Polarized Circuits: Party Affiliation of Appointing Presidents, Ideology and Circuit Court Voting in Race and Gender Civil Rights Cases

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ABSTRACT

Polarized Circuits: Party Affiliation of Appointing Presidents, Ideology and Circuit Court Voting in Race and Gender Civil Rights Cases

This article seeks to examine the impact of Presidential party affiliation on the ideological voting patterns of Circuit Court judicial appointments within the context of race and gender civil rights cases. The article assesses two hypotheses regarding Circuit Court judicial voting patterns in race and gender civil rights cases: 1) That the ideological voting gap between Democratic appointed Circuit Court judges and Republican appointed Circuit Court judges has widened over time within the context of race and gender civil rights cases and 2) That Republican and Democratic appointed Circuit Court judges are more closely aligned in their ideological voting patterns in gender civil rights cases than in race civil rights cases. After examining the validity of the two proposed hypotheses, the article proceeds to offer suggestions regarding future empirical studies, designed to more effectively test the two hypotheses. Finally, the article concludes by making predictions regarding the possible impact and influence of President Obama’s likely Circuit Court appointments over the next four or eight years on the two posited hypotheses.
Polarized Circuits: Party Affiliation of Appointing Presidents, Ideology and Circuit Court Voting in Race and Gender Civil Rights Cases

I. Introduction

This article seeks to examine the influence of judicial political ideology on judicial voting patterns in the United States Courts of Appeals (“Circuit Courts”) within the context of civil rights cases, focusing specifically on race and gender cases. To study ideology and judicial voting patterns, this article analyzes the data, analysis and findings of a recent study by Cass R. Sunstein, David Schkade, Lisa M. Ellman and Andres Sawicki (collectively “Sunstein”), which examined the effect of political ideology on Circuit Court Judge ideological voting across various case categories.¹

Two hypotheses form the foundation for this article. Focusing on civil rights cases from the 1950s or 1960s through the 2000s, the first hypothesis (“Ideology Gap Hypothesis”) posits that the ideological voting gap has widened between Circuit Court Judges appointed by Republican Presidents (“Republican judges”) and Circuit Court Judges appointed by Democratic Presidents (“Democratic judges”) in terms of the percentage likelihood that they will vote in a liberal direction or in favor of a race or gender civil rights claim. In other words, both sets of judges have become more partisan in their civil rights voting patterns over time. The foundation for this hypothesis is the theory that both the Democratic and Republican Parties have become more ideologically extreme in the past 40 or 50 years, and that this increased partisanship extends across the federal judiciary, as well.²

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² William A. Galston, Political Polarization and the U.S. Judiciary, 77 UMKC L. Rev. 307, 308 (Winter, 2008) (arguing that Congress has become increasingly politically polarized in recent times).
Somewhat counterintuitive to the first hypothesis, the second hypothesis (“Race/Gender Gap Hypothesis”) posits that the gap between Democratic judges and Republican judges in terms of the percentage likelihood that they will vote in favor of a sex-based claim is smaller than the gap between the two sets of judges in terms of the percentage likelihood that they will vote in favor of a race-based claim. The Race/Gender Gap Hypothesis is focused solely on the present gap between Democratic and Republican judges in terms of voting on women’s and African-American’s civil rights issues rather than any changes to that gap over time, so it is not as counterintuitive to the first hypothesis as it may first seem.

The foundation for the Race/Gender Gap Hypothesis is the fact that women appear to play a more prominent leadership role in the Republican Party than African-Americans, based on African-American Republican representation in Congress compared to female Republican representation in Congress. Although the Chairman of the Republican National Committee, Michael Steele, is an African-American, there are no African-American Republican Senators or Congressmen in the 111th Congress. On the other hand, there are four female Republican women Senators and 17 Republican Congresswomen in the 111th Congress and former Governor Sarah Palin of Alaska was the Republican nominee for Vice-President in 2008. The Race/Gender Gap Hypothesis assumes that Republican judges are a reflection of the Republican Party, and predicts that the Republican Party and its judges should be more sensitive to gender issues than racial issues and cast more liberal votes on the former over the latter, given the

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4 Manning at 5, supra note 3 (identifying four female Republican Senators and 17 Republican Congresswomen in the 111th Congress); Leland Ware & David C. Wilson, Jim Crow on the “Down Low”: Subtle Racial Appeals in Presidential Campaigns, 24 St. John’s J. Legal Comment. 299, 333 (Fall, 2009) (identifying Sarah Palin as the Republican Party’s first female Vice-Presidential nominee).
differences between female leadership and African-American leadership within the Republican Party. Accordingly, the ideological voting gap between Democratic and Republican judges should be smaller with regard to gender civil rights cases than race civil rights cases, given that Democratic judges are presumed to be strongly supportive of both women’s and African-Americans’ civil rights, as the Democratic Party has historically been viewed as a defender of African-American and women’s civil rights.5

Having outlined the two hypotheses for this article, the structure of the rest of the article follows in three parts. The first part discusses the Sunstein study and assesses and analyzes the study and its findings in terms of the two hypotheses of this article. The second part of this article outlines some deficiencies in the Sunstein study methodology and proposes suggestions for future studies to test the two hypotheses of this article. The final part of this article discusses possible implications of the new Obama administration on the issues discussed herein.

II. The Sunstein Study on Circuit Court Ideological Voting Trends

Although there are a number of recent studies on Circuit Court ideological voting in civil rights cases, none of the studies directly address the two hypotheses raised by this article.6

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5 Heather K. Gerken, A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach, 106 Colum. L. Rev. 708, 712 (April, 2006) (arguing that the Democratic party is traditionally the most supportive political party of minority civil rights); Vicki Lens, Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002, 10 Cardozo Women’s L.J. 501, 510-14 (Summer, 2004) (discussing conservative and Republican opposition or hostility, as opposed to Democratic opposition or hostility, to women’s rights issues in the 1970s and 1980s).

However, the most recent and comprehensive study that touches on these issues is the Sunstein study. Outlined below is a brief description of the Sunstein study, its methodology, findings and an assessment of the Sunstein study in terms of the two hypotheses raised in this article.

A. The Sunstein Study and Race and Gender Civil Rights Cases

The Sunstein study is a 2006 study that examined the effect of political ideology on the ideological direction of Circuit Court Judges’ votes in 6,408 published three-judge panel decisions over 19,224 judicial votes.\(^7\) Sunstein studied various categories of cases, including affirmative action, Title VII race discrimination, sex discrimination and sexual harassment cases.\(^8\) The study identified each judge as a Democrat or Republican based on the party of that judge’s appointing President.\(^9\) The purpose of Sunstein’s study was to explore three issues: 1) The impact of the appointing President’s party affiliation on the ideological direction of a judge’s vote; 2) Whether a judge’s tendency to vote along predicted ideological lines is dampened when he or she sits on a panel with two judges of a different political party affiliation than his or her own and 3) Whether a judge's tendency to vote along predicted ideological lines is amplified when he or she sits on a panel with two judges of the same political party affiliation as his or her own.\(^10\) Given the purposes of this article, this discussion will focus primarily on the first issue.

Starting with affirmative action cases, Sunstein examined affirmative action cases from 1978 through 2004 and revealed that Democratic judges voted in favor of affirmative action

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\(^7\) Sunstein, et al. at 8-9.  
\(^8\) Id. at 8-9.  
\(^9\) Id. at 8-9.
plans 75% of the time, while Republican judges voted in favor of them 47% of the time.\textsuperscript{11} Despite the large voting gap for affirmative action cases, the voting gap was a lot smaller for Title VII race discrimination cases, where Democratic judges voted in favor of the plaintiffs 43% of the time and Republican judges voted in favor of the plaintiffs 34% of the time.\textsuperscript{12} The voting gaps for both sets of data are deemed to be statistically significant voting gaps.\textsuperscript{13}

Sunstein never discusses possible explanations for why the data illustrates starkly different voting gaps between the two sets of judges, even though affirmative action cases and Title VII race cases both involve race and remedying racial discrimination. One plausible explanation for the two different voting gaps may be that affirmative action is a more partisan issue than Title VII race discrimination. Many Republicans are fundamentally opposed to the concept of affirmative action, whereas they are not fundamentally opposed to Title VII, but merely favor a more narrow interpretation of Title VII or believe that Title VII is overly enforced.\textsuperscript{14} If Republican judges are a reflection of the Republican Party, then expectedly Republican judges will display more extreme ideological voting in affirmative action cases than in Title VII race discrimination cases.

Although the partisanship rationale is a possible explanation for the different voting gaps for affirmative action cases and Title VII race cases, that rationale is undercut to some extent by the statistical showing that Republican judges voted more often in favor of affirmative action

\textsuperscript{11} Id. at 20-21, 24.
\textsuperscript{12} Id. at 20-21.
\textsuperscript{13} Id. at 24, n. 31, 36, n. 48.

plaintiffs, 47% of the time, than they voted in favor of Title VII plaintiffs, 34% of the time.\textsuperscript{15} Assuming the correctness of the partisanship rationale, one would expect to find the percentage of Republican votes in favor of plaintiffs to be lower in affirmative action cases than in Title VII cases.

The most likely explanation that the partisanship rationale is correct despite the comparison of Republican voting in affirmative action and Title VII cases is that the Title VII cases were simply weaker cases than the affirmative action cases. This explanation is a very real possibility, especially given that even Democratic judges voted for plaintiffs at much lower percentage rates in Title VII cases (43%) compared with affirmative action cases (75%).\textsuperscript{16} It is possible that too many attorneys are taking on frivolous Title VII race cases or that court decisions, over time, have interpreted the Title VII standards in such a manner as to be extremely difficult for plaintiffs to prevail, even if the deciding judges have a pro-plaintiff bent on the Title VII issue.\textsuperscript{17}

Turning to sex discrimination cases, Sunstein examined cases from 1995 through 2004, revealing that Democratic judges voted in favor of plaintiffs 52% of the time, while Republican judges voted in favor of plaintiffs only 35% of the time.\textsuperscript{18} A similar gap was present in the sexual harassment cases, where Democratic judges voted in favor of the plaintiff 55% of the time.

\textsuperscript{15} Sunstein, et al. at 20-21, supra note 1.  
\textsuperscript{16} Id. at 20-21.  
\textsuperscript{17} Reeves at 556, supra note 14 (arguing that “a considerable number of employment discrimination claims are meritless, if not frivolous”); Cynthia Estlund, \textit{Wrongful Discharge Protections in an At-Will World}, 74 Tex. L. Rev. 1655, 1679 (1995) (arguing that members of Title VII protected classes, in an effort to avoid the lack of recourse available in at-will employment relationships “may consequently see and claim discrimination when there is simple garden-variety unfairness”).  
\textsuperscript{18} Sunstein, et al. at 26, 30, supra note 1.
and Republican judges voted in favor of the plaintiff 40% of the time.\textsuperscript{19} In both sets of cases, the percentage gap is highly statistically significant.\textsuperscript{20}

**B. The Sunstein Study and the Race/Gender Gap Hypothesis**

Comparing the gender case statistics to the race case statistics, Sunstein’s study does not support the Race/Gender Gap Hypothesis that Republican judges and Democratic judges are more closely aligned in gender civil rights cases than in race civil rights cases. The voting percentage gap between Republican and Democratic judges is surprisingly larger in gender cases than in race cases, with the exception of affirmative action cases.\textsuperscript{21} The liberal voting percentage gap between the two sets of judges for Title VII race cases is 9%, while the liberal voting percentage gap between the two sets of judges for sex discrimination cases is 17%, almost double. However, the liberal voting percentages of Republican judges is practically the same for Title VII race cases, 34%, as it is for sex discrimination cases, 35%.

One explanation for the consistency across Republican judges is that Republican judges simply hold fast to their core belief in a narrow or strict construction of civil rights statutes, regardless of whether the subject of the discrimination case is gender or race.\textsuperscript{22} In other words, Republican judicial consistency in conservative ideology trumps any potential effect of female Republican leadership, when compared with possible effects of a lack of African-American Republican leadership, in terms of predicted greater Republican judicial sensitivities to gender civil rights over race civil rights.

\textsuperscript{19} *Id.* at 32.

\textsuperscript{20} *Id.* at 30, n. 37.

\textsuperscript{21} The extreme gap in voting percentages for the affirmative action cases may be explained by the extreme partisanship surrounding the issue of affirmative action, as discussed *supra* at p. 5.

\textsuperscript{22} Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 St. Louis L.J. 569, 591 (Spring, 2003) (arguing that conservative Supreme Court Justices fundamentally believe in a narrow interpretation of civil rights statutes).
More interestingly, and the actual explanation for the unpredicted difference between the two voting gaps is the fact that Democratic judges are 9% more likely to vote in favor of sex discrimination plaintiffs than Title VII African-American plaintiffs. Assuming Democratic judges are a reflection of the Democratic Party, this result is surprising as there is evidence of a closer alignment between the Democratic Party and African-Americans than the Democratic Party and women.

There are no patently obvious explanations for the difference in Democratic judicial voting. However, one possible explanation is that Democratic judges have viewed gender discrimination claims as stronger claims than racial discrimination claims. Alternatively, although these are Democratic judges, perhaps their tolerance for racial discrimination is more deeply seeded than their tolerance for gender discrimination. While President Obama is the first biracial President, demonstrating a giant leap forward in terms of racial tolerance and politics, judicial tolerance for racial discrimination may still be dying a slower death than tolerance for

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23 If one factors in the liberal voting percentages of Democratic judges on affirmative action cases by averaging the liberal voting percentage of Democratic judges in affirmative action cases (75%) with the liberal voting percentage of Democratic judges in Title VII race cases (43%), then Democratic judges are 7% more likely to vote in a liberal direction on race cases than on sex discrimination cases, as would be expected (59%, averaging the voting on affirmative action and Title VII race cases, versus 52% for sex discrimination cases). However, it is questionable whether one can simply average the liberal voting percentages for affirmative action cases with the liberal voting percentages in Title VII race cases and use the average to predict how a judge will vote in a given race-based case, regardless of the type of case or statute at issue. Moreover, most, if not all, of the sex discrimination cases will be Title VII sex discrimination cases, so it is more of an “apples to apples” comparison to compare the voting percentages for Title VII race discrimination cases and sex discrimination cases than to factor in affirmative action cases, which do not fall under the Title VII statute.

gender discrimination, even among Democratic judges. Only future empirical studies can confidently explain the Democratic judicial voting difference.

C. The Sunstein Study and Civil Rights Voting Trends Over Time

Along with examining ideological voting direction across case categories, Sunstein also studied Circuit Court judicial ideological voting categorizing the votes by case category and appointing President. In affirmative action cases, the study revealed the following percent of judicial votes in favor of plaintiffs categorized by groupings of appointing Democratic and Republican Presidents: Kennedy/Johnson/Carter appointees, 75%; Clinton appointees, 76%; Eisenhower/Nixon/Ford appointees, 62%; and Reagan/Bush I appointees, 40%. For Title VII racial discrimination cases, the statistics were as follows: Kennedy/Johnson/Carter appointees, 43%; Clinton appointees, 42%; Eisenhower/Nixon/Ford appointees, 38%; Reagan/Bush I appointees, 34%; and Bush II appointees, 14%. Switching to sex discrimination cases, the statistics were as follows: Kennedy/Johnson/Carter appointees, 55%; Clinton appointees, 51%; Eisenhower/Nixon/Ford appointees, 42%; Reagan/Bush I appointees, 34%; and Bush II appointees, 32.

While this set of statistics does not directly address changes in Circuit Court judicial voting patterns in civil rights cases over time, it does provide some information regarding voting patterns among Circuit Court Judges as categorized by appointing President. Assuming that individual Circuit Court Judges’ political voting behavior remains consistent during their time on

25 Sunstein, et al. at 113-22, supra note 1. Sunstein also examined the percentage of liberal judicial votes categorized by case category and individual appointing President, and not groupings of Presidents. Id. at 114-15.
26 Id. at 118. Sunstein did not include data on President G.W. Bush appointees and their votes on affirmative action cases, presumably because those appointees had not yet had the opportunity to rule on any affirmative action cases at the time of the study.
27 Id. at 119.
28 Id. at 118. The statistical significance of these statistics may be weak, given that the sample size of civil rights cases is small, particularly for judges appointed by Presidents Eisenhower, Kennedy and Bush II. Id. at 116.
the bench, these statistics may be used as a proxy for determining whether Democratic judges and Republican judges have become more partisan in their civil rights voting patterns over time.\textsuperscript{29}

In terms of Democratic judges, those appointed in the 1960s and 1970s vote in a liberal manner at almost the same rate as Democratic judges appointed in the 1990s in race civil rights cases, and in a slightly more conservative manner in gender civil rights cases than Democratic judges appointed in the 1990s. This finding goes against the first hypothesis that as the Democratic Party has become more liberally extreme over time so have Democratic judges in terms of their votes on civil rights cases.

Turning to Republican judges, the statistics illustrate that judges appointed by Republican Presidents in the 1950s-1970s vote in a much less conservative manner in affirmative action cases than judges appointed by Republican Presidents in the 1980s and 1990s. Those same judges tend to vote in a slightly to moderately less conservative manner in Title VII race and sex discrimination cases than judges appointed by President Reagan and President Bush I, and in a moderate to much less conservative manner in those cases than judges appointed by President Bush II.\textsuperscript{30} Assuming the statistical significance of the statistics associated with President Bush II’s judicial appointments, these statistics support the Ideology Gap Hypothesis insofar as they demonstrate a conservative ideological voting shift in civil rights cases for more recently appointed Republican judges.

\textsuperscript{29} This paper assumes that individual Circuit Court judges, once appointed, consistently vote in a specific ideological direction on civil rights cases over their individual tenures. Admittedly, this may be a tenuous assumption and may or may not be true. For example, Landes & Posner found that some Supreme Court Justices’ political voting behavior became more liberal during their tenure, while other Justices’ political voting behavior became more conservative. Landes & Posner at 36, \textit{supra} note 6.

\textsuperscript{30} The statistical significance for the Title VII race discrimination voting and sex discrimination voting by President Bush II judges may be weak, given that the sample included only 14 Title VII votes and 37 sex discrimination votes by those judges. Sunstein, et al. at 114-15, \textit{supra} note 1.
More generally, without categorizing the case types, Sunstein examined liberal voting percentages for Democratic and Republican Circuit Court Judges across time from 1981 through 2004.\textsuperscript{31} Sunstein’s study revealed that the percentage of liberal votes cast by Democratic judges steadily decreased from 68\% in 1985-1988 to 54\% in 1993-1996 to 46\% in 2001-2004, and that the percentage of liberal votes cast by Republican judges steadily decreased from 52\% in 1985-1988 to 43\% in 1993-1996 to 34\% in 2001-2004.\textsuperscript{32} For Republican judges the conservative trend is statistically significant for the entire period and for Democratic judges the conservative trend is statistically significant for the period since 1993.\textsuperscript{33}

To the extent that these statistics for all cases are reflective of the likely statistics for civil rights cases, these statistics do not support the Ideology Gap Hypothesis. Although the gap in liberal voting percentages widened between Democratic and Republican judges during some of the time periods studied and narrowed during other time periods, the gap in liberal voting percentages between the two sets of judges remained virtually unchanged for the time period 2001-2004 from what it was during the first statistically significant time period for both sets of judges, 1993-1996.\textsuperscript{34} While the gap remained stagnant, the statistics demonstrate that both Democratic and Republican judges voted in an increasingly conservative manner over time.\textsuperscript{35} As discussed \textit{supra} in the context of the weakness of Title VII race cases compared to affirmative action cases, this conservative voting trend, regardless of party affiliation, might be due to the

\begin{flushleft}
\textsuperscript{31} \textit{Id.} at 120. \\
\textsuperscript{32} \textit{Id.} \\
\textsuperscript{33} \textit{Id.} at 121. \\
\textsuperscript{34} \textit{Id.} at 120. \\
\textsuperscript{35} \textit{Id.} at 121.
\end{flushleft}
changing nature of all civil rights cases over time, with more recent civil rights cases being “harder” cases with less obvious forms of discrimination.\textsuperscript{36}

D. The Sunstein Study and Ideology Gap Hypothesis

Neither the set of statistics for ideological voting categorized by case type and appointing President, nor the set of statistics for ideological voting over time specifically test the Ideology Gap Hypothesis. The former fails to categorize judicial voting by time period and the latter fails to categorize the cases by case type. To try to infer common support for or common rejection of the first hypothesis from the two sets of statistics is futile, as the result is contradictory conclusions. The first set of statistics supports a widening gap, due to more conservative ideological voting by recently appointed Republican judges and relatively stable ideological voting by Democratic judges. By contrast, the second set of statistics support a stable ideological voting gap between the two sets over judges over time. The only consistency between the two sets of statistics is a general conservative trend over time in Circuit Court judicial voting, regardless of the party of the appointing President.\textsuperscript{37}

Assuming the first set of statistics is a better predictor of Circuit Court judicial voting trends in civil rights cases, there are two possible explanations for why Clinton appointed Democratic judges have not demonstrated a liberal ideological shift from judges appointed by Presidents Kennedy, Johnson and Carter, and why recently appointed Republican judges have demonstrated at least some if not a substantial conservative ideological shift from those Republican judges appointed in the 1950s through 1970s. First, President Clinton has been perceived as more ideologically conservative than Presidents Kennedy, Johnson, and, possibly,

\textsuperscript{36} Id. at 117.

\textsuperscript{37} Id. at 113, 121.
Accordingly, President Clinton would not be expected to have appointed more ideologically liberal Circuit Court judges than his Democratic predecessors. Likewise, Presidents Bush II, Bush I and Reagan are seen as more ideological conservative than their Republican predecessors. Therefore, Republican judges appointed in the last 30 years would be expected to be more conservative than Republican judges appointed before that time.

Second, President Clinton had to navigate his judicial appointments through six years of a Republican controlled Senate, unlike Presidents Kennedy, Johnson and Carter, who faced Democratic Senate majorities. Accordingly, President Clinton may have been able to appoint only moderate Circuit Court Judges in order to achieve confirmation through a Republican Senate.

On the other side of the ledger, for Republican Presidents, the history of party control of the Senate is somewhat complex. Presidents Eisenhower, Nixon and Ford faced Democratic controlled Senates for their entire terms, with the exception of two years of a Republican controlled Senate for President Eisenhower. President Reagan faced a Republican controlled Senate, unlike Presidents Kennedy, Johnson and Carter, who faced Democratic Senate majorities.

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38 Compare Clay Calvert & Robert D. Richards, Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press, 23 Loy. L.A. Ent. L. Rev. 259, 293 (2003) (quoting Judge Alex Kozinski as arguing that President Carter was more liberal than President Clinton) with Michael Bailey & Kelly H. Chang, Comparing Presidents, Senators, and Justices: Interinstitutional Preference Estimation, 17 J.L. Econ & Org. 477,494 (October, 2001) (arguing that President Carter was more conservative than President Clinton and that President Clinton was more conservative than Presidents Kennedy and Johnson).

39 Bailey & Chang at 494 (arguing that President Reagan was the most conservative Republican President followed by Presidents Bush I, Ford, Nixon and Eisenhower); Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, The Bush Imprint on the Supreme Court: Why Conservatives Should Continue to Yearn and Liberals Should not Fear, 43 Tulsa L. Rev. 651, 651, n. 10 (Spring 2008) citing David Alistair Yalof, Conservative Supreme Court will be Bush Legacy, 8 UConn. (Fall-Winter 2007) (arguing that “George W. Bush may have done more to transform the constitutional landscape in a conservative direction than any president in the past century, including Ronald Reagan and Richard Nixon”).

40 United States Senate, Party Division in the Senate, 1789-Present, available at http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (outlining the history of party control in the Senate).

41 Sunstein, et al. at 113, supra note 1.

42 Party Division in the Senate, supra note 40.
Senate for his entire two terms in office, except for the last two years, and President Bush I faced a Democratic Senate majorities during his one term Presidency.\textsuperscript{43} During the Bush II administration time period covered in Sunstein’s study, 2001 through 2004, President Bush II navigated his judicial nominees through an almost even party split Senate, with control of the Senate flipping back and forth between the parties until November of 2002, when Republicans seized control.\textsuperscript{44}

Unlike the Senates faced by Democratic Presidents over time, there is less of a clear trend in Senate party control over the terms of Republican Presidents, at least since 1987. Nonetheless, Sunstein’s grouping of the Circuit Court appointments of Presidents Eisenhower, Nixon and Ford together, the appointments of Presidents Reagan and Bush I together and the appointments of President Bush II separately makes it none too surprising to see a more conservative trend in Circuit Court judicial civil rights votes for Republican judges appointed in the last 25 years or so. First, given the history of Senate party control under Republican Presidents, it is no surprise that Presidents Reagan and Bush II would succeed in appointing more conservative Circuit Court judges in terms of civil rights voting when compared with their Republican predecessors. Second, by grouping President Reagan’s appointments with President Bush I’s appointments, President Reagan’s appointments may have also served to temper any effect a Democratic Senate majority had on President Bush I’s ability to obtain confirmation of judges who would vote in a conservative manner on civil rights cases.

If Sunstein’s second set of statistics, illustrating a stable ideological voting gap over time between Democratic and Republican judges and increasingly conservative voting patterns for both sets of judges, is an accurate predictor of whether or not Democratic and Republican judges

\textsuperscript{43}Id.

\textsuperscript{44}Id.
have become increasingly partisan in voting on civil rights cases, then there are at least three possible explanations. First, an increasingly conservative Supreme Court over time with increasingly conservative civil rights decisions may be pushing lower courts in more conservative directions, regardless of whether the judges on those courts are Republican or Democratic. Second, as discussed supra, the nature of the underlying civil rights cases may have become weaker for plaintiffs over time, accounting for a consistently conservative voting trend across both sets of judges.

The third explanation, which deserves more discussion, is that panel effects account for the consistent conservative voting trends across both sets of judges. The theory of panel effects is that a Republican judge sitting on a panel with two Democratic judges is more likely to vote in a liberal direction than a Republican judge sitting with one or two other Republican judges and vice versa for a Democratic judge sitting with Republican judges.

Over time as the Executive Branch changes hands and parties, the party breakdown of judicial appointments parties changes, as well. For example, in 1970, 59% of the federal judiciary had been appointed by a Democratic president, in 1980, 57%, in 1990, 33%, in 2000, 43% and in 2004, 37%. Although the percentages fluctuate, a Democratic judge in 2004 was much more likely to be sitting on a panel with one or two Republican judges than a Democratic judge before 1980. If the theory of panel effects is valid, then it makes sense that Democratic judges in 2004 felt more constrained to vote in a conservative manner in civil rights cases than they did 30 years ago, while Republican judges in 2004 felt more liberate to vote in a

45 Sunstein, et al. at 113, supra note 1.
46 Id. at 117.
47 Id. at 123.
48 Id. at 7.
49 Id. at 123. These percentages by Sunstein appear to account for both District Court and Circuit Court judges.
conservative manner on such cases than they did 30 years ago. In other words, the changing partisan breakdown of the federal judiciary and panel effects may allow judges appointed by one political party to move toward their natural ideological extreme in terms of voting, but precludes both sets of judges from moving toward their respective natural ideologically extremes. The theory of panel effects works to undermine the first hypothesis that both sets of judges have become increasingly ideologically partisan in voting in civil rights cases over time.

III. Suggestions for Future Empirical Studies

While the Sunstein study provides some substantive responses to the hypotheses raised in this article, further empirical studies can provide more complete or direct responses to the two hypotheses raised herein. The following outlines an ambitious suggested methodology for future empirical studies of ideological voting in Circuit Court gender and race civil rights cases.

First, Sunstein’s assignment of a liberal or conservative ideology to a Circuit Court Judge based on the party of the appointing president seems oversimplified. Accordingly, a better methodology would be to assign Circuit Court Judges a predicted numerical ideology score, accounting for multiple potential ideological predictors using Common Space scores or another method that measures ideology numerically. Such a method could start with gathering the following ideological scores: 1) An ideology score of the appointing President; 2) An ideology score of the home-state Senator or average score of the two home-state Senators, if one or both are of the same party as the appointing President; 3) An ideology score for the confirming Senate based on the numerical strength of the Republican or Democratic majority and 4) An ideology

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50 Lee Epstein & Gary King, The Rules of Inference, 69 U. Chi. L. Rev. 1, 87-89 (Winter, 2002) (arguing that assigning judicial ideology by party of the appointing President fails to account for variations in Presidential ideology within political parties, variations between Presidential ideologies and the ideologies of the judges that they appoint and the effect of senatorial courtesy).

51 Peresie at 1772, n. 3, supra note 6. Common Space scores are measures of ideology assigned to Presidents and Senators from 0 to 1, with 0 being most conservative and 1 being most liberal, and can be subdivided into ranges, i.e. 0 to .2, .3 to .5, etc.
score based on the Circuit Court Judge’s liberal or conservative decisions on race and gender
civil rights cases as a District Judge, if the judge was promoted from a District Judge slot. Those
four ideological scores can then be averaged to assign a numerical ideology score to each Circuit
Court Judge. Those scores can then be grouped into ranges of ideologies on a liberal-
conservative continuum.

Having determined a method for assessing predicted judicial ideologies, the other
methodological issue is to determine what civil rights cases to study. In terms of measuring
voting trends and ideological voting gaps in gender and race civil rights cases, Sunstein’s study
is arguably under-inclusive. First, future empirical studies will provide a more accurate picture
of voting trends in race and gender civil rights cases over time if those studies examine Circuit
Court judicial voting trends over time using all cases involving any federal civil rights law
addressing race or gender. Sunstein focused only on affirmative action, Title VII race and sex
discrimination cases and desegregation cases.\(^{52}\) Second, the best way to test for an ideological
gap in Circuit Court judicial voting in race civil rights cases versus gender civil rights cases is to
study judicial voting in cases involving the most commonly used federal civil rights laws
providing remedies for both race-based and gender-based claims. In addition to Title VII
(employment discrimination), those federal civil rights laws would most likely include 42 U.S.C.
\$ 1983 (violation of constitutional or federal rights and discrimination by state or local actors)
and 42 U.S.C. \$ 1985 (conspiracies to deprive individuals of equal protection), which Sunstein
did not examine.

The other methodological elements of Sunstein’s study seem pretty sound. Though
overly simplistic, Sunstein’s measurement of a liberal vote in most civil rights cases as a vote in

\(^{52}\) Sunstein, et al. at 17-18, \textit{supra} note 1.
favor of the plaintiff is probably the most manageable measurement. Nonetheless, future studies may want to account for situations of mixed votes, which are those in which the judicial vote was in favor of the plaintiff on some issues and against the plaintiff on other issues. Sunstein’s examination of panel effects patterns, categorization of judicial votes by appointing President and groupings of Presidents, and categorization of judicial votes by four-year Presidential terms also appear to be logical methodological choices. However, for a more complete picture than Sunstein provided, future studies may also want to include unpublished Westlaw/Lexis available opinions in their data. Future studies may also want to introduce other variables into the study, especially judges’ race and gender.

IV. Future Implications of the Obama Administration

One of the more interesting issues related to the two hypotheses raised in this article is what implications the current Presidential administration may have in terms of Circuit Court ideological voting on gender and race civil rights cases. There are 179 Circuit Court judgeships, including those in the Federal Circuit. Presently, there are 67 active judges and 32 senior status judges on the Circuit Courts who were appointed by Democratic Presidents, and 91 active judges and 76 senior status judges who were appointed by Republican Presidents. Including the senior status judges, the Republican judges outnumber the Democratic judges by a ratio of 1.68:1.

53 Id. at 19.
54 Landes & Posner at 22, 24, 55, supra note 6.
56 Id. at 18.
There are also 20 vacancies on the Circuit Courts, twelve Circuit Court nominees pending and to date, President Obama has succeeded in obtaining confirmation of nine nominees.\(^{59}\)

President Obama has the potential to make a substantial impact on the ratio of Democratic judges to Republican judges on the Circuit Courts. If the past is any indicator of the future, during President Bush II’s two terms in office he appointed 56 Circuit Court Judges and during President Clinton’s two terms he appointed 61 Circuit Court Judges.\(^{60}\) Moreover, one observer estimates that 50 appellate judges could possibly assume senior status during President Obama’s first term, 35 of whom were appointed by Republican Presidents.\(^{61}\) If President Obama succeeds in filling the 20 pending vacancies and if even a quarter of the 50 anticipated senior status vacancies arise from Republican appointees, materialize and are filled, then by the end of President Obama’s first term in office, Democratic judges will occupy at least 100 Circuit Court judgeships.\(^{62}\) During a second Obama term, the number of Democratic judges could increase by 15.\(^{63}\) A full two term Obama Presidency could conceivably result in the number of active Democratic Circuit Court Judges almost doubling from the number of active Democratic Circuit Court Judges at the start of President Obama’s term, while the number of active Republican Circuit Court Judges drastically decreases.\(^{64}\)

\(^{59}\) United States Courts, Judges and Judgeships, Judicial Vacancies, as of July 10, 2010, available at http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx. It is unclear why the number of Circuit Court vacancies listed by the U.S. Courts, when added to the number of active Circuit Court judges in the Biographical Directory of Federal Judges, falls one short of the 179 Circuit Court judgeships identified by the U.S. Courts.

\(^{60}\) Based on a search of The Federal Judges Biographical Database, as of November 30, 2009.


\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) These projections do not account for senior status judges, or the possibility that some judges may die in office, some judges may resign or retire unexpectedly and that one or more judges may be promoted to fill Supreme Court vacancies.
Obama Circuit Court appointments could be highly influential on Circuit Court ideological voting in terms of race and gender civil rights cases. First, a substantial liberal shift in the ratio of Democratic judges to Republican judges could completely alter the panel effects observed by Sunstein. Instead of both Democratic and Republican judges more likely to vote in a conservative manner on civil rights cases, due to panel effects, the large majority of Democratic judges may create more Democrat heavy panels with Democratic judges perceiving more freedom to vote in a liberal fashion on civil rights cases and Republican judges on those same panels feeling constraint to vote less conservatively than they would otherwise.

Second, President Obama, in his first term, has presided over a Democratic Senate majority ranging between 58 and 60 seats, with 58 Senators out of 99 caucusing as Democrats, as of the writing of this article.\(^65\) The present 58 Democratic Senator majority is just shy of a filibuster proof majority and is the most substantial Democratic Senate majority since 1979-1981.\(^66\) Unfortunately, this rosy scenario for Democrats is not likely to hold past the 2010 elections, as well-respected electoral prognosticator Charlie Cook presently designates three Democratic Senate seats as leaning, likely or solidly Republican in the 2010 election and another six Democratic Senate seats as toss-ups.\(^67\) Nonetheless, Cook’s prediction seems like a worst case scenario and it still seems unlikely that Democrats will lose control of the Senate. Therefore, if President Obama serves two full terms, he should still be more successful in obtaining confirmation of more ideologically liberal Circuit Court Judges who vote more

\(^{65}\) Party Division in the Senate, 1789-Present, *supra* note 40. Due to the very recent passing of Democratic Senator Robert Byrd of West Virginia, there are only 99 Senators as of the writing of this article.

\(^{66}\) *Id.*

favorably for civil rights plaintiffs than President Clinton, who faced six years of Republican Senate majorities.

Finally, President Obama is seen as a trailblazer in terms of race as the first biracial President of the United States and is seen as a more progressive or liberal Democrat than President Clinton and probably, President Carter.\(^{68}\) If President Obama’s Circuit Court appointments are a reflection of his ideology, as it is perceived, then his appointments should vote in a more liberal manner on civil rights issues than appointees of any of his predecessors over the past 40 years.\(^{69}\) That said, at least one scholar has characterized President Obama’s judicial nominees, to date, as political moderates.\(^{70}\) So far, perhaps the only perceived liberal Circuit Court nominee for President Obama is Goodwin Liu, who has been nominated to a judgeship on the Ninth Circuit, but whose confirmation is still lingering in the Senate.\(^{71}\)

Viewing matters from a more global perspective, given President Obama’s pioneering role in terms of accomplishments by African-Americans, it is easy to assume that he will be more sensitive to race-based civil rights issues than gender-based civil rights issues and that his Circuit Court appointments may share the same ideology. However, three acts by President Obama during his first year and a half in office may demonstrate otherwise. First, the first legislative act that President Obama signed into law was the Lilly Ledbetter Fair Pay Act, which resulted from a Supreme Court decision against a female plaintiff in a pay discrimination

\(^{68}\) Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 Conn. L. Rev. 1523, 1533 (July, 2009) (arguing that progressives view President Obama as a President who can move the Democratic Party away from moderate politics and “triangulation”).

\(^{69}\) Robert J. Pushaw, Jr., *Justifying Wartime Limits on Civil Rights and Liberties*, 12 Chap. L. Rev. 675, 700 (Spring, 2009) (arguing that President Obama has a liberal stance on civil rights issues).

\(^{70}\) Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. Rev. 769, 795 (May, 2010) (discussing President Obama’s adoption of “special initiatives to reestablish bipartisanship and limit politicization, especially through consultation with members of both parties and the selection of very able, moderate [judicial] nominees”).

\(^{71}\) Perry Bacon, Jr., *Goodwin Liu Appeals Court Nomination Advances*, THE WASHINGTON POST, May 14, 2010, at The Fed Page (noting that the Senate has not yet scheduled a formal vote on Liu’s nomination and describing Liu as having “a long paper trail of liberal positions”).
Second, President Obama’s first Supreme Court appointment was the first Latina Supreme Court Justice, Justice Sonia Sotomayor, which may be a testament to President Obama’s devotion to both race and gender issues. However, President Obama’s second Supreme Court nominee is also a woman, Solicitor General Elana Kagan, perhaps indicating a stronger devotion to gender issues. Should she be confirmed, which seems likely, her presence on the Supreme Court will be the first time in history in which the Supreme Court has been comprised of more than two female Justices.

The jury is still out, but President Obama’s politically moderate early Circuit Court appointments is not a strong indicator of a future string of progressive Obama Circuit Court nominees who vote in a liberal direction on race and gender civil rights cases, particularly if the political makeup of the Senate changes to the Democrats’ detriment in the 2010 elections. Moreover, some of President Obama’s early appointments and legislative achievements may be symbolic of a surprisingly greater commitment on his part to progressive stances on gender-based issues than on race-based issues. Accordingly, it is very possible that President Obama’s judicial nominees will hold stronger progressive views on gender issues than race issues, as well.

V. Conclusion

Generally, the findings of the Sunstein study reject the two hypotheses of this article. Sunstein illustrates that over time, Republican judges have become more ideologically conservative on civil rights issues, while Democratic judges have maintained a constant judicial ideology while trending slightly more conservative. The study also demonstrates that

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73 Asmara M. Tekle, *The “Non-Maternal Wall” and Women of Color in High Governmental Office*, 35 T. Marshall L. Rev. 169, 173 (Spring, 2010) (describing Justice Sotomayor’s nomination to the Supreme Court as groundbreaking “because she was the first Latina in a sea of white men to be appointed”).

Republican judges tend to vote consistently conservative whether the civil rights cases involve race or gender issues, while Democratic judges actually vote more liberally in civil rights cases involving gender as opposed to race.\textsuperscript{75}

Despite the very general conclusions drawn from the Sunstein study, Sunstein did not specifically test the two hypotheses of this article and the study is limited in terms of its application to these two hypotheses. Future empirical studies should specifically test the two hypotheses outlined in this article and should improve on Sunstein’s methodology by assigning predicted judicial ideologies in a less simplistic fashion than Sunstein’s study and should include more types of civil rights cases than Sunstein’s study. Not only may the conclusions change as a result of changes in the methodology, but the conclusions may also change as a result of changes brought about by Circuit Court appointments from 2004 through the present and Obama Circuit Court appointments likely to occur in the near future. The latter, in particular, may result in substantially different conclusions than those outlined in this article.

\textsuperscript{75} As discussed supra, factoring in Democratic judicial voting on affirmative action cases in the analysis of liberal voting by Democratic judges actually supports the hypothesis that Democratic judges vote more liberally in race-based civil rights cases than in gender-based civil rights cases.