these concerns, the scores do reflect the overall nature of resource advantages among litigating parties, as discussed in Collins (2008) and Black and Boyd (2012), among others.

After generating scores for the appeals' courts appellants and appellees, I take the differences between the appellees' scores and appellants' scores to obtain a measure of net litigant advantage. I choose this difference because the appellee was the more advantaged circuit party in 80.09% of the cases in the original dataset. Negative scores indicate the appellant was more advantaged, and positive scores indicate the appellee was more advantaged. In the aggregate, the value for net advantage is the mean score for a circuit in a given year.

Table II summarizes the number and percentages of times the more resource advantaged litigants won in the courts of appeals. Overall, more advantaged litigants were the most likely to be appellees in the court of appeals (meaning that these litigants won in the trial court), and the more advantaged litigants achieved at least a partial victory in over 75% of cases. However, the

²⁹ The counsel for circuit appellants is designated by the first counsel variable in the dataset ("counsel1"), and counsel for circuit appellees is designated by the second counsel variable in the dataset ("counsel2").

fact that more advantaged litigants won fewer than half of their cases in the courts of appeals when they were appellants (meaning they lost in the trial court) suggests that the resource advantage may apply only when the more advantaged litigant wins in the trial court. In other words, litigants win not so much because they are more advantaged but because the circuit courts generally affirm the decisions of the trial courts (Davis and Songer 1988-89). Consequently, it is important in the final model to account for the case decision made in the circuit court as an alternative explanation for an increase (decrease) in appeals over time (discussed in the methodology section). Nonetheless, the fact that more advantaged parties won far more often than they lost suggests that resource capacity does impact the likelihood of victory in the lower federal courts.

What is left unanswered is how this significant likelihood of victory impacts the decision to appeal to the Supreme Court. The extant literature suggests that resource disadvantage between litigants will decrease the likelihood of appeals to the Supreme Court and that more advantaged litigants are more likely to get their cases heard before the Supreme Court. However, I posit that the real question is not whether an increase or decrease in victories by the more advantaged parties affect appeals over time, but whether a change in the **degree** of resource (dis)advantage affects appeals over time. Because strategic litigants are cognizant of the difference in resources between themselves and the other party, strategic litigants will be less likely to appeal to the Supreme Court if the resource gap between the two parties is significant,³⁰ and the aggregate gaps between the litigants in the circuit courts will decrease appeals to the Supreme Court over time.

An alternate account of my hypothesis is that appeals to the Supreme Court decrease as resource inequality rises because strategic advantaged litigants choose to settle, rather than risk a

³⁰ Previous studies make no claims as to what constitutes a “significant” gap, and I also take no position on the definition of “significance”.

successful appeal by the “underdog”. Litigants are strategic and are cognizant of changes in the characteristics of the appeals and Supreme courts (ideology, issue cues, etc.). If the proverbial blowing of the wind is not in a more advantaged litigant’s favor, even a victory in the federal circuit court could be short-lived should the economic underdog be successful before the Supreme Court, as such an outcome would be binding precedent for the entire country (Cross 2003; Brace, et al 2012). Consequently, appeals for *certiorari* may decrease as the resource gap between litigants increases because the advantaged party will be more likely to settle after a victory rather than risk an unfavorable high court verdict.

H_{1a}: As the resource gap between the litigating parties increases, *certiorari* appeals decrease.

Hypothesis 1_a postulates what will happen to appeals as the resource divide among circuit litigants increases, but what will happen to grants of *certiorari* by the Supreme Court under such conditions? It is relatively clear from the literature that resource differences among litigants affect grants of *certiorari*. Extant studies indicate that upper dogs do better when the Court is more conservative and underdogs do better when the Court is more liberal, and the only study to examine how the degrees of differences in litigants’ statuses affect Supreme Court review (Black and Boyd 2012) finds that higher resource advantages result in a greater likelihood of a grant of *certiorari*.

Table III summarizes the number and percentage of times the more resource advantaged litigants received a grant of *certiorari*. The responding litigants were the more advantaged party in almost 80% of cases appealed to the Supreme Court. Furthermore, just over 90% of these such cases were denied *certiorari*. The percentage of *certiorari* grants was 34% when the petitioner was more advantaged, compared to approximately 10% when the respondent was more advantaged. These figures anecdotally indicate that advantaged petitioners are better able to overcome the tendency of the Supreme Court to deny review.

As with Hypothesis 1_a, left unanswered by this table is whether a change in the degree of the resource advantages enjoyed by one party affects the likelihood of review by the Supreme Court, as well as whether variation in this degree over time affects *certiorari* over time. Although the more liberal justices may be more sympathetic to less-advantaged litigants, I posit that a widening gap in the aggregate between the litigants will reduce grants of *certiorari*, as the more advantaged litigants will have the resources necessary to convince at least six of the justices to reject a review of the lower court.

H_{1b}: As the resource gap between the petitioners and respondents increase, grants of *certiorari* by the Supreme Court decrease.

Resource advantages are not the only effect regarding how appeals and *certiorari* decisions are made. The ideological differences between the circuit judges and the Supreme Court justices matter as well. Supreme Court justices use ideological change at the court of appeals level as a cue regarding whether to pay closer attention to the decision outputs of a particular circuit, particularly when the ideological direction of the circuit's output is in a direction less tolerable to the majority on the Court (Cameron, et al 2000; Scott 2006a, 2006b; Lindquist, et al 2007a).

As indicated in Table IV, just under 56% of the cases decided by the circuits between 1983 and 2009 were disposed of in a conservative direction. Based on the percentages, the most conservative circuit during this time period was the Eighth, and the most liberal circuit was the DC circuit. However, as discussed in the previous chapter the directions of the circuits' overall outputs are not the best indicator for determining the causal link between ideology and appeals, given that the justices pay attention to the composition of the circuit courts as well. Furthermore, there are concerns about the misclassification of the ideological direction of some cases (Bailey 2013) and of confirmation bias in the coding of a "liberal" or "conservative" decision (Harvey and Woodruff 2011).

I consequently posit that both strategic litigants and justices pay attention to both the difference between how a circuit **should** rule (given the median judges) and how a circuit **does** rule (given the mean direction of the final case outcomes), and the difference between the policy preferences of the median circuit judge and the median Supreme Court justice. The difference between the ideological composition of the appeals court and its decisions in a given year matters to litigating parties because these actors observe general litigation trends beyond the immediate case, assuming the majority of these actors are indeed strategic, and I posit that greater variation between court composition and ideological output is part of these trends. If a traditionally liberal appeals court is making conservative case decisions, Supreme Court justices are less likely to grant review (Kastellec 2011b) – meaning that strategic (and more resourced) parties will reduce appeals to the Supreme Court because the likelihood of *certiorari* is declining.

H_{2a}: As the distance between the median circuit judge and the mean direction of the circuit’s decisions increases, appeals to the Supreme Court increase.

H_{2b}: As the distance between median circuit judge and the mean direction of the circuit’s decisions increases, grants of *certiorari* increase.

Having established the theoretical basis for my ideology hypotheses, I shift the reader’s attention to conceptualizing ideology. There are several choices available for measuring the policy preferences of both circuit judges and Supreme Court justices. One option is the Judicial Common Space scores developed by Epstein, et al (2007b). The JCS is the arctangent transformation of the Martin-Quinn (2002) ideological scores for Supreme Court justices, in order to place these scores on the same scale as the Giles, Hettinger, and Peppers (2001) ideological scores for federal appeals court judges.³¹ The utility of the JCS scores lies in the placement of judges and justices on the

³¹ The GHP scores are the second dimension of the Poole and Rosenthal (2000) common space scores for the appointing presidents or senators.

same scale, allowing researchers to compare the ideological behavior of these actors (Epstein, et al 2007b). Furthermore, the JCS (as the progeny of the Martin-Quinn scores) takes an agnostic approach to the classification of ideology by assuming a vote is liberal if the court majority is liberal, and vice-versa – thus avoiding the possibility of confirmation bias in the assignment of “liberal” or “conservative” (Harvey and Woodruff 2011).³² However, the JCS scores for circuit judges may be flawed because the scores for circuit judges are fixed at the point in time that a person becomes a judge: a judge’s ideological score at the time of their confirmation in 1983 will be the same in 1993. This fixture is problematic because there is evidence suggesting that circuit judges do change their ideological orientation over time (Kaheny, et al 2008; Ho and Quinn 2010).³³

Another option is to use the direction of the circuit court decision. The ideological direction of a circuit’s decision is based on an ordinal categorization of the outcome.³⁴ The direction of a decision follows the Spaeth, et al (2015) Supreme Court database categorization guidelines. For instance, a decision expanding the rights of prisoner access to worship would be a “liberal” decision, and a decision in which companies were given more mining rights in a sensitive environment would be a “conservative” decision. An ideologically mixed decision can comprise one of two situations: the court ruled in favor of both parties, or the direction of the decisions on

³² Martin and Quinn (2002) also use a Bayesian prior to smooth preferences over time, allowing for discrete (but not necessarily significant) shifts in ideology longitudinally.

³³ The evidence for ideological drift on the part of circuit judges is still relatively new, however, and Epstein, et al (2013) write that the ideological voting patterns of circuit judges are more predictable than their Supreme Court counterparts.

³⁴ The ideological direction for cases with two issues decided by the court is based on the average of the values for each issue. For example, if the Free Speech issue was coded as “liberal” (expansion of free speech rights) and the 10th Amendment issue was coded as “conservative” (state power prevailed over federal power), then the direction of the decision was “mixed.”

each issue was different.³⁵ In the original data, a decision is coded “-1” if it is a liberal decision, “0” if it is ideologically mixed, or “1” if it is a conservative decision. After the collapse, the variable for ideological direction is the average direction of all sampled cases in the circuit for that year. Higher means indicate more conservative decisions. The majority of the ideological classifications conform to intuitive explanations of “liberal” and “conservative” ideology, and because of the drawbacks of the Giles, et al (2001) scores, the direction of lower court decisions have many benefits.

There are still many drawbacks to using the direction of a lower court decision alone. In addition to the aforementioned criticisms by Harvey and Woodruff (2011) and Bailey (2013), there is the risk of oversimplifying the relationship between ideology and appeals by focusing solely on the average ideological direction of the circuits’ decisions. Even in the aggregate, judges make the final decisions of the court. Omitting the ideological values of the individual judges omits an important piece of the ideological puzzle: as previously mentioned, Kastellec (2011a, 2011b) finds that conservative justices are less likely to review a liberal decision made by a conservative circuit. Consequently, I employ a somewhat novel method: upon obtaining the average ideological direction for a circuit in a given year, I take the difference between that average and the median JCS score for a circuit in that year to obtain the final ideological score for a circuit in a given year. The values range from -1 to +1, with positive values equaling a more conservative court in the aggregate.

The hypotheses for this ideology score is that greater distance will produce more appeals to the Supreme Court and more grants of *certiorari*. The basis for this contention is the knowledge

³⁵ For example, if the circuit court ruled against a union on its unfair labor practices claim against management but ruled in favor of the union on a collective bargaining agreement claim.

that the Supreme Court possesses regarding the decision-making nature of the lower courts. The Supreme Court knows how the lower circuits rule in previous years, and the justices can correctly ascertain the ideological position of the median judge in a circuit by examining the decisions of its judges in the past. If the lower court is deviating from what the justices expect, this deviation serves as a signal to the justices that the behavior of the lower court has changed – indicating that the high court should take a closer look at that circuit. For example, if the decision outputs of the (generally) conservative Fifth Circuit are more liberal, this deviation from the expected outcome of that circuit could cue the Supreme Court to monitor the Fifth more closely because the signals sent by that circuit have changed.

Although measuring the gap between the policy preferences of the appeals courts' median judges is a promising measurement, there is still the aforementioned problem of case direction classification, and there is still the possibility that Supreme Court justices may be more concerned with specific cases than with the total output of the circuits mean that the justices may be more concerned with the policy preferences of the appeals courts than whether the judges are producing decisions in a certain manner. Therefore, I employ a second measure of circuit-Supreme Court ideology: the distance between the JCS score for the median Supreme Court justice in a given year and the JCS score for the median circuit court judge in each circuit in each year. The JCS scores for each median judge and justice range from -1 to +1, with positive JCS scores indicating that a justice or judge is more conservative, and negative JCS scores indicating that a justice is more liberal (Epstein, et al 2007b). I then take the difference between the median justice and median judge to produce a distance score, ranging from -1 to +1. A negative score indicates that the median justice was more liberal than the median judge in the circuit, while a positive score indicates the median justice was more conservative than the median circuit judge.

I posit that both litigants and Supreme Court justices use the position of the median judge in a circuit to gauge the preferred policy preferences of the circuits. As discussed in the previous chapter, the median justice on the Supreme Court and the median judge on the appeals court theoretically represent the preferred policies of their respective courts – particularly with regard to the appeals courts, where the judges’ ideologies are more predictable (Epstein, et al 2013). If the medians are accurate watermarks of the ideological dispositions of both the circuits and the high court, then a growing gap between each court’s policy preferences will serve as a signal to litigants that the Supreme Court might be more willing to consider *certiorari* because the Court is more willing to audit a particular circuit.

H_{3a}: As the ideological distance between the median circuit judges and the median Supreme Court justice increases, appeals to the Supreme Court increase.

H_{3b}: As the ideological distance between the median circuit judges and the median Supreme Court justice increases, grants of *certiorari* increase.

Data and Methods

Source of Case Data

For the case data from 1983 to 2002, I use the Shepardized version of the Songer, et al (1996) U.S. Court of Appeals Database. Although the COA Database begins in 1925, I choose to begin the analysis in 1983 because this year was the first full year of the current structure of the federal appellate court system. The Shepardized database contains the complete case history of the appeals court cases in the database, including whether the case was appealed to the Supreme Court and whether the Supreme Court granted review. The COA database consists of a weighted³⁶ random sample of approximately thirty cases per circuit per year. However, I want to account for

³⁶ The weights are designed to make sure the larger circuits are not overrepresented.

recent case developments in the courts of appeals, as well as account for the totality of the Rehnquist Court, so I followed the sampling procedure outlined by Songer (1996): I used the LexisNexis database to compile a spreadsheet of all appeals court decisions published in the *Federal Reporter*, imported the spreadsheet into STATA, and compiled a weighted random sample of cases for each circuit for the years 2003-2010. After generating the random sample, I proceeded to use LexisNexis Advanced³⁷ to gather information about the case, including any subsequent history.

An alternative method for data construction is the matching method used by Boyd, et al (2010) and Black and Owens (2013). The purpose of matching is to test whether an event occurs in the absence of certain conditions, with the goal being to select identical covariate characteristics for both the treatment and control groups minus the condition tested by the hypothesis (Boyd, et al 2010). To give an example, Black and Owens (2013) use matching to determine whether the Solicitor General is more likely to win a Court case than his or her non-SG counterpart. Although matching provides a more robust – and realistic – way of testing certain hypotheses, the reason I do not use it here is because matching is best used when testing hypotheses at the micro (individual) level (cases, judges' votes, etc.), as opposed to the aggregate level, because analysis at the aggregate level involves one observation per temporal and cross-sectional unit per year – involving the collapsing of scores of individual observations. Because observations change from year to year, it is impossible to use matching effectively. Furthermore, I do not have data regarding which justices voted to grant or deny *certiorari* – making it practically impossible to test the *certiorari* hypotheses using matching.

³⁷ Special thanks to the University of Tennessee School of Law for providing me with access to this database.

Ideally, each circuit should have at least one case per year appealed to the Supreme Court. Failure to have at least one case appealed for each circuit makes cross-circuit analysis extremely difficult because of missing data.³⁸ Every circuit in every year did have at least one appeal to the Supreme Court, but the sampler did not always select these cases. Alternately, a case selected by the sampler may have been discarded because the case failed to comply with the criteria for case selection in this research (i.e. neither litigant was more advantaged). Consequently, if a circuit lacked at least one case appealed for *certiorari*, I proceeded to search the spreadsheet or Lexis, find the requisite number of appropriate cases, and replace one or more of the cases in the random sample with these more appropriate cases.³⁹ As a result, each circuit in the sample has at least one case appealed to the Supreme Court in every year.

Source of Litigant Data

In order to obtain a proper assessment of litigant advantage, I used the LexisNexis Advanced Database. The advantage this database has over the general LexisNexis database is that the Advanced Database contains background information on the attorneys representing each side in the case. As a consequence, I am able to obtain information regarding an attorney's case history, how often he or she has argued before the federal appeals court in question, and the areas of expertise for the attorney. In the absence of information on the specific attorney, I use the law firm in question as a proxy and examine the characteristics of that firm (how many cases the firm's

³⁸ Admittedly, the likelihood of biased estimators given missing data is comparatively low, since there is no indication that any of the missing data were correlated with idiosyncratic errors (Wooldridge 2013). Having issued this caveat, and after balancing the low likelihood of biased estimators with missing data with the need to have a representative N in the *certiorari* model, I proceeded to use Lexis Advanced to search for decisions to include.

³⁹ This decision was not taken lightly, given that purposeful replacement can lead to selection bias. However, the risk for not substituting was years in which circuits did not have any cases appealed to the Supreme Court. Furthermore, I only substituted cases 26 times across all years and circuits. Given the N's, the likelihood of a selection effect is minuscule.

attorneys have argued before the circuit, et al). If one or all of the parties have multiple attorneys and firms, I examine all of the attorneys or firms.

There are five categories of litigant counsel: public, private, interest group, state governments, and the federal government. Litigants represented by the federal government are assumed to be the most advantaged litigants in all cases, as the federal government is the most likely to have the highest resource capacity, as well as the most experienced attorneys and the greatest knowledge of a case and its corresponding precedents and law. Conversely, individuals represented by “public” counsel (legal aid societies, pro se, etc.) are assumed to be the least advantaged in all cases, as these parties have the lowest resource capacity, often less-experienced attorneys, and attorneys with the least knowledge of a case and corresponding precedent and law.⁴⁰

I define an interest group as an organization litigating cases for the purpose of furthering a public interest, in terms of public policy. This definition distinguishes interest groups from legal aid societies and law clinics because interest groups take cases in order to advance the visibility and advocacy goals of the organization, while legal aid societies accept cases to advance the visibility and business of their organization and because their clients generally can afford no other representation. In the case of law school clinics, a goal is to provide law students with case experience, in order to make the students more attractive hires upon graduating (Carp, et al 2016). Because interest group organizations generally have much higher resource capacities than public counsel, interest group representation is assumed to be superior to public representation.⁴¹

⁴⁰ In determining who represented each party, I follow the Songer, et al (1996) assumption and code a counsel as “private” unless indicated otherwise. I also assume that federal counsel represents all federal agencies and officials who are parties in their official capacities.

⁴¹ Per the Songer, et al (1996) classification, counsel for labor unions are classified as interest group representation.

However, not all interest groups are created equal. For example, in a dispute between the AFL-CIO and the Pacific Legal Foundation, the litigants represented by the AFL-CIO Lawyers Coordinating Committee are classified as having superior counsel, even though the Pacific Legal Foundation is a high-capacity interest group because the AFL-CIO LCC is a more experienced organization with a larger operating budget.

The default is to measure advantage based on the parties' **counsel** rather than the parties themselves because it is counsel that argues the case.⁴² However, if it is impossible to determine by counsel type which party is more advantaged, the next step is to examine the litigating parties. For example, both sides in a personal injury suit may hire private counsel, but if the appellant is Andrew Smith and the appellee is Wal-Mart, it is reasonable to conclude that the appellee is more advantaged. If the general category of the litigants does not determine which party is more advantaged, the specific issue in a case served as an indicator. For example, in a bankruptcy case, the debtor is assumed to be the lesser advantaged of the parties. If the parties do not match any of these characteristics, and it is impossible to determine the characteristics of the counsels, then neither party is more advantaged, and the case is excluded from the final analysis.

Methodological Approach

As previously mentioned, there are precious few studies examining different changes in the circuit courts over time and their effects on appeals. While the circuits do share the same structural characteristics, the extant literature demonstrates that it is erroneous to assume

⁴² The Supreme Court does not list the attorneys filing petitions on behalf of litigants. Consequently, I cannot account for whether a different attorney or firm represented the petitioning and responding parties, which may change the scores for resource advantage (I was unable to find information as to how often a change in representation occurs between the circuit stage and the petitioning stage). I assume that the same attorney(s) representing the litigants in the appeals court represented the litigants at the petitioning stage, with the exception of the federal government, in which case I assume the Solicitor General is filing.

homogeneous normative characteristics (ideology, et al) or a similar rate of change in characteristics of each circuit. Consequently, the appropriate statistical method to test the hypotheses is time series cross-sectional, or pooled time series. By using pooled time series, the different changes – and rate of change – for each circuit can be ascertained, as well as differences in those effects on appeals to the Supreme Court and the granting of *certiorari*. Because the analysis is pooled time series, the temporal unit of analysis is the calendar year in which the case was decided at the appeals level, and the cross-sectional unit of analysis is the twelve circuit courts. The original data are collapsed based on the means of the variables for each circuit in each year. The population of federal circuit court decisions for this time period is 8,426, with 2,135 of those decisions appealed to the Supreme Court. I then proceed to collapse the data in both the appeals and *certiorari* by circuit and year (using the mean values for the germane variables), for a final sample N of 312 (12 circuits x 27 years, with 12 degrees of freedom).

The use of longitudinal lags in the study of the judiciary is somewhat unique but hardly new: Mishler and Sheehan (1993) and McGuire and Stimson (2004), for instance, demonstrate the utility of lagged public opinion on Supreme Court decisions to affirm or reverse a lower court. However, few studies have applied distributional lags to other dependent variables – including when and why parties appeal to the Court and whether the Court issues a writ of *certiorari*. Baird (2004) is one of the few judicial scholars to employ the Lagged Dependent Variable (LDV) model outlined in Beck and Katz (1995), using an LDV model to analyze the effect of case salience on Supreme Court decision-making.

There are two reasons I choose an LDV model. I posit that litigants and Supreme Court justices use values in the previous years as predictors for values in the current year. For example, in deciding whether to grant *certiorari*, Supreme Court justices may use the value of a median

circuit judge at time $t-1$ as a baseline for the value of the median judge at time t , given the overall predictability of circuit voting behavior. By failing to use lags, I ignore the theory that judicial actors look to the (immediate) past to predict the future. An example of this process is the progeny of *Brown vs. Board of Education* (1954).⁴³ In the aftermath of the momentous decision, the Court likely understood that it would have to address racial segregation in other school districts and states throughout the country, as there were many school districts maintaining *de facto* (customary) as well as *de jure* segregation policies (Herbst 1973). However, an examination of the progeny of *Brown* – such as *Florida ex rel. Hawkins*⁴⁴ (1956) and *Cooper v. Aaron*⁴⁵ (1958) – reveal a Court more willing to accept *certiorari* from cases emerging from states and circuits with a long history of segregating students on the basis of race (Brown 2004).⁴⁶

The second, more methodological reason is the superiority of the LDV model over traditional Ordinary Least Squares (OLS) and Feasible Generalized Least Squares (FGLS) regressions. OLS assumes the error variances are the same and the error processes are independent of one another over time (Beck and Katz 1995), but it is not unreasonable to assume that error variances are different over time, if for no other reason than the changing memberships on both the lower courts and Supreme Court likely impact decision-making on the part of judicial actors, and it is also reasonable to assume that what happens at time t affects what happens at time $t+1$ – making the error terms not completely independent. Using FGLS is problematic because I am

⁴³ 347 U.S. 483.

⁴⁴ 350 U.S. 413.

⁴⁵ 358 U.S. 1.

⁴⁶ See also “Timeline of Supreme Court Desegregation Cases from *Brown* to *Fisher*”, American Bar Association Annual Meeting, 2013.
<http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/aba-annual-2013/written_materials/20_lessons_in_leadership.authcheckdam.pdf>

examining a comparatively small data set, and FGLS estimates numerous parameters – potentially eliminating results altogether (Beck and Katz 1995). Consequently, LDV is the optimal solution.

Deciding on the appropriate number of lags is more of an art than a science, given the lack of longitudinal studies in the judicial politics literature. McGuire and Stimson (2004) use a one-year lag in their study of public opinion and the Supreme Court, on the basis that using no lags would “contaminate” the analysis by using opinions “measured partly before and partly after” the Court issued its opinion. However, the authors admit that “the decision (to use a one-year lag) is wholly *a priori*” and do not examine whether longer lags produce stronger results. Mishler and Sheehan (1993) use a first-order autoregressive process to examine the impact of public opinion and changes in Supreme Court ideological composition on the liberalism of Supreme Court decisions. The authors find that the strongest cross-correlations for both variables were produced at a lag of $t - 1$. However, in the regression analysis, Mishler and Sheehan find that the Court responds to public opinion as far back as five years’ prior ($t - 5$). Consequently, I ran initial models with up to five lags and found that the one-lagged models produced better results, both in terms of avoiding problems with autocorrelation and in terms of the substantive results. Therefore, the final analysis reported in subsequent chapters uses a one-year lag for all dependent and independent variables.

Dependent Variables

There is one dependent variable for each model. For the first model, the variable for whether a case is appealed to the Supreme Court is dichotomous: originally coded “0” for not

appealed and “1” for appealed.⁴⁷ ⁴⁸ When collapsed by the mean, the dependent variable becomes the average rate of appeals for each circuit in each year. The higher the mean, the more appeals there were for a circuit in a given year. For the second model, the variable for whether the Supreme Court granted *certiorari* is also dichotomous: originally coded “0” if *certiorari* was denied and coded “1” if *certiorari* was granted. When collapsed by the mean, the dependent variable becomes the average rate of *certiorari* grants for each circuit in each year.⁴⁹ The higher the mean, the higher the number of cases granted review by the Supreme Court from the circuit in a given year.

Control Variables

Because the median justice theoretically represents the majority of justices, the median justice is considered an influencing factor on decisions to appeal to the Supreme Court. I posit that the median justice is integral in gaining the minimum four votes necessary for *certiorari* to be granted, based on the logic that the median justice may be the deciding factor in whether four votes emerge, just as the median justice is the theoretical reason a majority emerges in close decisions. The median justice is measured by using the JCS median score for each Court in the years analyzed. The reason it is acceptable to use the JCS in the case of Supreme Court justices is that that value does change every year, in contrast to the circuit court JCS scores.

The drawback to using a single median justice is the fact that different justices value certain issues more than others, meaning that the overall median justice may not be the most optimal measure of whether a justice is a median in different types of issues (Lauderdale and Clark 2012).

⁴⁷ For the sake of simplicity, “appealed” is interpreted broadly: if the original issue in a case was petitioned to the Supreme Court at any time without returning to the circuit court (i.e. after a remand to the district court), it was classified as appealed.

⁴⁸ Cases in which both parties appealed to the Supreme Court were classified as the original appellant making the appeal.

⁴⁹ Cases in which *certiorari* was originally granted but dismissed later are classified as denials.

However, past research has demonstrated the utility of using the median justice in analyzing decisions to grant *certiorari*: Black and Boyd (2012), for instance, find that more liberal median justices are more likely to grant *certiorari* petitions when the petitioner is less advantaged than the respondent, and vice-versa for conservative median justices, while Cameron, et al (2000) found that more conservative Supreme Courts were more willing to grant review to cases arising from more liberal circuits. In addition, the fifth justice is often the “swing” justice in close decisions (Segal 1986; Clark and Lauderdale 2010), and justices will not vote to grant *certiorari* unless they are reasonably certain they have the requisite number of votes to achieve a victorious outcome (George and Solimine 2001). Furthermore, we lack data regarding which justices vote to grant or deny *certiorari*.

Although the median justice is defensible in terms of determining the ideology of the Supreme Court for *certiorari* purposes, it is still suboptimal. Because there are nine justices on the Court, the median is the fifth justice. However, only four justices are needed to grant *certiorari*. By focusing on the fifth justice, rather than the fourth, the previous scholarship may be incorrectly placing the decision-making power for *certiorari* in the hands of a justice that may not be the deciding factor. Although in the subsequent analysis I use the median justice, I employ two other variables. Using the order of the JCS scores for the justices in a given year, I create one variable for the fourth justice (one score below the median) and one variable for the sixth justice (one score above the median). Although I posit that the justice immediately below the median is most likely to be the fourth justice in cases, I need to account for the possibility that the more ideologically conservative sixth justice is the deciding vote needed for *certiorari*.⁵⁰

⁵⁰ I use the term “conservative” because an examination of the data indicates that in the years analyzed the sixth justice always has a positive JCS score.

I also control for several other important factors for both the decisions to appeal and the decisions to grant *certiorari*. As previously mentioned, the majority of circuit panel decisions are unanimous, causing dissents to hypothetically serve as signals to both the litigating parties and the Supreme Court that there is a lack of cohesion regarding the application of law or precedent in a case. This signal theoretically leads to an increased likelihood of appeal and review, particularly if there is an upsurge in dissent over time. In the original dataset, dissent is coded as a dummy variable, with a value of "1" indicating that there was a published dissent in the case. In the final analysis, the value of dissent is the average rate of published dissents in a circuit in a given year, with higher values indicating more dissents in that circuit. In addition to dissent, I also include a variable for the average rate at which the circuit court reversed the lower courts. Because the majority of cases heard by the circuit courts during this time period were affirmed in whole or in part (72.04%), an increase in reversals over time could signal to the Supreme Court that there is conflict over the appropriate disposition of a case – consequently increasing the likelihood the Supreme Court will intervene to resolve the dispute (Cameron, et al 2000; Clark and Kastellec 2013).

Conclusion

This chapter provides an explanation of the central hypotheses of this dissertation and the methods used to test these hypotheses. However, caveats should be issued before proceeding further. The most important are the limitations of the explanations provided by examining data longitudinally. As previously stated, longitudinal pooled analysis potentially provides a more robust explanation for the changes in appeals emerging from different circuits, by examining how the changing rates in appeals and *certiorari* writs are the product of collective – rather than panel

– ideological changes in a circuit and aggregate decisions by strategic litigants. However, by not examining individual decisions the results are generalizable only to institutional behavior. In other words, the results herein provide information only on collective behavior of institutions, rather than the behavior of the individuals within these institutions. The limitation of aggregate analysis is there is no way to examine the social characteristics of the individual judges and justices, omitting an important explanation of judicial behavior. To provide two examples, Boyd, et al (2010) find that male judges are more likely to support the civil rights claims of female litigants when there is a female judge on the panel, and Bonneau and Rice (2009) find that black state supreme court judges are more likely to overturn criminal convictions than their white counterparts, in states without intermediate appellate courts.⁵¹ As federal courts increase in diversity, it may become possible to analyze the voting behavior of different types of judges over time, but until then temporal analysis cannot evaluate these demographic characteristics.

Another limitation of note is the low number of samples in the Court of Appeals dataset. The Songer, et al (1996) data set contains approximately thirty published decisions per circuit per year. However, thirty cases are a proverbial drop in the bucket, in terms of the actual caseload of the circuits. In 2007, for instance, the circuit with the smallest number of published decisions was the Fourth, with 195. With thirty cases sampled using the Songer, et al (1996) method, only 15.4% of the published decisions of the Fourth Circuit were included in the database. If one also considers the total number of unpublished decisions of that circuit (5,094), not even .01% of all decisions of the Fourth Circuit was included in the COA dataset. As outlined in more depth in Chapter 6, future

⁵¹ It should be noted that the Bonneau and Rice (2009) found that this difference applied only to states without intermediate appeals courts. Black and white supreme court judges in states with intermediate appeals courts did not rule in a significantly different manner.

research must address the shortcomings of the COA dataset, if researchers wish to enhance the robustness of their findings.

In spite of the caveats, the foundation for a pooled longitudinal analysis of the relationship between federal court litigants, circuit court judges, and Supreme Court justices has been established, and the nature of these institutional actors and their relation to appeals to the Supreme Court and grants of Supreme Court review hypothesized. With these facets complete, the next chapters empirically analyze the aforementioned hypotheses, as well as provide plausible explanations for the outcomes found. Chapter 4 will provide a descriptive and quantitative analysis of the changing relationships between these judicial players and appeals to the Supreme Court over time, while Chapter 5 will provide a descriptive and quantitative analysis of the changing relationships between these same actors and grants of *certiorari* over time.

Chapter 4:

**The Effect of Ideology
and Resource Advantage
on Appealing to the Supreme Court**

Abstract

Chapter 3 outlined the research design for this study, including the theories and hypotheses for this research and the empirical methods and variables used herein. Chapter 4 implements these methods to explain whether litigants are strategic in their decisions to appeal to the Supreme Court. The first part of the chapter presents a descriptive account of trends in appeals from the federal appellate courts over time, as well as a discussion of how these trends support and refute my initial hypotheses. I then turn to a pooled time series analysis of the research variables. I find mixed support for the ideological variables: although changes in ideological distance between median panel judges on appeals courts and the median justice of the Supreme Court significantly impact appeals, changing differences in the ideological preferences of the panel judges and the mean ideological directions of the decisions of the circuits do not significantly affect appeals. In contrast, I find that a greater resource gap between litigants significantly affects appeals to the high court. The chapter concludes with a discussion of these findings and how they may affect support for the hypotheses regarding the decisions by the Supreme Court to grant *certiorari*.

Introduction

My central research question for this study can be summarized as follows: how do the relationships between three sets of judicial actors – litigants, circuit judges, and Supreme Court justices – affect appeals to the Supreme Court, and grants of *certiorari*, over time and across different circuit courts? I posit that underlying any changes in these relationships is the theory that justices seek cues as to which circuits should be reviewed more than others, and factors endogenous (median justice ideology) and exogenous (ideological distance between circuits and Court median, litigant resource advantages, etc.) provide those cues. My hypotheses are that

aggregate changes in ideology – whether changes in the ideological distance between circuit judges and Supreme Court justices or changes between what the policy outputs of the circuits should be and what they really are – and differences in litigant resource advantages significantly affect appeals to the US Supreme Court from the federal circuit courts.

This chapter begins with descriptive insights into the trends of appeals to the US Supreme Court between 1983 and 2009, as well as the aggregate trends of circuit ideology and the resource gap between litigants in the different circuits. The chapter then provides a pooled time series analysis of my hypotheses, as well as an explanation of the empirical findings. Although the empirical findings are encouraging, in terms of shedding more light on why litigants decide to appeal to the Supreme Court, many questions remain for future research. Furthermore, there is the question – answered in Chapter 5 – of whether these significant factors influence changes in grants of *certiorari* by the Supreme Court over time.

Descriptive Statistics

Before conducting an empirical analysis of the pooled time series regression, it is important to observe whether the descriptive assumptions made in the previous chapters bear fruit in the actual trends. The following figures in this section show the longitudinal and cross-sectional trends of the explanatory variables and the dependent variable for this model (appeals to the Supreme Court). Figure I shows the proportion of federal circuit decisions appealed to the Supreme Court between 1983 and 2009, with the overall trend overlaid onto each circuit's trend to demonstrate how some circuits do have higher (lower) rates of appeals than others.⁵²

⁵² The rates of appeals are based on the number of circuit decisions appealed to the Supreme Court, divided by the overall number of sampled cases from a circuit. If a circuit has 30 sampled cases in the data, and 50% of the decisions that year were appealed, then 15 of 30 circuit decisions were appealed.

In the data set, the frequency rates of all circuit cases appealed to the Supreme Court slowly increased between 1983 and 2009, peaking in 2006 – the year after current Chief Justice John Roberts took office. This overall increase in appeals to the Supreme Court is surprising, given the literature: if the Rehnquist Court was less willing to review federal circuit cases (George and Solimine 2001), then why do appeals to the Court increase during this time period? The steady increase in appeals from the circuit courts can be partially explained by the variations among the appeals from individual circuits; no two circuits had the same trend in appeals over time. This explanation also supports my contention that we cannot generalize findings regarding the relationships between the appeals courts and Supreme Court in general without analyzing differences among the individual circuits – and using a cross-sectional analysis to control for these differences. In addition, the spike in appeals during Chief Justice Rehnquist’s final year in office and Chief Justice Roberts’ first year is most likely because litigants were willing to gauge the new Court’s willingness to review lower court decisions. There is also the interesting spike in overall appeals in 1993, marking the beginning of a time period in which overall appeals to the Supreme Court never dropped below 25% of all circuit cases decided in a given year. The most likely reason for this change is because of the appointments made by President Clinton, beginning with Ruth Bader Ginsburg’s appointment in 1993. Although none of Clinton’s appointments were “critical” appointments – the ideological majority remained conservative throughout Clinton’s two terms – the appointment of new justices perceived as more receptive to less advantaged petitioners and petitioners preferring ideologically liberal outcomes may be the reason appeals increased, particularly as the policy position of the median justice became less conservative.

Turning to the appeals rates from the individual circuits, the rate of appeals of circuit decisions largely correspond to what one would predict, given the sizes of the circuits. As shown

in Figure 2, in the 4th, 6th, and 9th circuits, the appeals rates were consistently above 50% of all sampled circuit decisions in a given year, and in 2005 almost 60% of the 9th Circuit's decisions were appealed to the Supreme Court. The high rates of appeals from the 9th Circuit are not surprising: in addition to being the largest circuit, both geographically and judge-wise, the 9th has a reputation of being very ideologically liberal, compared to other circuits, and the ideological scores of its median judges⁵³ support this reputation. The high proportions for the 6th Circuit are also explained by the median ideology of that circuit⁵⁴ - at least in contemporary years, when the 6th became far more liberal than in previous years. The 4th Circuit's higher rate of appeal is somewhat surprising: the 4th is traditionally conservative, both in terms of its median judges and in terms of its decision outputs.⁵⁵ However, Figure VII may provide an explanation: the median Supreme Court justice becomes more liberal over time, while the 4th Circuit's median remains quite conservative. Consequently, litigants favoring an ideologically liberal outcome may view this greater distance as a way of increasing the likelihood of getting their case heard before the high court.

Despite the higher-than-average appeals rate, in all three circuits, the appeals rates dropped precipitously after these peaks and never approached those rates again. Furthermore, the majority of cases decided each year in other circuits were not appealed. In the 7th Circuit, for instance, only around 25% of that circuit's decisions are appealed to the Supreme Court each year. The question remains why do litigants – knowing that the Supreme Court will likely not hear their case – continue to appeal to the Court at a somewhat increasing rate? While the plausible answers for this

⁵³ As shown in Figures IV and VI.

⁵⁴ As shown in Figure IV.

⁵⁵ As shown in Figure IV.

question are legion, I focus on two possible explanations, as hypothesized in Chapter 3: litigant resource advantages and the ideological relationship between the appellate and Supreme courts.

Shifting to resource differences as an account of appeals, Figure III charts changes in the mean resource gaps among circuit court litigants in the individual appeals courts, as well as the overall trend in the resource divide between the “haves” and “have nots” across all circuits, overlaid with the rate of appeals to the Supreme Court from each circuit. Overall, the resource differences among circuit litigants increase over time, particularly between 1988 and 1991. This general trend is expected, due to the rise in criminal cases before the appellate courts. Even after removing criminal appeals from the analysis, however, the resource gap between litigants increases over time (albeit at a less consistent rate), indicating that the resource advantages enjoyed by the “haves” grow stronger between 1983 and 2009. These trends confirm the assumption that the resource gap between appeals court litigants is widening over time, and this widening gap should significantly affect appeals to the Supreme Court. Specifically, appeals will decline, for two reasons: less advantaged litigants lack the resources necessary to mount a successful (or even economically viable) appeals campaign following a decision in the intermediate courts, and more advantaged litigants losing in the circuit courts do not want to risk this adverse decision becoming binding on the entire nation via a grant of *certiorari*.

Why are the resource advantages of the “haves” increasing over time? In addition to the case law and congressional statute limitations on the ability of inevitably less advantaged litigants to succeed in the federal court system discussed in Chapter 2, the rise in litigation regarding government benefits may also explain the rising resource divide. In the decades following *Goldberg v. Kelly*⁵⁶ – holding that the termination of government benefits without a fair hearing

⁵⁶ 397 U.S. 254 (1970).

violated the Due Process Clause – administrative litigation (Social Security benefits, Medicare benefits, etc.) increased substantially (Manning and Randazzo 2009), and these cases are generally the federal government – the most advantaged party – versus individual claimants. The rise in business group participation may also drive the increasing differences in resources. During the 1970s, and increasing during the 1980s, business groups – and interest groups representing more pro-business concerns (environmental deregulation, et al) – began participating more in the federal judiciary, including the appeals process, as a way of protecting the gains they achieved in other branches of the federal and state governments (Epstein 1985), and in the data these groups tend to be significantly more advantaged than their opponents in the appellate courts.

A final reason for these changes in litigant advantage is the aforementioned increase in criminal cases in the appeals courts. With the escalation of the War on Drugs, among other changes in criminal justice public policy beginning in the 1980s, there was a sharp increase in the proportion of criminal cases heard by the federal appeals courts.⁵⁷ In these cases, the federal government was most often the appellee.⁵⁸ Because the federal government has the highest resource advantage – and because in criminal cases the federal government is most often facing individuals represented by public or weak private counsel – the mean gap in resources between the litigants increased as a consequence of the rise in criminal justice cases.

In terms of the individual circuits, some circuits have more evenly matched litigants on average than others. The 3rd, 4th, and 11th circuits consistently have a smaller mean resource gap than the overall trend would suggest, while the DC, 8th, and 9th circuits consistently have a larger

⁵⁷ In the data set, by 1992 the mean proportion of criminal appeals heard by the circuit courts was almost 40%, and even after a decline by 2007 there were more criminal appeals cases (approximately 36% of all circuit cases) than civil rights and liberties (approximately 22%) and labor and economic cases (approximately 33%).

⁵⁸ In the data set, the federal government was the appellee in almost 84% of circuit criminal cases.

mean resource gap than in other circuits. The reason the DC and 9th circuits have a generally greater divide between the “haves” and the “have nots” is due in large part to the types of cases heard in those courts. The DC Circuit primarily handles federal agency appeals, meaning that the federal government is a party in the case in some capacity (most often as the appellee). Consequently, even corporate appellants face a greater resource disadvantage than they might face in other circuits. The 9th Circuit, meanwhile, has an interesting mixture of criminal appeals, immigration appeals, and miscellaneous economic appeals – cases generally featuring a wide gap between litigants – and the 8th Circuit hears significantly more criminal appeals than the majority of circuits. In the case of the 4th and 11th circuits, the high proportion of civil rights and liberties appeals in these courts may explain why the gap between the “haves” and “have nots” is not as high as in other circuits: in the data, these cases most often involved suits against local municipalities, which generally do not have their own in-house counsel and are often battling against pro-civil rights interest groups (NAACP Legal Defense Fund, et al). Consequently, even poorer individuals are not at as significant a disadvantage.

Figure III provides visual confirmation that appeals decline when the resource divide between circuit appellees and appellants increases. Figure III, however, still does not answer the question of whether ideology affects appeals to the Supreme Court (or whether ideology has a stronger effect than resource advantage). The next series of graphs shed light on the ideological trends among the circuits and the Supreme Court.

I begin with a descriptive analysis of the differences between what the circuits **should** do (based on the median panel judges) and what they **actually** do (based on the average ideological direction of the circuits’ decisions), since the Supreme Court may be less likely to trust the signals sent by some circuits more than others (Cameron, et al 2000; Lindquist, et al 2007a; Black and

Owens 2012): Figure IV plots the variations in the mean panel median judges and the mean direction of appellate case decisions between 1983 and 2009, overlaid with the overall rate of appeals to the Supreme Court. Smaller gaps between the two lines indicate that the circuit in question performed as one would expect, given the median judge's ideology. As shown in Figure IV, there is a significant discrepancy between the ideological predispositions of the circuit judges (given the average ideology of the panel median judges) and the mean ideological outcome of the cases decided by the circuits. In summation, circuit medians are moderately conservative, but the decisions reached by those panels are more conservative than one would predict. A simple, methodological explanation for this result is the differing scales for ideological preferences and decision outcomes: judges' preferences are on an interval scale, while the ideological directions of decisions are on an ordinal scale. As a result, ideological direction means are more "extreme" than judges' preferences.

Having provided a methodological caveat, appeals do increase as there is a greater difference between what the circuits should and actually do: both the circuits' judges and the case outcomes are becoming more conservative over time. This outcome is not surprising: during the years analyzed, Republicans controlled the presidency in eighteen of those years, and even during the eight years of the Clinton administration Republicans controlled both houses of Congress for six of those years. With the opportunity to appoint conservative judges – and the decline in regional variation in the ideology of the Republican Party (Stidham and Carp 1988) – it is not a radical discovery to find that the circuits and their corresponding decisions became more conservative.

What is more surprising is the rate of appeals during this time: appeals to the Supreme Court continued to increase overall. There are at least two explanations for this outcome. One

explanation is that litigants believe that the decision outcomes in the circuits are more conservative than the Supreme Court (embodied in the median justice) would prefer. The graphs in Figure V lends support to this explanation: the Supreme Court median's ideology becomes more liberal over time (or at least the median justice for that year has a more liberal position than in previous years), but the circuit judges remain conservative. As a result, the Court may be more willing to review more conservative circuit decisions – particularly when those decisions are being made by more conservative circuit panels. Consequently, litigants are more willing to appeal because they predict that the Court will be more receptive to review.

The second explanation is that the ideological directions of decisions – and possibly the greater conservatism of the circuits – are being driven by certain circuits, rather than an overall trend. This result would support my contention that some circuits will be examined more closely by the Supreme Court than others because those circuits are less aligned with the preferred policies of the Court. Understanding this fact, litigants from those circuits are more favorable to appealing because they hypothesize that their petitions will receive closer scrutiny from the Court than those petitions from circuits whose policy positions and outcomes more closely align with the Court's. Without an examination of the differences between the predicted and actual case outcomes of the circuits, this account is conjecture. Figure V examines the differences between the median panel judges and the average ideological direction of appellate court decisions in each circuit, overlaid with the appeals rate for each federal appeals court.

In Figure V, the mean ideological direction of circuit decisions varied tremendously over time, even as the panel median ideology did not fluctuate widely: in the 10th Circuit, for instance, no distinct pattern emerges with regard to ideological direction. The reason for the high variation is likely a combination of both the selected panel judges and the types of cases heard by the circuits

in that year: given the increase in criminal appeals and the growing conservatism of the federal courts on criminal issues, for instance, a circuit with a higher number of criminal appeals cases in a year is likely to issue more conservative decisions. Nonetheless, several circuits appear to make decisions at odds with what would be predicted by the median ideology: the 7th, 8th, and 9th circuits' decisions, for instance, were overall significantly more conservative than the median judge's ideological score would predict, and in those circuits the rate of appeals to the Supreme Court increase and decrease as the gap between the mean direction of the decisions and the position of the panel medians change. Even for circuits in which the panels ruled more liberally than the median judges' positions would predict, appeals increased and decreased as these mean values changed: in reference to Figure II, in the 3rd Circuit, for example, appeals spiked when the decisions of the circuit became more liberal on average than the median panel judges' scores would indicate. These changes lend support to the hypothesis that litigants view deviations from the predicted policy positions of the judges as a cue that a circuit will be monitored more closely by the high court, boosting the likelihood of review and thus appeals.

Working against this account of appeals is the lack of predictability regarding the shifts in circuit outputs. Although it is not surprising that the policy positions and decision directions will change as the circuit medians and the types of cases heard by the circuits change, these changes do not fully confirm my hypotheses because the changes are dynamic, rather than static; a sudden change in the ideological preferences and decision outputs of almost all circuits does not return to the previous mean in subsequent years. Therefore, litigants may not be able to establish an accurate assessment of the changing policies of the circuits, causing them to reduce appeals because they perceive the Supreme Court as less focused on a circuit. Conversely, and more supportive of my

hypothesis, litigants may view this lack of predictability as a cue to appeal to the high court, as there is such inconsistency in the policy outcomes of a specific circuit.

An alternate possibility is that litigants take this lack of policy predictability as an indicator that justices will pay closer attention to changes in the ideological preferences of the median judges on the circuit panels, regardless of the ideological directions of the decision outputs, since the median policy positions are comparatively stable (or at least do not fluctuate as widely as the ideological directions of decisions). Consequently, it is not unreasonable to posit that the ideological distance between the median panel judges in a circuit and the median justice on the Supreme Court will serve as a more significant signal to litigants as to whether they should appeal to the Supreme Court. Figure VI presents the differences in the median judges for the circuits and the Supreme Court's median justices over time, overlaid with the total rate of appeals from the circuits, to assess whether litigant appeals might follow changes in the ideological preferences of the respective courts.

Figure VI illustrates the changing nature of the divide in preferences between the circuit courts and the Supreme Court. In 1983, the Supreme Court's preferences and the overall median preferences of the circuits were diametrically opposed, with the circuits firmly liberal and the Court firmly conservative. Given the conservative control of the White House between 1983 and 1992, coupled with the retirement of many older and more liberal appointees, it should not be surprising that the circuits became significantly much more conservative – to the extent that the circuits on average had more conservative policy preferences than the Supreme Court by 1992. Clinton's eight-year reign as Commander-in-Chief moved the circuit medians in a less conservative pattern on average, before the two terms of George W. Bush reversed the trend and pushed the circuits' preferences in a more conservative direction again. Regardless of presidential control, beginning

in 1987 and continuing through the end of the data the mean panel median judges in the circuits were firmly conservative. The tale of the tape for the Supreme Court's median, however, is a very different story. Despite conservative Republican control of the White House for much of this time period – and complete Republican control of Congress between 1994 and 2006 – the Supreme Court's median became steadily more liberal, such that by 2005 the Court's median preferences were the most liberal they had been since the Warren era. President Clinton's appointees, coupled with the moderate voting behavior of Justices O'Connor and Kennedy, provide the most likely cause of the liberal shift in the median policy preferences of the Court during this time.⁵⁹

These ideological trends, coupled with the rise in appeals as the circuits' and Supreme Court's preferences diverge, lend support to my theory that the diverging policy preferences of the Supreme Courts and circuit courts will lead to higher rates of appeal, as the overall rate of appeal from the circuits steadily increases as the policy positions of the circuit court and Supreme Court medians grow further apart. However, this descriptive pattern does not mean that my hypotheses regarding ideological distance will be confirmed. Although the circuits' median policy preferences overall are more liberal than those of the Supreme Court's, the circuits' preferences are still conservative for most of the time period analyzed – raising the question of whether there is enough ideological distance between medians to provoke greater review by the high court. Furthermore, Figure VI examines only the overall liberalism of the circuit courts, not the liberalism of each circuit compared to the Supreme Court – problematic, given my theory that changes in ideology are not uniform across circuits. Figure VII proceeds to provide a descriptive analysis of the above trends, but now broken down by individual circuits.

⁵⁹ Another possible explanation is the flawed measurements of the Judicial Common Space (Lauderdale and Clark 2012; Ho and Quinn 2010; Bailey 2013), which will be discussed more in Chapter 6.

As shown in the graphs in Figure VII, the median preferences of the individual circuits and the Supreme Court vary widely. The 9th Circuit is generally further to the ideological left than the Supreme Court, while the 5th and 11th circuits are generally further to the ideological right than the Supreme Court. The 1st, 3rd, and (more recently) 6th circuits most closely correspond to the median preferences of the Supreme Court, but even in these circuits, there is much year-to-year variation. Appeals to the Court do not correspond necessarily to the degree of difference in the preference distance between the circuits and the Supreme Court: in the 2nd Circuit, for instance, between 1997 and 2001 the preferences of the panel medians and median justice diverge greatly, yet appeals decrease over this time period.

These patterns both reinforce and qualify my theory that a widening preference gap over time will increase appeals to the Supreme Court. On one hand, there are discernable differences in preferences among the circuits and between the circuits and the Supreme Court. Furthermore, the appeals patterns for many circuits indicate that appeals do increase as the median justice becomes more liberal. On the other hand, there is so much fluctuation on preferences that it may be harder for even more advantaged litigants to accurately assess whether the ideological distance between the circuit and the Supreme Court is so wide as to cause the Court to pay closer attention to a circuit – potentially making litigants more risk averse and willing to decrease their appeals rather than risk a “wrong” guess as to the willingness of the Court to review a particular appeals court more.

Appeals to the Supreme Court over Time⁶⁰

The results observed in the figures above suggest moderate support for my hypotheses, at least in some circuits. The question now becomes whether a pooled time series analysis will

⁶⁰ For pre-estimation test of unit roots for this model, please see Appendix A.

provide support for a causal relationship between ideology, litigant resource advantage, and appeals to the Supreme Court in the aggregate. In the results below, I observe mixed support for my hypotheses.

Model I: Appeals to the Supreme Court over Time

N	312
Wald χ^2	78.35
Prob> χ^2	0.000

	Coefficient	PCSE	Prob > z
Appeals to the Supreme Court (lagged)	0.1511763	0.0714817	0.034**
Distance between Circuit and SC Median (lagged)	0.0915894	0.0364604	0.012**
Circuit Ideology (lagged)	-0.0337665	0.0276545	0.222
Mean Resource Gap (lagged)	-0.0046929	0.0024073	0.051*
Mean Dissent Rate (lagged)	0.0565296	0.0771003	0.463
Mean Treatment of Lower Court Decision by Circuit (lagged)	0.0475126	0.0267562	0.076*
Criminal Case Rate	-0.0685092	0.1146471	0.550
Civil Rights/Liberties Case Rate	-0.0300584	0.1123877	0.789
Labor/Economic Case Rate	-0.0865686	0.1037935	0.404
Median Supreme Court Justice	-0.1263064	0.0808	0.118
4th Justice	-0.0185481	0.027137	0.494
6th Justice	0.0286543	0.0470671	0.543

*p $\geq$.10 **p $\geq$.05

There was a total of 312 observations for the time period analyzed (27 years, 12 circuits per year, minus 12 degrees of freedom). The χ^2 of 78.35 is significant at the .001 level, indicating that the variables are independent of one another. The pre-estimation unit root analysis in Appendix A indicates that the variables are stationary, meaning that the statistical properties of the variables (mean, variance, etc.) will return to the equilibrium if disturbed – avoiding modeling issues of a change in the properties of the variables should there be a “shock”. The dependent variable, lagged appeals to the Supreme Court, is significant at the .05 level and positive, indicating

that appeals to the Supreme Court are significantly **increasing** from year to year. Given that grants of *certiorari* declined between 1983 and 2009, this result is interesting: if litigants were strategic, would appeal not decline as grants of review decline? To answer this question, we must examine the regression analysis.

Of the two ideology variables, only the lagged distance between circuit and Supreme Court medians is significant; greater differences between the mean direction of circuit decisions and the circuit panel medians do not significantly affect appeals to the Supreme Court. This lack of significance is disappointing and contrary to the literature: if the circuits are behaving in a manner different from what is predicted by the median, then why are litigants not responding in the predicted manner? A plausible explanation for this finding lies in the graphs in Figure IV: the mean directions of the decisions of the circuits are more conservative than the median judge's position would predict. If the policy preferences of the Supreme Court are generally conservative, based on the median justice (and the Court is conservative, with the exception of 2005), then the Court may be more concerned with the policy preferences of the median judges on circuit panels, rather than the overall ideological direction of the circuits' decisions, since the judges may be more liberal but the decisions are in a direction favored by the Court. Consequently, litigants are less likely to consider differences between the circuit medians and the mean directions of decisions, unless the directions of individual decisions run contrary to the policy preferences of the Court. In summation, litigants do not concern themselves with the forest of the ideological directions of all decisions, only on whether a litigant's particular case runs in a manner contrary to the preferences of the Court. What litigants **do** care about, according to the results, is whether the panel medians are further away from the preferences of the Supreme Court median in the aggregate: as the ideological distance between the median panel judges and the median justices increases, appeals

to the Supreme Court increase. In other words, litigants are not concerned with whether a circuit is behaving in a manner contrary to what would be predicted by the median panel judges, but litigants are concerned with whether the policy preferences of the judges are incongruent with the policy preferences of the Supreme Court.⁶¹

My hypothesis regarding the resource gap among litigants is supported (albeit weakly): as the size of the resource gap among litigants increases, appeals to the Supreme Court decrease. This finding lends credence to the theory that litigants are strategic and calculate the risks and benefits of appealing to the Supreme Court. For less advantaged litigants, it is likely they do not have the capabilities to appeal an adverse appellate court decision because the Supreme Court reviews so few cases and because previous decisions by the Court regarding jurisdiction and litigation have hindered their ability to petition the Court for review. These litigants do not wish to spend the time and money on an appeal that will likely not be heard. Conversely, more advantaged litigants losing in the circuits do not want to risk the Supreme Court accepting their case and then affirming the circuit's decision – creating a precedent binding on the entire country. As a result, more successful litigants will end their appeals to avoid a nationally disadvantageous outcome. Even when the "haves" do win in the appeals courts if there is the possibility that the high court will grant review and overturn the circuit decision, the more advantaged litigants may seek to stymie appeals by settling with the losing side. Future research must unpack these possibilities further, in order to determine which of these factors are driving the decrease in appeals (or if both are) and why.

⁶¹ There is also the fact that most circuit decisions are unanimous: 90.17% of circuit decisions in the COA database had no dissenting opinions. This unanimity in turn may make justices less concerned with whether circuit panels are deviating from their expected behavior and more concerned with whether the preferences explicated by these decisions run contrary to those of the Court. This theory would also explain why litigants are not concerned with deviations from expected behavior but are concerned with incongruent policy preferences.

Of the control variables, only the treatment of the trial court's decisions was significant, and it was significant only at the .10 level. As the rates of mixed circuit outcomes (affirmed in part, et al) and reversals of the trial courts increase, appeals to the Supreme Court (weakly) increase. The logic for a circuit's treatment of trial court decisions is intuitive. Circuits overall affirm the decisions of the original jurisdiction courts. Consequently, an increase in mixed decisions – or reversals of the original jurisdiction courts – serves as a signal to litigants that there is significant conflict between the original jurisdiction and appellate courts, thus increasing the likelihood the Court will pay closer attention to a circuit and making appeals more likely.

Conclusion

This chapter sought to examine whether changes in ideology or litigant resource advantage – or both – over time affected appeals to the Supreme Court. As hypothesized, a greater ideological divide between the panel median judges in a circuit and the Supreme Court's median justice leads to a higher rate of appeals over time. However, a greater distance between predicted and actual circuit ideological behavior has no effect on appeals to the Supreme Court. More promising is the finding for litigant resource advantage: as the resource gap between the “haves” and the “have nots” widens, appeals to the Supreme Court decline.

What is left unanswered in this chapter is whether the factors significantly impacting appeals to the Supreme Court also impact grants of *certiorari* by the Court? Although litigants may examine the differences between themselves and their opponents – and between the preferences of the circuit and the Supreme Court – this examination may not be mirrored by the considerations of the high court. Chapter 5 will test the hypotheses regarding grants of *certiorari* over time – and which factors significantly affect these grants.

Chapter 5:

**The Effect of Ideology and Resource
Advantage on Grants of *Certiorari*
by the Supreme Court**

Introduction

In Chapter 4, I examined the longitudinal effects of litigant resource advantages and ideological changes in the policy preferences of the circuit courts on appeals to the US Supreme Court. As expected, greater distance between the circuit panel and Supreme Court medians increases appeals to the Supreme Court. This finding supports the hypothesis that litigants are cognizant of changing policy differences between the intermediate appeals courts and the high courts, and litigating groups adjust their Supreme Court appeals strategies accordingly. There is still an important question left unanswered by this finding: are litigants correct in assuming changes in ideological distance will make it more likely that the Court pays closer attention to some circuits more than others? Is changing ideological distance over time a cue valuable only during the decision to appeal to the high court or do the justices factor these changes in when deciding to review some circuits more? This chapter addresses this question by analyzing whether changes in preferences between the circuit panel median judges and the Supreme Court's median justice affects grants of *certiorari* over time and across circuits.

Although increases in the resource gap between litigants do significantly decrease appeals to the Supreme Court, this effect is only significant at the .10 level: both greater ideological distance among the medians and greater conservatism on the part of the Supreme Court's median justice affect appeals more than resource (dis)advantage. Despite the weak significance of the coefficient, the finding for changes in the resource gap among litigants is intriguing. If a widening gap between the "haves" and the "have nots" decreases appeals to the Supreme Court, then the question becomes what effect, if any, does the widening resource gap between litigants have on grants of *certiorari* by the Supreme Court? Does this gap increase or decrease the scrutiny given to a circuit by the Supreme Court justices? In this chapter, I consider these questions by examining

changes in the resource gap among petitioners and respondents, to determine whether the Supreme Court responds one way or the other to changes in the resource advantages of the litigants.

Although the circuit litigants do not significantly respond to differences between what the circuit courts should do and what they actually do, in terms of decision outputs, this lack of significance for litigants does not mean the Supreme Court justices ignore these differences. If it is true that justices scrutinize some circuits more than others when the justices have little reason to trust the “signals” sent by the circuit, then the differences between the circuits’ median policy preferences and the mean of the circuits’ policy outputs should produce an increase in grants of *certiorari* over time, even if such differences do not produce significant changes in appeals to the Supreme Court. A widening gap in the policy preferences of the circuit median judges and the Supreme Court median justices should also produce higher grants of review, despite the decline in appeals from the circuits, as the justices have little reason to trust any signals sent from a circuit whose preferences run counter to those of the Court. In this chapter, I address these questions by examining these changes and whether the Supreme Court significantly responds to these changes over time.

Trends in Certiorari over Time

Before addressing the empirical findings, it is helpful to examine the descriptive changes in the germane trends related to grants of *certiorari*. Figure VIII presents the rates at which appeals from each circuit were granted *certiorari* by the Supreme Court in a given year, overlaid with the grant rate for all circuits. In the data set, the rate of *certiorari* grants declines steadily between 1983 and 1992, followed by an increase between 1992 and 1995, followed by a decrease between 1996 and 2000, followed by a spike in grants between 2001 and 2004. Even after a decrease in grants of *certiorari* after 2004, the rate of grants remains higher than in the preceding years.

Regarding the specific circuits, no clear pattern of Supreme Court auditing emerges from any circuit. The appealed decisions of the 2nd and 3rd circuits are generally at or below the overall *certiorari* rate, but almost all circuits fluctuate greatly, in terms of the rate of review by the Court. This fluctuation supports the theory that Supreme Court justices use the previous policy points of a circuit to assess the contemporary preferences of a circuit: as shown in Figure IX, in the majority of the circuits grants of review increase following a shift in the policy preferences of the circuits' median judges. However, the lack of a stable pattern also indicates that justices review based only on the most recent decisions of the circuit courts, rather than reviewing based on long-term changes in the circuit – indicating that any change in grants of *certiorari* over time and across the circuits is not significant.

The differences between the circuits in grants of *certiorari* may also explain why grants of *certiorari* increase over time, particularly in the final years of the Rehnquist Court: specific circuits are driving these changes. For example, 2004 had the highest rate of *certiorari* grants in the years analyzed, but the 6th, 9th, and 10th circuits had rates of *certiorari* well above the average for that year, while the other circuits saw only slight increases in the percentage of appealed decisions reviewed by the high court. The 11th Circuit in 1987 and the 2nd Circuit in 2005 are other examples in which the rate of *certiorari* was influenced by an extraordinarily high review of particular circuits. Consequently, the increase in grants of review may be driven by specific circuits, rather than the overall population of decisions appealed, resulting in no significant longitudinal change in grants of *certiorari* overall.

This sharp increase in grants of review by the Court toward the end of the time period analyzed mirrors the sharp increase in appeals to the Court as outlined in Chapter 4, but there is still the question of why the grants of review in the data set are higher than in the extant literature.

One possible reason is that there was a policy change by the Roberts Court, in which the Court was more willing than its predecessor to engage in the review of lower federal court decisions. In addition, *certiorari* possibly declined during Roberts's first year on the Court as he acclimated himself to both the high court and his role as the Chief Justice. A simpler explanation is that the data analyzed in these chapters are of federal court cases, rather than state cases. Due to the few cases appealed from the state systems to the federal Supreme Court, and the willingness of latter-day US Supreme Courts to devolve more judicial policymaking power to the state courts (Carp, et al 2016), Supreme Court grants of *certiorari* may have declined in the entire review population, even if review of the lower federal courts increased.

Another explanation is found in the small sample size in the initial data set. With approximately thirty decisions for each circuit in each year, there may only be one decision appealed to the Supreme Court from a circuit in a given year, or there are multiple appeals in a given year but all are denied review. Consequently, grants of review may be lower or higher for a circuit because the small number of decisions in the data set is not reflective of the true population of appeals. Chapter 6 will address this shortcoming by discussing how to build upon the current Court of Appeals Database.

Regardless of the correct explanation for these trends, the descriptive presentation of grants of *certiorari* both support and undercut my theoretical assumptions. As expected, rates of review by the Supreme Court do vary among the federal circuits, and the Court reviews only a small proportion of the decisions appealed to it. Despite this fact, no clear pattern of *certiorari* grants for the individual circuits emerges, and the changes in the review of the different circuits appear to be temporary: a circuit reviewed more by the Supreme Court in year $t+1$ may not be reviewed as much by the Court in year $t+2$. Whether this drop is the product of greater circuit compliance

with the Court or changes in the nature of the decisions emerging from a circuit is subject to logical conjecture in this study, but the implication for the empirical analysis is that grants of *certiorari* may not be significantly affected by any change in the rates of review – making generalizable findings difficult. Nonetheless, the concerns regarding the accuracy of my assumptions cannot be confirmed without examining the trends among the primary explanatory variables. The subsequent figures graph the trends among the ideological and resource advantage variables, beginning with graphs for the mean differences in resource advantages among the petitioning and responding parties in their Supreme Court petitions, in order to determine how well the theoretical assumptions of this study hold prior to a final empirical analysis.

Change to Resource Advantage Independent Variable

Before proceeding to the descriptive analysis of mean resource advantages among the litigants, an important clarification of the resource advantage measurement is necessary. The litigants examined in this model are the petitioner (the litigant requesting a writ of *certiorari*) and the respondent (the litigant asking for the denial of a writ of *certiorari*). The variable for resource advantage is measured the same as it is in the first model, but the petitioning litigant may not be the same as the appellant litigant at the circuit level: if the appellee lost in the circuit court and appealed to the Supreme Court, the circuit appellee is now the petitioner, and the circuit appellant is now the respondent. Although developed for reference purposes only, I created a variable for which circuit litigant was the petitioner, with a value of “0” indicating the circuit appellant is the petitioning party and a value of “1” indicating that the circuit appellee is the petitioning party,⁶² and I then assign the parties the same resource advantage score as they had in the circuit court.

⁶² For decisions appealed by both circuit litigants, the circuit appellant is classified as the petitioning party.

With this clarification, I turn to a descriptive analysis of the changes in resource advantages among the Supreme Court litigants over time.

Descriptive Statistics

Figure IX presents the average distance, in terms of resources, between responding and petitioning litigants from each circuit to the Supreme Court over time. The patterns in the mean resource gap between Supreme Court respondents and petitioners somewhat mirror the results from the appeals model in Chapter 4: after an initial small difference among the litigating parties, the respondents (on average and across circuits) have a greater advantage over petitioners than in previous years, beginning with the early 1990s – most likely due to the increases in criminal appeals. What is different from the appeals model is the degree to which respondents are more advantaged than the petitioners. In the appeals model, mean advantage generally stays at a difference of eight beginning in 1989, rarely rising higher, and the mean resource gap between respondents and petitioners never exceeds fourteen. In the *certiorari* model, by contrast, the degree to which respondents are more advantaged than petitioners is greater generally, indicating that there is a more pronounced resource divide between Supreme Court litigants than for appeals court litigants.

There are several reasons why the degree of disadvantage suffered by the petitioner is much greater in the *certiorari* model than in the appeals model. One explanation is there are simply fewer circuit decisions appealed to the Supreme Court: only 2,135 of the 8,426 total decisions in the Court of Appeals Database during this time were appealed to the Supreme Court. With fewer data points, it is unsurprising that the mean resource differences between litigants will be greater. A second reason for the higher degree of disadvantage is the aforementioned increase in criminal

appeals. Of the 2,135 Supreme Court appeals, 947 (44.36%) were criminal appeals from the federal circuit courts. Because the resource differences between the litigants are significantly greater than in other case types, the higher distance between respondents and petitioners is the product of these types of appeals. This explanation also supports my hypothesis that a greater resource difference between respondents and petitioners will reduce grants of *certiorari*: of the 947 criminal appeals to the Court, just 86 (9.08%) were reviewed.⁶³

Although the expectation that (on average) respondents are more advantaged than petitioners was largely confirmed, several circuits have years in which (on average) the Supreme Court **petitioner** was more advantaged than the respondent. The most likely reason for these anomalies is because the federal government lost in the appeals courts: in 1983 in the 3rd Circuit, for instance, the federal government was the petitioning party in two of the five circuit decisions appealed, and in the four 9th Circuit decisions appealed in 1991, the federal or state governments were the petitioning party in all but one of those appeals. The bigger question is whether such anomalies impact the effect of aggregate resource advantage on grants of *certiorari*. Most likely there will be no effect, given that there are few years in which the petitioners are on average more advantaged than the respondents. However, the fact that there are years in which petitioners are more advantaged on average raises concerns about the accuracy of the empirical findings. Because so few cases are appealed to the Supreme Court, even an isolated change in the nature of the resource gap between litigants could affect whether resource advantages have a significant impact on the rate of *certiorari*.

⁶³ As an aside, there is nothing in the COA database to indicate whether a request for *certiorari* was submitted *in forma pauperis*. A petitioner demonstrably incapable of paying the filing fee of the Court may seek to file for free, and (anecdotally) the Supreme Court generally grants these requests. These briefs are generally of poor quality and not likely to receive serious consideration by the justices. Unfortunately, the possibility that the resource gap is driven in part by an increase in *in forma pauperis* filings must remain conjecture, due to a lack of information in the data.

Regardless of whether the federal government is the petitioner, grants of review by the Supreme Court appear to increase when the mean resource gap between litigants decreases over time, and vice-versa. This trend lends support to my hypothesis that higher resource differences will produce fewer *certiorari* grants. However, Black and Boyd (2012) suggests that the effect of resource advantage on grants of *certiorari* may be contingent on ideology, such as the liberalness of justices. In any event, resource advantage is one piece of the puzzle as to why the Court reviews some circuits more than others. The next series of figures examine the ideological relationships between the circuits, the Supreme Court, and *certiorari*, beginning with an examination of the longitudinal relationship between the median justices on the Supreme Court and the median panel judges on the appeals courts.

Figure X presents the changes among the individual circuits' median judges, in relation to the Supreme Court's median, and the changes in grants of *certiorari* among the individual circuits. The mean circuit panel median judges in decisions appealed to the Supreme Court trend more ideologically conservative than the mean panel medians of all circuit decisions. This result may be due in part to the smaller number of cases considered for *certiorari*, but the greater ideological conservatism of the panel medians may also be the byproduct of strategic appeals by litigants. Although intuition would suggest that rational litigants would appeal those decisions for which the median judge is more ideologically liberal than the median justice, as liberal justices are more receptive to economic underdogs (Black and Boyd 2012), it is not unreasonable to posit that strategic litigants appeal because median judges are more ideologically conservative than the Supreme Court median. A component of theories regarding preference cut points is that political actors will react when an opposing action is distant from the actor's cut point (Lindquist, et al

2007b).⁶⁴ Applying this finding to Figure X, even when the panel median judges' preferences are ideologically conservative, Supreme Court review of a circuit should increase if those preferences are **too** conservative, relative to the median justice. This position is partially supported by the trends: in the DC Circuit, for example, review by the high court increases when the panel medians are significantly distant from the median justice, regardless of whether their preferences are more ideologically conservative or liberal than those of the Court median. This observation supports my hypothesis that greater ideological distance between the median panel judges in the aggregate and the median Supreme Court justice will serve as a conduit for higher rates of *certiorari*.

Although the pattern of review of the DC Circuit is applicable to many of the other circuits, this trend is not universal. The 2nd and 3rd circuits, for instance, maintain a comparatively stable pattern of grants of *certiorari*, regardless of ideological change among the median panel judges. There is also the fact that information acquisition by the justices is somewhat easier for the DC Circuit relative to the other circuits, making the **explanations** underlying the trends in the DC Circuit less applicable to other circuits: the DC Circuit is located in the same city as the Supreme Court, and the cases heard by the DC Circuit are comparatively narrow in issue type.⁶⁵ Consequently, policy preference distance alone may not significantly affect the ebb and flow of *certiorari* grants. More importantly, the constant fluctuation in the mean preferences of the panel medians may make it prohibitively difficult for the justices to react to changes in the panel medians over time – and render ideological distance ineffective as a predictor of *certiorari*.

⁶⁴ The extant literature does not indicate whether the distance between cut points is asymmetrical. That is, prior research does not observe, for instance, whether a conservative justice is more likely to grant *certiorari* if the circuit median is significantly more conservative, or if distance matters only when the circuit median is significantly more liberal. Subsequent research will investigate this question in more depth.

⁶⁵ Of the 735 sampled decisions of the DC Circuit during this time, 445 (60.5%) were decisions regarding labor or economic issues, followed by civil rights and liberties (21.2%) and criminal appeals (15.6%).

Figure X does provide valuable information regarding ideological distance, but it addresses only the distance between the panel and Supreme Court medians. As stated previously, the justices are more likely to audit circuits whose signals are untrustworthy (Cameron, et al 2000; Lindquist, et al 2007b; Black and Owens 2012). In theory, significant differences in how different the decision outputs of a circuit are from what is expected, given the median judges, should serve as a cue for the justices in their evaluations of *certiorari*. To provide a preview of Figure XI, the 9th Circuit's medians are (as anticipated) quite liberal, yet the mean direction of its decisions trends ideologically conservative. Is this situation unique to the 9th Circuit, or is this common across most circuits, and if this condition is relatively typical for the circuits, or even if it unique to the 9th Circuit, does this condition impact grants of *certiorari* by the Supreme Court? The next figure set examines changes in the relationship between the mean ideological direction of a circuit's decisions and the policy positions of the panel median judges, in an attempt to address these questions.

Figure XI presents the differences in the mean circuit panel median judges' preferences and the median justice's preferences. For most of the circuit courts, the relationship between the mean direction of the circuits' decisions and the mean panel median ideology is as one would anticipate: when the preferences of the panel medians are more liberal, the outputs are more liberal, and vice-versa. However, there are notable exceptions. For example, despite their deserved reputations as extremely liberal, the majority of appealed decisions from the 2nd and 9th circuits were conservative. Additionally, there were individual years in which the mean direction of circuits' decisions was the opposite of what was predicted by the panel medians' preferences: in 2002, for instance, the 4th Circuit's preferences were quite conservative, yet the mean direction of its appealed decisions was liberal. Although some of these outliers are the byproduct of few appeals

in a given year,⁶⁶ the fact that the majority are not the consequence of few appeals raise the question of the accuracy of the Judicial Common Space as a predictor of judges' preferences – and if (and at which point) the more conservative outputs of the circuits, relative to the medians, will increase review by the Court.

There are three ways to interpret these trends, in terms of expectations for the TSCS regression results. Because the trends for the ideological direction of decisions mirror the mean panel median ideological preferences, the Supreme Court could consider the circuits to be behaving as expected. Consequently, audits of a circuit will increase when the circuit's output is opposite what would be predicted by the panel median ideology. Another way of interpreting the trends is to posit that a wider difference between the predicted output and the actual output will increase grants of *certiorari* by the Court. Although grants of *certiorari* follow the mean panel median judge ideological preferences more closely, in many circuits grants of *certiorari* rise and fall as the mean ideological direction of appealed decisions rises and fall. A final way of interpreting these trends is that the Court cannot gauge the trends of the circuits' overall outputs, given that no permanent pattern emerges in the mean directions of appealed circuit decisions.

Heretofore, the analysis has been one of the graphed trends. Though important, such examinations do not provide a causal inference or clear evidence to support or refute the hypotheses. The next section conducts a pooled time series analysis of the aforementioned variables, and whether these variables significantly affect grants of *certiorari* across time and appeals courts.

Model II is a pooled time series regression analysis, with panel-corrected standard errors, of the relationships between the independent variables and grants of *certiorari* over time. There

⁶⁶ In the DC Circuit in 2005, for example, there was only one case appealed to the Supreme Court.

was a total of 312 observations (27 years, 12 circuits per year, minus 12 degrees of freedom). The pre-estimation unit root analysis in Appendix A indicates that the panels are stationary, meaning that the statistical properties of the variables (mean, variance, etc.) will return to the equilibrium if disturbed – avoiding modeling issues of a change in the properties of the variables should there be a “shock” (a drastic change to the values permanently altering the means). However, the lagged dependent variable is not significant at the .05 level, indicating that there was not a significant change in grants of *certiorari* over time. This lack of significant change is somewhat contrary to the established literature, given the aforementioned desire of the Court to reduce its caseload. The lack of significant change, however, may partially explain the significant increase in appeals from the first model: if the rate of *certiorari* does not significantly increase or decrease over time, litigants may believe that they have as much of a chance of receiving a writ of review in year t as in year $t-1$.

Model II: Grants of *Certiorari* by the Supreme Court over Time⁶⁷

N	312
Wald χ^2	35.86
Prob > χ^2	0.0003

	Coefficient	PCSE	Prob > z
Grants of <i>Certiorari</i> (lagged)	0.0814735	0.0698526	0.243
Distance between Circuit and SC Median (lagged)	0.0303146	0.0498285	0.543
Circuit Ideology (lagged)	-0.0002987	0.026296	0.991
Mean Resource Gap (lagged)	0.0022474	0.0022509	0.318
Mean Dissent Rate (lagged)	-0.031354	0.048085	0.514
Mean Treatment of Lower Court Decision by Circuit (lagged)	0.0051854	0.0244023	0.832
Criminal Case Rate (lagged)	-0.1008942	0.1168029	0.388
Civil Rights/Liberties Case Rate (lagged)	-0.1144075	0.1215915	0.347
Labor/Economic Case Rate (lagged)	-0.0816115	0.1198379	0.496
Median Supreme Court Justice (lagged)	-0.5912953	0.1675698	0.000***
4th Justice (lagged)	-0.0171154	0.0678696	0.801
6th Justice (lagged)	0.2854514	0.1238803	0.021**

**p ≥ .05

***p ≥ .001

The results of the ideological variables in the model fail to confirm any of my hypotheses. Neither lagged measure of ideology is a significant indicator of grants of *certiorari*. The reason for a lack of finding regarding the differences between the mean panel median judges' preferences and the mean directions of circuit decisions is because there was no consistent pattern to the mean output of the majority of circuits: as shown in Figure XI, only the 7th Circuit demonstrated remote consistency in the mean direction of appealed decisions. Because of the (sometimes extreme) variability in the direction of circuits' decisions, the Supreme Court may struggle to accurately

⁶⁷ For pre-estimation tests of unit roots, please see Appendix B.

predict how the circuits behave – causing the justices to disregard differences in how a circuit’s panels should behave and how they actually behave.

More surprising is the lack of significance for the lagged distance between the mean ideological preferences of the circuit panel median judges and the lagged preferences of the Supreme Court’s median justices. Model I indicated that ideological distance significantly affects appeals to the Supreme Court, and much of the literature (Lindquist, et al 2007b; Westerland, et al 2010) indicates that ideological distance between the circuit court and the Supreme Court impacts Supreme Court decision-making. Nonetheless, the literature is not unanimous in this regard. In explaining why ideologically distant panels suffered no greater unanimous reversal likelihood than those panels closer to the Supreme Court’s preferences, Scott (2006a) explains that the Court may examine the median judge for the entire circuit, rather than the median panel judge. Consequently, the use of the mean preferences of the panel medians may be a sub-optimal measure of the relationship between the ideologies of the Supreme Court and circuit courts.

To determine whether the use of the mean preferences of the panel medians is sub-optimal, and to test whether using the circuits’ median judges affects the outcomes for both circuit ideology and ideological distance, I create new variables for the median judge for the entire circuit, the difference in the mean ideological direction of the circuit’s decisions and the circuit’s median judge’s JCS score, and the ideological distance between the Supreme Court median and the circuit’s median, and I run the model again. The results are almost identical to the model above: none of the explanatory variables significantly affect grants of *certiorari*.⁶⁸ The implication of these lack of findings is that, over time, the ideological positions of circuit median judges – whether

⁶⁸ I also ran the model with stand-alone variables for the mean ideological direction of circuits’ decisions and for the average panel median judge ideology. The results still do not confirm any of my hypotheses.

panel or the entire circuit – do not significantly impact aggregate changes in *certiorari*. The question then becomes why such is the case.

There are two plausible answers to this question. One answer is the invariability of the ideological scores for circuit judges, suppressing any possibility of observing dynamic changes in the policy positions of the judges and reducing the likelihood of observing significant variation in the aggregate. Another plausible answer is the lower N for cases appealed to the Supreme Court for review. With a smaller sample size, it is more difficult to capture aggregate variation in ideology. Consequently, the measures for differences in circuit behavior are optimal, but we do not have enough data points at the individual case level to produce meaningful measurements at the aggregate level. This same concern applies to the low rate of appeals in the aggregate: many circuits only have one decision (in the COA database) appealed to the Supreme Court in a given year – making substantive analysis extraordinarily difficult, both in comparison to other circuits and across time.⁶⁹

The lack of an impact by ideological distance may also be reflective of the Rehnquist Court's desire to be more selective in its review of the lower federal courts (George and Solimine 2001).⁷⁰ Because of concerns regarding the legitimacy of the lower courts, and a desire to remove the Supreme Court from national policy debates, the Rehnquist Court reduced its caseload over time and across even ideologically disagreeable circuits, as shown in Figure VIII. This reduction in caseload came despite the changes over time in the ideological preferences of the circuits and

⁶⁹ This explanation may also explain why an iteration of the model which included a control for the rate of appeals in a given year for the circuits produced almost identical results to the model above.

⁷⁰ It should be noted that this restrained approach to the lower courts applies primarily to the decision to review, not to the ideology of the decisions reached by the Rehnquist Court, which may be the most conservative since the 1930s (see Barnett (2001) for an account of the Rehnquist Court's Commerce Clause decisions as an example of this greater conservative activism).

the Supreme Court. Consequently, grants of *certiorari* declined regardless of the ideological relationship between the lower courts and the Supreme Court because the Rehnquist Court wanted to fulfill its purported goal of reducing the involvement of the Court in legal disputes.⁷¹

The results for resource disadvantage are also disappointing: an increase in the mean resource divide between the “haves” and “have nots” does not significantly impact changes in grants of *certiorari*. There are several possible explanations for this outcome. One explanation is a selection effect: if some circuits have a higher rate of review than others, and the resource gap among Supreme Court litigants emerging from those circuits is not as great as in other circuits, then these higher rates of appeal to the Court depress the effect of mean resource (dis)advantage as a predictor of changes in *certiorari* grants. Another explanation for the lack of a finding is the presence of a conservative majority for most of the time period analyzed. If conservative justices are less receptive to the arguments of less advantaged petitioners (Black and Boyd 2012), then these justices are more likely to vote against *certiorari* no matter the size of the resource gap. This explanation is supported by the significance of the median justice: as the median justice’s ideological position becomes more conservative, grants of *certiorari* decline significantly over time.⁷²

Underlying all of the explanations for the failure to confirm my hypotheses is that there is a disconnect between what the cues the litigants believe the justices seek and the cues the justices

⁷¹ Despite the possibility that litigants do not seem as concerned with the general unanimity of circuit decisions, as explained in Chapter 4, the justices may take under advisement the unanimity of most circuit decisions as a sign that the circuits are of one accord on their policy preferences, given the high rates of unanimous decisions and the lack of *en banc* challenges to these united panel decisions. If the Court seeks to reduce its caseload, the unified signals sent by circuit panels provide a convenient cue for the Court to decline *certiorari*.

⁷² I also consider the possibility that the presence of negative resource advantage scores may affect the data, so I re-ran the model but used the absolute value of the mean resource gap between petitioners and respondents. The coefficient was not significant, indicating that the mean resource advantage enjoyed by one side over the other still does not affect grants of *certiorari*.

actually seek. In Chapter 4, the results indicate that greater ideological distances between the circuit courts and the Supreme Court, as well as greater conflicts between the federal district and circuit courts, produce higher rates of appeals to the high court, yet these same characteristics have no significant effect on changes in rates of *certiorari* from the Court. A more detailed discussion of these conflicting results can be found in Chapter 6, but to provide an introductory summary the reasons the results of the two models conflict is because there is an unmeasured threshold at which litigant resource advantage does not matter to the justices and that the justices are ultimately concerned with the outcomes of the individual cases, rather than the aggregate ideological output of a circuit.

In addition, there is the possibility that the lack of support for the hypotheses is due to a selection effect in the data, the product of the overrepresentation of some circuits in the *certiorari* model. As demonstrated in Figure VIII, some circuits do have a higher rate of review by the Court, and as discussed in Chapter 4 litigants may still appeal if their case is in a circuit with a higher rate of being reviewed by the Court. Consequently, the reason the explanatory variables do not have a significant effect is that of the greater appeals from specific appeals courts, which depresses the effect of circuit court divergence as a predictor of significantly higher (lower) aggregate review. To summarize, the possible reason that the variables do not significantly affect grants of *certiorari* is that appeals to the Court are concentrated in a handful of circuits, creating a selection effect that depresses the impact of circuit divergences on aggregate changes in review.

There are two variables in the model which do significantly impact changes in grants of *certiorari*: the ideological positions of the Supreme Court median justice and the sixth justice. The effect of the median justice is as expected, but the finding for the sixth justice – as the sixth justice becomes more conservative, grants of *certiorari* increase – is interesting for at least two reasons.

One reason is that the sixth justice's ideological position is not a significant predictor of appeals to the Court, yet that justice is a significant predictor of review by the Court. There is the possibility that potential petitioners must resolve conflicting signals in the Court's ideological position, assuming the median justice is more conservative over time, and future research must examine fully when and why either the median justice or the sixth justice may be the ideological yardstick by which litigants measure their likelihood of success before the Court.^{73 74}

The second reason for the interest in the finding for the sixth justice is that the significance of the sixth justice raises the possibility that our understanding of the “swing” justice on the high court is at best under-informed. An additional implication of the significant impact of the 6th justice is that the Supreme Court is more conservative than the median justice would indicate. The theory of the importance of the Supreme Court's median justice is prefaced on the merit decisions being close, particularly 5-4 votes. Over 60% of all Supreme Court decisions issued during this time (1,613),⁷⁵ however, were not close decisions, with 65% of those decisions containing unanimous majorities. Of those 1,613 decisions, the overwhelming majority were decided in an ideologically conservative direction: of the 6-3 decisions during this time, for instance, most were in a conservative direction ideologically. While it is conjecture to assume that the sixth justice influenced the final outcome in such situations, it is also erroneous to conclude that the median justice influenced these outcomes. If the significance of the median justice may be prefaced on the likely outcome being close, then one of two conclusions can be drawn: the justices voting for

⁷³ Were this study to be expanded to include all Supreme Court eras since 1925 (the first year in which the Court had complete control of its docket), it would also be interesting to examine whether the more liberal fourth justice does significantly affect grants of *certiorari*, at least when the Court is more liberal overall.

⁷⁴ This explanation assumes the accuracy of all ideological measurements. Chapter 6 will discuss why the ideological measurements here are not completely accurate and what can be done to improve the accuracy of the ideological scores.

⁷⁵ Per the Spaeth (2015) Supreme Court Database.

certiorari erroneously concluded that the merits decision would be close, or the median justice is the incorrect pivot point for determining *certiorari*. Although the former explanation cannot be answered with certainty, the latter explanation can be examined by observing the ideological positions of the two justices, overlaid with grants of *certiorari*.

Figure XII plots the ideologies of the germane justices, overlaid with the overall rates of review by the Supreme Court during this time. The relationship between the ideology of the median justice and grants of review is as predicted by the model: between 1989 and 1994, the position of the median justice becomes more conservative, and grants of *certiorari* precipitously decline. During this same period, however, the sixth justice remains more ideologically conservative than the median and grants of review decline, and when the sixth justice is the least conservative – between 2001 and 2005 – grants of review peak. The most likely reason for the lack of synchronicity between what the graph shows and what the regression results show are that the sixth justice's ideology is stable, in comparison to the median justice. This explanation fails to explain why the greater ideological conservatism of the sixth justice predicts an increase in *certiorari* grants while the median justice's ideological position predicts a decrease in *certiorari*. More research must be done to determine why there are such discrepancies in this finding.

Another question incapable of being answered definitively in this analysis is **why** the greater ideological conservatism of the sixth justice significantly increases grants of *certiorari*, and why the sixth justice does not affect appeals to the Supreme Court but does affect the review of those appeals. One possible reason is that litigants erroneously conclude that the support of the median justice is necessary for granting review. While it is certainly possible that the median justice will be the key ally in the final merit decision, the data and analysis do not support this contention. The consequence of these findings is that the theory of litigants as strategic decision-

makers may be flawed, whether because litigants are not as strategic as previously thought or because the strategy of appealing to the median justice is the byproduct of litigants possessing less information. In other words, the question is whether more advantaged litigants (with more information) understand that the median justice is not the pivot point for *certiorari*, while less advantaged litigants (with less information) believe that the median justice is the determinant of review.

Conclusion

The results of the second model are somewhat disappointing, as almost all of the hypothesized factors affecting *certiorari* by the Supreme Court had no significant impact over time, even after interacting those effects. Nonetheless, there are several important takeaways from this model. One takeaway is that longitudinal changes in grants of *certiorari* are more justice-driven than litigant-driven. A widening gap in resources between the "haves" and the "have-nots" do not increase *certiorari*. In contrast, the ideological positions of the justices do significantly impact review. However, the two justices analyzed affect *certiorari* in completely different ways. As predicted, *certiorari* decreases as the median justice becomes more ideologically conservative, but the sixth justice significantly **increases** grants of *certiorari* as its ideological position becomes more conservative. Because other studies (George and Solimine 2001) find that greater ideological conservatism generally decreases the likelihood of review, this finding is peculiar.

Though enlightening, the work regarding the Supreme Court appeals process over time is far from concluded. The findings of Chapter 4 suggest strategic litigants examine the ideological differences between their home circuit and the Supreme Court, yet the findings of Chapter 5 suggest that ideological differences between the circuit courts and the Supreme Court do not

matter. What does matter in both models, however, is the ideological position of the median justice. The questions for future research are why these findings occurred, and what do these findings mean as far as our understanding of the relationship between litigants, judges, and justices? Chapter 6 will discuss the empirical implications of this dissertation, as well as what needs to be done to illuminate the relationship between litigant resource advantages, ideology, and the Supreme Court appeals process over time.

Chapter 6:

Future Research and Conclusion

Introduction

The purpose of this dissertation was to explore the changing relationship between the different federal judicial actors over time, specifically the relationship between litigants, federal appeals courts, and the US Supreme Court, and how these changes potentially serve as cues for greater review of certain circuits by the Court. I posited that changing differences in the resources of the litigants and changes in the ideological composition and output of the circuit courts would affect appeals to the Supreme Court, and grants of review by the Court, over time. For effects on appeals to the high court, the results were as hypothesized: increases in resource differences between litigants significantly decrease appeals to the Supreme Court, and a greater ideological distance between the median circuit judges and the median Supreme Court justice significantly increase appeals to the Court. For effects on grants of *certiorari* by the Supreme Court, the results are less promising: none of the ideology hypotheses were supported in the model.

Even with the lack of findings in the *certiorari* model, this dissertation has contributed to our understanding of judicial behavior by moving beyond the individual case level and examining changing ideological and resource trends as effective cues – providing a better understanding of whether litigants respond to differences in lower federal court signals over time and across circuits. Even the lack of findings for change in grants of *certiorari* provides a greater understanding of Supreme Court behavior, as the conflicting results between the appeals and *certiorari* models reveal a communication breakdown between which cues litigants **believe** the justices seek and which cues the justices **actually** seek, regarding review.

Though this study expands our understanding of how appeals and Supreme Court review respond to changes in judicial behavior and litigant characteristics, pieces of the *certiorari* puzzle remain. Why do changes in ideology over time effect appeals to the Court but not grants of review?

Why do differences in litigant resources affect only petitions to the Court? If justices are not responding to changes in lower court signals, yet appeals over time significantly increase, then are litigants as strategic as researchers posit? The final chapter of this dissertation discusses the empirical and normative implications of the findings. After discussing the implications of the findings herein, I turn my attention to suggestions as to how we as scholars can improve upon the analysis conducted, to better ascertain the longitudinal and cross-sectional relationship between the federal appeals courts and the Supreme Court. The first section discusses alternative data collection and sampling methods, the second section discusses alternative measurements for judges' ideologies, and the third section discusses alternative pooled time series methods.

Implications of Findings

Empirical

The outcomes of both pooled time series models raise interesting questions regarding how much we researchers know about the behavior of judicial actors and institutions. In terms of litigant resource, the findings of this study lend credence to the theory of litigants as strategic actors, but the conflicting results suggest a more complex relationship between litigating parties and the Supreme Court, and the conflicting results raise more questions. In Chapter 4, an increase in the resource divide between litigants significantly decreased appeals to the Supreme Court, but in Chapter 5 grants of *certiorari* do not significantly change as the resource divide among the petitioners and respondents increases. The finding of Chapter 4 is not surprising: if one side is more advantaged than the other, then they can make better calculations regarding the likelihood of a successful appeal – and consequently decide to either not appeal or settle with their opponent, given the low likelihood of a grant of *certiorari* (or the likelihood of a grant of *certiorari* coupled

with the reversal of the lower court decision). An additional inference is that more advantaged litigants losing in the lower court believe that they have little chance of obtaining victory before the Supreme Court and consequently abandon the judicial “game”.⁷⁶ The implication of this finding is that as the resource gap between the “haves” and “have nots” increases over time, the federal circuit courts will be more likely to become the final arbiter of legal disputes.

What is left unresolved in this research are the specific calculations for determining whether the pursuit of *certiorari* is worthwhile. Given the significance of the variable, it can be inferred that strategic litigants calculate the ideological distance between the circuit court and the Supreme Court, and more advantaged litigants are likely to more accurately determine the preference gulf between these courts and adjust appeals strategies accordingly. However, the lack of significance for the ideological distance variable in Chapter 5 raises the possibility that litigating parties are not accurately assessing the signal valued by the Court. In addition, there is the possibility that it is erroneous to consider aggregate changes in ideological distance as a factor in Supreme Court decision-making regarding *certiorari*. The justices may well consider distance trends as a signal for paying closer attention to petitions from a specific circuit, but in terms of the actual decision to review the justices may look only at the ideological distance between itself and an individual circuit panel. Consequently, an aggregate ideological divide provides little to no information to the justices as to whether they should grant *certiorari*, even if such a divide leads the justices to monitor litigation from a particular circuit more closely.⁷⁷ There is also the

⁷⁶ Still another possibility is that more advantaged winners in the lower court will refuse to settle and allow the less advantaged losers to appeal, in the hope that the Court will grant review and uphold the lower court decision, transforming a regional precedent into a national one, but an investigation of this account must wait for future research.

⁷⁷ There is the additional possibility that our conceptualization of ideology is inaccurate, and this possibility is discussed in subsequent sections.

possibility that changes in legal factors, such as the alteration or abandonment of precedent, over time, affect appeals to the Supreme Court and grants of *certiorari*. If circuit courts fail to conform to the expectation of enforcing established Supreme Court precedent, or if circuits significantly alter Supreme Court precedent, then these changes may provide an additional signal for an appeal to the high court – thereby increasing the likelihood that circuit litigants appeal to the Supreme Court.

The results from Chapter 5, in contrast, fail to resolve the question of which factors affect decisions of *certiorari* over time and across circuits. None of the principal explanatory variables can statistically explain different rates of Supreme Court review. The question here is how to interpret these lack of findings, in terms of their implications for judicial behavior.

One explanation for the results in Chapter 5 is that the greater divide between the “haves” and “have nots” reflects an unmeasured threshold at which resource disadvantage compared to the opposing side does not matter. If petitioners are willing to take their case to the Supreme Court, they have calculated the costs and benefits of a petition’s success, in terms of obtaining a writ of *certiorari* and prevailing on the merits – indicating that these litigants have (or believe they have) the information necessary to accurately predict how the Supreme Court will treat the petition. Additionally, if respondents are less willing to settle and more willing to take the chance that their entreats for *certiorari* denial will go unheeded, then the respondents have (or believe they have) the information necessary to accurately predict the behavior of the Court.⁷⁸

Another hypothetical explanation of the decline in relative advantage’s importance is regarding repeat players, those litigants consistently appearing before the various courts (Galanter

⁷⁸ An alternate explanation, meriting further research, is the possibility that the litigating parties do attempt to settle before a *certiorari* appeal is made and that the failure of these talks at least partially drives appeals.

1974). If repeat players, such as the federal government, are posited to be more advantaged than their opponents – particularly when the opponents are new or “one-shot” players – then the continued presence of these repeat players should significantly decrease *certiorari* over time. This theory is not supported by the findings, however, and one of the reasons may be because there is an increase in the number of “repeat player versus repeat player” petitions (i.e. ExxonMobil versus EPA) and possibly *amicus* participation by a repeat player on behalf of a one-shotter. In such situations, each side has the information necessary to calculate the benefits and costs of a (un)successful petition because the sides have enough experience to know how the Supreme Court is likely to rule (Songer, et al 2000). Consequently, relative advantage ceases to matter. Although past research (Songer, et al 2000; et al) suggests that participation by certain repeat players negates relative advantage, these conditions have still not been examined temporally. Consequently, these conditions must be explored in more depth in future research, in order to determine how often such situations occur, and whether RP versus RP resource advantage has a separate impact on grants of *certiorari* – and appeals to the Supreme Court – from RP versus one-shot matchups.

A second way of interpreting the litigant-based results in Chapter 5 is that the results support the theory that more conservative Courts are more likely to favor more resourced upper dogs. Because more advantaged litigants are better able to send signals to the Court regarding characteristics of a case that may be contrary to the preferences of the Court, the rise in the litigant resource gap means that more advantaged litigants are better able to get the more conservative justices to support review, given that conservative justices are more sympathetic to appeals by resource advantaged petitioners (Black and Boyd 2012).⁷⁹ This interpretation meshes well with

⁷⁹ The converse – that more advantaged respondents prevent review – may also be valid, but this possibility is not measured here, and given that the greater ideological conservatism of the sixth justice increases review, such a situation is unlikely. However, this explanation assumes the Court eyes reversal (and therefore a loss for the responding litigant) when it accepts a case; future research needs to examine this assumption more closely.

the finding that the more conservative sixth justice significantly increases grants of *certiorari*, but the more liberal fourth justice – and the less conservative median justice – do not significantly affect grants.

Regardless of which explanation is correct, if either is correct, the results for litigant advantage and its effect need further unpacking. One unanswered question from this study is whether appeals to the Supreme Court decline because more advantaged litigants decide to settle or because less advantaged litigants refuse to appeal.⁸⁰ Even if the quality of cases appealed to the high court are increasing, this possibility may not preclude the idea that there are many other qualified lower court decisions not appealed to the Supreme Court. If lower court litigants are truly rational actors, then they can and do compute the costs and benefits of an appeal, and as discussed in Chapter 2 more advantaged litigants will settle following a lower court victory if they believe their opponent has a good chance at success on appeal to the high court. Alternately, those litigating parties losing in the lower court may refuse to appeal because they believe their likelihood of success is low. Further study is needed to determine whether lower court losers or winners are driving changes in *certiorari* petitions.⁸¹ As discussed in a subsequent section, there is also the normative concern that resource disadvantaged litigants are being shut out of the judicial process.

Another question regarding the effect of litigant advantage on appeals is whether appeals to the **circuit** courts change over time because more advantaged litigants are settling with the other

⁸⁰ In addition, and as an additional comment on future research on resource advantage in general, it may be prudent to examine whether these relationships are affected by race or gender, particularly regarding discrimination cases, as women in general (Karpowitz, et al 2012; et al) and African-American women in particular (Acker 2006, et al) traditionally suffer greater resource disadvantages in American democracy. Such studies, however, require more information regarding litigant demographics, reporting lacking in court documents outside of racial and gender discrimination cases.

⁸¹ A related concern is whether the likelihood of reversal affects appeals to the Supreme Court and grants of *certiorari* in favor of one set of litigants (i.e. upper dogs) since the Supreme Court theoretically grants petitions with an eye to reversing the lower court

side or because less advantaged litigants are (not) deciding to appeal. Although appeals to the circuits are appeals by right, the empirical evidence suggests that just because litigants **can** appeal an adverse trial court decision does not mean they **will** appeal, due to the requisite transaction costs associated with appeals (Posner 1985; Barclay 1995) and the likelihood of victory (or lack thereof) and the effect of a loss (Cross 2003; Brace, et al 2012). If appeals to the circuits decrease because the more advantaged side is settling or because the less advantaged side refuses to pursue further action, such findings lend support to changes in the degree of resource advantage as an explanation for the decline in appeals to the Supreme Court, because the same effect occurs for appeals to the intermediate federal courts.⁸²

Transitioning to the ideological theories for appeals and *certiorari*, both models present interesting findings – and raise interesting questions. In the appeals model, ideological distance increases petitions for review to the Supreme Court, confirming that litigants examine not only ideology but also previous ideological disagreement between the appeals court and Supreme Court, in deciding whether to appeal. The implication is that at the very least petitioners view ideological distance as an important macro cue that will increase the likelihood the Court will give greater scrutiny to petitions emerging from that circuit (and, by extension, the petition of the litigant). However, it is not implausible to suggest that winners in the circuit courts will not oppose an appeal for *certiorari* to the Supreme Court when the ideological distance between the circuit panel and Supreme Court is narrower, as this lack of ideological conflict lessens the likelihood that the Court will pay closer attention to the petitions from a specific circuit (and thus a lessened likelihood that

⁸² Similarly, future research should parcel out whether the degree of resource advantage enjoyed by a litigant affects the decision to go to trial in the federal system versus settlement.

the respondent's opponent will obtain a writ of review). What must be left to future research is whether this latter theory bears fruit upon empirical scrutiny.

Left unanswered is whether petitions for *certiorari* increase because litigating parties believe the Court is concerned with the panels themselves, or if appeals increase because the panel medians reflect the median of the entire circuit. In other words, does the Court (litigants believe) view median panel judges as reflecting the preferences of the circuit as a whole? There is the alternate possibility that a greater ideological distance between panel median judges in the aggregate and the median judge for the entire circuit may serve as a cue for review, as litigants could use such a divide to signal the Court that there are two conflicting medians, with conflicting preferences, on the circuit, and if the distance is too great then the Court could use higher rates of review as an attempt to get the circuit judges to become more in sync with one another (presumably in a policy direction amenable to the Court), in order to avoid higher audits in the future.

There is also the possibility that using panel median preferences as the measure for circuit ideology is erroneous. The lack of significance in terms of ideological distances' effects on Supreme Court review raises the possibility that the Court does not view ideological disagreement between itself and the median **panel** judges as an important cue for the Court's *certiorari* decisions. This finding does not preclude the theory that the Supreme Court does not examine the median ideology of the circuit, however, as there is the likelihood that the Court views the median judge for the entire circuit as the policy point to observe, in determining whether the policy preferences of a circuit are changing. Such an outcome would support Scott's (2006b) contention that the ideologies of the median judges on a panel do not matter as much to the Supreme Court and that the Court examines the median judge for the entire circuit, as the circuit median may inform the Court more regarding whether the panel decision reflects the ideology of the circuit itself (a macro

level cue) or simply a dissonant panel (a micro level cue). The implication is that litigants in the aggregate may be attempting to send a signal that the Supreme Court does not consider informative: litigants believe that the ideological distance between the panel and Supreme Court medians serves as a cue for greater auditing, when in reality the Court is more interested in the distance between the **circuit** and Supreme Court median ideology.

The implications for the lack of support for the inconsistent circuit behavior hypotheses are less clear. One possibility is that the Court does consider deviations from expected behavior as an important signal, but I did not measure the signal correctly. Part of the goal of measuring deviation from expected decision-making was to test Kestel's (2011b) findings that the Supreme Court is less likely to review conservative lower court decisions when the circuit panels deciding the case are of an ideological mix (i.e. two Democrat appointees and one Republican appointee). Instead of using the mean ideology of the panel medians as senders of signals regarding circuit outputs, the Court and litigants use the average ideological composition of all panels in a circuit as the cue for the palatability of the decision outputs of a circuit. In other words, if the overall decision outputs of a circuit are ideologically liberal, but those outputs are made by panels consisting of mixed ideologies, justices may interpret these outcomes as a cue that a circuit is behaving in accordance with case law, rather than ideology, and lessen the likelihood of a greater review of a circuit. Similarly, litigants may interpret these same outputs as an indicator that the Court is less willing to apply closer scrutiny to petitions coming from that circuit, lessening the likelihood of appeals to the high court.

An alternate implication for differences between ideological outputs and the composition of the courts is that litigants and justices are more concerned with the final ideological outcome in decisions, rather than the ideological preferences of the judges making those decisions. It can be

inferred from the strategic nature of litigants that litigants will be less likely to appeal if they believe the Court will not be receptive to altering the appellate court decision. Consequently, litigant appeals to the Supreme Court will decrease over time because the **outputs** of the circuits are more in line with the preferences of the Supreme Court, even if the median **judges** are not.

The above section discussed ways in which the results of this research lead to new questions regarding changing judicial behavior over time, as well as how the results shed new light on the longitudinal relationships between litigants, federal circuit courts, and the Supreme Court. However, there are also serious normative implications concerning the results. In the next section, I explore two of these implications: whether the significance of ideological factors might affect diffuse support for the federal judiciary among the other branches of government, and the possibility that the growing resource divide among litigants affects the ability of groups to turn to the judiciary, period – and the consequences of this possibility.

Normative Implications

Regardless of whether votes for *certiorari* are the product of justices' individual attitudes, strategic considerations, a desire to settle the law, or some combination thereof, the results in the appeals model suggest that litigants do believe that greater divergence between the justices' and judges' policy preferences increases the likelihood of review by the Court, even if such assumptions are not confirmed in the *certiorari* model. Within the judiciary, if litigants have the perception that decisions to review lower federal court decisions are based more on changing ideological discord between individual circuits and the Court – and less on the merits of an individual decision – then such a view poses problems for judicial legitimacy.

One concern is that less advantaged litigants are being shut out of the Supreme Court because of the ideologically conservative contemporary Court. A partial explanation for the

finding of a significant decline in *certiorari* when the sixth justice is more conservative is that, as shown in the models, the resource divide between the “haves” and “have nots” is increasing over time, and Supreme Court respondents in this study are more likely to be the more advantaged party,⁸³ thus supporting Black and Boyd’s (2012) finding that ideologically conservative justices will favor the more advantaged litigant. If such an explanation proves valid in future research, and if such an explanation applies to the decision to utilize the judiciary, then the implication is that less advantaged litigants will turn to the federal judiciary less frequently, given the perceived advantages and policy monopolies of the “haves”, and if parties are less willing to use the judiciary to redress grievances, then in the long term there may be an issue of the federal courts being rendered impotent in policy disputes because citizens refuse to turn to it.⁸⁴

This concern of legitimacy regarding the less advantaged being (or perceiving to be) denied equal access to justice because of ideology is mirrored in concerns of judicial legitimacy in the American body politic in general. If ideological discord between the high court and lower courts significantly affects appeals, and this policy divide is growing over time, then it raises questions regarding what else this divide might impact. For example, if public trust in the judiciary pivots on a greater divide between what the public expects courts to do and what the public views courts as doing (Scheb and Lyons 2001), then an increase in ideological disputes between the appellate branches of the federal judiciary could lead to a loss of diffuse support for the courts, as the public prefers the courts to use the law to decide cases, rather than the judges’ or justices’ policy preferences. A loss of diffuse support could also make the other branches of the federal government more willing to intervene in the aftermath of a Supreme Court decision because public

⁸³ Among circuit decisions appealed to the Supreme Court, the respondent was classified as the more advantaged litigant 79.06% of the time.

⁸⁴ Criminal cases excepted since such matters must be resolved in some capacity in the judicial system.

dissatisfaction with the Court may reduce the consequences of opposition to judicial decisions, since justices and judges will be perceived (in such a scenario) as “politicians with robes”.⁸⁵ This greater willingness to intervene may over time lead to a serious decline in judicial independence (or at least greater dependence on the other branches), and the consequences of this loss of independence can lead to dire situations, such as corruption (Gong 2004).

The greater – and possibly more consequential – implication of changing resource disparity among litigants and its effect on appeals and *certiorari* mirrors general concerns for democratic institutions in nations with rising socioeconomic inequality. Participation in the democratic process, and the ability to challenge the status quo, is dependent primarily on resources (Solt 2008; Kelly and Enns 2010; etc.). If individuals and groups cannot enter the policy process because they lack the income and resources necessary to obtain access, then they are more likely to perceive policy making institutions as monopolized by the “haves”, at best leading either to maintenance of the status quo or a lack of participation in the process altogether (Schattschneider 1960; Seccombe, et al 1998; Solt 2008). At worst, however, is the prospect of a decline in support for democratic institutions, particularly if support lies less with the principle of democracy and more with whether one’s preferred policies are enacted (Doorenspleet 2012). If the courts are viewed as just another sustainer of the policy monopoly of the “haves”, then the ability of the courts to function as policymakers may cease. Such a crisis could occur with the judiciary if the significant effects of resource inequality continue to increase over time.

All of these implications and explanations, both empirical and normative, assume that the measures and data are not problematic. As previously mentioned, however, the measurements of

⁸⁵ “Gorsuch says judges shouldn’t be ‘politicians with robes’”. *The Washington Post* 20 March 2017. <https://www.washingtonpost.com/video/national/gorsuch-says-judges-shouldnt-be-politicians-in-rob/2017/03/20/ddbbce88-0da0-11e7-aa57-2ca1b05c41b8_video.html>

ideology – and the quantity and quality of sampled data – raise questions as to whether we do have sufficient ways and means of analyzing the relationships between litigants, judges, and the Supreme Court. In the sections that follow, I address these concerns by discussing improvements to the current Court of Appeals Database, as well as the benefits and drawbacks of ideology measurement alternatives to the Judicial Common Space.

Building a New Court of Appeals Database

Created in several phases – the first phase was completed in 1988 – the federal Court of Appeals Database was designed “to facilitate the empirical analysis of the votes of judges and the decisions of the United States Courts of Appeals” (Songer 1996). The database contains approximately 20,000 published decisions across the eleven regional circuit courts and the DC Circuit between 1925 (the first year that the Supreme Court gained complete control of its docket) and 1988,⁸⁶ based on a weighted random sample of the population of published circuit opinions (Hurwitz and Kuersten 2012). In addition to the variables used in this research, the COA Database contains a comprehensive case history of each decision contained therein, including the case’s history in the lower federal and state courts and information regarding all relevant actors in that case (lawyers, deciding judges, etc.).

The value of a federal appeals court database with comprehensive case history cannot be overstated. Nonetheless, the flaws of the current database must be discussed. Although including every single possible variable of interest to researchers into one data set is likely impossible, the COA database does omit certain characteristics of increased importance to researchers. For

⁸⁶ Future work by Donald Songer and others would expand the database to include circuit cases through 2002, and Rorie Spill Solberg would use Shepard’s Citations to trace the appeals process following a circuit court’s initial decision.

example, the database does not include any ideological scores for circuit judges; users must add those scores manually. There are also problems regarding the coding of the decisions prior to 1960: for example, almost 40% of included cases decided between 1925 and 1950 erred in the coding of the ideological direction of a circuit court decision, compared to just 10% after 1960 (Epstein, et al 2013).

There is also an issue with which circuit decisions may be sampled. The current Court of Appeals database does not include circuit decisions not published in the *Federal Reporter*. The given (and not invalid) reason for these omissions is that unpublished opinions are done when cases are comparatively non-controversial (i.e. the applicable legal rule is well-established and clear), but the problem with only permitting published opinions to be sampled ignores the fact that almost all circuit decisions are unpublished: as much as 75% of a circuit's decisions in a given year are not submitted for publication in the *Federal Reporter* (Weisgerber 2008). In addition, the rules for opinion citing have changed since the COA data set was first published. At the time the COA database was created, unpublished decisions could not be cited as binding precedent in the federal courts, but with the creation of Rule 32.1 of the Federal Rules of Appellate Procedure in 2006 litigants and courts may now cite unpublished decisions in making their arguments or opinions.⁸⁷ Although only a thorough investigation of unpublished circuit decisions will determine whether for the purpose of research these omissions are egregious or harmless, the lack of inclusion of unpublished opinions may constrain our ability to make generalizable inferences regarding the choices judges make in deciding cases, since the current database has a degree of

⁸⁷ Under Rule 32.1, courts are not **required** to designate their opinions as publishable in the *Federal Reporter*; the rule simply states that courts may not forbid the use of an unpublished opinion in citations. Furthermore, the rule does not apply retroactively: the rule applies only to those decisions issued after January 1, 2007, <https://www.law.cornell.edu/rules/frap/rule_32.1> .

sampling bias as a consequence of the omission of unpublished circuit decisions (Hurwitz and Kuersten 2012).

The most consequential concern with the Court of Appeals Database is the small number of cases sampled. From 1925 to 1960, each circuit contained a random sample of fifteen decisions, and from 1961 to the present, each circuit contained a random sample of thirty decisions. Such a small sample was sufficient when the circuits heard very few cases: a cursory examination of the volume of published opinions between 1925 and the mid-1950s reveals that almost all circuits published fewer than 300 decisions per year (Songer 1996). By the 1960s, however, the volume of decisions published by the federal appellate courts grew precipitously, and by the beginning of the analysis herein no circuit had fewer than 150 published decisions per year, with the majority of circuits having more than 250 published decisions in a given year. At best, the current data set samples (when weights not included) around 15% of a circuit's published decisions in a given year, and at worst the data set samples approximately 3% of a circuit's published decisions.⁸⁸ By confining the sample to such a small number of cases, it is difficult to accurately assess legal, ideological, and strategic factors in a circuit's decision making, particularly at the macro level.

My solution is simple: create a new Court of Appeals Database, with a larger sample of cases for each circuit per year. The sample should be weighted without replacement so that larger circuits are not overrepresented in the data, but the weights should be designed in a way to allow a higher number of samples from the case population. If an investigation into unpublished decisions after 2006 indicates that such decisions provide "useful"⁸⁹ information regarding judicial

⁸⁸ The proportional weight for each circuit from 1925 to 1960 is .1, while the proportional weight for each circuit from 1960 to the present is .08. For a more detailed explanation of how these weights were calculated, please see Songer (1996).

⁸⁹ The term "useful" is defined agnostically here, referring to information contained in a decision that might be of general use to researchers, regardless of individual research questions.

characteristics, then future additions of the new database should allow unpublished decisions in the case population to be sampled along with published decisions.

The task of determining which variables to include in the new data set is challenging, given that it is likely impossible to account for every possible research question scholars may seek to answer. The current Court of Appeals data set contains approximately 500 variables, ranging from informational (case citation, year, etc.) to those variables of most interest to researchers (how many *amici* filed, ideological direction of a decision, etc.). I shall make no pretense as to which of the variables in the current COA database should carry over to the new dataset, but there are several new variables that should be included, including measures for the ideology of circuit judges (discussed below), relevant demographics about the judges (race, gender, etc.), and the variables included in this research which are not in the current COA database.

Measures of Judicial Ideology

The Judicial Common Space

The measure used for both Supreme Court justices and circuit court judges is the Judicial Common Space (JCS). The JCS's foundation rests on two different measurements of judicial ideology. For justices, their ideal points are based on a Bayesian Markov Chain Monte Carlo (MCMC) method, using the previous year's judicial votes (for justices) to calculate a measurement of contemporary ideal points for justices (Martin and Quinn 2002). For lower court judges, the method used is the 2nd dimension of the Poole and Rosenthal ideal point estimates for appointing presidents or senator(s) (Giles, et al 2001). Because the scales for these scores are different for judges and justices, Epstein, et al (2007b) use an arctangent transformation of the Martin-Quinn scores to place the justices on the same measurement plane as the lower court judges.

Though ubiquitous in the study of the judiciary, there are numerous criticisms of the scores. The principal criticisms of the JCS are the tautology of using vote choice to explain vote choice and the unidimensional policy preferences assumption (Farnsworth 2007; Lauderdale and Clark 2012), as well as the inability to account for legalistic bases independent of unidimensional ideology (Bailey and Maltzman 2008). Additionally, a temporal comparison of votes (for instance, votes for desegregation in 1950 and 1980) is possible only if the “distribution of case characteristics is constant over time” (Ho and Quinn 2010) – problematic, given that there is evidence that case characteristics do change over time (Baum 2013). There is also the fact that the JCS scores for circuit judges are fixed at a judge’s time of entry onto the court, despite the evidence that a judge’s preferences may change as their career progresses (Hettinger, et al 2003b; Kaheny, et al 2008). By not accounting for the possibility of variation in policy preferences and voting behavior among circuit judges, scholars are hindering their ability not only to track changing policy preferences in the circuits over time but also to determine the policy preferences of the circuits accurately. The discussion that follows evaluates the alternatives to the Judicial Common Space and the benefits and drawbacks of each approach.

Percent Liberal/Percent Conservative

I begin the discussions of alternative measurements of ideology with the simplest measure: the percentage of judges’ votes classifiable as “liberal” or “conservative”.⁹⁰ Because so many judicial decisions correspond to a layman’s definition of liberal or conservative (decision restricting felons’ voting rights is conservative, et al), the majority of judicial votes can be included in a computation of the percentage of liberal votes on a particular case type (criminal justice,

⁹⁰ I use the term “percent liberal” predominantly in the subsequent discussion, as almost all studies using the ideological percentage of votes to explain vote choice (Baum 1988; Epstein, et al 1989; etc.) examine the percentage of votes corresponding to liberalism. Bailey (2013) is a notable exception to this trend.

desegregation, etc.). Beyond its easy computation, the percent liberal method of judicial ideology lends itself to changes in judicial ideology over time among judicial actors: as their votes on issues become more – or less – liberal over time, it is not unreasonable to suggest that a judge or justice is becoming more – or less – liberal over time.

The ease of the percent liberal or percent conservative measurements is attractive for research. It is the simplicity of this measure, however, that makes it suboptimal for the study of judicial policy preferences. One shortcoming of the percent liberal measure is its inability to capture the totality of judicial vote choices. Many judicial decisions – such as 1,166 of the appellate decisions in this sample – are ideologically mixed, and other decisions simply do not correspond clearly to either a liberal or conservative policy (Harvey and Woodruff 2011). These mixed decisions may still be important to individual judges or justices, yet such decisions would be omitted from the final analysis – posing problems as to the full extent of judges’ preferences.⁹¹ Similarly, if cases become more complex over time, then a simple measure of whether a judge or justice voted liberally or conservatively may not reflect the value placed on such a decision by that actor – or the liberalness (conservativeness) of a decision is overly simplified.

Although an issue ubiquitous to any ideological measure, there is the problem of defining a “liberal” or “conservative” decision. “Like pornography, we may know a liberal vote when we see it, but like pornography it is difficult to devise clear criteria.” (Bailey 2013) As stated in Chapter 3, this study used the Spaeth (2015) criteria for a “liberal” vote or decision, and, generally, this measure assigns the correct ideological value to a decision (i.e. a decision that overturns a conviction for a violation of the 4th Amendment). As Harvey and Woodruff (2011) and Bailey

⁹¹ If many of these decisions are unanimous, the problem becomes worse because not only does one have decisions not corresponding to a clear delineation between “liberal” and “conservative” but also one it is more difficult to ascertain any changes in policy differences among judges and justices.

(2013) point out, this general accuracy still belies situations in which the ideological coding of a decision may be inaccurate or subjectively biased: *Citizens United*,⁹² for instance, is classified as a “liberal” decision because it expands Free Speech protections, even though it struck down a campaign finance restriction, favored a conservative organization, and was authored by an ideologically conservative majority. There is also the fact that the percent liberal measure tells us little as to **why** a particular policy position was chosen: for example, a “liberal” vote in a circuit court decision may have nothing to do with a judge’s policy preferences, due to the higher expectations of collegiality on many appellate courts (Hettinger, et al 2003a; Kestel 2011a; etc.) and the mundane nature of many appeals.

Segal-Cover Scores

A more sophisticated measure of judicial ideology is the pre-nomination score developed by Jeffrey Segal and Albert Cover. It is well established in judicial scholarship (Giles, et al 2001; Epstein, et al 2007b; Carp and Stidham 2016; etc.) that presidents and senators seek judicial nominees who conform to the ideological position of the nominator, and as a consequence these actors search for cues as to whether a possible nominee will possess policy preferences similar to the president or senator(s). Using content analysis, Segal and Cover (1989) used editorials in major newspapers (*New York Times*, *Washington Post*, etc.) as a proxy for a nominee’s ideology, coding the conclusions of editorials on a liberal-conservative scale.⁹³ After conducting a regression analysis of the confirmed justices’ subsequent votes on civil liberties issues, Segal and Cover (1989) find a strong correlation between the justices’ measured ideology prior to confirmation and

⁹² 558 U.S. 310 (2010).

⁹³ The reason the authors did not use the voting behavior or speeches of senators or nominees, respectively, during the confirmation hearings is because of the lack of true information revealed in such behavior: Sandra Day O’Connor, for example, refused to answer almost all the questions posed to her during her confirmation hearings.

their votes,⁹⁴ and a later analysis by Segal, et al (1995) demonstrated the utility of the Segal-Cover scores in analyzing justices' votes in economic cases.⁹⁵

The Segal-Cover scores are attractive measures for several reasons, particularly the avoidance of the tautological problems of the JCS and percent liberal measures, as the Segal-Cover scores are based on the perceived ideology of a justice prior to nomination; the ease of classifying newspaper editorials on a liberal-conservative scale; and the accuracy of Segal-Cover scores in the extant literature, in terms of predicting voting behavior (Brenner and Arrington 2001; Hurwitz and Stefko 2004). However, the utility of the Segal-Cover scores as a predictor of Supreme Court voting behavior is confined to civil rights and liberties and economic cases: the utility of the Segal-Cover scores across other issues is severely diminished, primarily due to the fact that civil rights and liberties and (to a lesser extent) economic cases are more salient to justices' policy preferences (Epstein and Mershon 1996; Hurwitz and Stefko 2004). In addition, Segal-Cover scores are fixed at the time a justice is confirmed to the Court, despite evidence of ideological drift (Epstein, et al 2007a; Owens and Wedeking 2012; etc.). The most troublesome aspect of the Segal-Cover scores is the difficulty in using the same measure to calculate the ideological scores for circuit court nominees, as the lack of public knowledge of, and interest in, these nominations makes it highly unlikely that there will be numerous editorials regarding a circuit nominee's policy positions – making it impossible to measure a judge's ideology ad hoc.

Bridge Preferences

⁹⁴ Subsequent updates now contain the Segal-Cover scores for all Supreme Court nominees up through Elena Kagan <<http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf>> .

⁹⁵ It should be noted that, although this study did find a significant correlation between Segal-Cover scores and justices' votes in economic cases, the relationship was weak.

Another possible alternative to the JCS is the use of bridge preferences: cardinal, inter-institutional measures of ideology designed to measure changes in ideology over time as the agenda changes through the use of Bayesian Markov Chain Monte Carlo via a Gibbs sampler (Bailey 2013). In addition to the aforementioned issues with Martin-Quinn, another problem with the Martin-Quinn scores (and, by extension, the JCS scores) is they can be treated only as ordinal measurements, rather than cardinal: the JCS/MQ scores can be interpreted only as a rank-order, rather than on the actual distance from a set point (most often zero) (Ho and Quinn 2010). To give a practical example of the consequence of this distinction, the Martin-Quinn scores hold that the early-1970s Burger Court – the one that decided *Furman v. Georgia*⁹⁶ and *Roe v. Wade*⁹⁷ - was one of the most conservative Courts in history, while the post-*Roe* Burger Court was one of the most liberal in history, despite evidence to the contrary (Bailey 2013).

There are two principal sources of bridging information, allowing for a comparison of how the individual justices' views (do not) change over time. The first source is a stated position by the justice as to an earlier Court's decision on a particular matter (i.e. "*Roe v. Wade* was wrongly decided" or "The *Chevron*⁹⁸ precedent was one of the Court's finest moments") (Bailey 2013). The benefit of this information is it can explicitly place the position of a justice (and the Court, in the aggregate) relative to the ancestral Court. The second source is the relative ideological position of a decision over time. For example, it can be reasonably inferred that if a justice voted liberally

⁹⁶ 408 U.S. 238 (1972).

⁹⁷ 410 U.S. 113 (1973).

⁹⁸ 467 U.S. 837 (1984).

in the *Miller v. Alabama*⁹⁹ case, they would vote liberally in the *Graham v. Florida*¹⁰⁰ case, as *Miller v. Alabama* is to the left of the *Graham* ideal cut-point (Bailey 2013).¹⁰¹

There are several key advantages of bridge observations over other measurements of judicial ideology. One advantage of bridge observations is the ability to control for changes in the judicial agenda over time. By using justices' positions on previous cases decided by the Court, and the ideological position of a justice relative to previous Court decisions, we can establish more objective benchmarks for measuring ideology – and possible ideological drift – over time and across different issues.

A further advantage of the bridging method is its use of covariates to account for the differing weights judges may place on certain factors (Sixth Amendment cases, *stare decisis*, etc.).¹⁰² This inclusion is important for at least two reasons. One reason is that there are considerations exogenous to the immediate case for justices to consider. For example, justices (and to a lesser extent judges) may make their decisions with an eye to how the other branches will react (Peters 2007; Calvin, et al 2011) or (in the case of justices) the possibility of a negative lower court reaction to the precedent (Klein and Hume 2003; Westerland, et al 2010). By including these factors, scholars can better assess both whether ideology is the most important factor in judicial decision-making and whether ideology still changes over time as exogenous factors change over time.

⁹⁹ 567 U.S. ___ (2012), ruling that a sentence of life without parole for minors was unconstitutional.

¹⁰⁰ 560 U.S. 48 (2010), ruling that the death penalty for minors was unconstitutional.

¹⁰¹ It should be noted that Bailey (2013; p. 15) does not attempt to “time travel” in these bridge observations (he is not “trying to say what Justice Holmes would think of GPS surveillance”, for instance). Rather, the purpose of these bridge observations is to ascertain the ideological position of a contemporary justice relative to the Court (or justice) establishing a precedent.

¹⁰² As Bailey (2013) makes clear, the list of covariates used in this study is not meant to be comprehensive, and future scholars are free to add their own relevant covariates.

A second reason for the importance of including the covariates is because the strength of the weights – or even which weights are considered – will vary among individual justices and possibly judges. Justice Stevens, for instance, may place more importance on whether the appeal involves the First Amendment than on whether members of Congress want the Court to rule in a particular way. Consequently, if Justice Stevens appears to vote more liberally in 1999, as opposed to 2000, Justice Stevens may have voted more liberally because there were more First Amendment appeals in 1999 – not because he took a subsequent conservative turn. By not assuming that the non-ideological preferences of the justices are monolithic, researchers can more accurately assess the impact of ideology on the Court's decisions.

There are several other benefits to the bridge preferences of note. If bridge estimates are applicable to the lower federal courts, there is the possibility of comparing changes in ideal points among circuit judges to changes in ideal points among Supreme Court justices – shedding more light on the ideological relationship between the circuit courts and Supreme Court. An additional benefit of bridge preferences is the bridge preferences take an agnostic approach to ideology, particularly after including the covariates – avoiding the confirmation bias issue in the JCS scores. There is also the possibility that the included covariates will allow scholars to include unanimous decisions in the calculation of judges' ideal points – of crucial importance if the bridge preferences are to be applied to the courts of appeals.

The benefits of the bridge preference method are legion, but there are several drawbacks to this approach. One is the mundane nature of appeals to the circuit courts. In calculating ideal point estimates using bridge preferences, Bailey (2013) restricts the eligible justices' votes to

decisions considered “important”.¹⁰³ Although this distinction is not necessarily problematic for a court with complete control of its docket (and thus very few appeals heard), this distinction is more egregious in courts with little control of their agenda. By restricting the inclusion of circuit decisions to “important” ones, researchers risk an inaccurate estimation of ideology because the case population will be extraordinarily small.

There is also the relative simplicity of the decisions selected for inclusion in the Bailey (2013) analysis. The author restricts the votes included to those falling on a conventional left-right split on the Supreme Court. However, this restriction ignores the nature of many decisions made by the courts, which are ideologically mixed or favor both parties in some way. By failing to include decisions that do not fit onto a conventional liberal-conservative scale, we risk removing an important explanation for year-to-year variance in judges’ voting habits.

Using bridge preferences also assumes that we know why a circuit judge was given the task of writing the final opinion. One of the woefully few studies of opinion assignment in the circuit courts (Farhang, et al 2015) finds that gender and ideology matter most as to whom receives the task of writing the final opinion of the court, but this study examined only sexual harassment cases, and the ideological aspect of the findings applied only when the plaintiff (the person alleging sexual harassment) won in the court of appeals. In addition to a lack of research regarding opinion assignment, there is the possibility that greater collegiality on the appellate courts will negate attempts to place a judge’s policy preferences in a final opinion. Put simply, a judge signed on to a final appellate court decision not because the majority decision conformed to his or her policy preference but because the challenge to the judge’s preference was not significant enough to

¹⁰³ An “important” decision in his study is one cited in the *Harvard Law Review*’s annual report, classified as a “landmark” case in the Cornell Legal Information Institute’s database or the *Congressional Quarterly*’s key case list, or mentioned by a congressperson, Executive, or retired justice.

mandate deviation from the other judges' decision. Such a situation makes preference comparisons with the other branches and the Supreme Court impossible.¹⁰⁴

Textual Analysis

The final measurement possibility I will consider is the use of software to analyze the written opinions of the courts. An important question in judicial research is how judges and justices justify the decisions they make. If it is true that ideology is not the sole consideration in judicial decision-making, then there must be some form of legal justification (precedent, et al) to justify the final vote on the merits. Furthermore, the decisions made by the Supreme Court are (or at least should be) binding on the lower federal courts, and in new or changed precedents, the decisions of the high court come with instructions – whether vague or explicit – as to how the lower courts should proceed in subsequent cases. For example, the Supreme Court can establish a “bright-line” rule, in which there is little flexibility for the lower courts to deviate from the precedent established by the Court, thus providing a convenient signal for monitoring non-compliance among the lower courts (Lax 2012).¹⁰⁵ By focusing so much on whether the final vote is “liberal” or “conservative”, rather than the stated reasons for the majority’s decision, we risk conflating other important considerations (*stare decisis*, et al) with attitudinal preferences. There is also the need to control for the briefs in the case, whether from the actual parties (Corley 2008, et al) or through *amicus curiae* briefs (Collins 2008, et al), as briefs may play a role in shaping the final content of a court’s opinion.

¹⁰⁴ An alternative would be to measure judges’ ideologies based only on those opinions authored by the judge. While such a selection choice works well in smaller circuits with few judges (and thus more opportunities for judges to author opinions), this selection would likely provide few measurement points in larger circuits, in which a judge may write very few opinions in a year.

¹⁰⁵ There is a plausible question as to whether the establishment of a “bright line” rule or the more flexible “balancing test” is centered around ideological considerations, but this question must wait for another study.

A potential solution to this concern is the use of text mining software, such as Wordfish or WCopyfind. The purpose of text mining software is to utilize computer programs capable of converting printed text to analyzable data. Because the use of these sophisticated programs is still in its infancy, precious few studies of the judiciary have utilized this software. Corley (2008) uses a text mining software to determine how much the parties' briefs influence the majority opinion of the Supreme Court, while Corley, et al (2011) use plagiarism software to ascertain whether the opinions of the lower courts heavily influence the majority opinion of the Supreme Court. As of this writing, these are the only two extant studies (to my knowledge) which use text mining software, but the findings of both studies show promise: both studies support their respective hypotheses that the briefs of litigants and the opinions of the lower courts influence the final content of the Supreme Court's opinion.

Using software of some type to analyze and quantify the decisions of the courts has several notable advantages over other measures of judicial ideology. One advantage is that using the content of court opinions to measure ideology avoids the problem of tautology found in the use of vote choice. Another, theoretical advantage of text mining software is the ability to more accurately assess the influence of strategic or legalistic considerations in judicial decision-making. For example, text mining could more accurately determine to what extent key external actors, such as Congress, influence the decision to uphold or strike down a congressional statute by using software to determine how often the Court invokes some type of deference to the other branches, and under which conditions such deference will be cited. Additionally, text mining – specifically, the use of plagiarism software – could enhance our understanding of cues in the federal judiciary by, for instance, expanding the findings of Corley, et al (2011) to examine whether the Court will more consistently incorporate some lower courts' opinions more than others.

An additional benefit of using text mining is expanding the number of cases used to code for ideology. One of the common traits of ideological measurements (Giles, et al 2001; Martin and Quinn 2002; etc.) is that they examine only non-unanimous votes to obtain a measure of ideology. The problem with measuring non-unanimous decisions alone is that doing so ignores the fact that almost all of the decisions in the circuit court – and many of the decisions in the Supreme Court – are unanimous. What text software can (theoretically) do is a search for the common rationale for the decision reached and – with specifications from the researcher – code these printed rationales into quantitative data, which can then be used to form a measure of ideology. By being able to code non-unanimous cases, we can expand the number of cases available for inclusion.

The use of text mining software for developing a more comprehensive measure of ideology – as well as the software’s other possible applications – is intriguing, but there are several issues which may arise. One concern is that researchers will still need to define “liberal” or “conservative”, which can lead to at best different definitions of ideology and at worst confirmation bias. Another concern is the information on ideology contained in written judicial opinions. One of the reasons voting behavior is used as the measure of judges’ “revealed” preferences is because the language in published decisions is highly legalistic, making it difficult (at least at this stage) to ascertain specific instances in which ideology can be distilled from opinion content. For example, would one consider a decision invoking judicial restraint ideologically liberal or conservative?

In addition to the concerns regarding the language of opinions, there is the issue of the quality of opinions. At the lower court levels, in particular, many of the decisions of the judiciary are relatively mundane (case precedent is unambiguous, et al). Consequently, running a text mining for such opinions will tell us very little about the preferences of the judges. Any measure

of judicial ideology involving text mining would also need to differentiate between “significant” and “not significant” decisions for coding – possibly leading to subjective bias in which cases are included in an ideological measure.¹⁰⁶ Text mining also poses the same problem as bridge preferences, in that the opinions of a circuit panel may not be the revelation of the true preferences of the majority opinion writer, due to greater expectations of collegiality and the influence of other factors, such as gender and issue expertise (Hettinger, et al 2003a; Kestellec 2011a; Farhang, et al 2015).

Conclusion

The research conducted herein sheds new light on the nature of appeals and grants of Supreme Court review across time and federal appellate courts. This study is the first of its kind, and the results are decidedly mixed as to which factors – ideological or otherwise – influence the decisions made by litigants, circuit court judges, and Supreme Court justices. Whether these results are the result of the underlying nature of judicial actor decision-making – or the product of sub-optimal data or analysis – remains to be seen, but the temporal, cross-sectional nature of appeals and *certiorari* cannot – and should not – be ignored. As long as the judiciary remains an institution with no self-starting mechanism – and with a partisan divide mirroring the general partisan divide in government and American society – the temporal, cross-circuit behavior of germane actors is of great importance, and the results of this research indicate that there is still much to be learned regarding the choices made by some of the most powerful groups in American government, particularly the signals sent by these actors over time. These new research questions, however, are

¹⁰⁶ Whether this concern is fatal or severely damaging to the use of text mining as a method of computing ideology is debatable, given that the same criticisms can be leveled at other conceptualizations of decision “importance” (Bailey 2013, et al), but this concern should still be mentioned.

part of the adventure of empirical research: more research can lead to better answers, which in turn leads to better solutions to the policy problems facing America.

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Appendix

Table I: Resource Advantage Scores

Litigant	Counsel	Score
Person	Public	1
Person	Private	2
Business	Public	3
Person	Interest Group	4
Association	Private	5
Local	Private	6
Association	Interest Group	7
Business	Private	8
Business	Group	9
Person	State	10
Person	Federal	11
State	Private	12
Local	State	13
Business	State	14
Business	Federal	15
State	State	16
State	Federal	17
Federal	Federal	18

Table II: Summary of Which Side is More Advantaged and Times of Victory

Which Litigant More Advantaged?	Did Advantaged Litigant Win in Appeals Court?			Total
	Yes	Mixed	No	
Appellee	4,377 (65.10%)	715 (10.63%)	1,632 (24.27%)	6,724 (79.80%)
Appellant	819 (48.12%)	220 (12.93%)	663 (38.95%)	1,702 (20.20%)
Total	5,196 (61.67%)	935 (11.10%)	2,295 (27.24%)	8,426 (100.00%)

Table III: Summary Table of Supreme Court Litigant Advantage and *Certiorari* Grants

Did Supreme Court Grant *Certiorari*

Which Party More Advantaged?	No	Yes	Total
Petitioner	295 (66.00%)	152 (34.00%)	447 (20.94%)
Respondent	1,523 (90.23%)	165 (9.77%)	1,688 (79.06%)
Total	1,818 (85.15%)	317 (14.85%)	2,135 (100.00%)

Table IV: Summary of Ideological Direction of Disposed Cases in US Courts of Appeals

Circuit	Ideological Direction Of Decisions			
	Liberal	Mixed	Conservative	Total
DC	290 (39.46%)	100 (13.61%)	345 (46.94%)	735 (8.72%)
1st	187 (25.90%)	87 (12.05%)	448 (62.05%)	722 (8.57%)
2nd	226 (32.52%)	106 (15.25%)	363 (52.23%)	695 (8.24%)
3rd	266 (38.22%)	123 (17.67%)	307 (44.11%)	696 (8.26%)
4th	202 (30.47%)	97 (14.63%)	364 (54.90%)	663 (7.87%)
5th	165 (24.02%)	79 (11.50%)	443 (64.48%)	687 (8.15%)
6th	221 (31.44%)	112 (15.93%)	370 (52.63%)	703 (8.34%)
7th	169 (23.41%)	74 (10.25%)	479 (66.34%)	722 (8.57%)
8th	153 (21.37%)	78 (10.89%)	485 (67.73%)	716 (8.50%)
9th	256 (36.36%)	116 (16.48%)	332 (47.16%)	704 (8.36%)
10th	229 (32.86%)	90 (12.91%)	378 (54.23%)	697 (8.27%)
11th	212 (30.90%)	104 (15.16%)	370 (54.94%)	686 (8.14%)
TOTAL	2,576 (30.57%)	1,166 (13.84%)	4,684 (55.59%)	8,426 (100.00%)

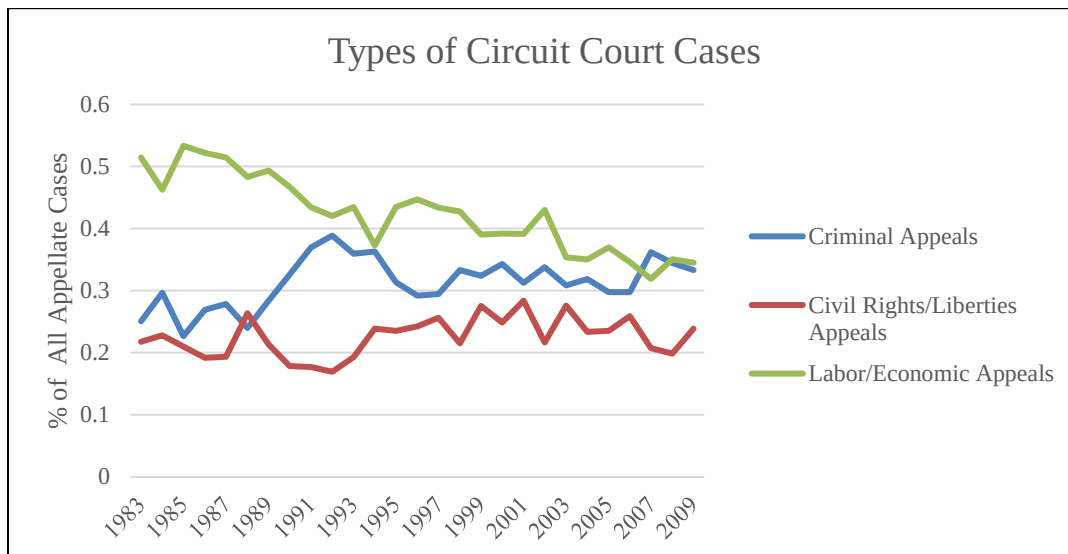


Figure I: Types of Federal Circuit Cases, 1983-2009

Figure II: Rates of Circuit Cases Appealed to the US Supreme Court – Circuit Trends, 1983-2009

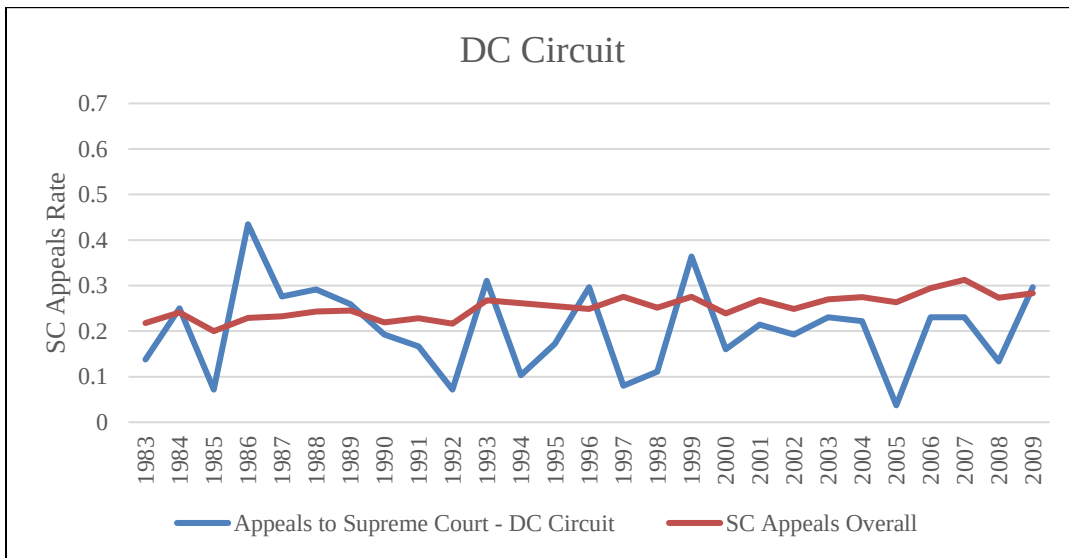


Figure II-A – DC Circuit

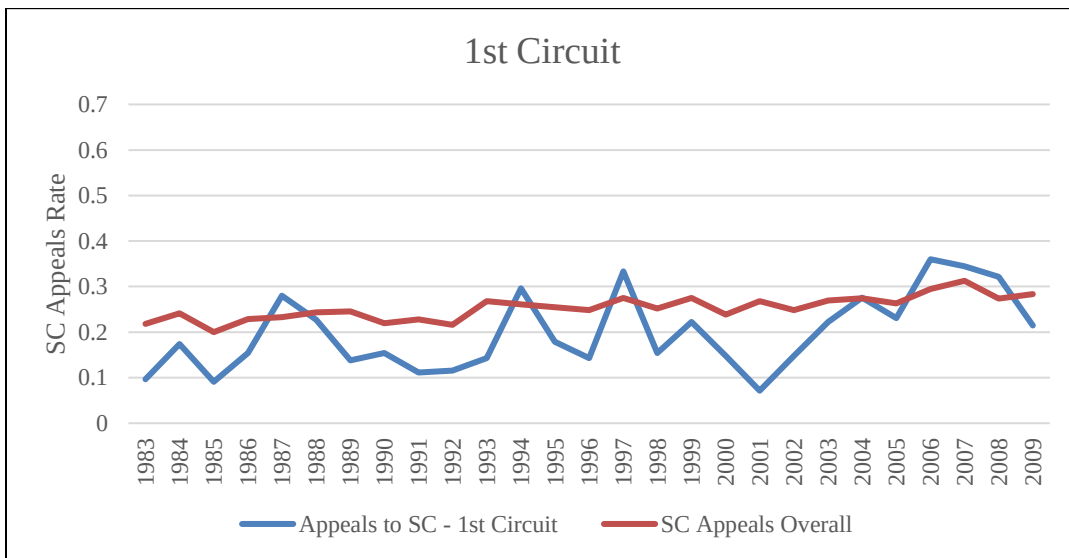


Figure II-B – 1st Circuit

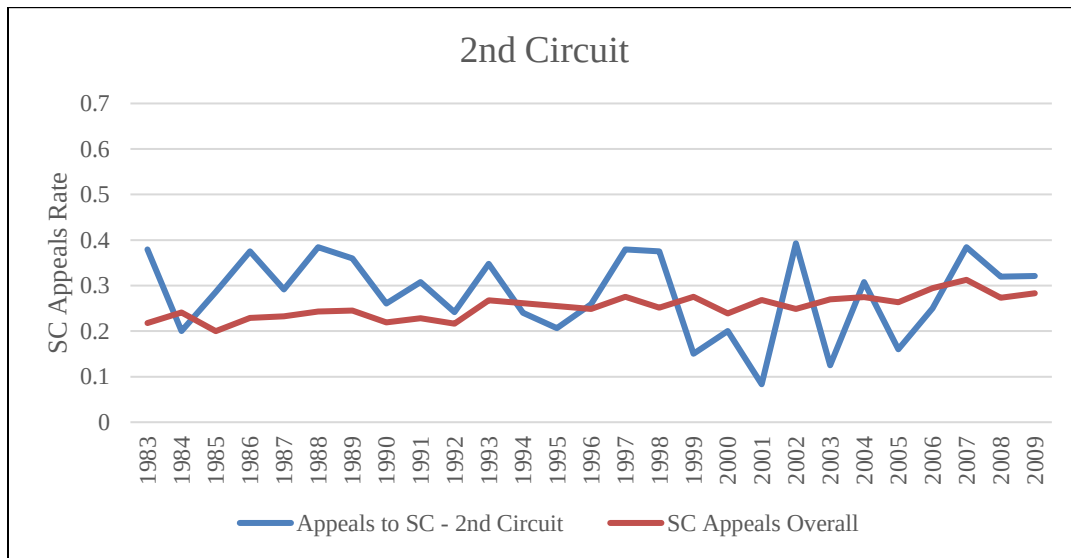


Figure II-C – 2nd Circuit

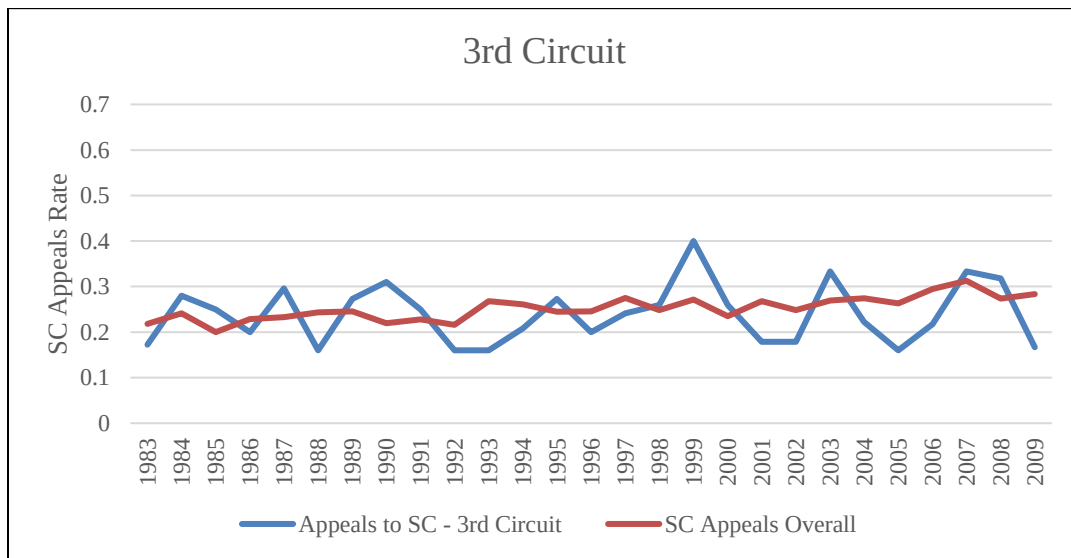


Figure II-D – 3rd Circuit

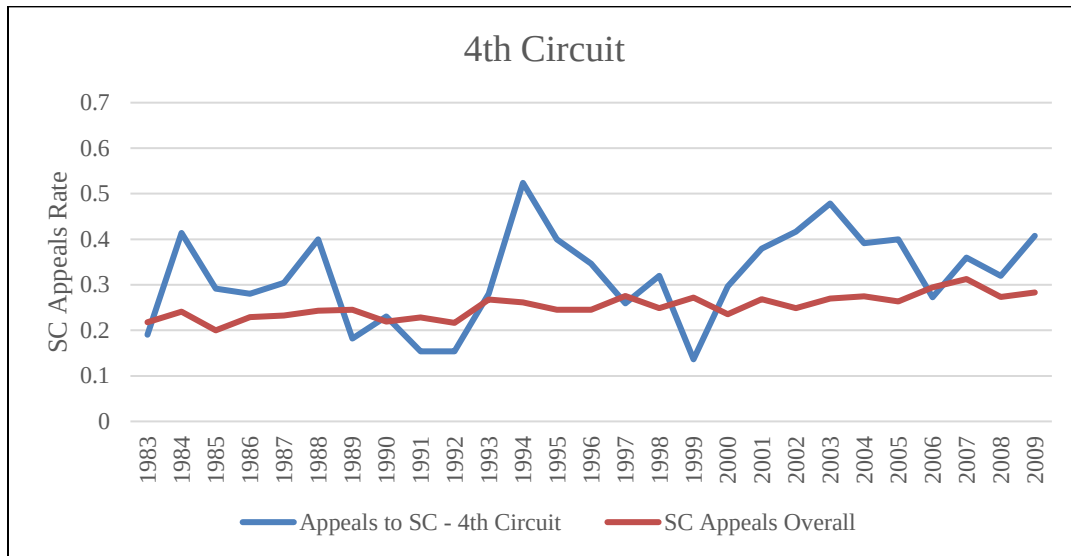


Figure II-E – 4th Circuit

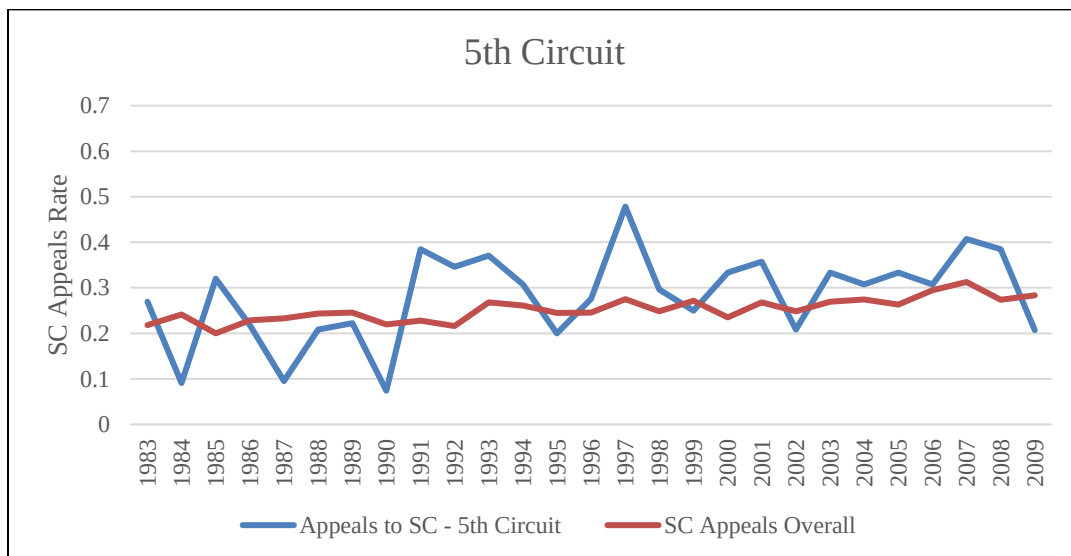


Figure II-F – 5th Circuit

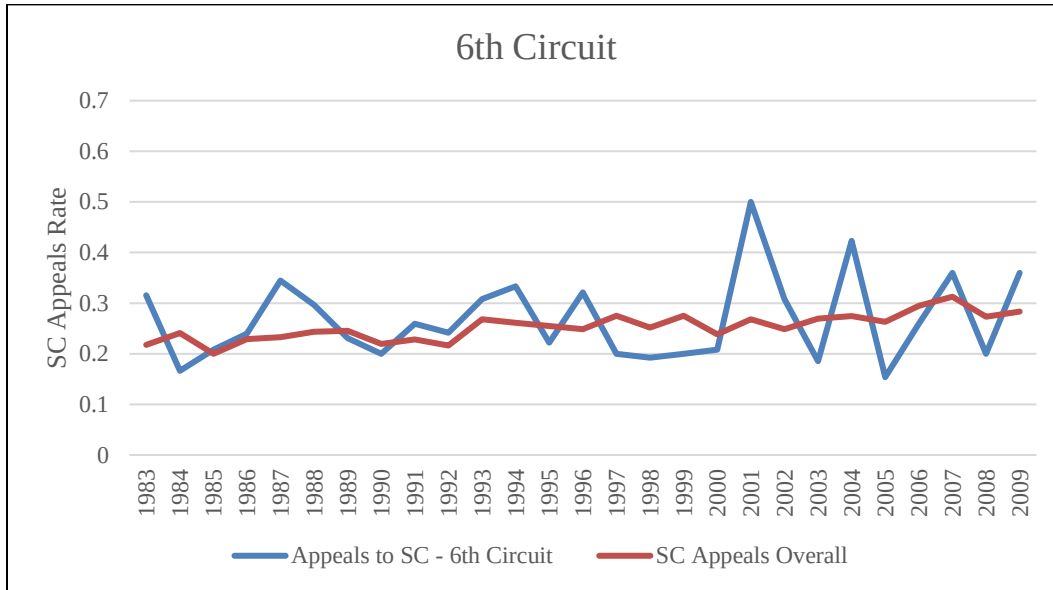


Figure II-G – 6th Circuit

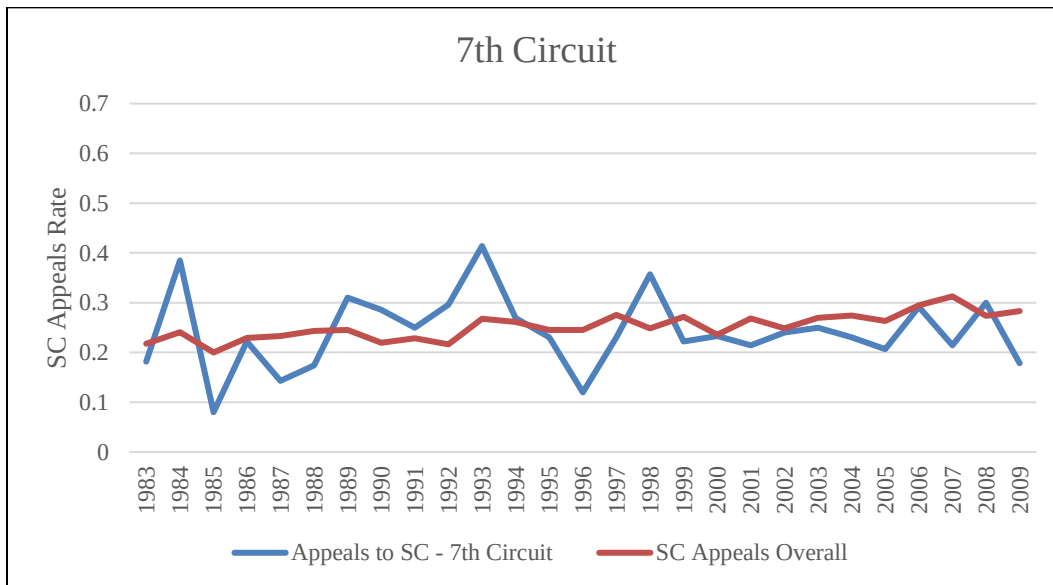


Figure II-H – 7th Circuit

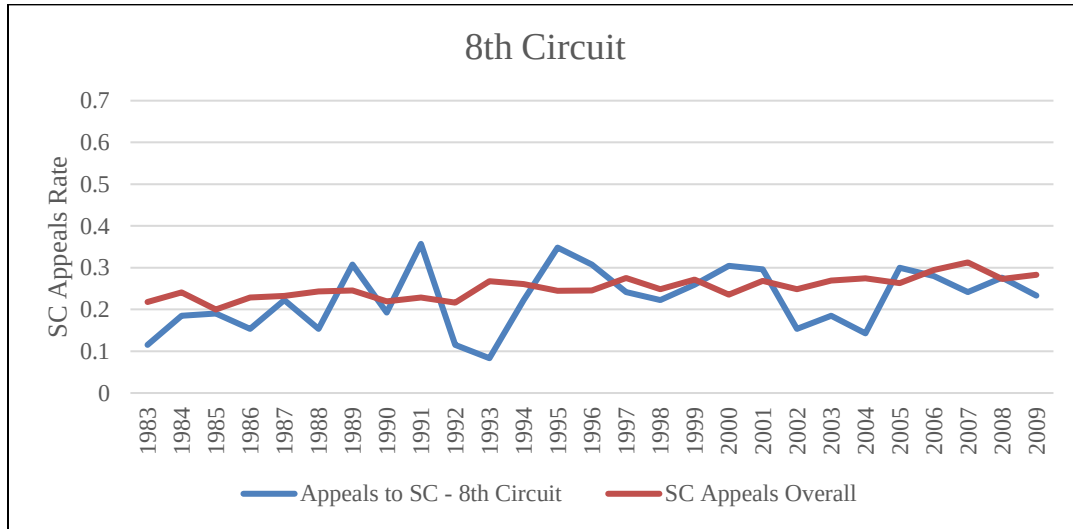


Figure II-I – 8th Circuit

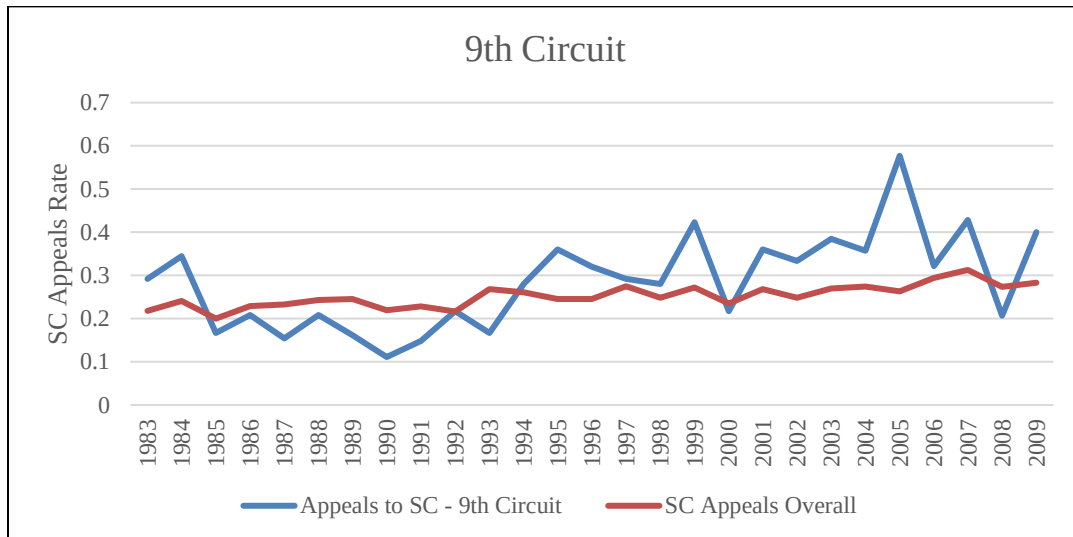


Figure II-J – 9th Circuit

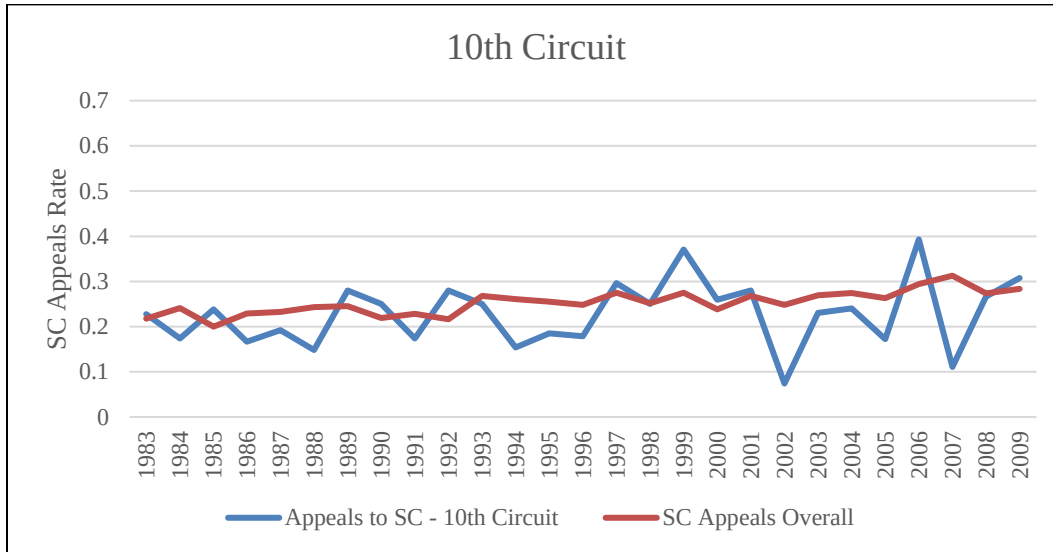


Figure II-K – 10th Circuit

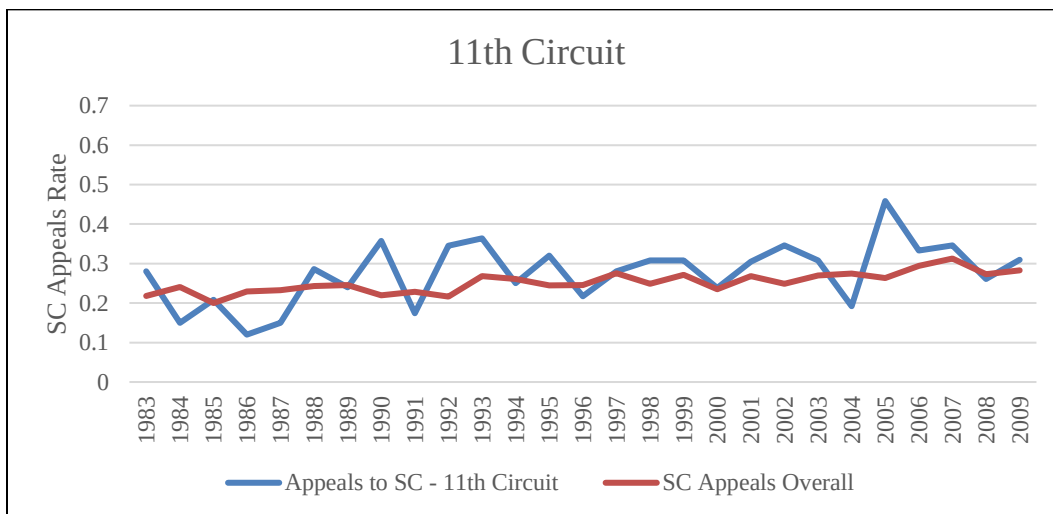


Figure II-L – 11th Circuit

Figure III: Mean Gap in Resource Advantages Among Circuit Litigants, 1983-2009

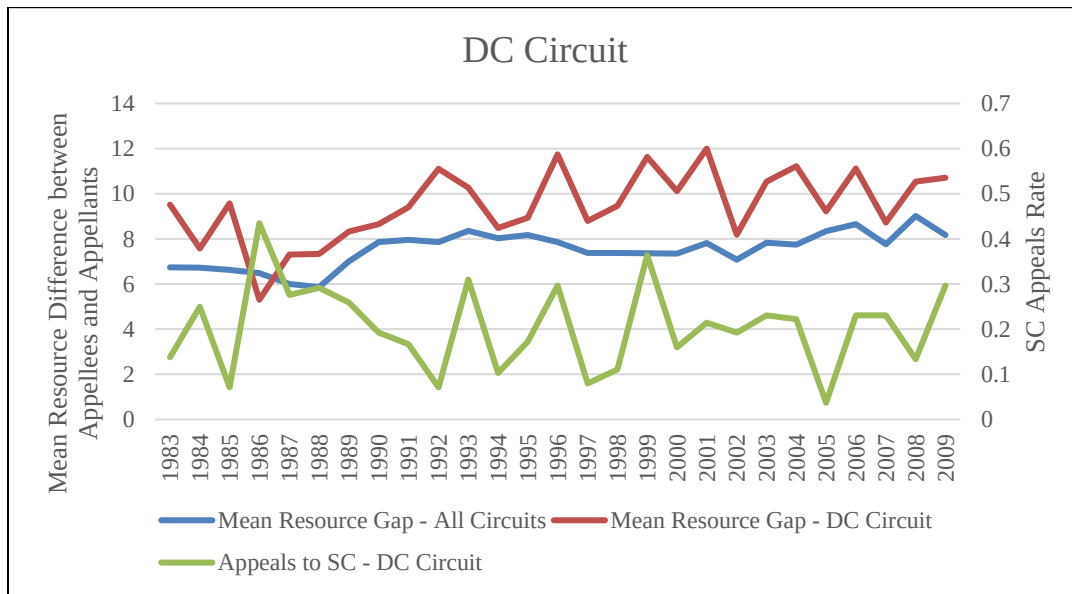


Figure III-A – DC Circuit

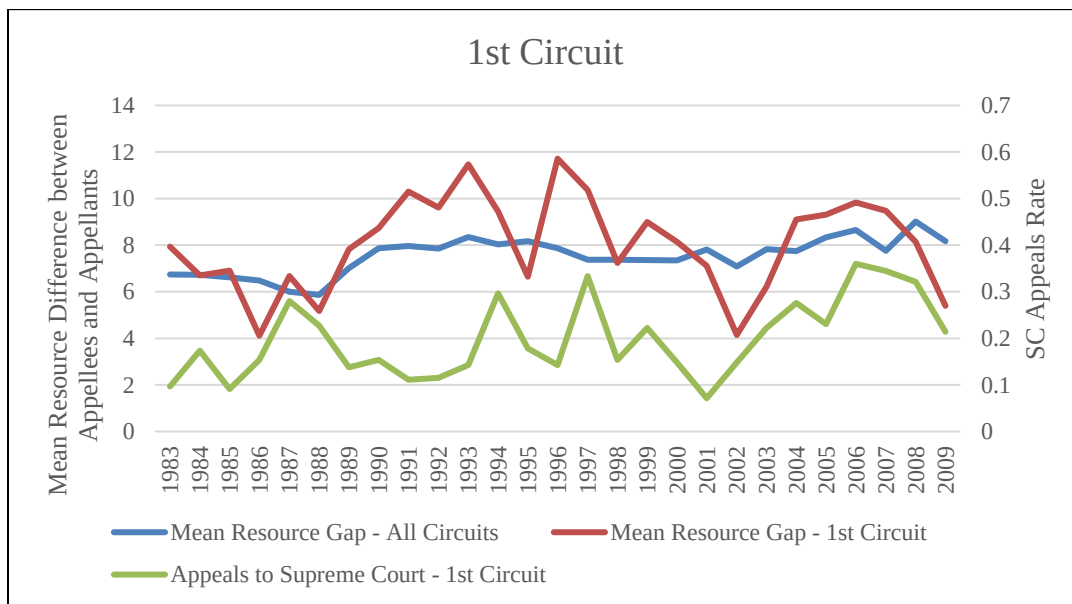


Figure III-B – 1st Circuit

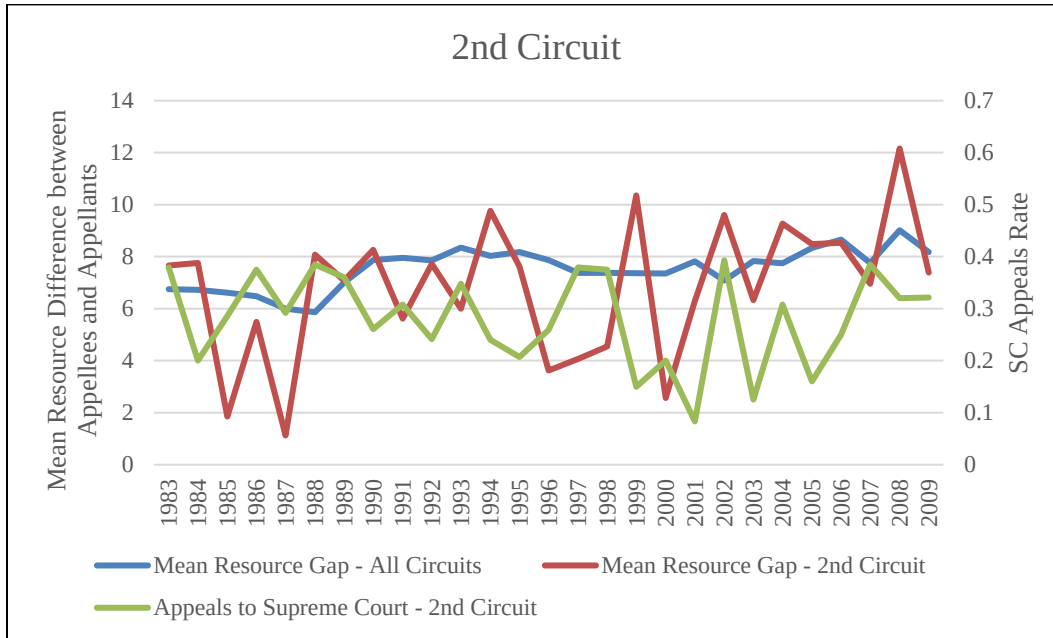


Figure III-C – 2nd Circuit

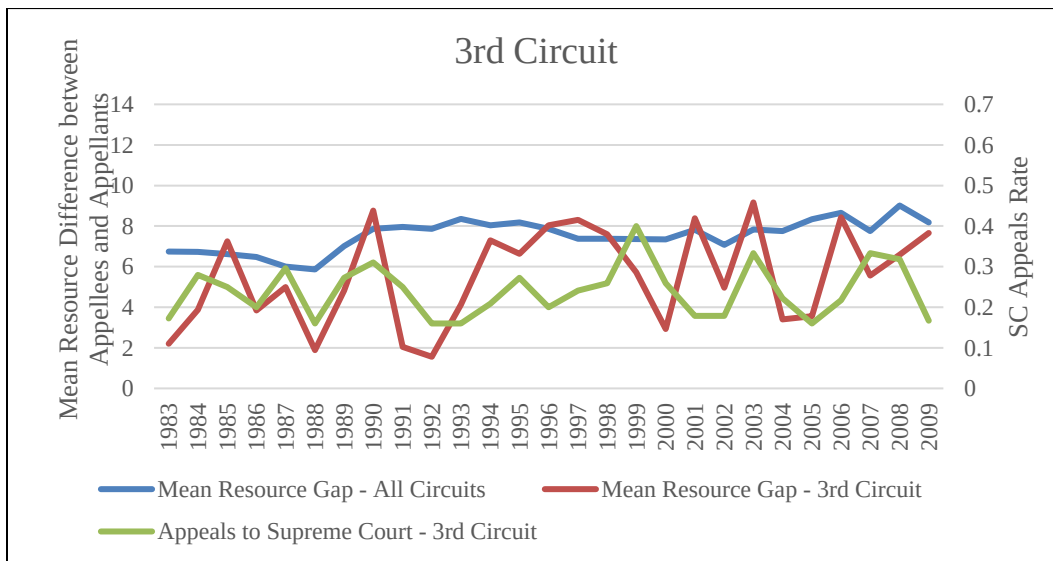


Figure III-D – 3rd Circuit

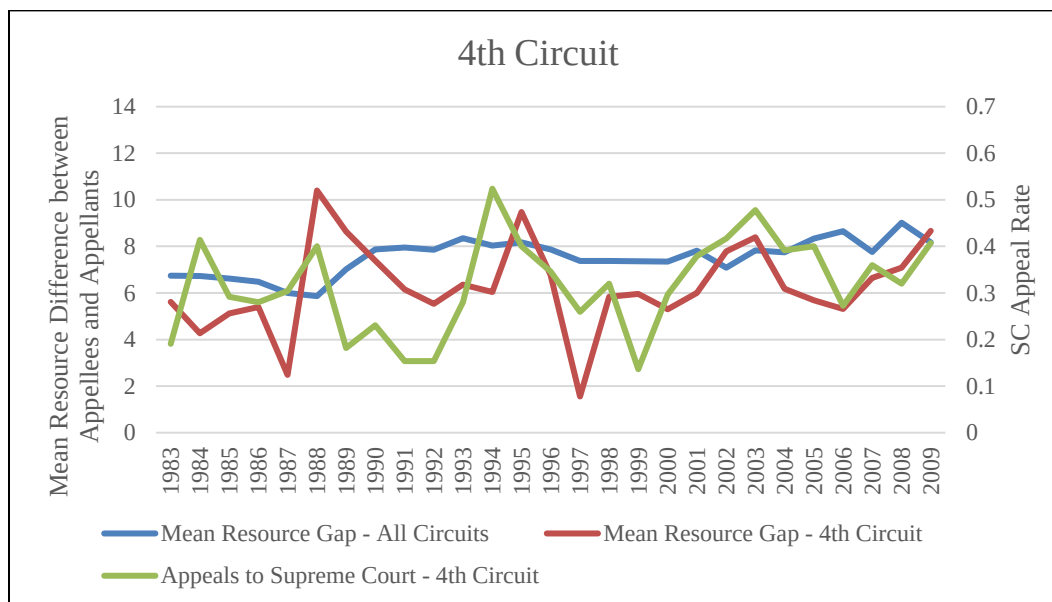


Figure III-E – 4th Circuit

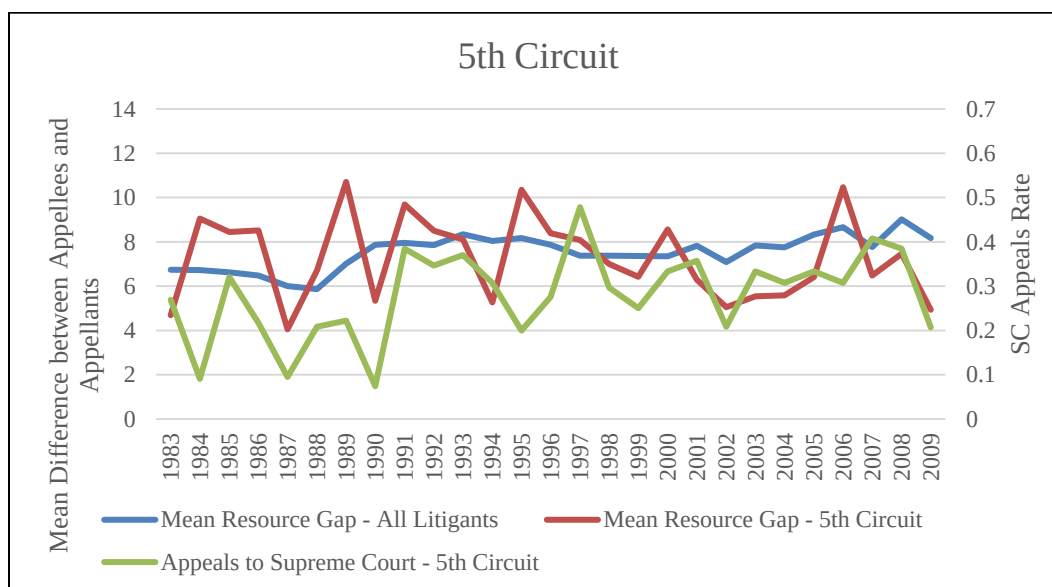


Figure III-F – 5th Circuit

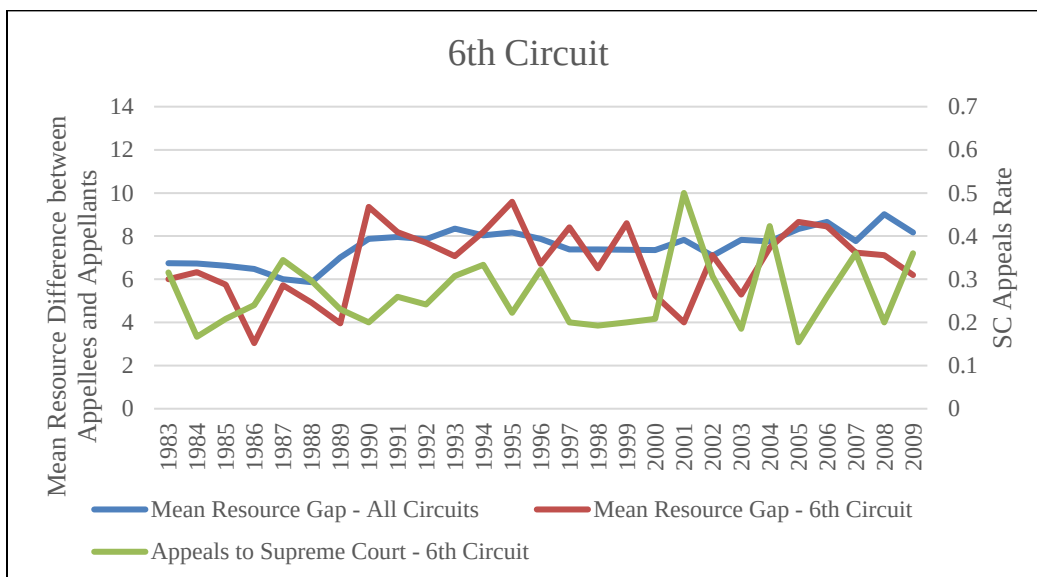


Figure III-G – 6th Circuit

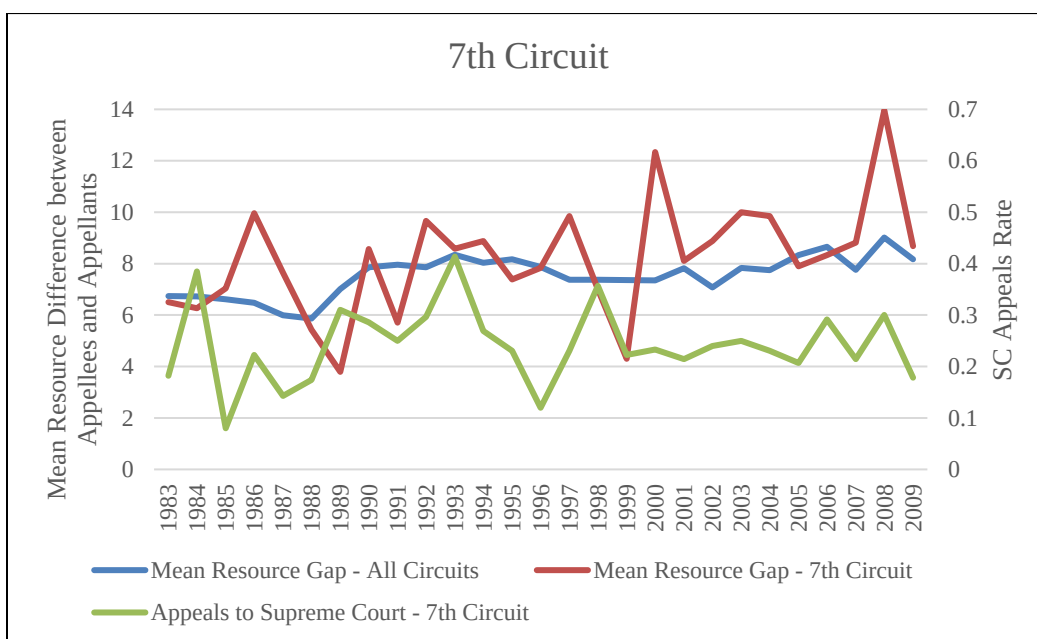


Figure III-H – 7th Circuit

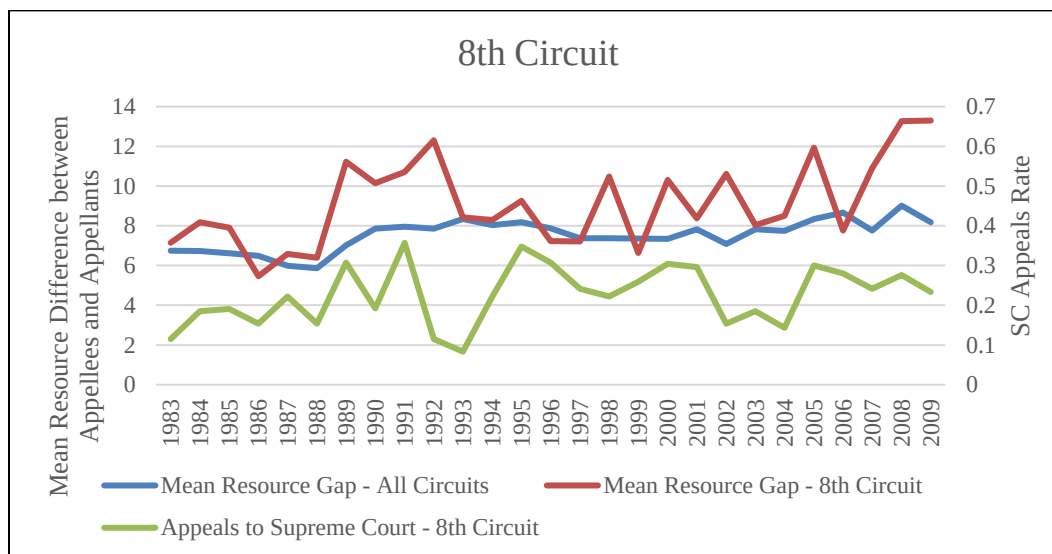


Figure III-I – 8th Circuit

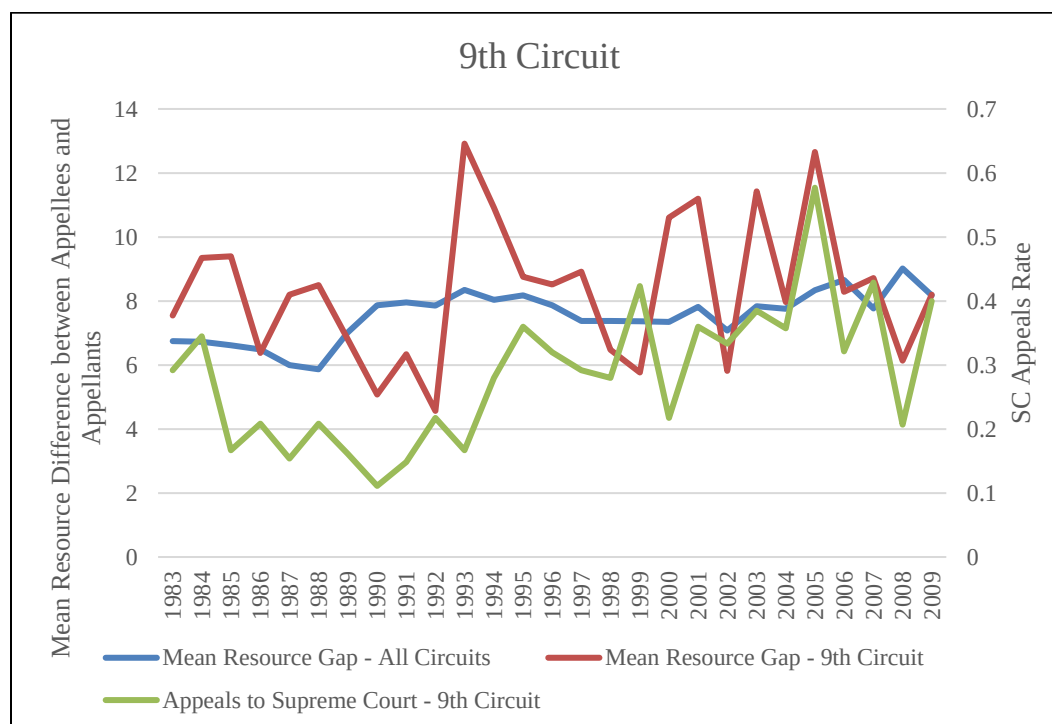


Figure III-J – 9th Circuit

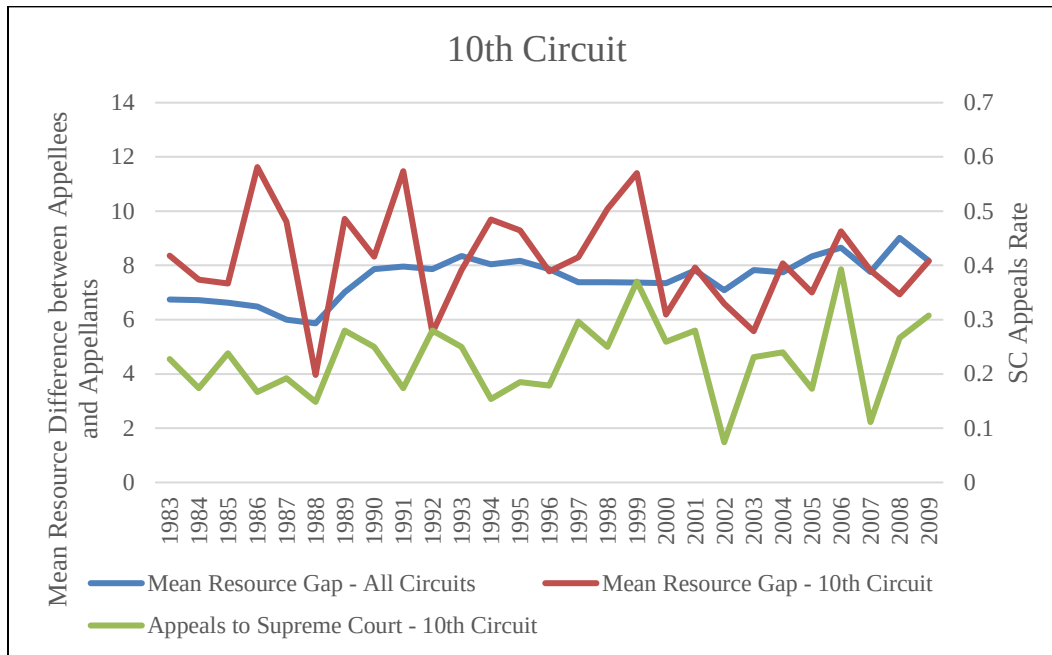


Figure III-K – 10th Circuit

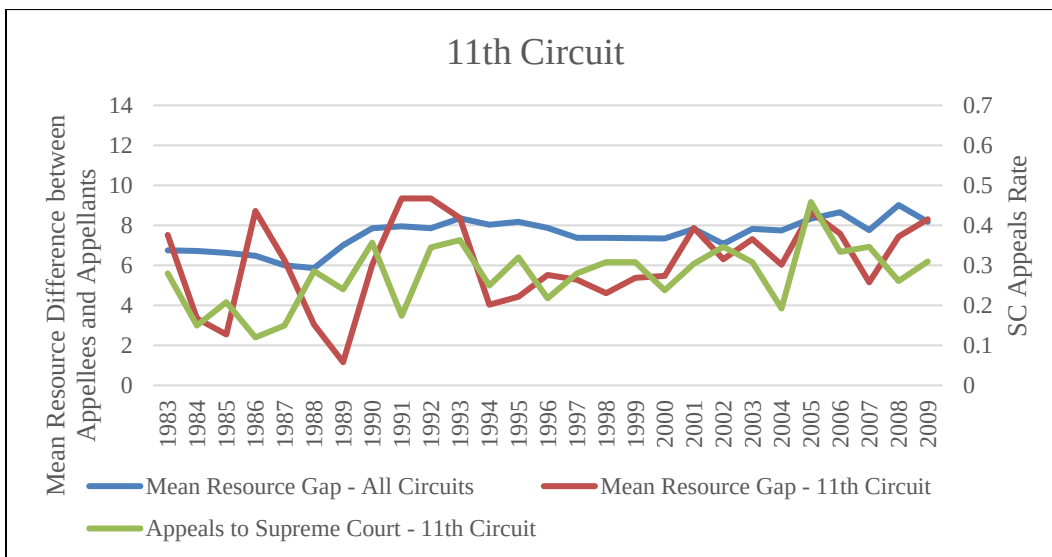


Figure III-L – 11th Circuit

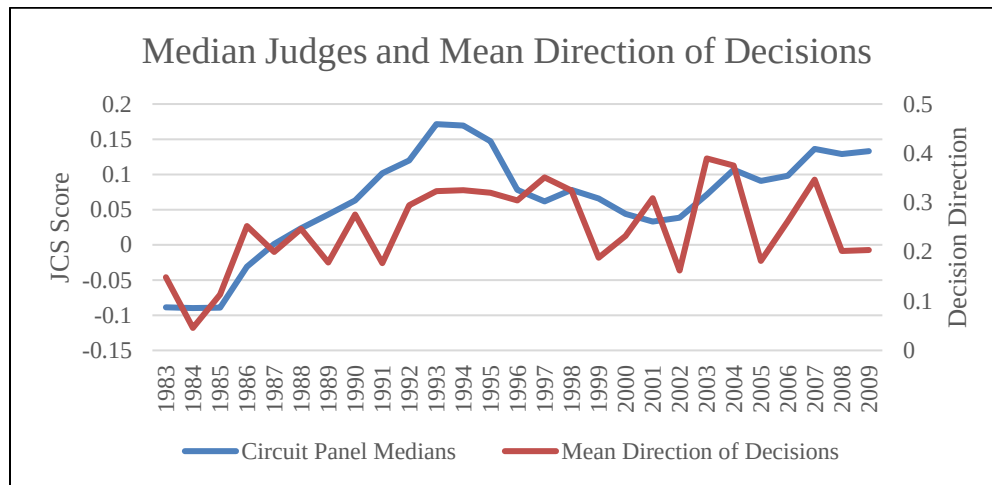


Figure IV: Differences between Median Circuit Panel Judges and Mean Ideological Direction of Circuit Decisions – Overall, 1983-2009

Figure V: Differences between Median Circuit Panel Judges and Mean Ideological Direction of Circuit Decisions – Individual Circuits, 1983-2009

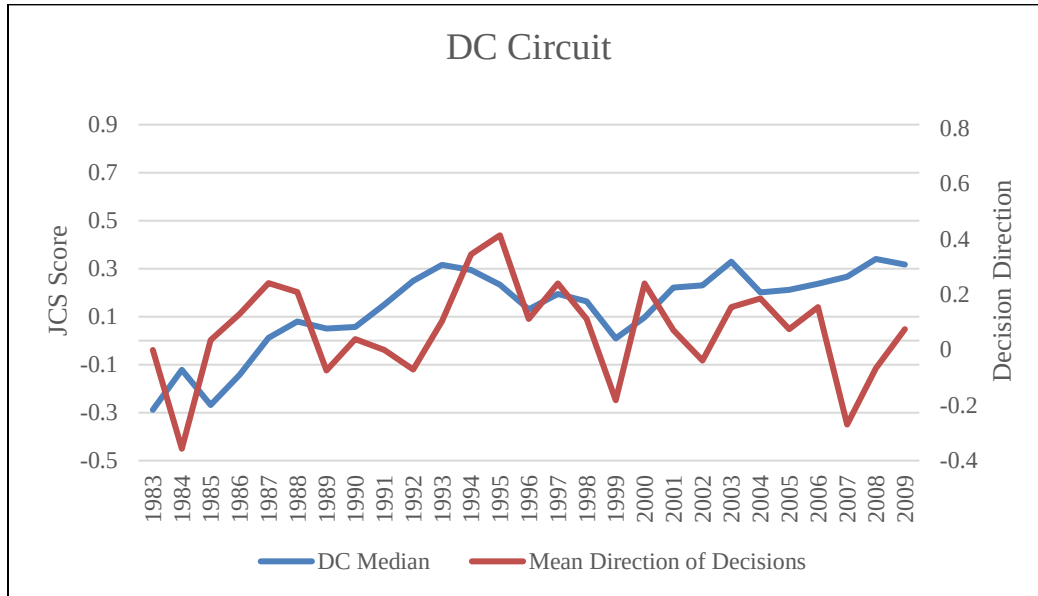


Figure V-A – DC Circuit

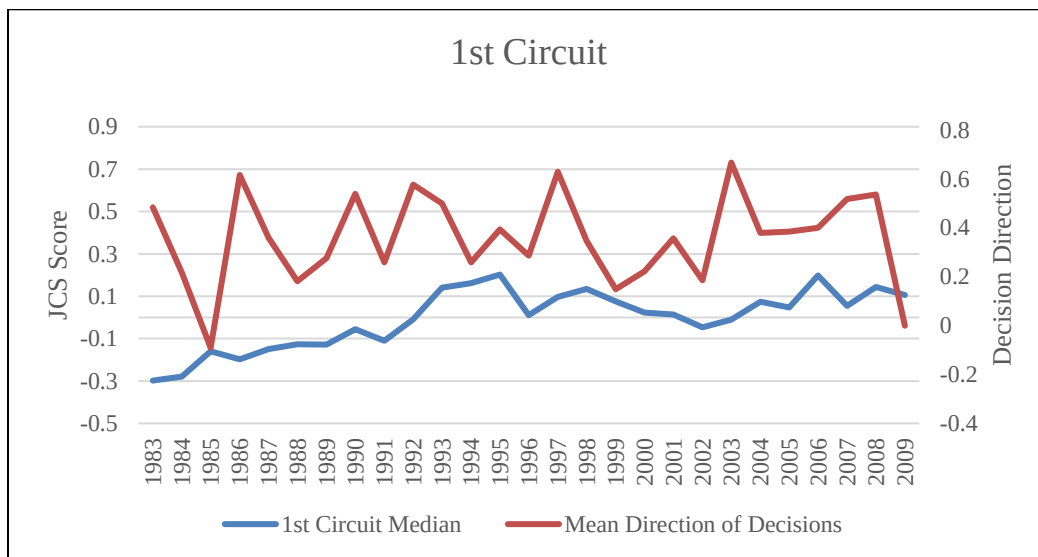


Figure V-B – 1st Circuit

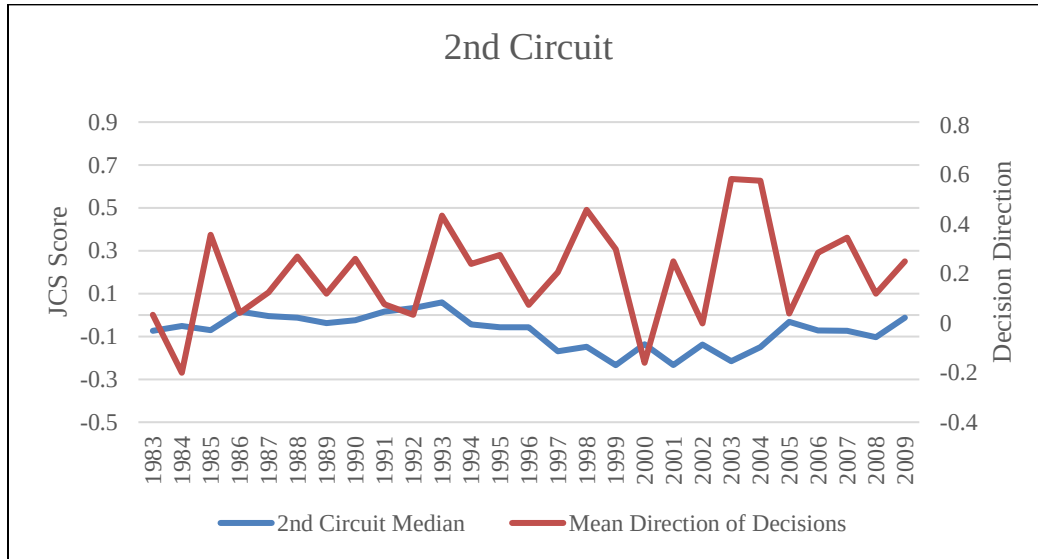


Figure V-C – 2nd Circuit

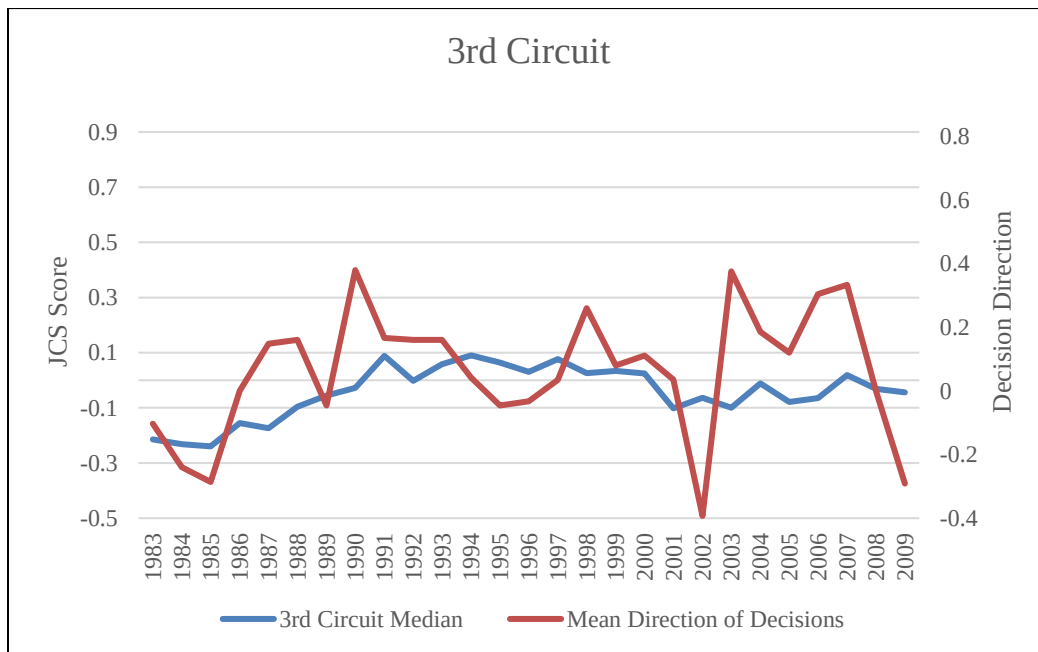


Figure V-D – 3rd Circuit

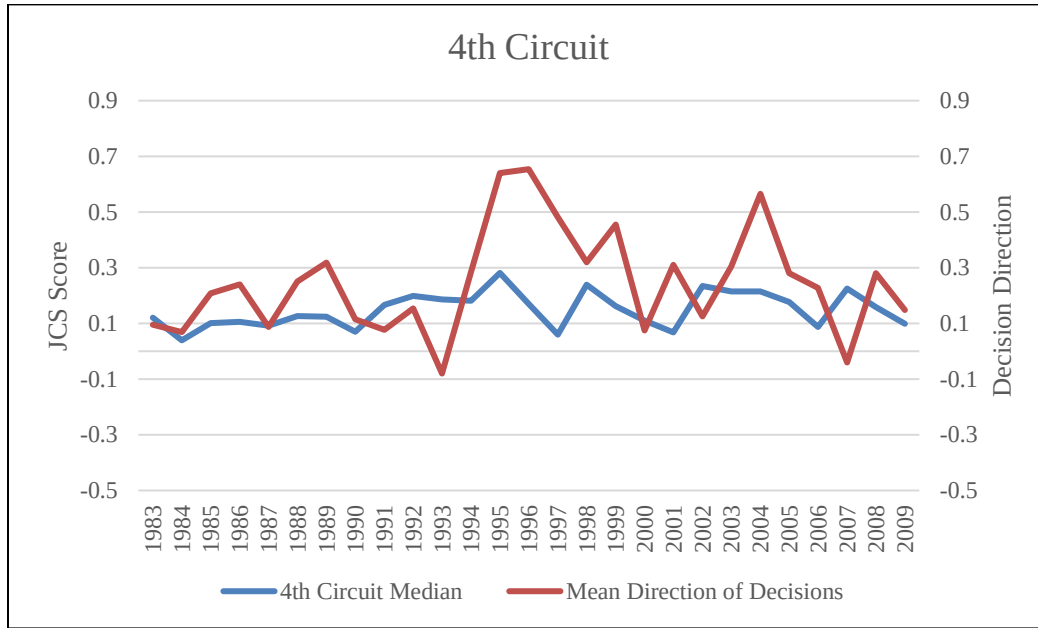


Figure V-E – 4th Circuit

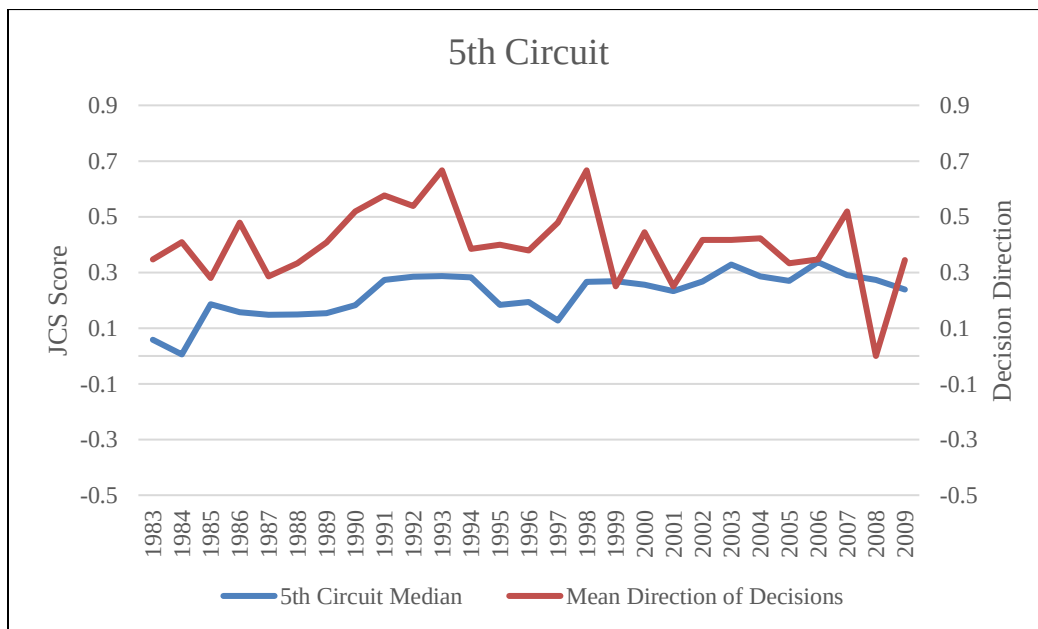
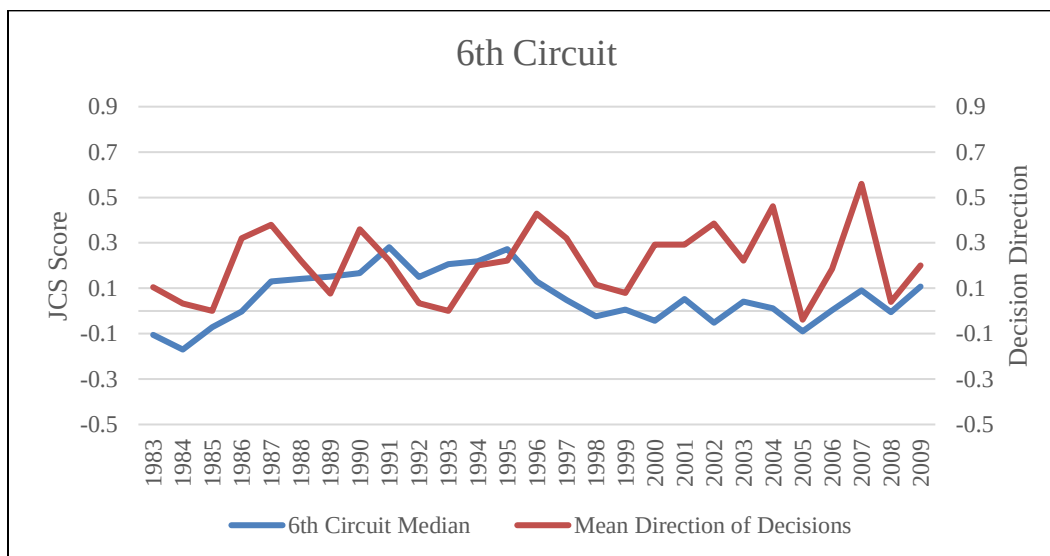


Figure V-F – 5th Circuit



V-G – 6th Circuit

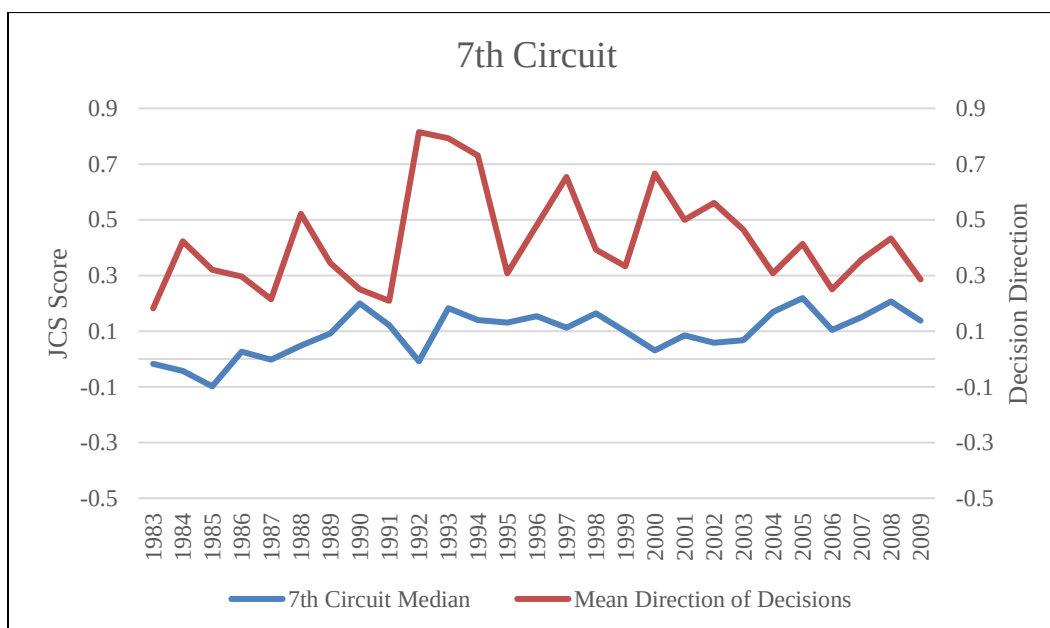


Figure V-H – 7th Circuit

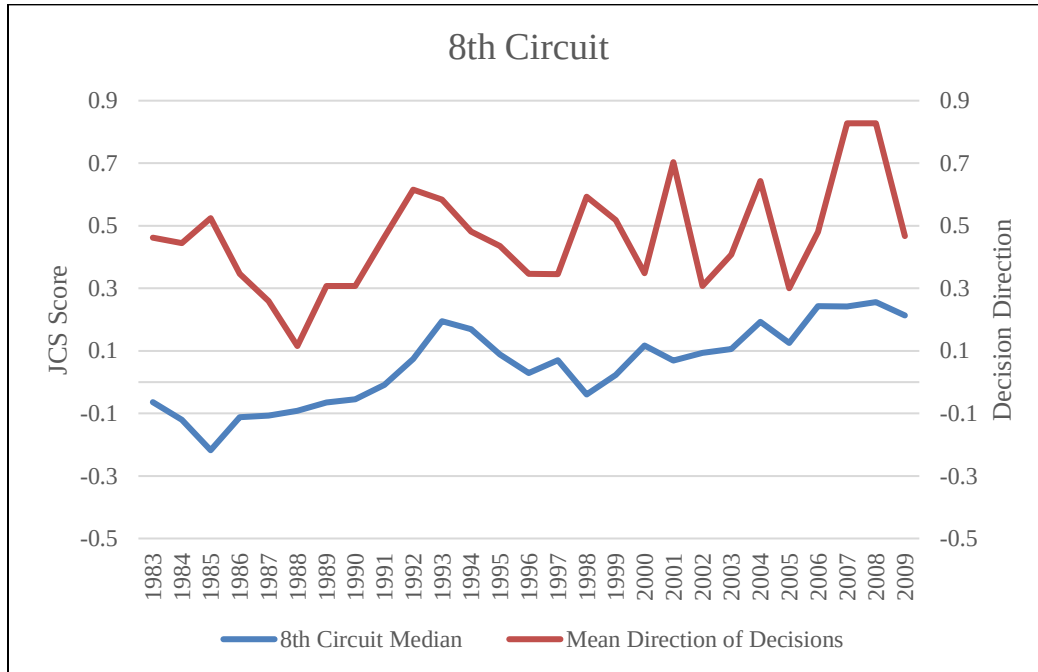


Figure V-I – 8th Circuit

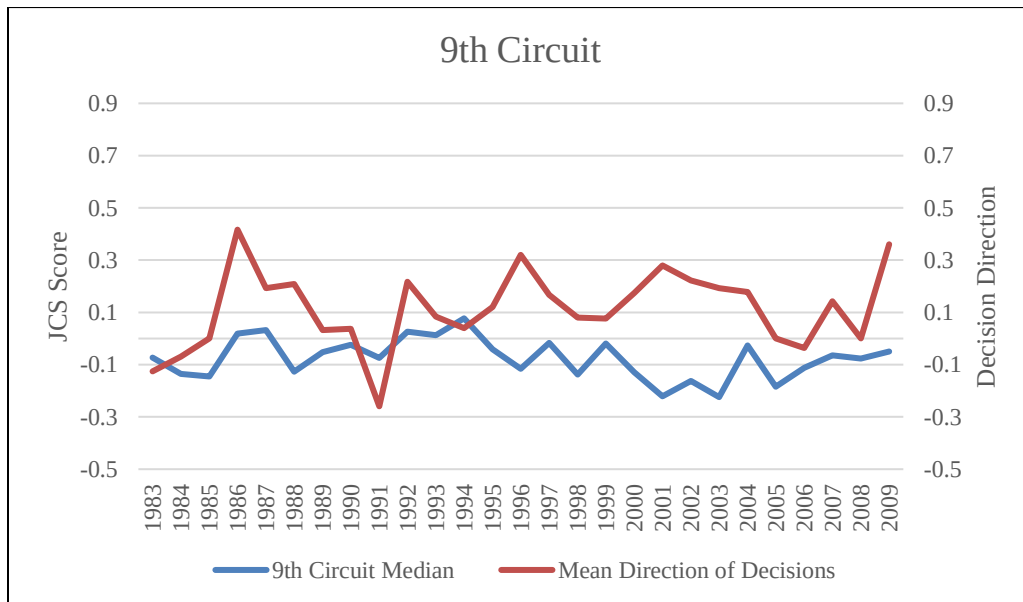


Figure V-J – 9th Circuit

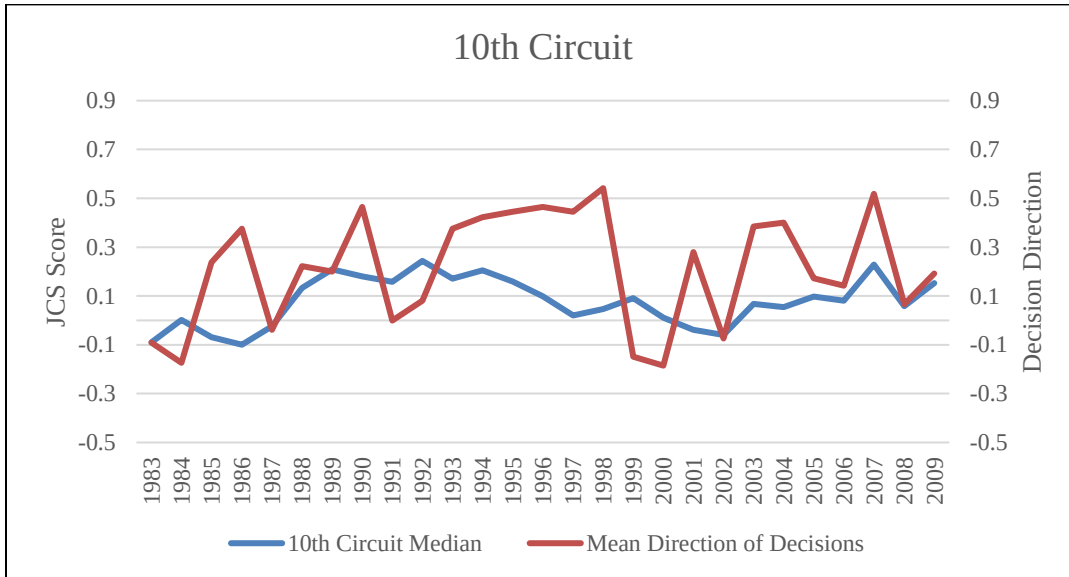


Figure V-K – 10th Circuit

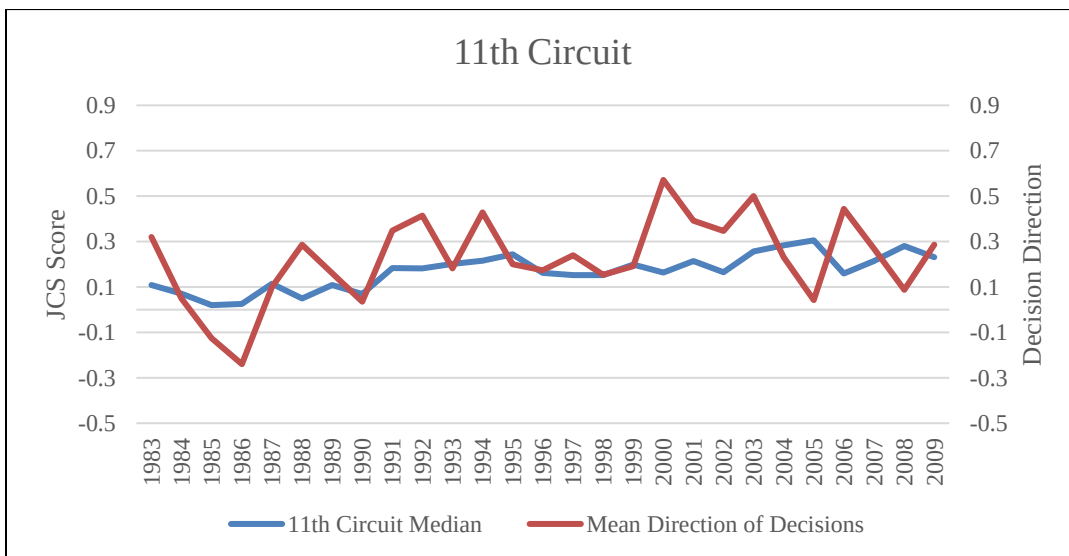


Figure V-L – 11th Circuit

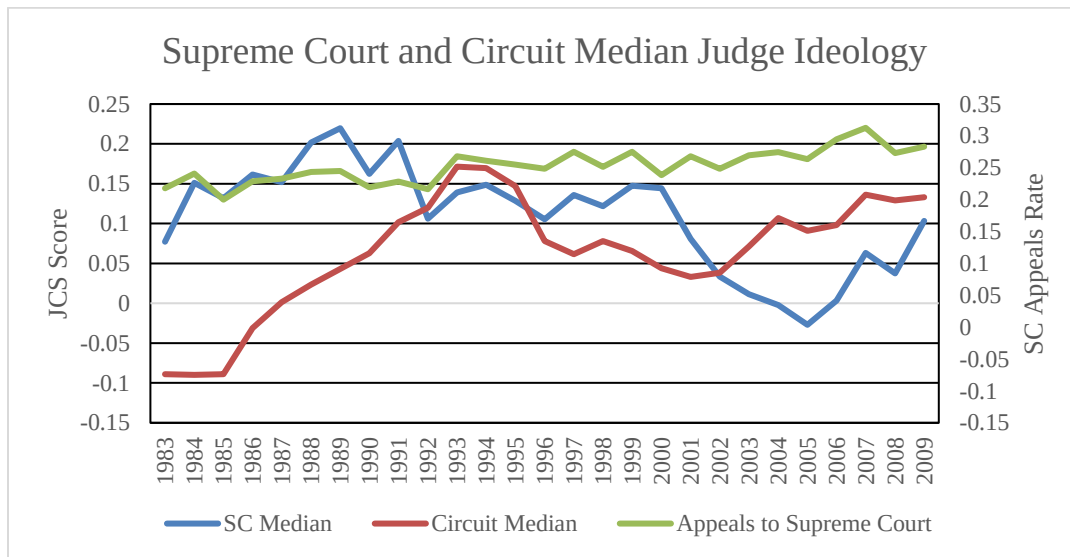


Figure VI: Supreme Court Median Justice Ideology and Circuit Median Judge Ideology, 1983-2009

Figure VII: Supreme Court Median Justice Ideology, Median Circuit Panel Judge Ideology, and Appeals to the Supreme Court by Circuit, 1983 – 2009

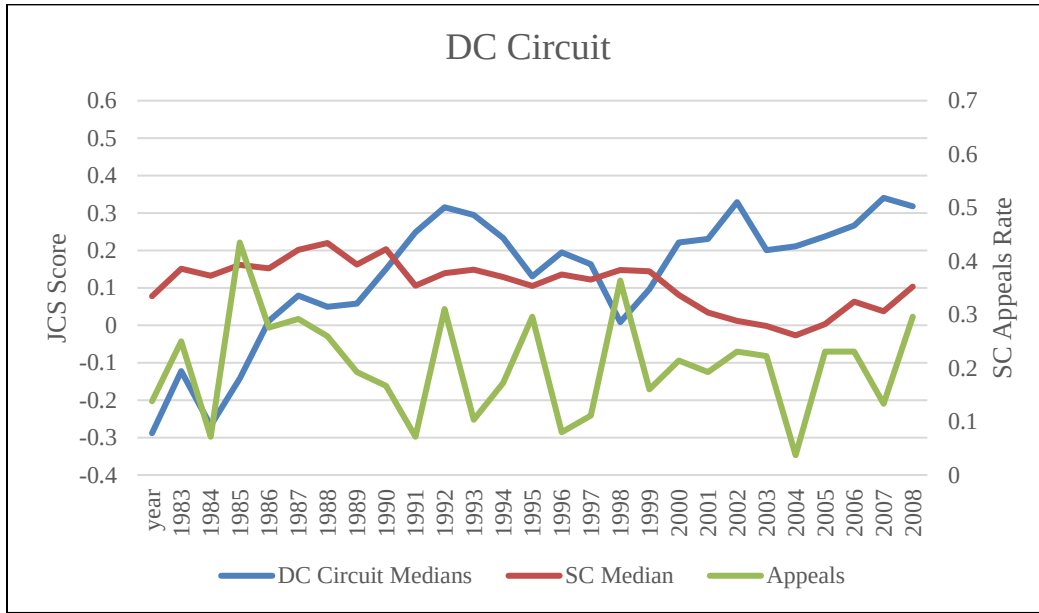


Figure VII-A – DC Circuit

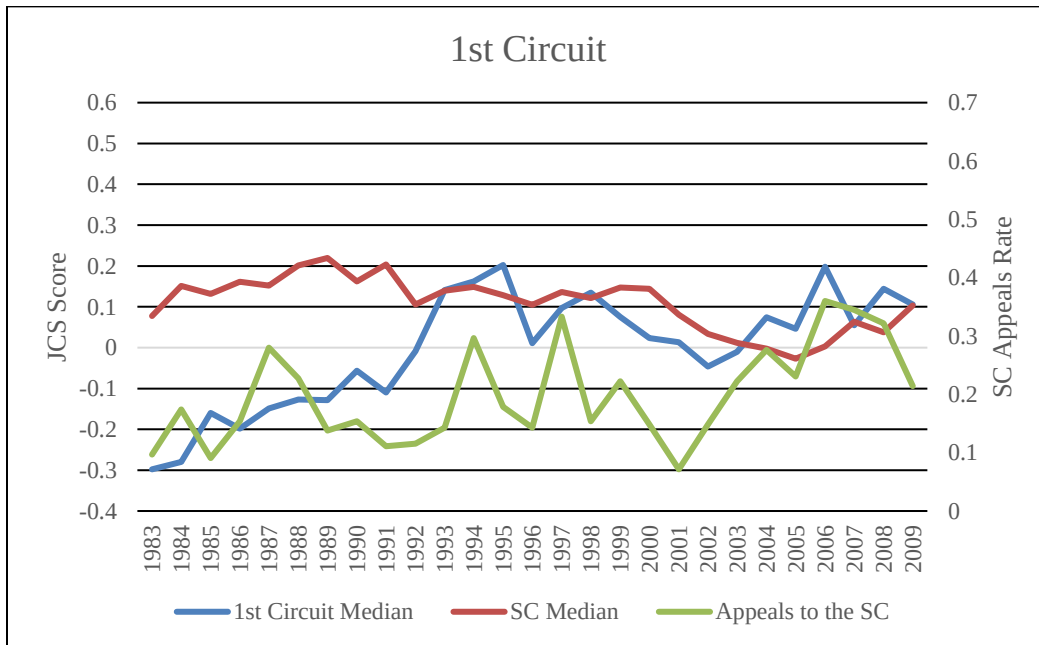


Figure VII-B – 1st Circuit

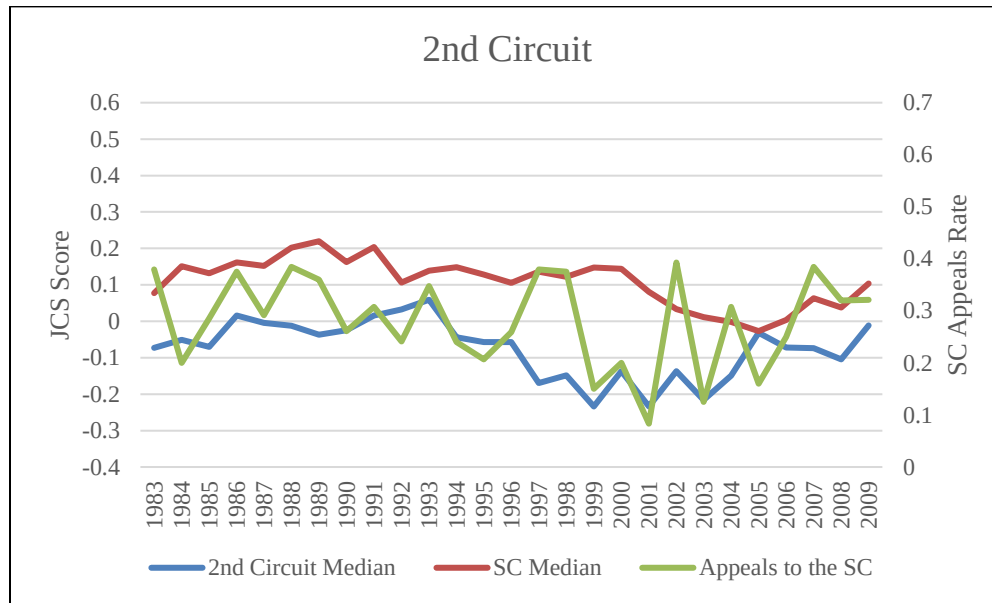


Figure VII-C – 2nd Circuit

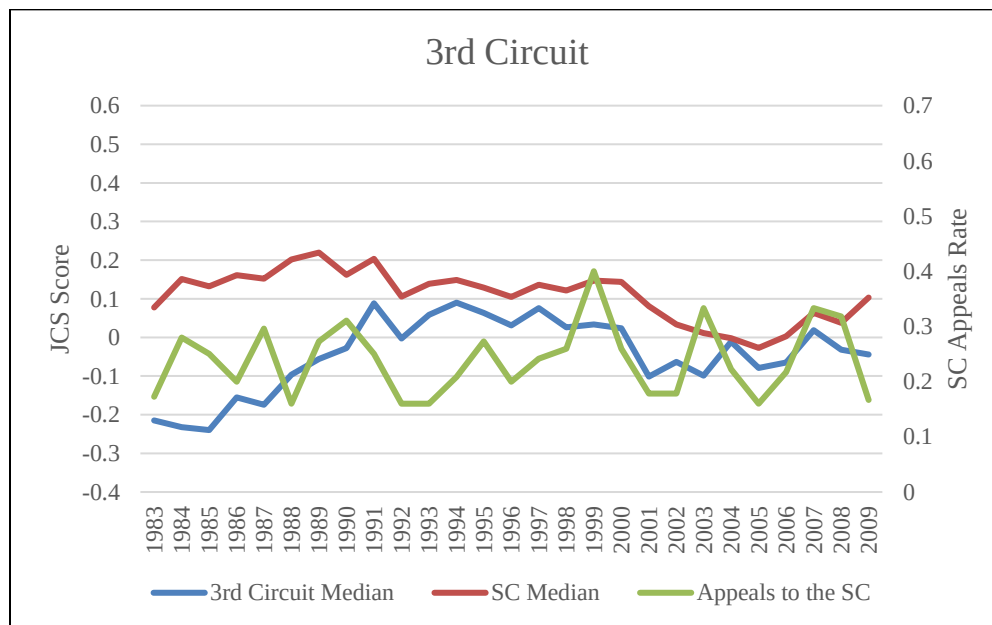


Figure VII-D – 3rd Circuit

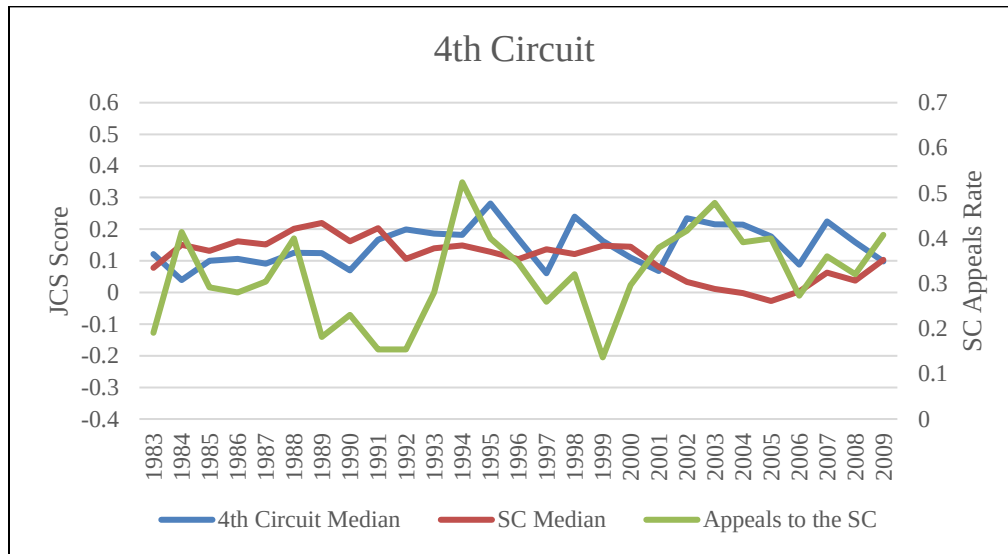


Figure VII-E – 4th Circuit

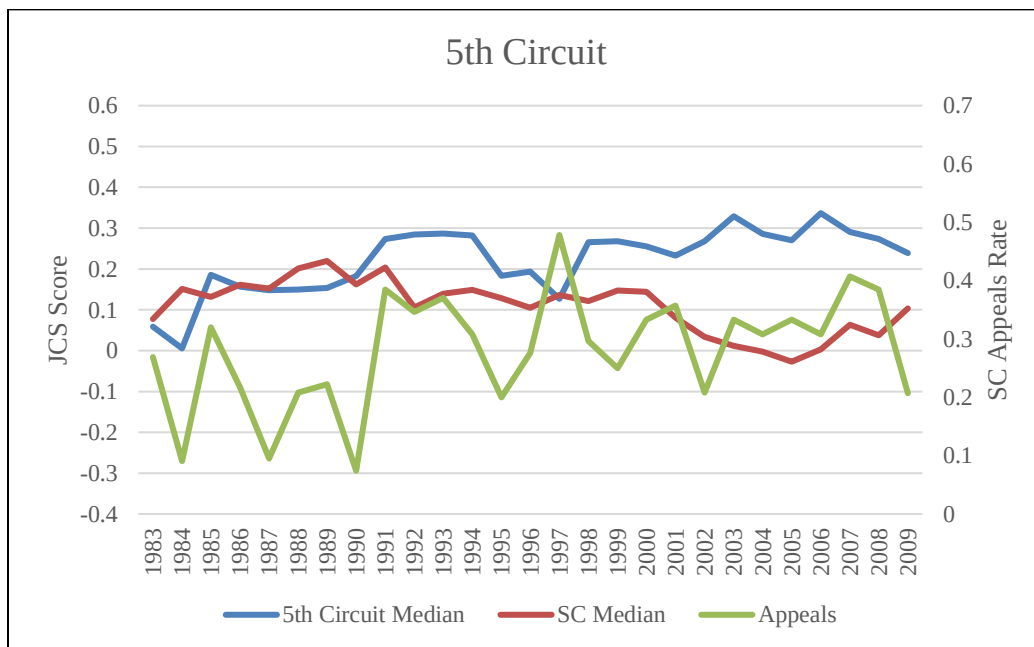


Figure VII-E – 5th Circuit

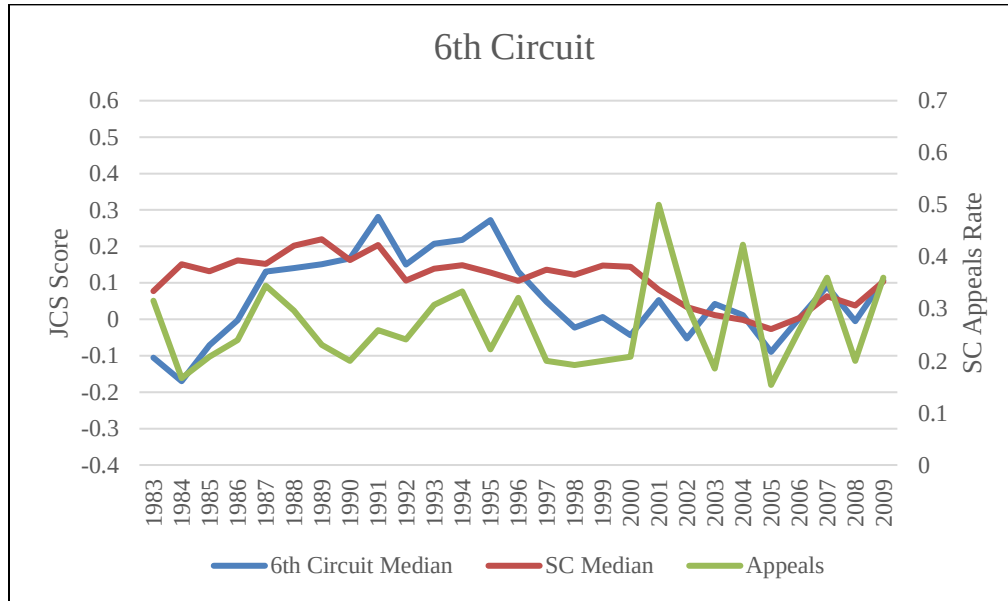


Figure VII-F – 6th Circuit

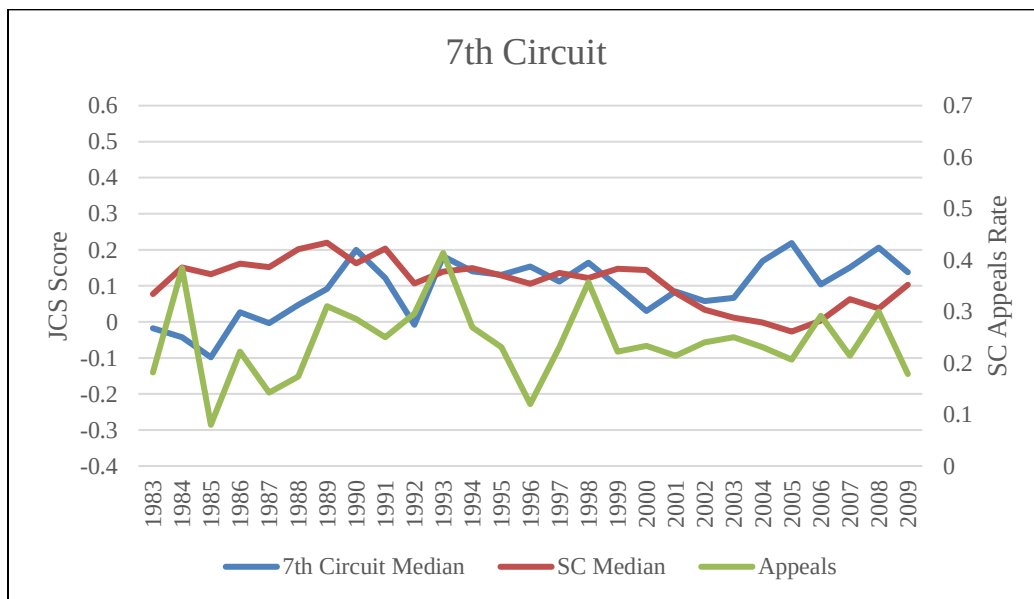


Figure VII-H – 7th Circuit

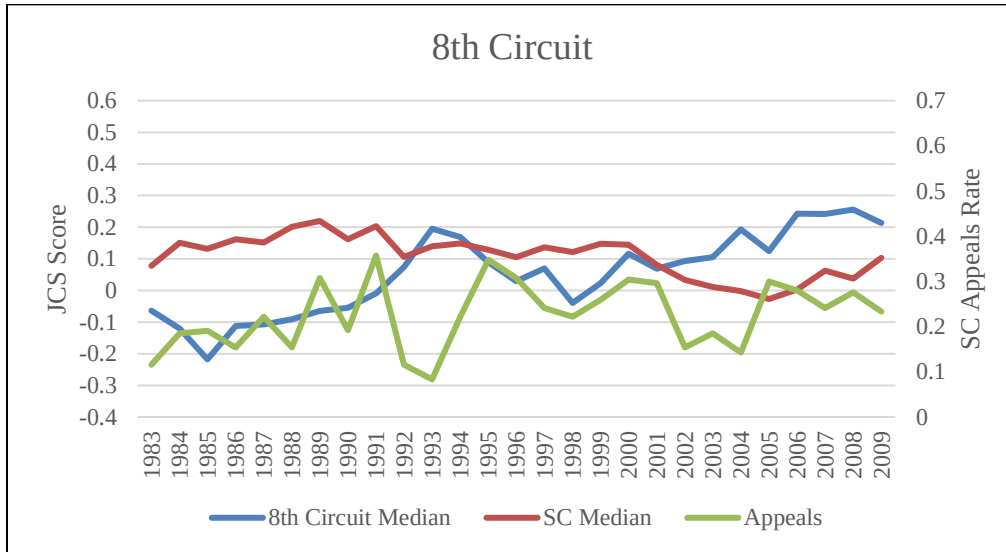


Figure VII-I – 8th Circuit

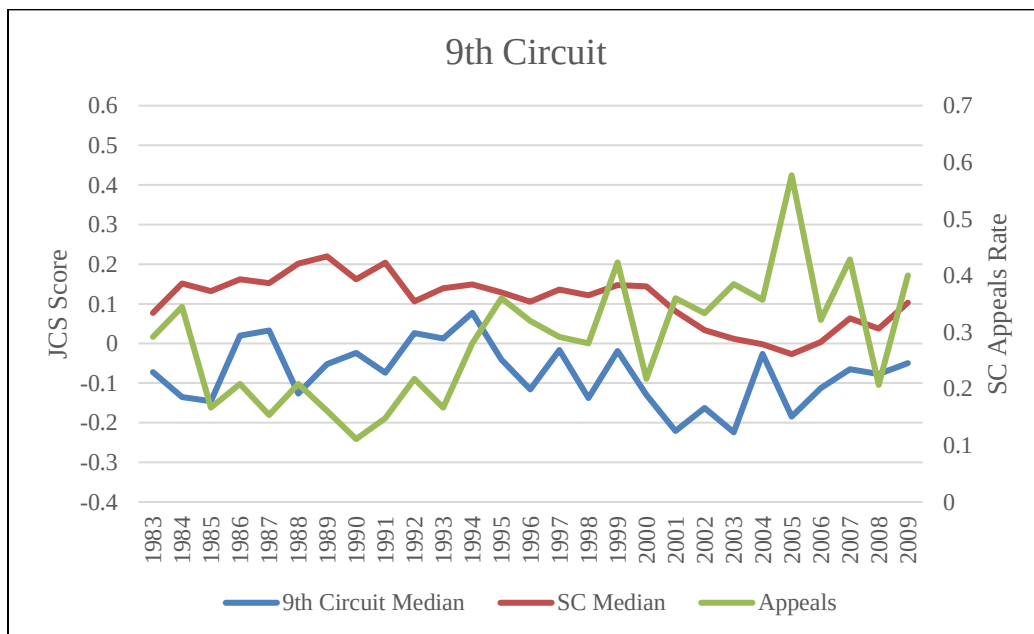


Figure VII-J – 9th Circuit

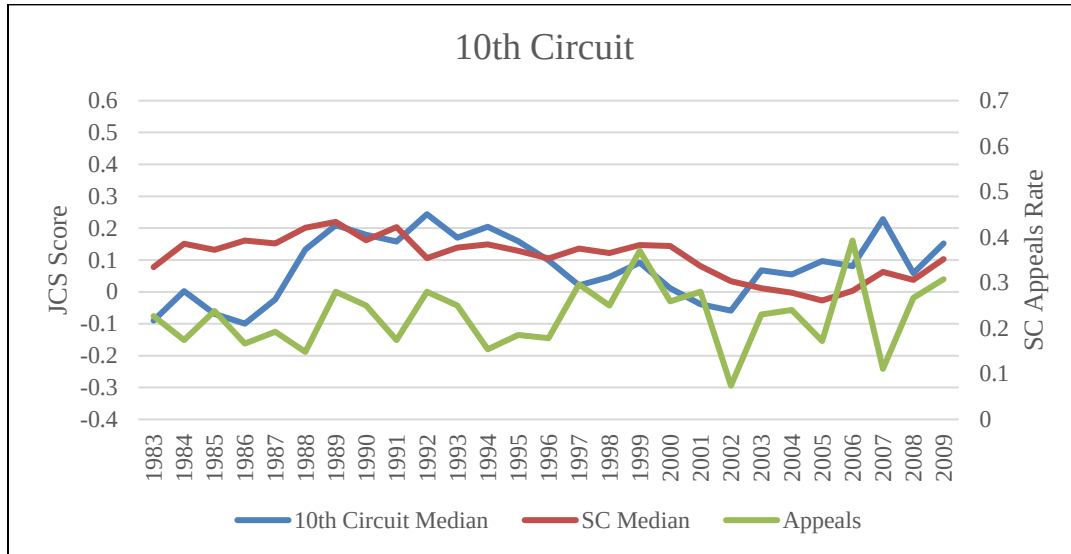


Figure VII-K – 10th Circuit

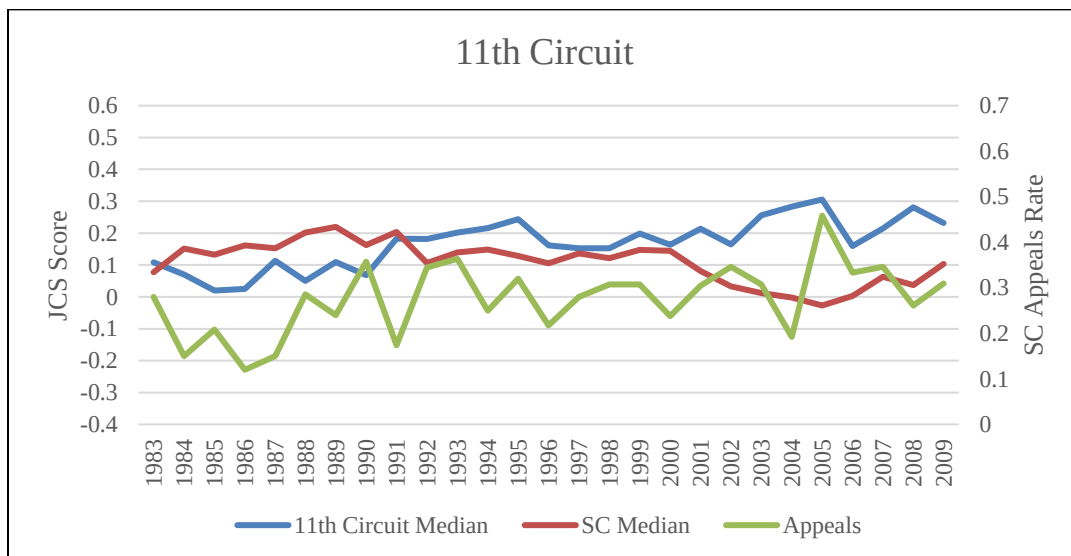


Figure VII-L – 11th Circuit

Figure VIII: Rates of *Certiorari* Grants – Circuit Trends, 1983-2009

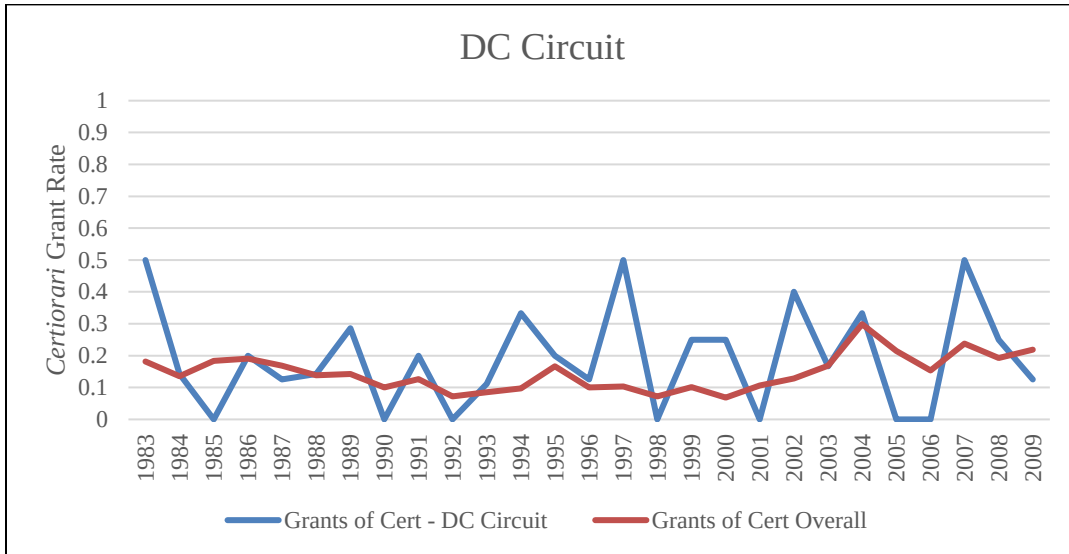


Figure VIII-A – DC Circuit

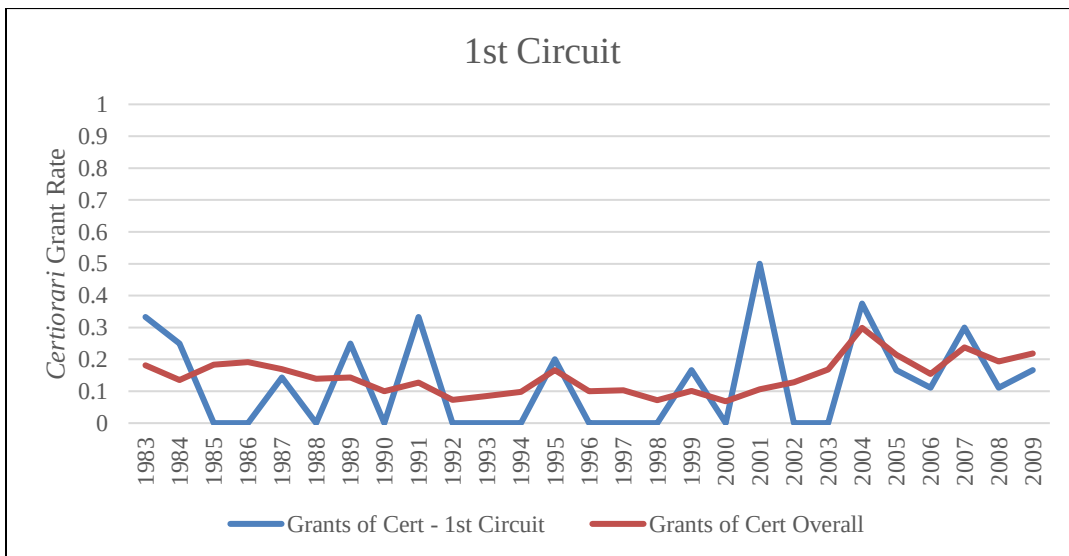


Figure VIII-B – 1st Circuit

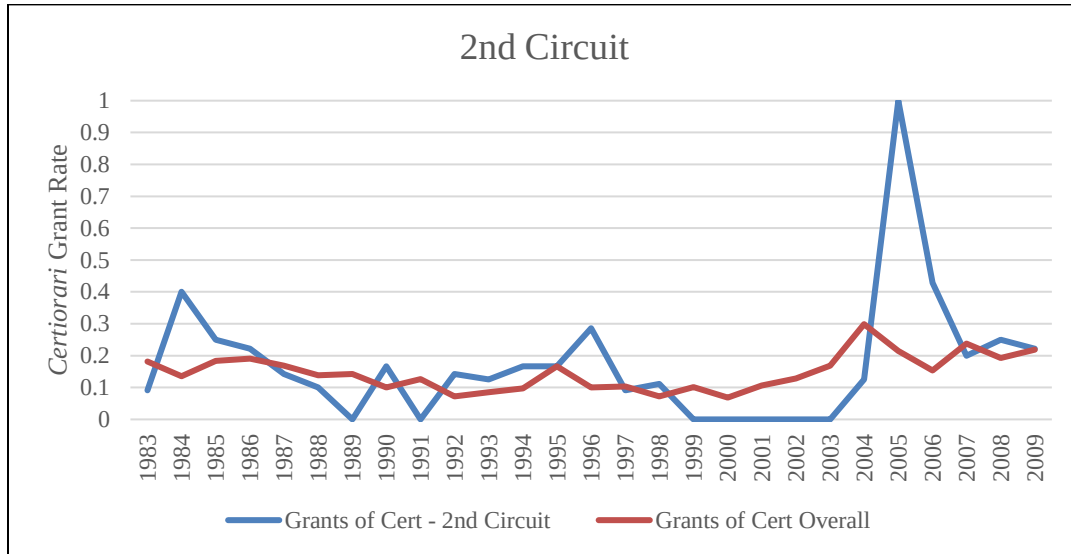


Figure VIII-C – 2nd Circuit

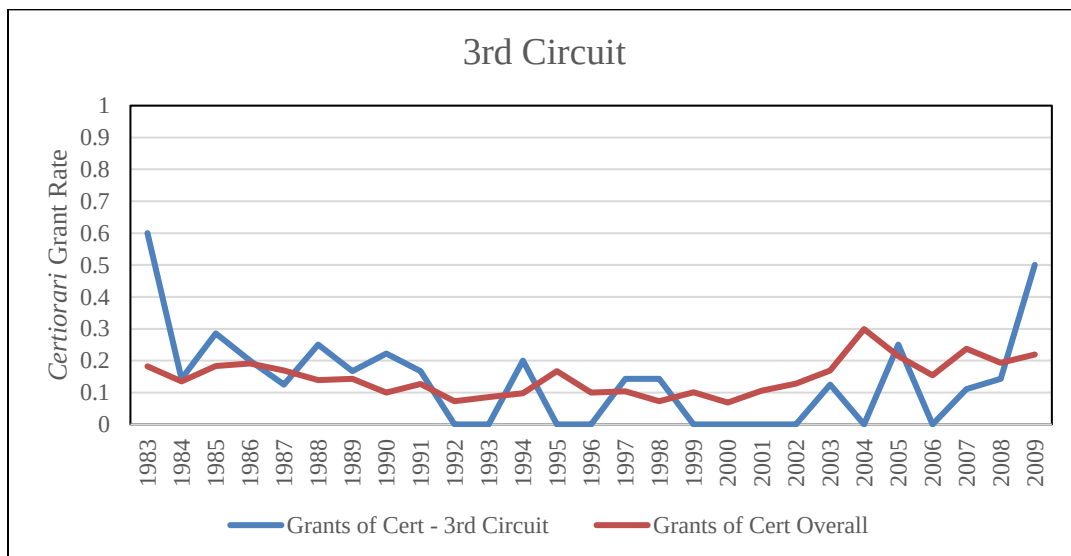


Figure VIII-D – 3rd Circuit

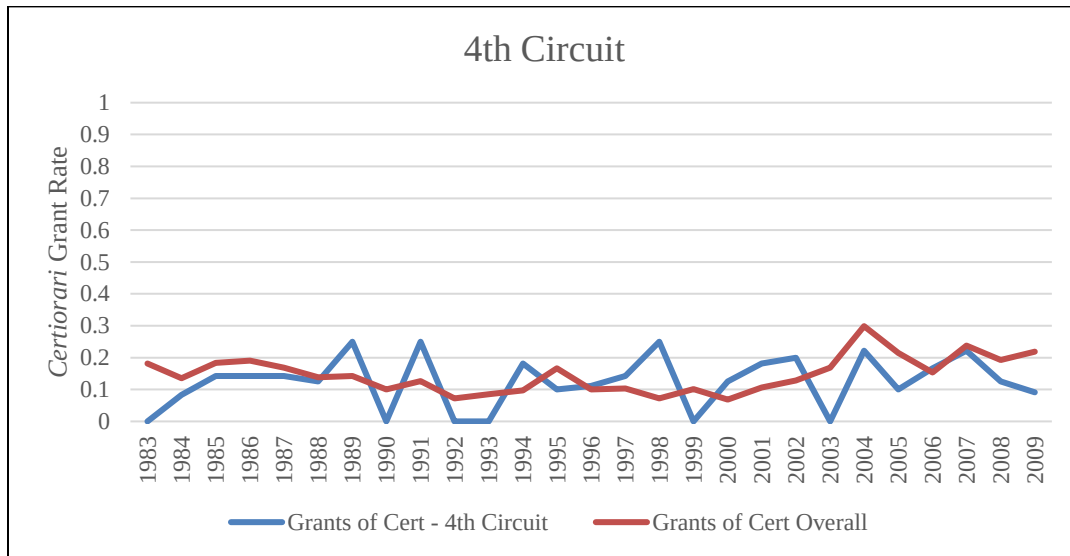


Figure VIII-E – 4th Circuit

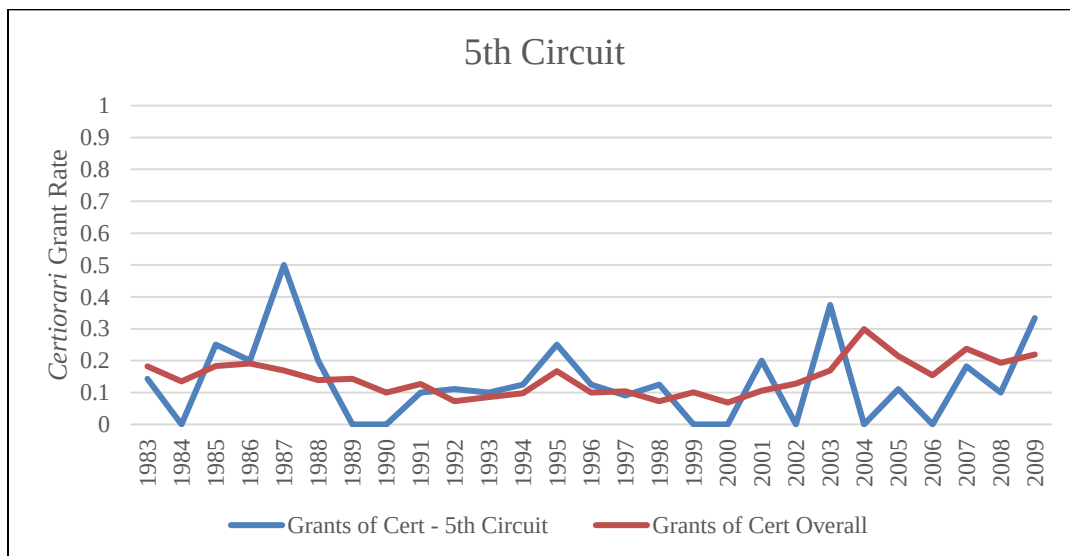


Figure VIII-F – 5th Circuit

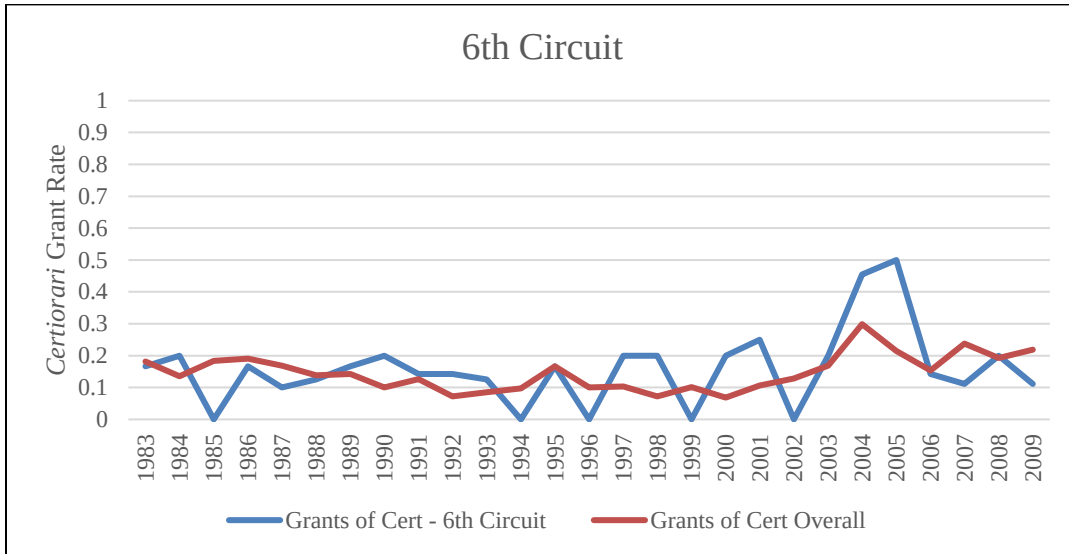


Figure VIII-G – 6th Circuit

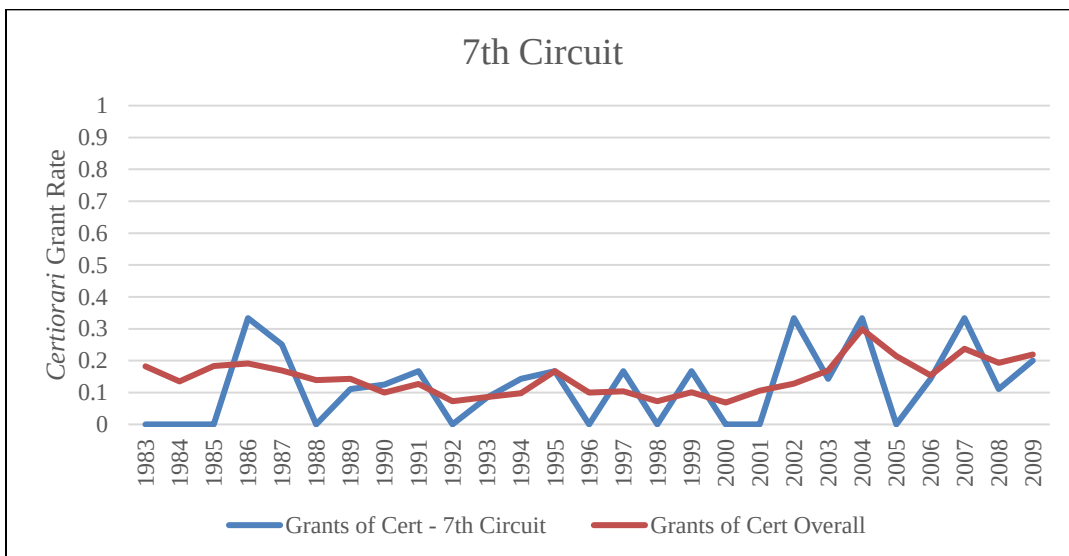


Figure VIII-H – 7th Circuit

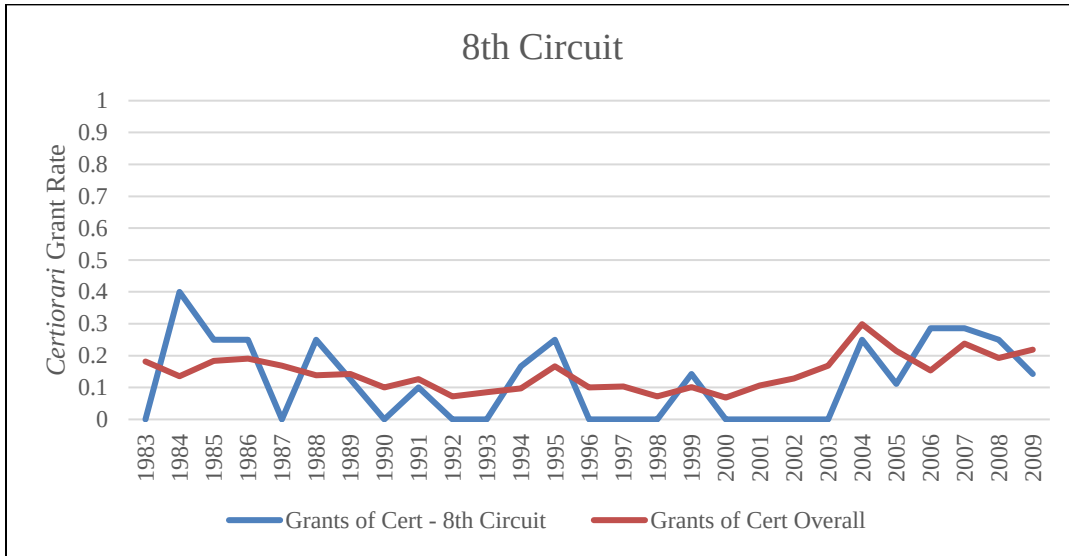


Figure VIII-I – 8th Circuit

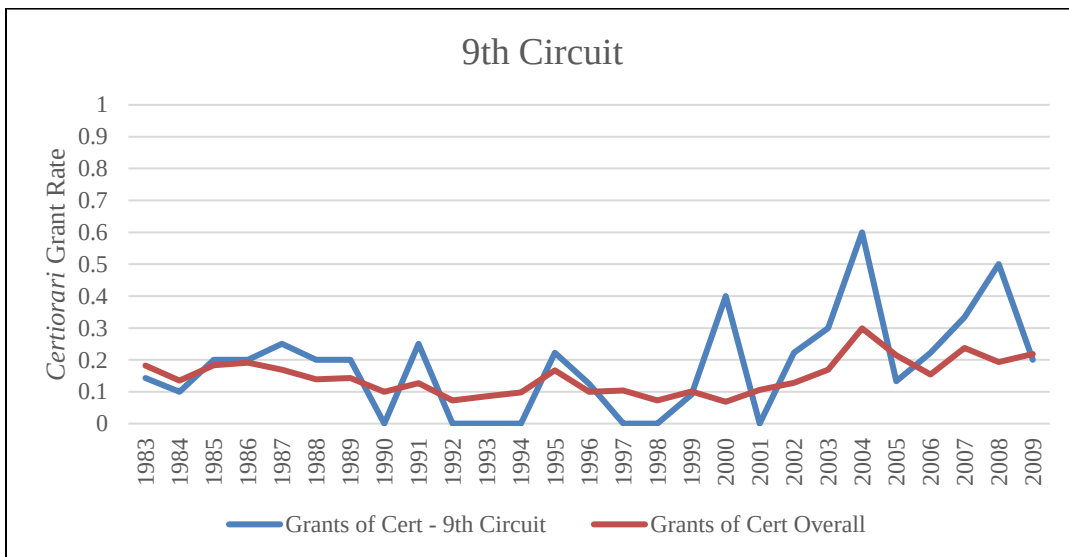


Figure VIII-J – 9th Circuit

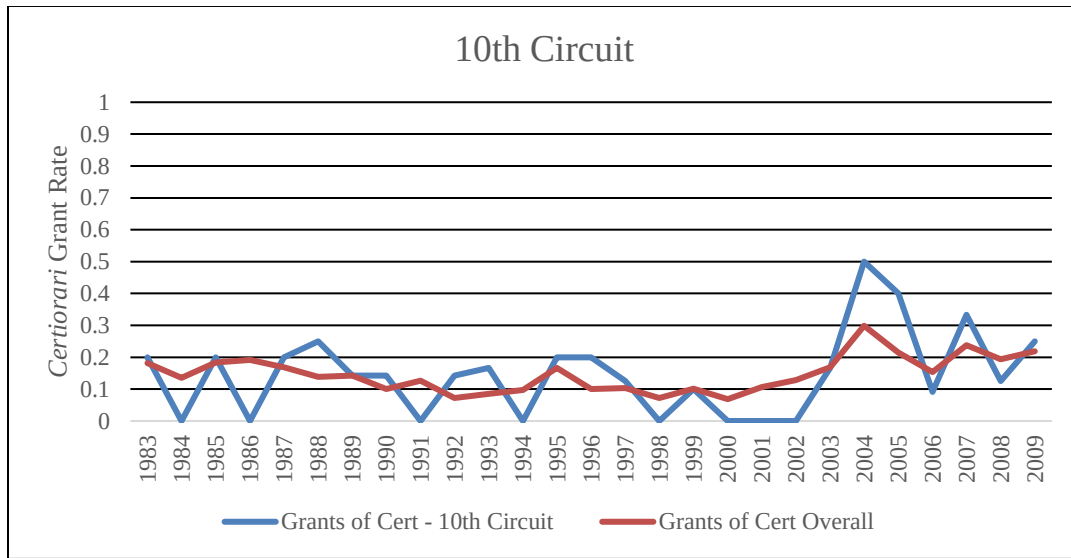


Figure VIII-K – 10th Circuit

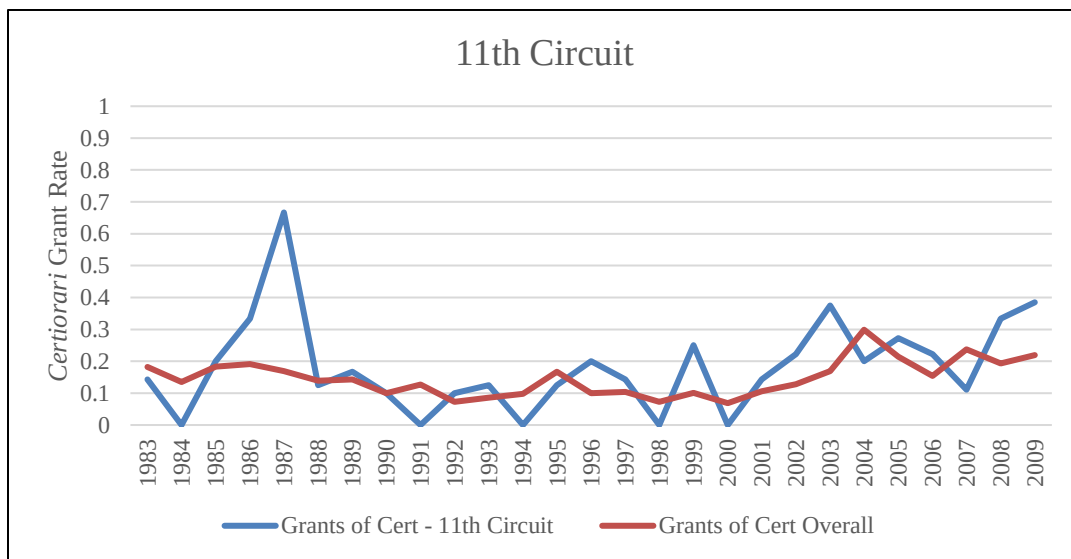


Figure VIII-L – 11th Circuit

**Figure IX: Mean Difference in Resource Advantage
among Supreme Court Litigants by Circuit, 1983-2009**

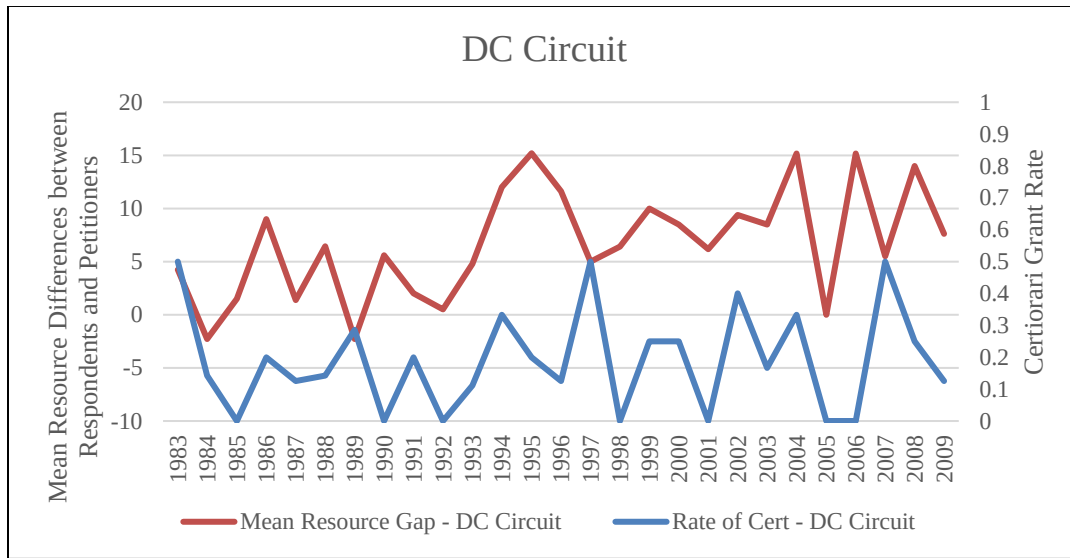


Figure IX-A – DC Circuit

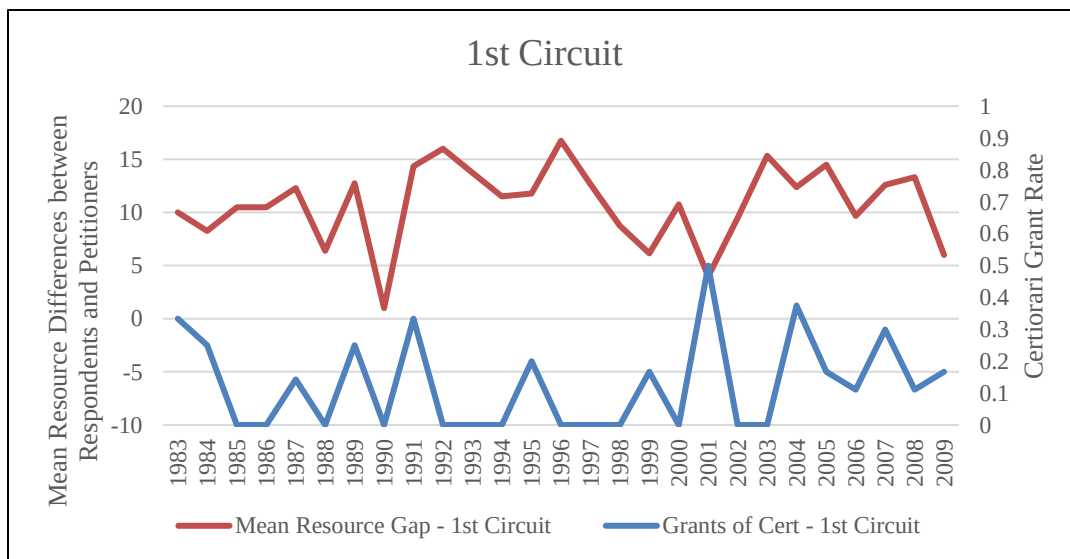


Figure IX-B – 1st Circuit

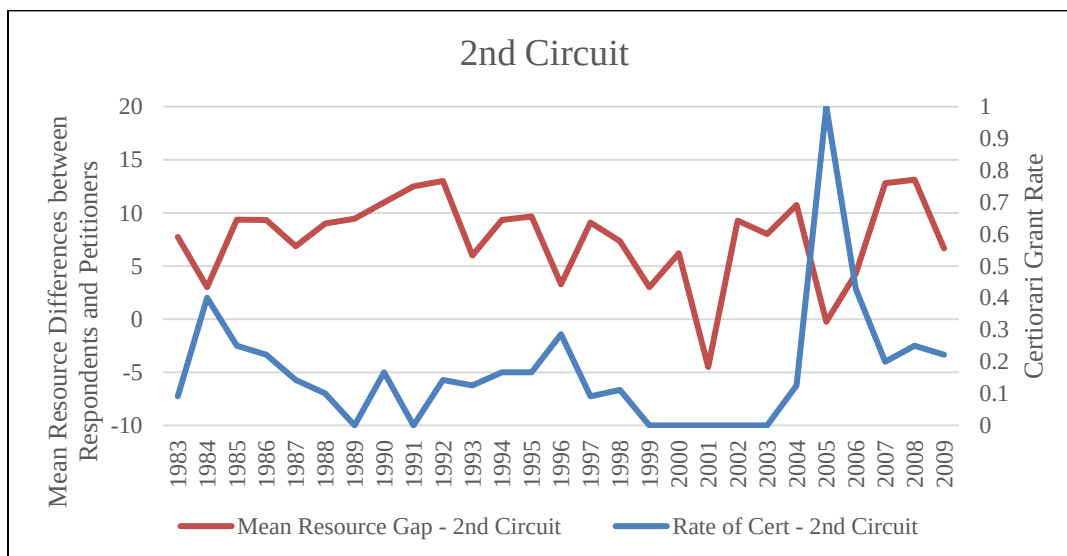


Figure IX-C – 2nd Circuit

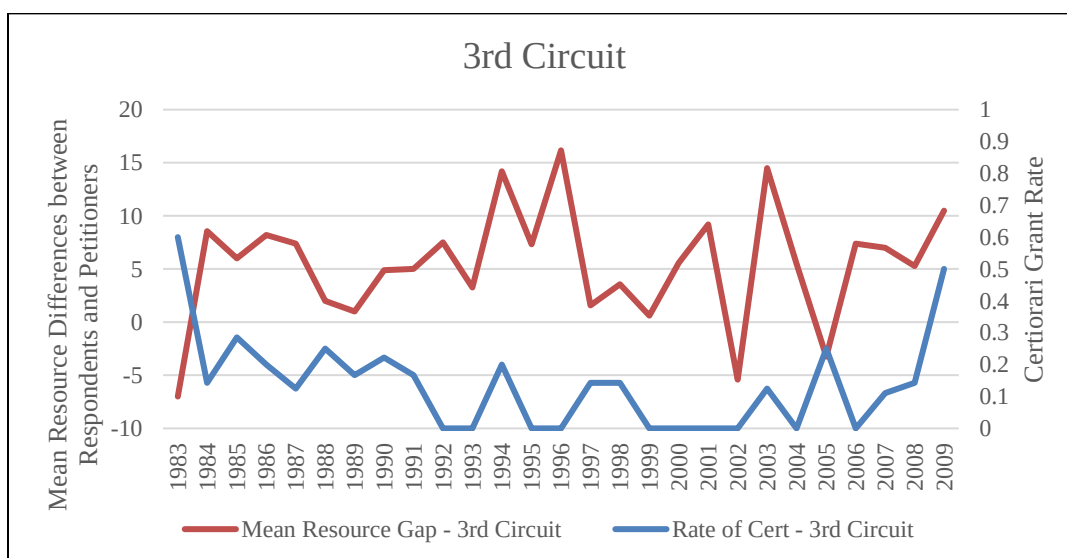


Figure IX-D – 3rd Circuit

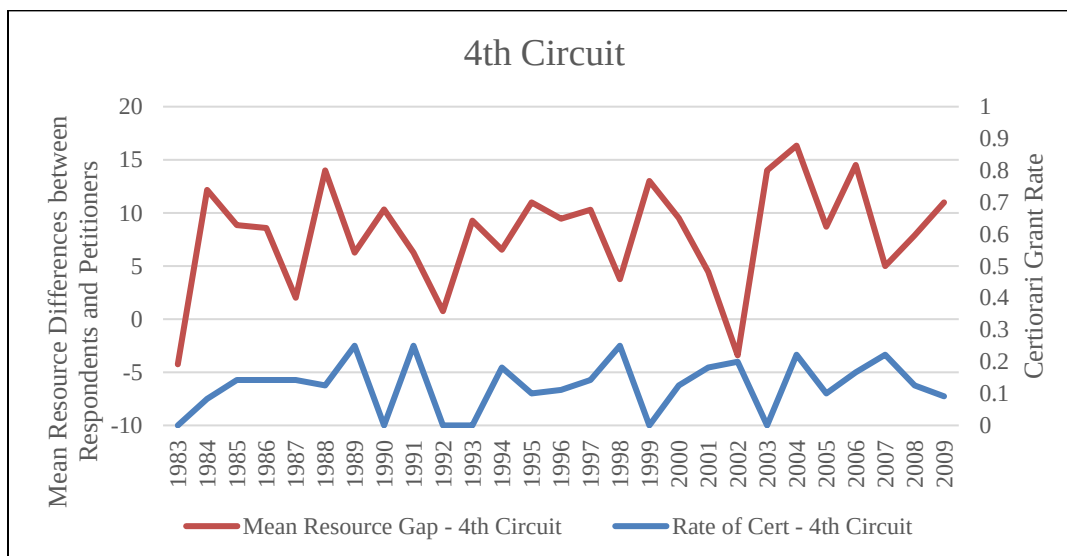


Figure IX-E – 4th Circuit

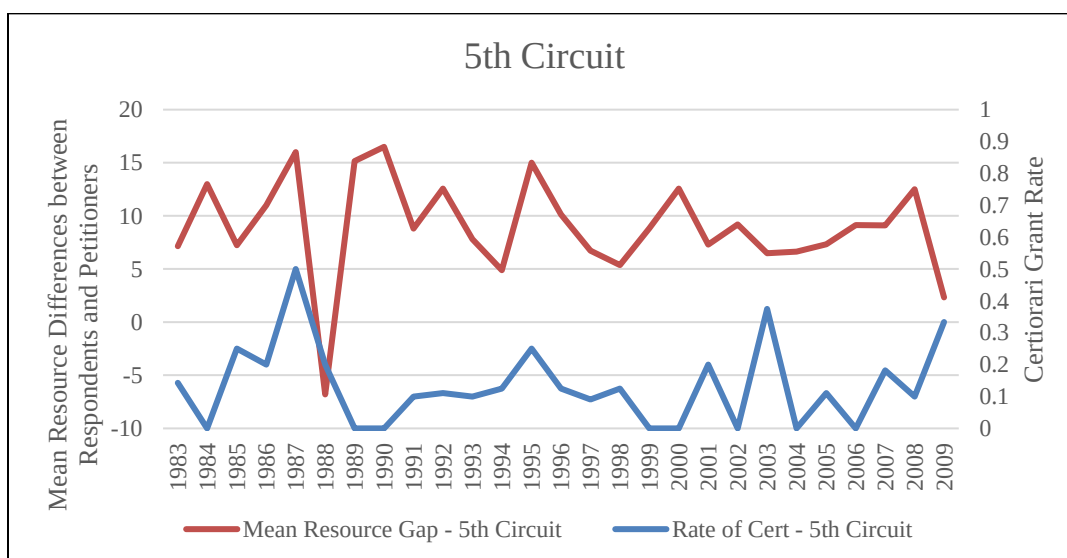


Figure IX-F – 5th Circuit

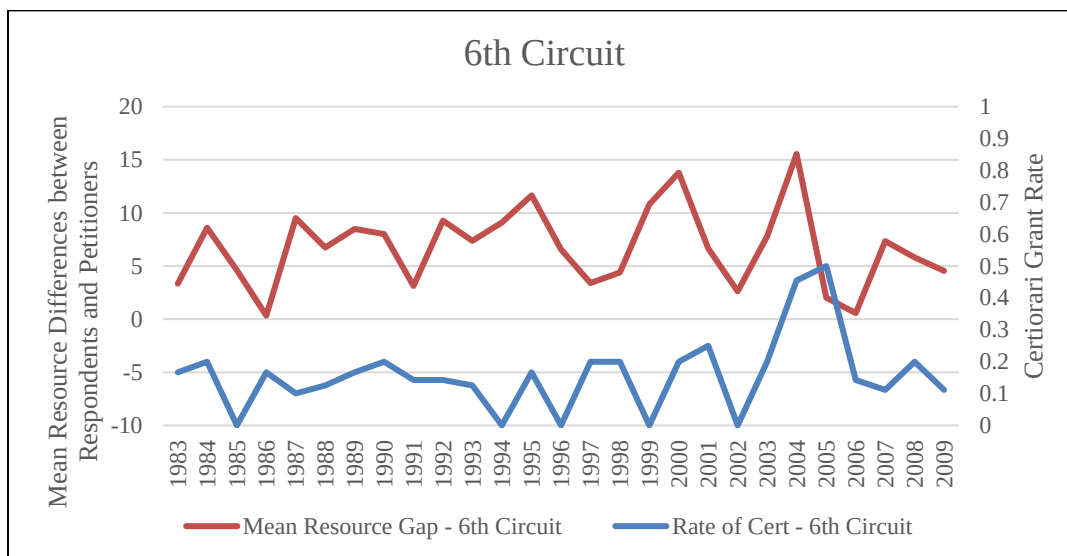


Figure IX-G – 6th Circuit

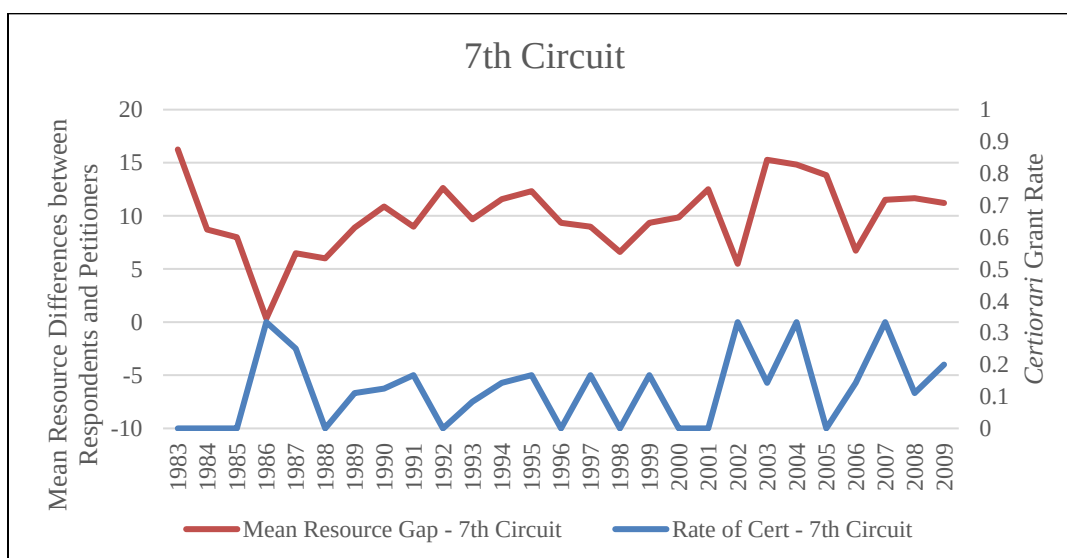


Figure IX-H – 7th Circuit

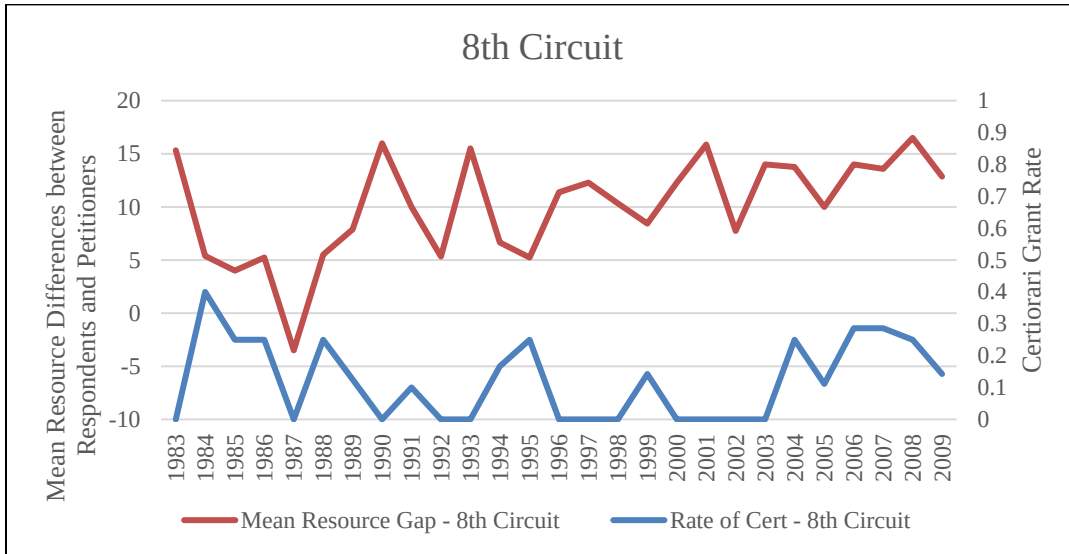


Figure IX-I – 8th Circuit

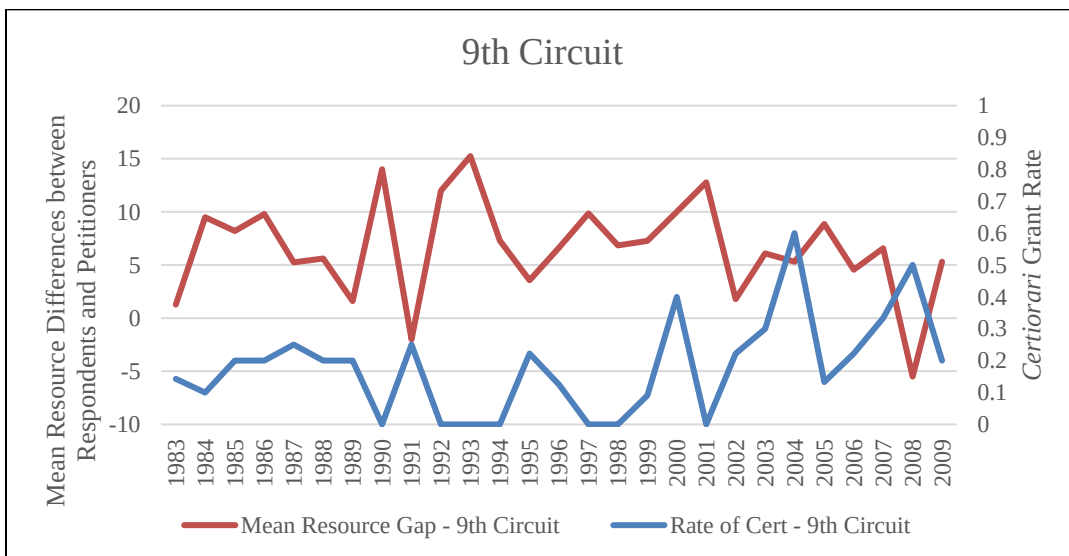


Figure IX-J – 9th Circuit

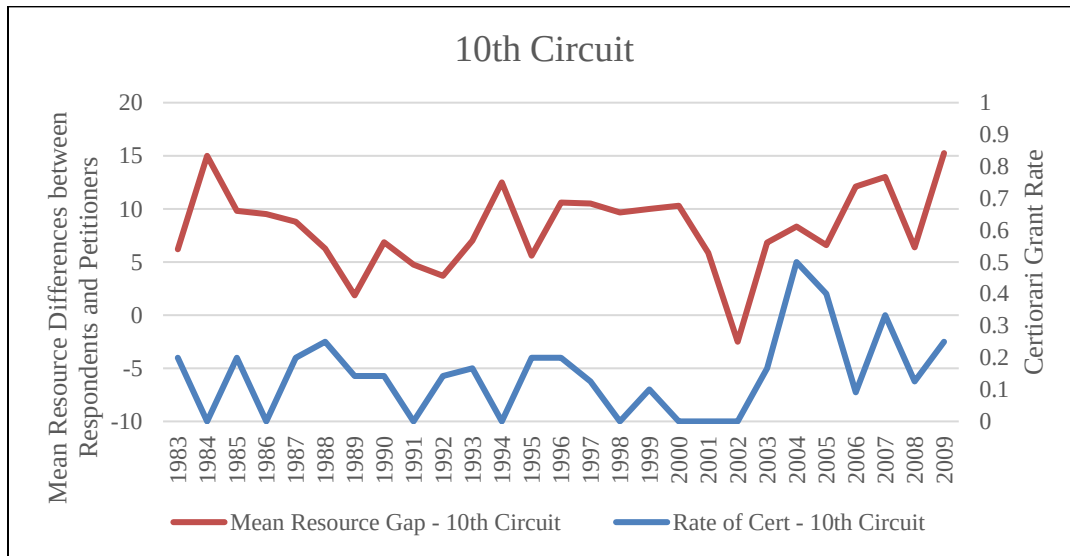


Figure IX-K – 10th Circuit

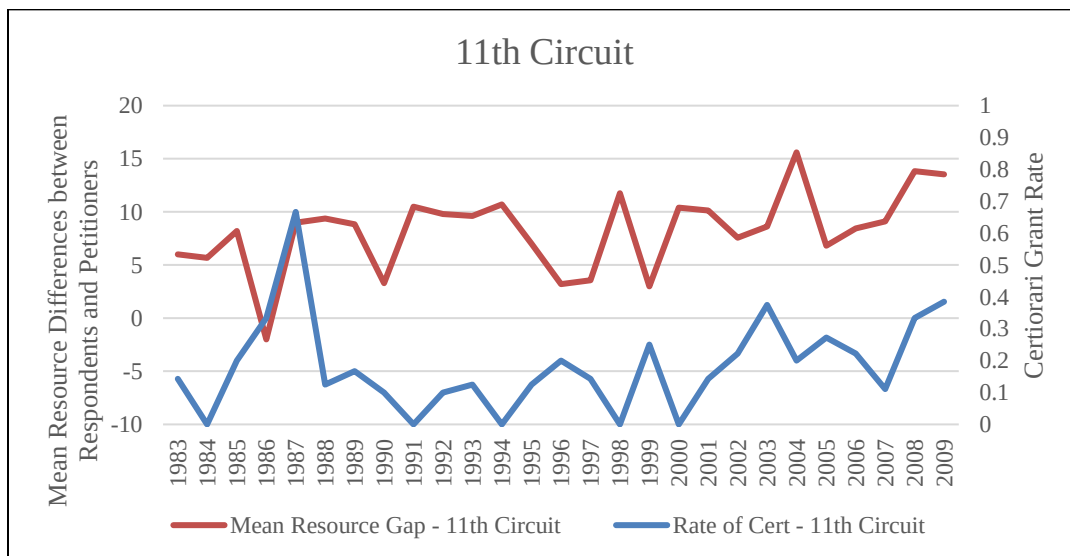


Figure IX-L – 11th Circuit

**Figure X: Supreme Court Median Justice Ideology, Median Circuit Judge Ideology,
and Grants of *Certiorari* by Circuit, 1983-2009**

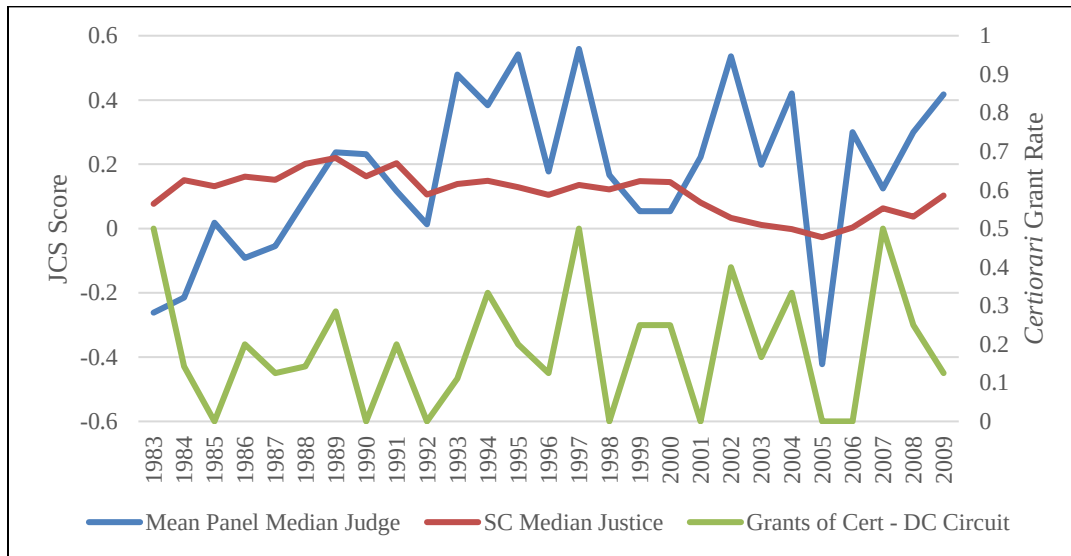


Figure X-A: DC Circuit

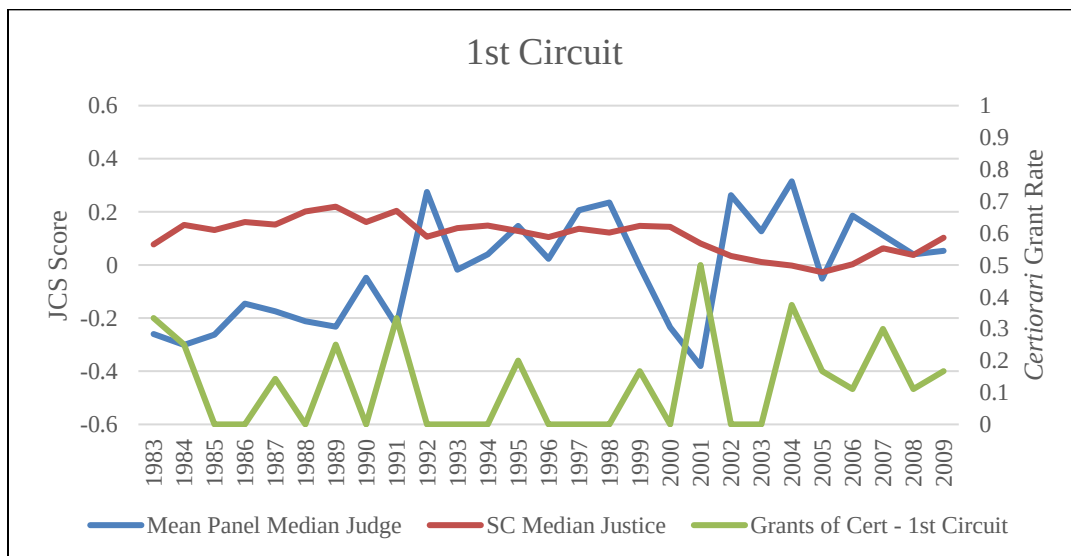


Figure X-B: 1st Circuit

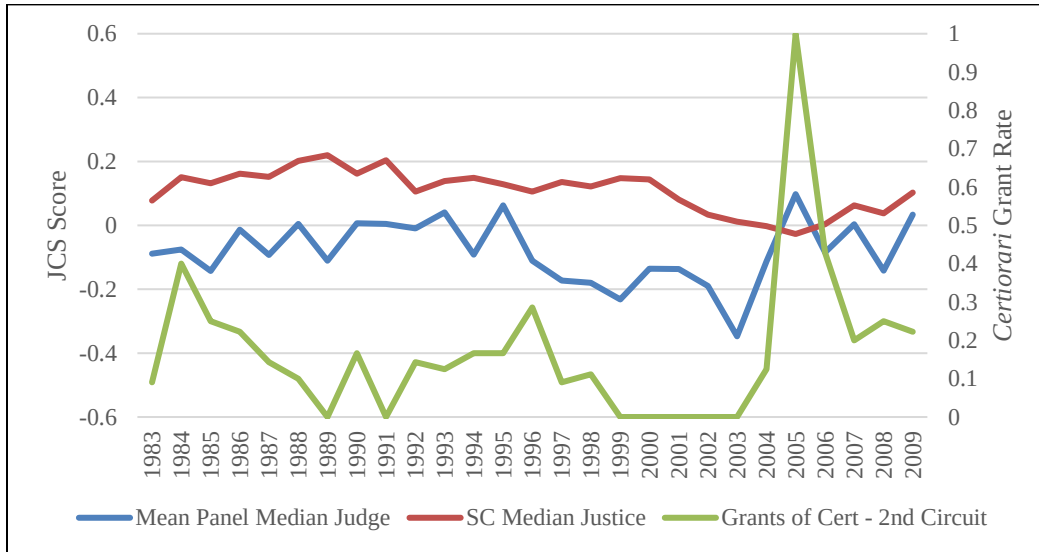


Figure X-C: 2nd Circuit

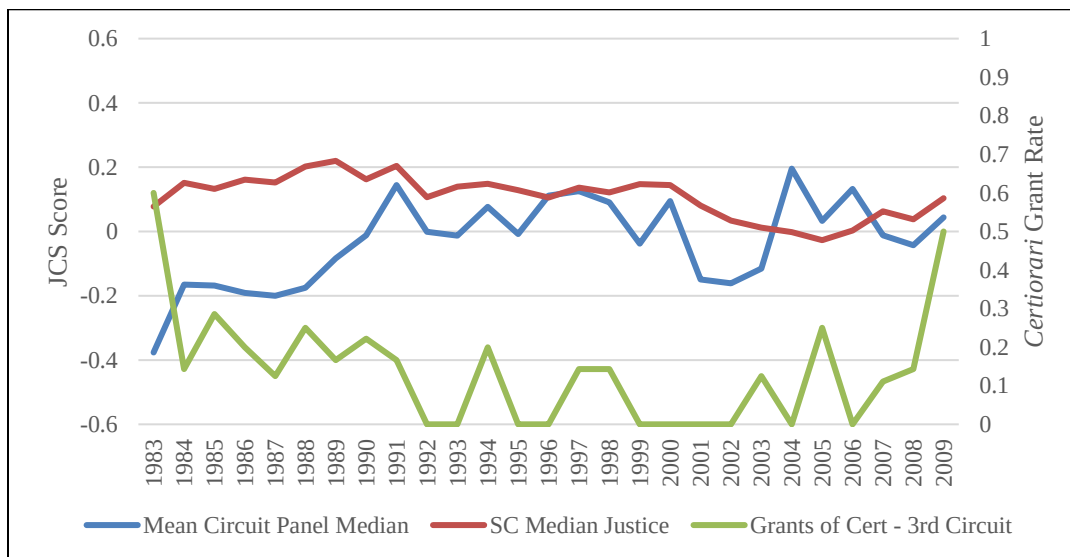


Figure X-D: 3rd Circuit

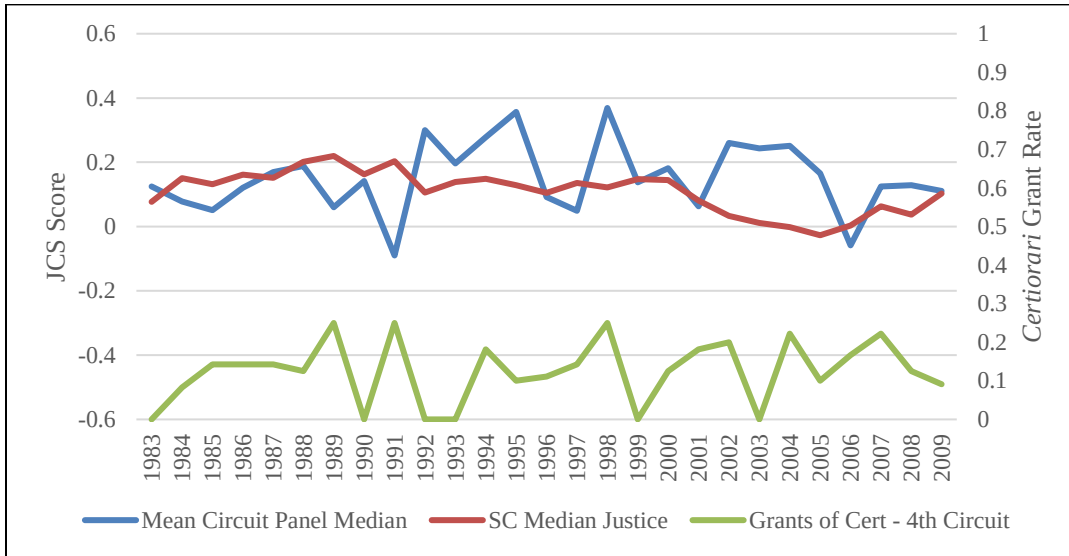


Figure X-E: 4th Circuit

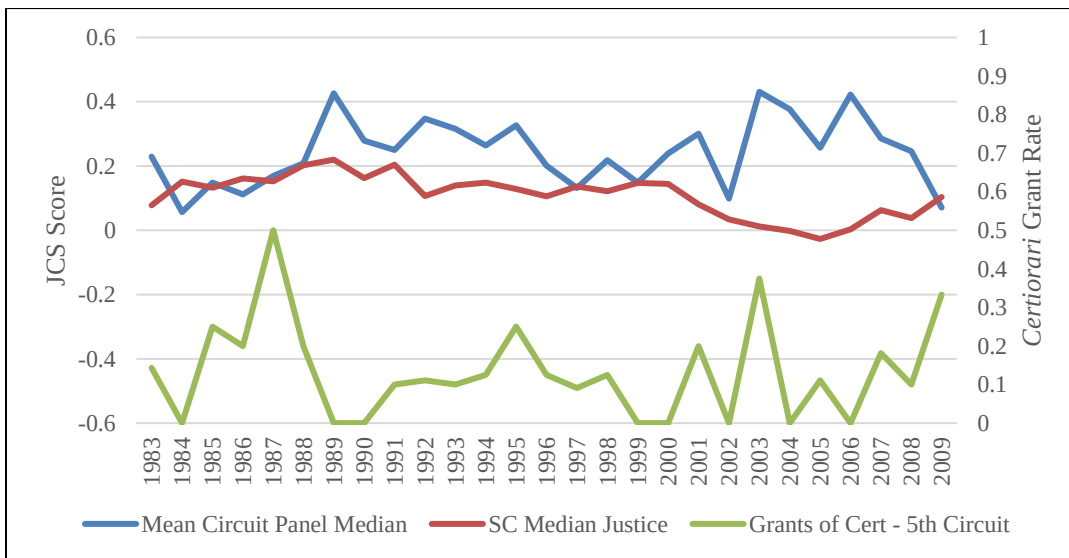


Figure X-F: 5th Circuit

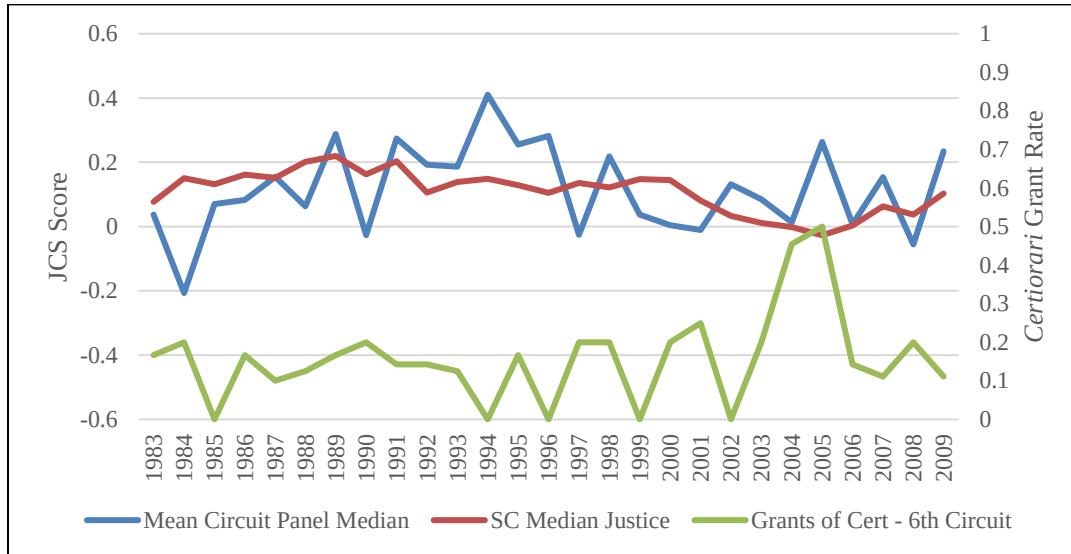


Figure X-G: 6th Circuit

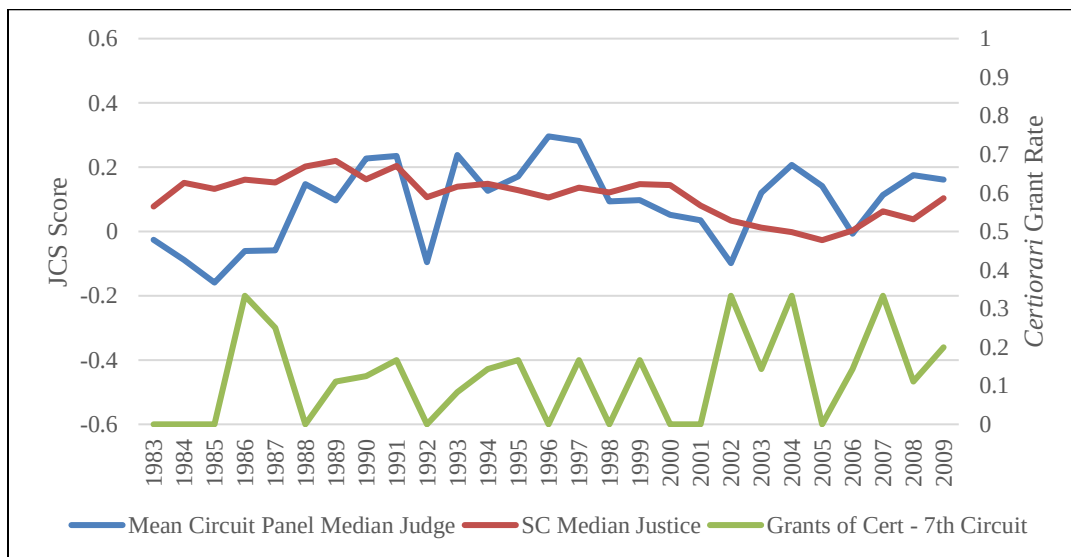


Figure X-H: 7th Circuit

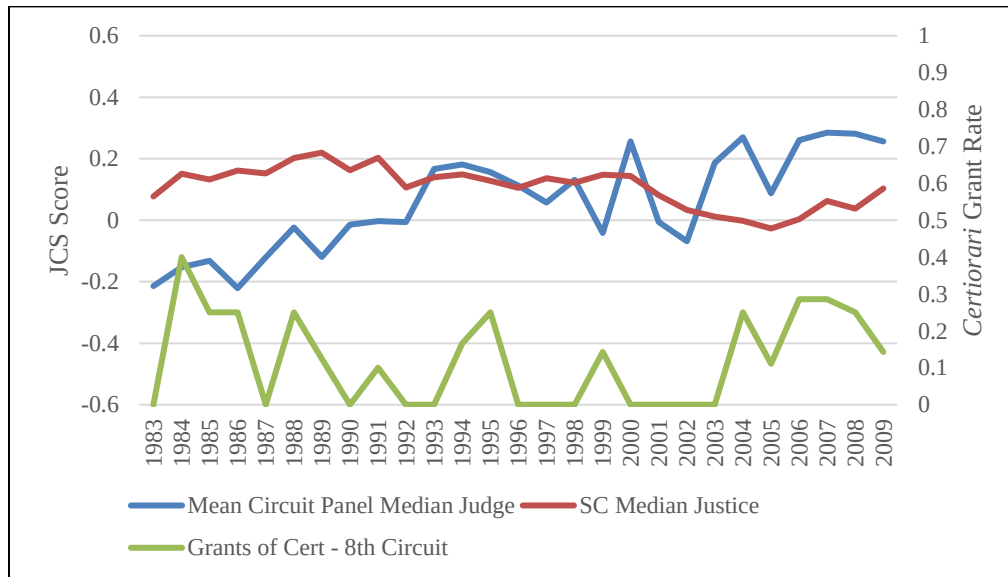


Figure X-I: 8th Circuit

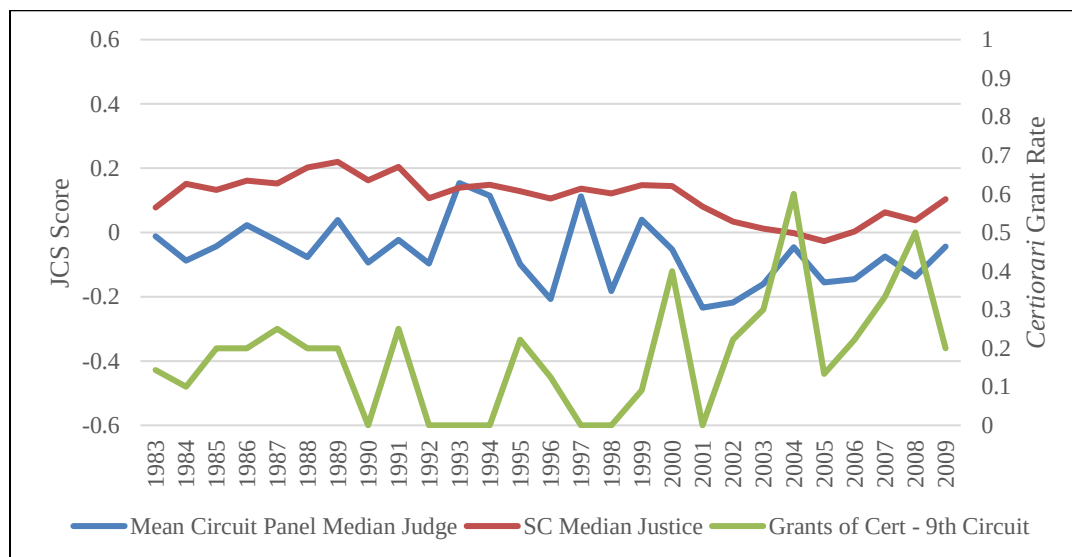


Figure X-J: 9th Circuit

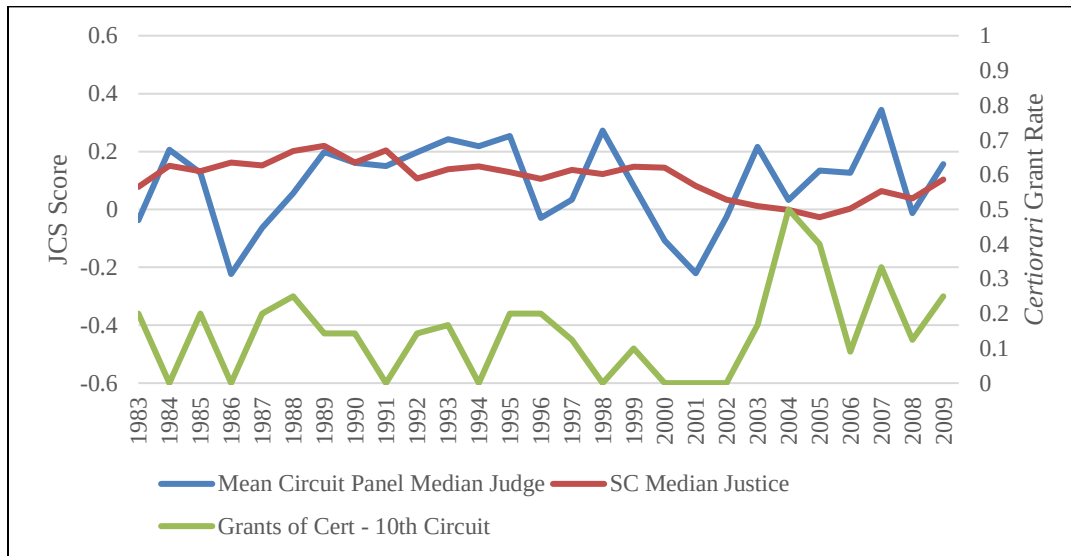


Figure X-K: 10th Circuit

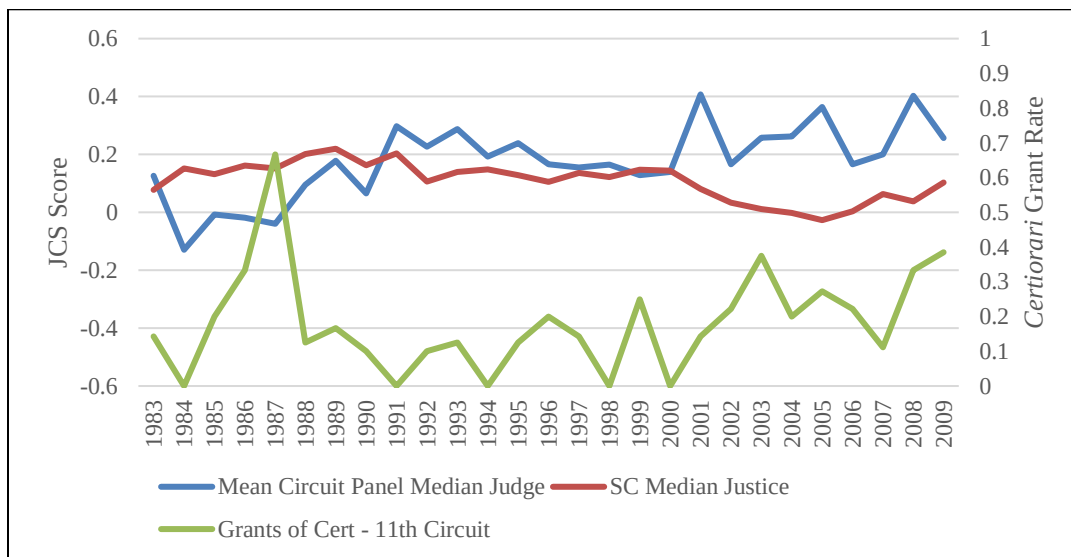


Figure X-L: 11th Circuit

Figure XI: Differences between Mean Circuit Panel Median Judges and Mean Ideological Direction of Circuit Decisions, 1983-2009

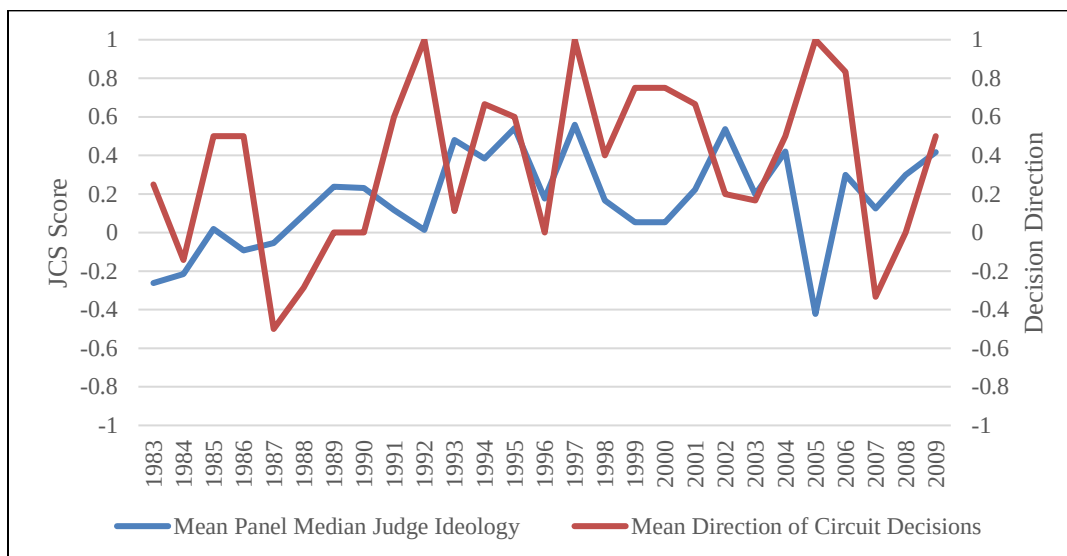


Figure XI-A: DC Circuit

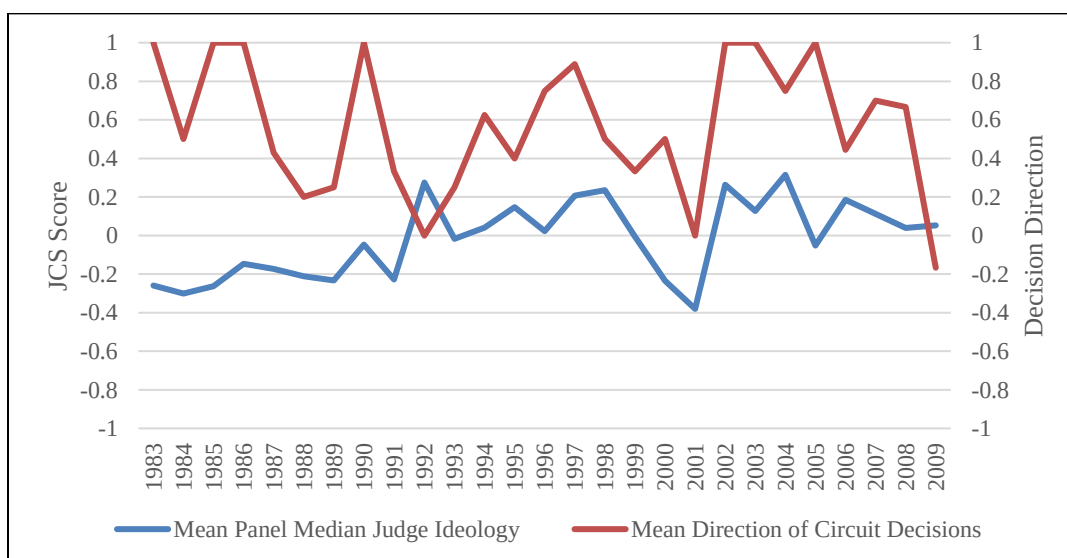


Figure XI-B: 1st Circuit

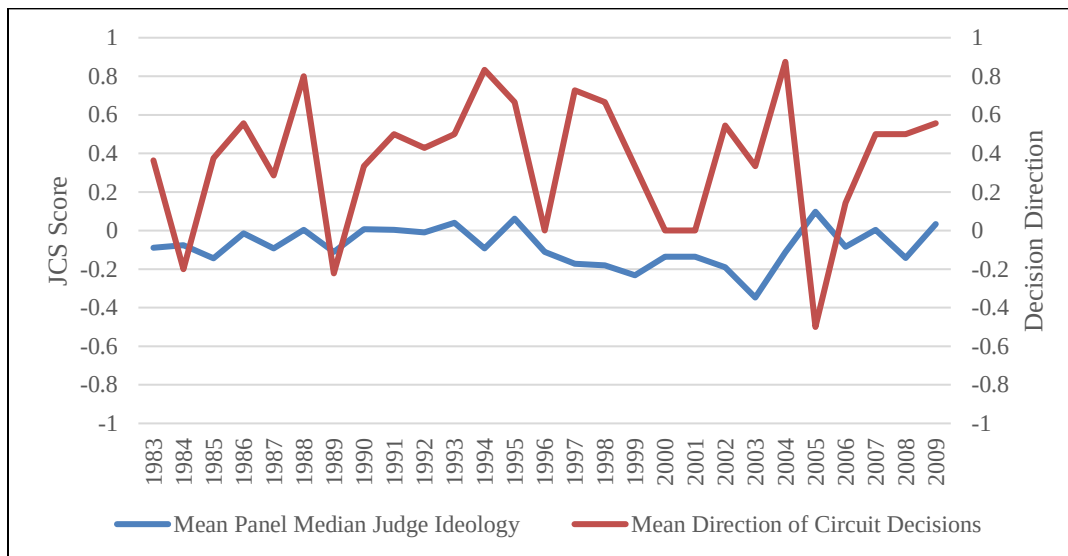


Figure XI-C: 2nd Circuit

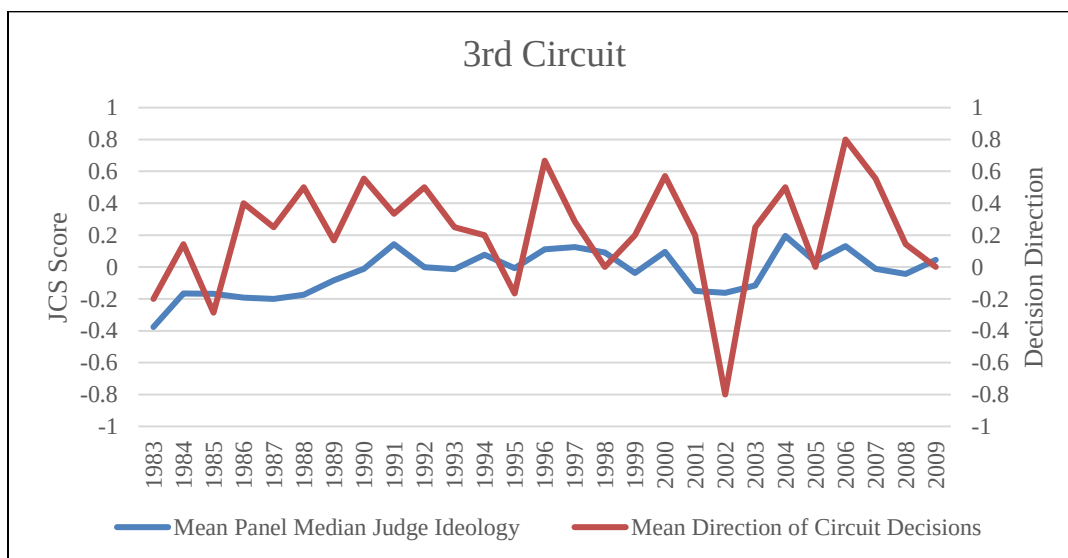


Figure XI-D: 3rd Circuit

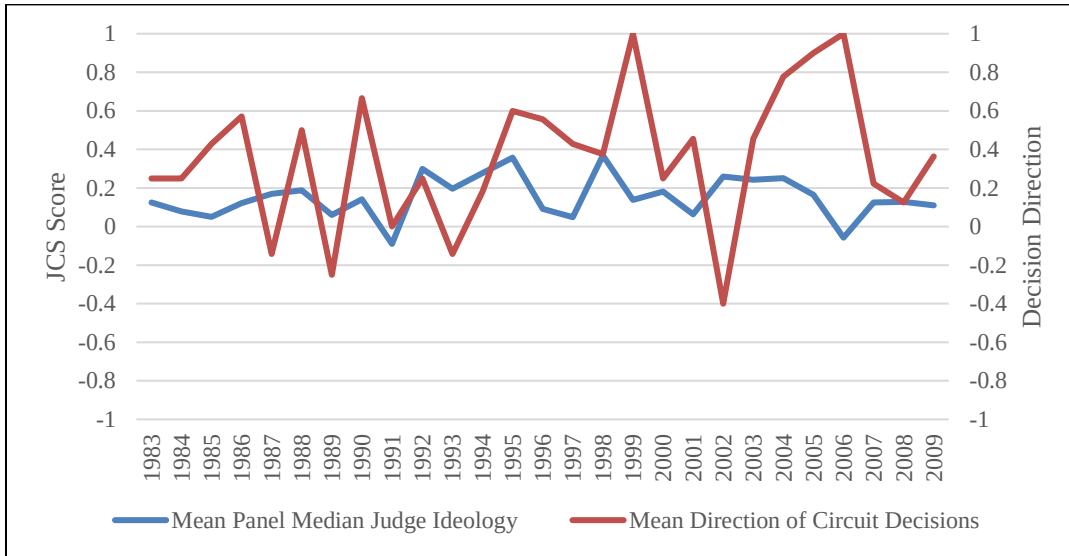


Figure XI-E: 4th Circuit

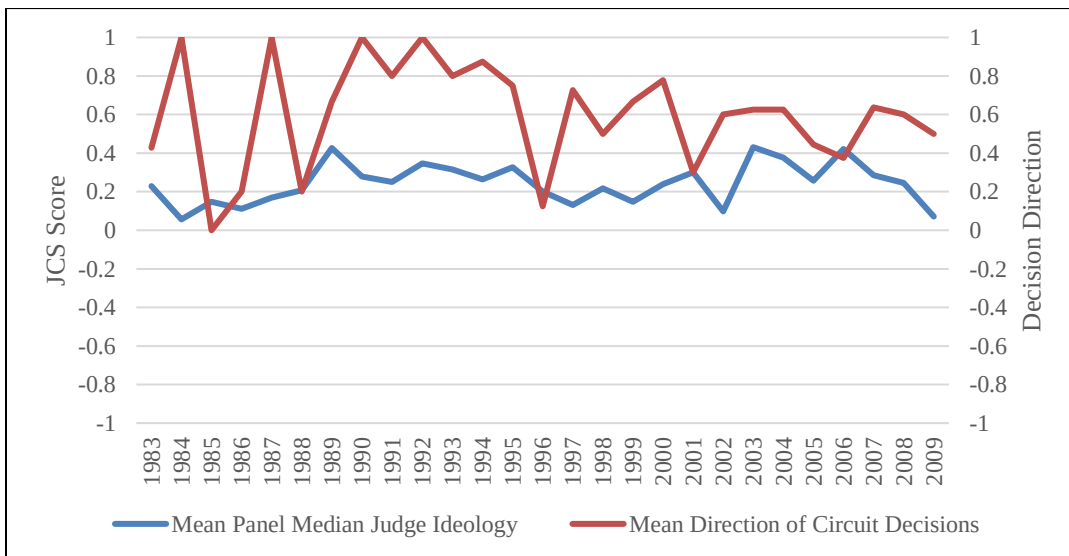


Figure XI-F: 5th Circuit

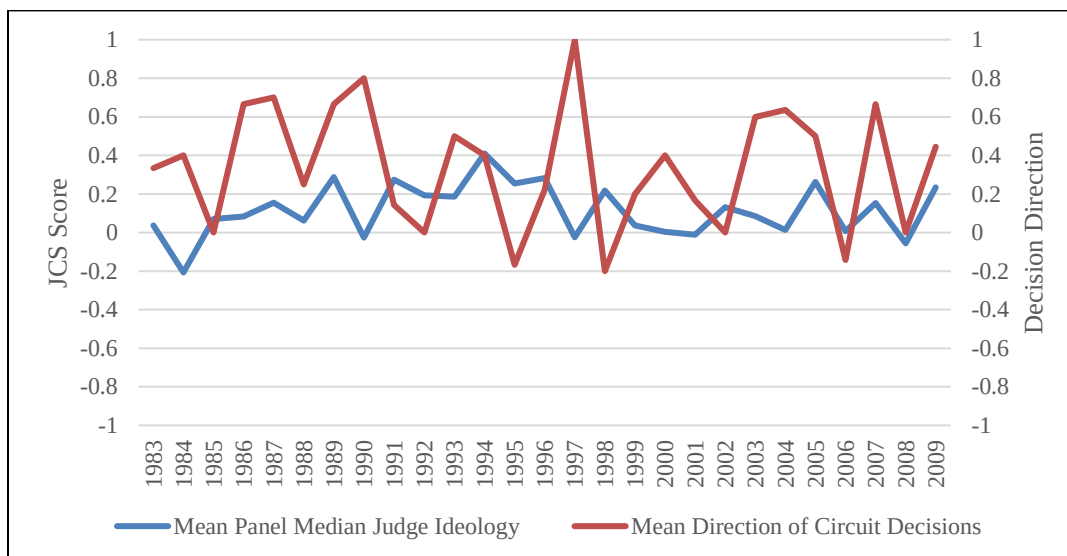


Figure XI-G: 6th Circuit

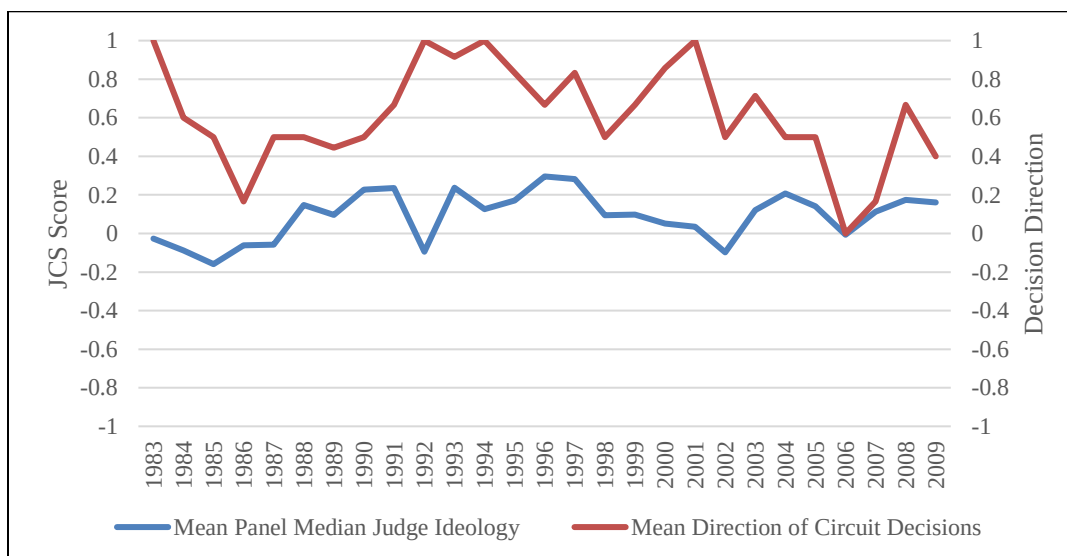


Figure XI-H: 7th Circuit

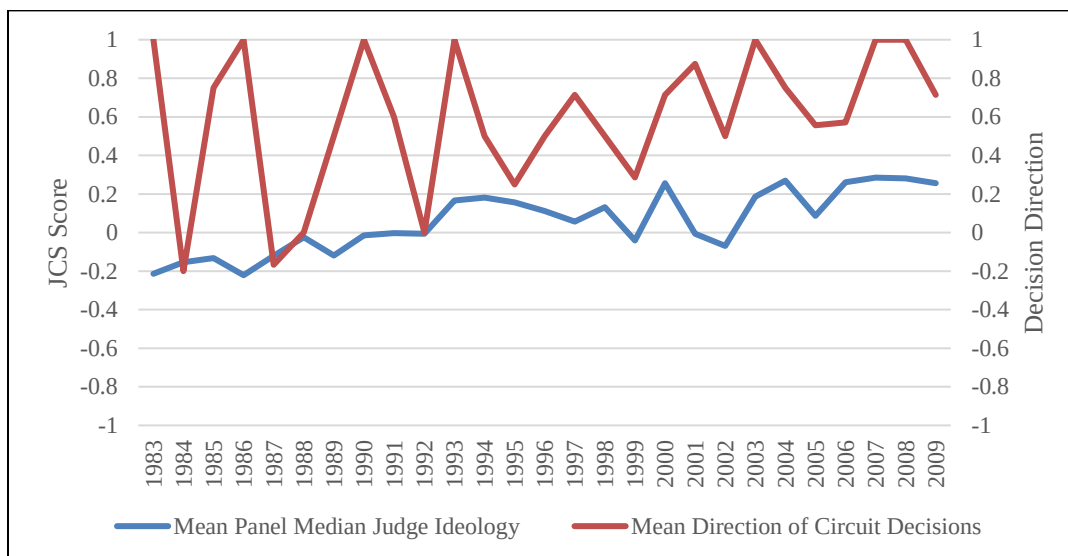


Figure XI-I: 8th Circuit

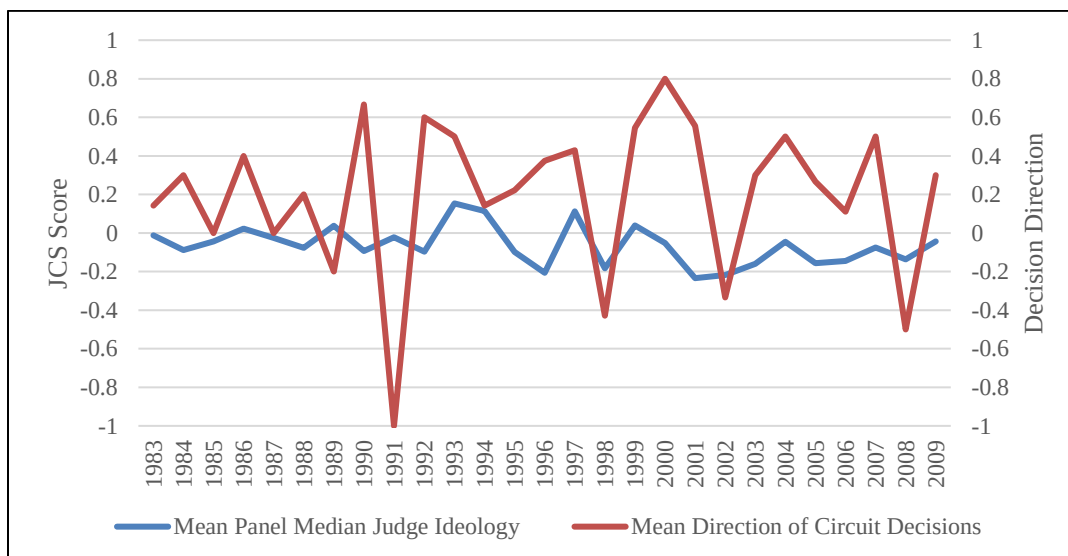


Figure XI-J: 9th Circuit

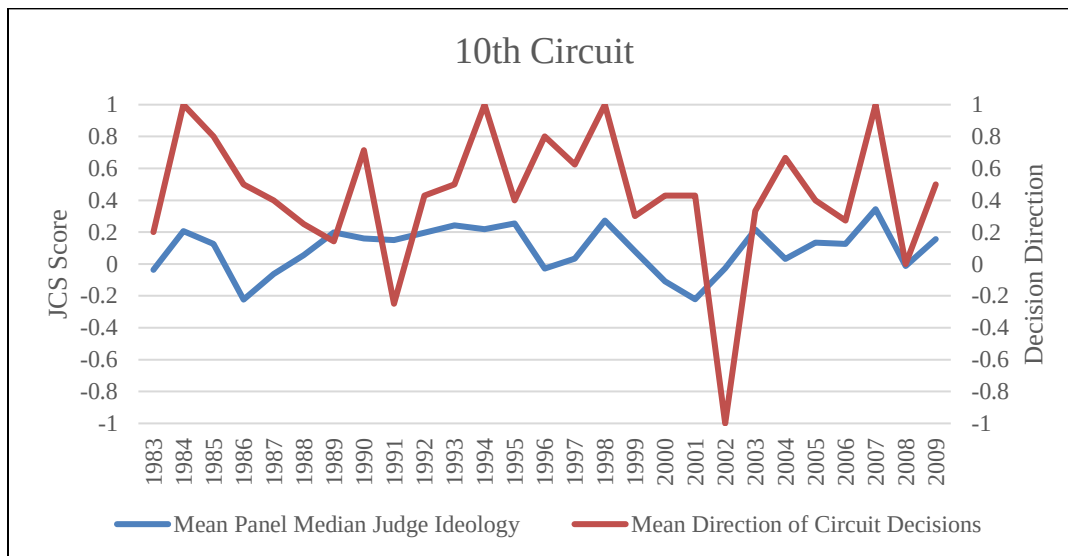


Figure XI-K: 10th Circuit

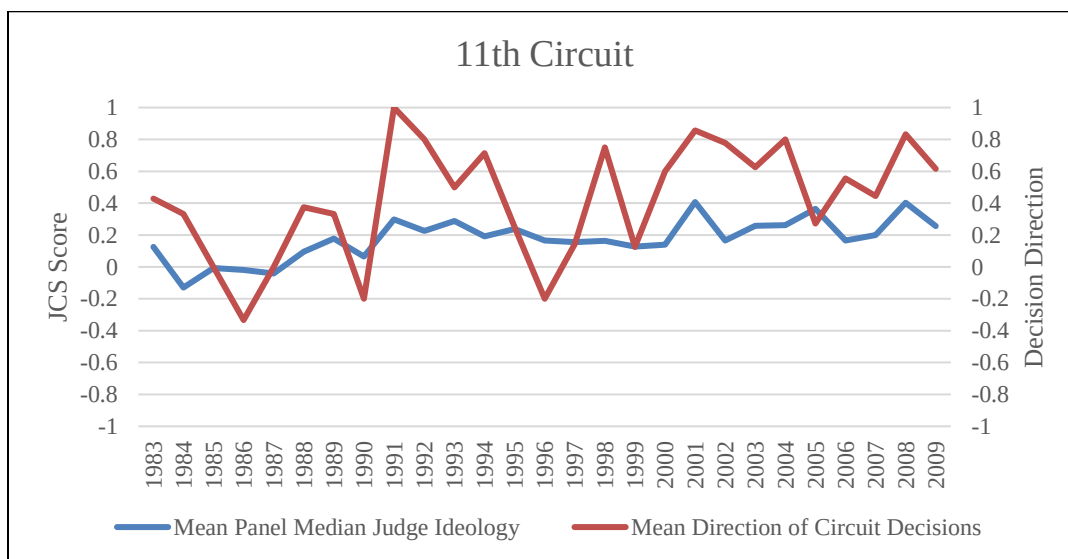


Figure XI-L: 11th Circuit

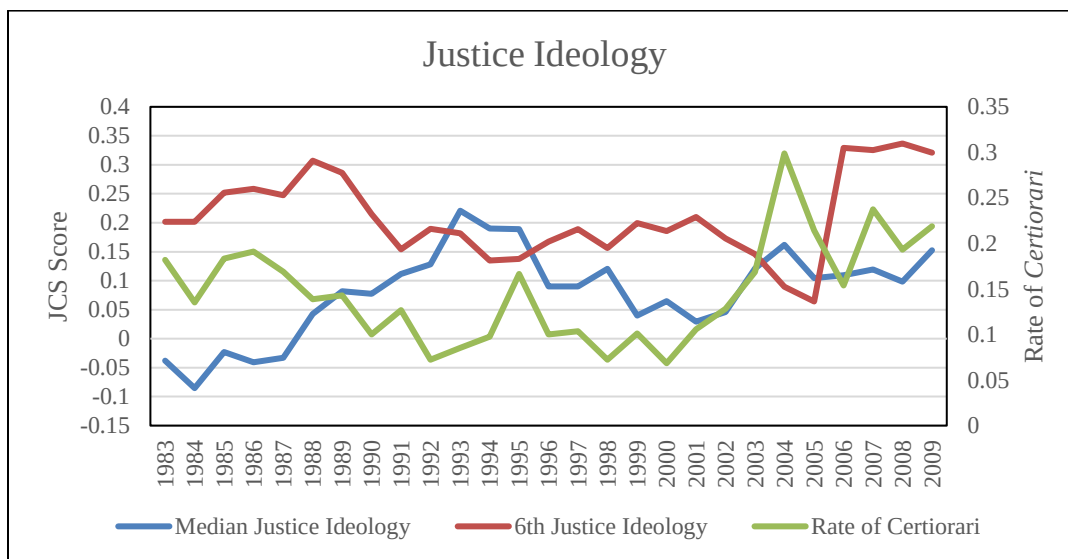


Figure XII: Ideology of Sixth and Median Justices and Rate of *Certiorari*, 1983-2009

Appendix A: Im-Pearson-Shin Test for Unit Root, Trend – Model I

H_0 : All panels contain unit roots

H_a : Panels stationary

Number of panels: 12

Number of time periods: 27

Appeals to the Supreme Court

Fixed-N Exact Critical Values

	Statistic	P-Value	1%	5%	10%
t-bar	-5.2603		-2.680	-2.530	-2.450
t-tilde-bar	-3.6465				
Z-t-tilde-bar	-9.7965	0.0000			

Distance between Circuit Median and Supreme Court Median

Fixed-N Exact Critical Values

	Statistic	P-Value	1%	5%	10%
t-bar	-2.9059		-2.680	-2.530	-2.450
t-tilde-bar	-2.5166				
Z-t-tilde-bar	-4.8042	0.0000			

Circuit Ideology

Fixed-N Exact Critical Values

	Statistic	P-Value	1%	5%	10%
t-bar	-4.6082		-2.680	-2.530	-2.450
t-tilde-bar	-3.4219				
Z-t-tilde-bar	-8.8042	0.0000			

Mean Resource Gap between Litigants

Fixed-N Exact Critical Values

	Statistic	P-Value	1%	5%	10%
t-bar	-4.8288		-2.680	-2.530	-2.450
t-tilde-bar	-3.4789				
Z-t-tilde-bar	-9.0559	0.0000			

Mean Rate of Dissent

Fixed-N Exact Critical Values					
	Statistic	P-Value	1%	5%	10%
t-bar	-4.8099		-2.680	-2.530	-2.450
t-tilde-bar	-3.4620				
Z-t-tilde-bar	-8.9812	0.0000			

Mean Treatment of Lower Court Decision by Circuit Court

Fixed-N Exact Critical Values					
	Statistic	P-Value	1%	5%	10%
t-bar	-5.5167		-2.680	-2.530	-2.450
t-tilde-bar	-3.7186				
Z-t-tilde-bar	-10.1153	0.0000			

Mean Criminal Case Decisions Rate

Fixed-N Exact Critical Values					
	Statistic	P-Value	1%	5%	10%
t-bar	-4.6896		-2.680	-2.530	-2.450
t-tilde-bar	-3.4208				
Z-t-tilde-bar	-8.7992	0.0000			

Mean Civil Rights and Liberties Decisions Rate

Fixed-N Exact Critical Values					
	Statistic	P-Value	1%	5%	10%
t-bar	-5.0124		-2.680	-2.530	-2.450
t-tilde-bar	-3.5420				
Z-t-tilde-bar	-9.3351	0.0000			

Mean Labor and Economic Decisions Rate

Fixed-N Exact Critical Values					
	Statistic	P-Value	1%	5%	10%
t-bar	-4.5097		-2.680	-2.530	-2.450
t-tilde-bar	-3.3580				
Z-t-tilde-bar	-8.5219	0.0000			

*Supreme Court Median Justice***Fixed-N Exact Critical Values**

	Statistic	P-Value	1%	5%	10%
t-bar	-3.0215		-2.680	-2.530	-2.450
t-tilde-bar	-2.6601				
Z-t-tilde-bar	-5.4381	0.0000			

*4th Supreme Court Justice***Fixed-N Exact Critical Values**

	Statistic	P-Value	1%	5%	10%
t-bar	-2.2247		-2.680	-2.530	-2.450
t-tilde-bar	-2.1036				
Z-t-tilde-bar	-2.9789	0.0014			

*6th Supreme Court Justice***Fixed-N Exact Critical Values**

	Statistic	P-Value	1%	5%	10%
t-bar	-1.9903		-2.680	-2.530	-2.450
t-tilde-bar	-1.9039				
Z-t-tilde-bar	-2.0966	0.0180			

Appendix B: Im-Pearson-Shin Test for Unit Root, Trend – Model II

H_0 : All panels contain unit roots

H_a : Panels stationary

Number of panels: 12

Number of time periods: 27

Grants of Certiorari by the Supreme Court

Fixed-N Exact Critical Values

	Statistic	P-value	1%	5%	10%
t-bar	-5.0322		-2.680	-2.530	-2.450
t-tilde-bar	-3.5013				
Z-t-tilde-bar	-9.1552	0.0000			

Distance between Mean Panel Median Judge Ideology and Supreme Court Median Justice Ideology

Fixed-N Exact Critical Values

	Statistic	P-value	1%	5%	10%
t-bar	-4.2092		-2.680	-2.530	-2.450
t-tilde-bar	-3.2579				
Z-t-tilde-bar	-8.0794	0.0000			

Circuit Ideology

Fixed-N Exact Critical Values

	Statistic	P-value	1%	5%	10%
t-bar	-5.2444		-2.680	-2.530	-2.450
t-tilde-bar	-3.6297				
Z-t-tilde-bar	-9.7225	0.0000			

Mean Resource Gap between Litigants

Fixed-N Exact Critical Values

	Statistic	P-value	1%	5%	10%
t-bar	-5.5795		-2.680	-2.530	-2.450
t-tilde-bar	-3.7371				
Z-t-tilde-bar	-10.1970	0.0000			

*Mean Rate of Dissent***Fixed-N Exact Critical Values**

	Statistic	P-value	1%	5%	10%
t-bar	-5.3733		-2.680	-2.530	-2.450
t-tilde-bar	-3.6611				
Z-t-tilde-bar	-9.8612	0.0000			

*Mean Treatment of Lower Court Decision by Circuit Court***Fixed-N Exact Critical Values**

	Statistic	P-value	1%	5%	10%
t-bar	-5.6987		-2.680	-2.530	-2.450
t-tilde-bar	-3.7606				
Z-t-tilde-bar	-10.3009	0.0000			

*Mean Criminal Case Decisions Rate***Fixed-N Exact Critical Values**

	Statistic	P-value	1%	5%	10%
t-bar	-4.8019		-2.680	-2.530	-2.450
t-tilde-bar	-3.5126				
Z-t-tilde-bar	-9.2050	0.0000			

*Mean Civil Rights/Liberties Decisions Rate***Fixed-N Exact Critical Values**

	Statistic	P-value	1%	5%	10%
t-bar	-5.0247		-2.680	-2.530	-2.450
t-tilde-bar	-3.5533				
Z-t-tilde-bar	-9.3847	0.0000			

*Mean Labor/Economic Decisions Rate***Fixed-N Exact Critical Values**

	Statistic	P-value	1%	5%	10%
t-bar	-4.8026		-2.680	-2.530	-2.450
t-tilde-bar	-3.4638				
Z-t-tilde-bar	-8.9894	0.0000			

*Supreme Court Median Justice***Fixed-N Exact Critical Values**

	Statistic	P-value	1%	5%	10%
t-bar	-3.0215		-2.680	-2.530	-2.450
t-tilde-bar	-2.6601				
Z-t-tilde-bar	-5.4381	0.0000			

*4th Supreme Court Justice***Fixed-N Exact Critical Values**

	Statistic	P-value	1%	5%	10%
t-bar	-2.2247		-2.680	-2.530	-2.450
t-tilde-bar	-2.1036				
Z-t-tilde-bar	-2.9789	0.0014			

*6th Supreme Court Justice***Fixed-N Exact Critical Values**

	Statistic	P-value	1%	5%	10%
t-bar	-1.9903		-2.680	-2.530	-2.450
t-tilde-bar	-1.9039				
Z-t-tilde-bar	-2.0966	0.0180			

Vita

Andrew Smith was born in 1984 in Memphis, Tennessee, to Harold and Debra Smith. He is the oldest of two siblings, Caitlin and Katie. After graduating from Memphis University School, he attended Birmingham Southern College in Birmingham, Alabama, where he earned a Bachelor of Arts in political science, with a minor in history. He then attended American University in Washington, DC, where he earned a Master of Science in Justice, Law, and Society. After two years working at the FedEx corporation, Andrew enrolled at the University of Tennessee, Knoxville, to pursue his doctoral degree in political science. In May 2018, Andrew received his PhD from the university. His plans are to teach at a liberal arts college or teaching university, while continuing to conduct research on the American judicial system.