Ideological Voting Applied to the School Desegregation Cases in the Federal Courts of Appeals From the 1960’s and 70’s

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* Assistant Professor of Law and Director, Omer Poos Law Library. Author’s Note: I thank the Saint Louis University School of Law Half-Baked Faculty Workshop for much fruitful discussion that seriously helped me guide the direction of this paper. In addition, I want to thank the Central States Law Schools Association for inviting me to present this paper where I received more excellent feedback. I want to thank long-time mentor, Peter Schanck for his excellent reading of the manuscript. Anders Walker for his read and very helpful input. Andrew D. Martin for his very helpful comments and suggestions. Brenda Smith-Custer for her helpful read and formatting. I also want to thank two excellent faculty fellows: Andrew Wrenn and Theresa Yoffe. Thanks to Lacy Rakestraw who did some footnote citation work. An additional thank you to Ann Fessenden, Eighth Circuit Court Librarian; Debra Davendons-Todd, University of Florida; Jim Casick, University of Florida; Rita Wallace, Sixth Circuit Court Librarian; Sabrina Sondhi, Columbia University School of Law Librarian; Jason G Speck, University of Baltimore; Mathew White, Fourth Circuit Court Librarian; Katie Pappageorge, Eighth Circuit Court Librarian; Tricia Kent, UNC Chapel Hill Librarian; John Klaus, Seventh Circuit Court Librarian; Carrie Hinz, Columbia University; Marian Drey, Fifth Circuit Court Librarian; Sarah Hartwell, Dartmouth College; Michael T. Davis, Eleventh Circuit Court Librarian; Heather Smedberg, UC San Diego Mandeville Special Collections Library; Jason G Speck, Special Collections Librarian, University of Maryland; Joan Voelker, Eighth Circuit Court Librarian; and the staffs of the First Circuit Court Library, University of Iowa College of Law Library, Ninth Circuit Court Library, and the Missouri Historical Society Archives.
I. INTRODUCTION

This article will explore judicial decision-making and what outside influences, if any, impact how judges rule. There has been considerable discussion in legal scholarly research over the last several years as to what judges consider in arriving at their decisions. While there are several models and methods that have been discussed and examined, this article will concentrate on four. The first discusses the controversial “rule of law” model or alternatively, the “legal model.” The legal model has been heavily criticized over the last twenty years or so by influential legal scholars and some of these criticisms will be discussed below.

The second model at issue is known as the attitudinal model, first championed by Jeffrey A. Segal and Harold J. Spaeth. It emphasizes a judge voting her policy preferences as opposed to following established precedent. A Cass Sunstein article, which will be discussed in greater detail below, discusses and studies the attitudinal model. The third model that is studied is the personal attributes model, or social background model, which was first proposed by C. Neal Tate. This model looks at the background of a judge and considers attributes that the judge brought with her from her previous life experiences to the judgeship that may influence her voting, such as her religion, prior employment, education, among other attributes. The last of the four models studied is the strategic model. The strategic model is actually a class of models and when testing, a researcher

2 The Legal Model, the Attitudinal Model, the Personnel Attributes Model, and Strategic Model. Although some may use other terms for these models, the names listed here will be used throughout this discussion.
5 Study was based on research suggestion from the article, Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 VA. L. REV. 301, 309 (2004).
needs to focus only on one.\textsuperscript{9} Strategic models are based on the assumption that all actors are motivated by preferences.\textsuperscript{10} After an overview of the four models in question, the paper then moves on to describe a Cass Sunstein paper that inspired this research.\textsuperscript{11} The paper introduces a school desegregation study that was suggested by Sunstein for further research.

The paper discusses differences with the Sunstein paper while applying the four models to the school desegregation study. The conclusion of this paper will summarize the merits of the four models and the degree to which any of the four models was helpful in explaining what the judges were thinking when voting on the school desegregation cases. The paper then discusses any aspect of this study that may be applicable to today’s legal world. This model, in addition to the others, will be examined and analyzed in conjunction with the findings from a desegregation study that was conducted for this article. The school desegregation study examines Federal Circuit Court decisions starting in 1960 and running through 1973.

\textbf{II. Legal Model}

The legal model, according to Frank Cross, is the “path of the law” that “can be identified through reasoned analysis of factors internal to the law.”\textsuperscript{12} Another definition comes from Jack Knight who states that judges who apply the legal model are those who are motivated by precedent and “who craft opinions that are grounded in past decisions.”\textsuperscript{13} Are judges really applying the legal model? It is very difficult to obtain an empirical analysis of the legal model because of the lack of an objective measure on how a judge actually decides a case. As Henry Spaeth contended, the legal model is not “falsifiable.”\textsuperscript{14} Advocates of the legal model state that the decision-makers, the judges, are to be independent nonplussed by any other political philosophy other than the one based on substantive law.\textsuperscript{15} In the United States today, however, most people believe that judges are partisan.

\begin{flushleft}
\textsuperscript{10} Jack Knight, \textit{Are Empiricists Asking the Right Questions About Judicial Decision Making?} 58 DUKE L.J. 1531, 1540 (2009).
\textsuperscript{13} Knight, supra note 12.
\textsuperscript{14} Sara C. Benesh, Harold J. Spaeth: The Supreme Court Computer, in \textit{THE PIONEERS OF JUDICIAL BEHAVIOR} (Nancy Maveety, ed., 2003)
\end{flushleft}
Sunstein states, “No reasonable person seriously doubts that ideology, understood as normative commitments of various sorts, helps to explain judicial votes.”

Several of those who have examined the legal model have stated that the outcomes are mechanical. A judge takes the law and facts of a case and drops them into the precedent machine and the correct holding pops out. This is a silly description but one that I use in class to get students on board with the concept. Does this mean that in applying the legal model there may never be a dissent? No, because sometimes there is disagreement among judges as to which specific precedent is to be applied in the case before the court.

An additional aspect of the legal model that proves troubling to some is its focus on only the parties named. Higher level rulings decided by state Supreme Court judges or by appellate federal court judges many times extend beyond affecting only the stated litigants. With the influence of many decisions extending well beyond the named parties, arguably the courts are leaving the parameters of legal model and moving into that of judicial policy-making.

Friedman and Martin in their chapter of the book, Looking for Law in All the Wrong Places: Some Suggestions for Modeling Legal Decision-making list several sources that effectively criticize the legal model. Perhaps the most salient criticism in the chapter is one they make themselves:

…(t)he legal model -- does not constitute a model. Asserting
that condition X matters to an outcome is an incomplete explanation. How condition X should matter, and under what circumstances and with what limitations, are important components of positing an explanatory model. Without rigorously sorting out these explanations, what is described as the legal model is not an explanatory object but rather is a collection of indeterminate factors.

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19 Brian E. Butler, Legal Pragmatism: Banal or Beneficial as a Jurisprudential Position?, 3 ESSAYS IN PHILOSOPHY2, 11-12 (2002).
III. The Attitudinal Model

If the legal model exists, Judges are certainly going beyond it in their decision-making and have since Chief Justice Marshall's opinion in *Marbury v Madison*. Segal and Spaeth state that justices make decisions based on “ideological attitudes.” They state that judges are using the attitudinal model and voting their “values.” The attitudinal model is constructed on a belief that judges are placing more emphasis on policy considerations than they are on legal considerations in the determinations of cases. Critics of the attitudinal model concede that “ideological values...of Supreme Court justices have a profound impact on their decisions.”

As to how complete a role the attitudinal model plays in judicial decision-making role is debated. Some judges and scholars believe that while lower federal court judges will consider policy, they ultimately take the legal precedence (legal model) more seriously in their decision-making. Segal and Spaeth make a distinction between the United States Supreme Court and their lower court brethren writing “institutional rules and incentives that allow Supreme Court (to apply the attitudinal model) do not apply in full to other courts.”

If Segal and Spaeth are correct, it is curious as to how a judge who previously was committed to something else, perhaps the legal model, would now decide cases based on policy preferences. Segal and Spaeth suggest that United States Supreme Court justices are finally free from electoral or political accountability (political accountability being a significant constraint on federal district court judges), ambition for any higher office or concern about future reversal. The absences of these factors free the Supreme Court justices to partake in attitudinal voting.

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22 See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* 65 (Cambridge Univ. Press, 1993).
23 Id. at 244-45.
Segal and Spaeth point toward Bush v. Gore as evidence of the attitudinal model. They state that this case should end any “pretense” on the part of the judiciary that they are truly beholden to legal precedent after deciding a case in such a “shamelessly partisan” way. In essence, judicial decision-making, at least at the level of the United States Supreme Court, is “wholly political” and how a judge decides a case goes to that judge’s policy preferences.

Segal and Spaeth argue that judges possess certain attitudes or values about particular areas of the law and these attitudes or values are good predictors of how justices will vote in the future regarding these types of cases. By researching a judge’s voting record in different areas of the law, Epstein & Mershon contend a scholar can predict how liberal a judge will vote on those particular areas of law. Frank Cross asserts that criminal rights and civil liberties, like the death penalty, are the best types of cases to study to determine the political leanings of judges because they tend to have more of a policy or political basis. The study of these less than typical cases, however, has drawn criticism from some scholars.

Friedman and Martin contend that the attitudinal model is a good model to use to explain past decisions but the model does not predict future opinions. For the purpose of my paper, which is to examine case outcomes from the 1960’s and 1970’s, the predictive value of the attitudinal model is not so imperative. Nevertheless, a good paper should address any ramifications that can be taken to the present day and, as stated above, the attitudinal model does comport to assert how liberal a judge has been in her rulings compared to a group of judges, but as Friedman and Martin contend it “tells us nothing about where they would divide on the merits of any given case.”

IV. The Personal Attributes Model

C. Neal Tate argues that the attitudinal model really doesn’t identify a justice’s attitudes or beliefs, but simply records how a justice voted on a particular...
case. There is no explanation as to how the votes are related to any specific attitude or belief. Tate proffers that judges develop their policy and political decision-making attitudes based on their background and socio-economic status. Tate states that how liberal a judge is can be correlated to factors such as: the political party of the judge; the prior employment of the judge; what region of the country the judge comes from; the race, gender, religion and education of the judge.

The personal attributes model is sometimes referred to as the social background theory. Regardless of the label, “these studies hypothesize that judicial characteristics influence judicial decisions.” The personal attributes model may be said to be indicative of some voting patterns of recent Supreme Court justices. On abortion cases, gender can be suggested as a strong predictor when assessing Sandra Day O’Connor’s and Ruth Bader Ginsburg’s voting. Perhaps O’Connor and William Rehnquist’s conservative voting tendencies may have something to do with them both attending and excelling at Stanford Law School. Stanford, however, does not seem to have a reputation as a law school with a particular ideological bent, at least in the 1950’s.

V: The Strategic Model

Friedman and Martin state that there is no one specific strategic model. Rather there are several different strategic models that share some common axioms. The strategic model that will be studied in this paper is the one explained in the book The Choices Judges Make by Lee Epstein and Jack Knight. There are three main components to the strategic model addressed in the book. The first component states that justices are goal oriented and want to see their political values and beliefs (policy preferences) reflected in their decisions. Secondly, judges are “seekers of legal policy” and their “ability to achieve their goals [primarily policy goals] depends on a consideration of the preferences of others.” Judges do not make decisions in a vacuum solely based on their own ideological beliefs and values, so they act strategically, taking into consideration the

39 Id.
40 Tracey E. George, From Judge To Justice: Social Background Theory And The Supreme Court, 86 N.C. L. REV. 1333, 1336 (2008).
42 Id.
44 Id. at 10.
preferences of the other judges. Thirdly, justices realize that they are tied to an institutional setting that brings associated pressures that they must account for in their voting. These institutions can be “formal, such as laws, or informal, such as norms and conventions,” or “groups.” Working within these institutional restraints force judges to sometimes work in unconventional ways to “pursue their policy goals.”

In the strategic model described by Epstein and Knight, components of both the legal model and attitudinal model can be at play. The personal attributes model may already be in play regardless of how the judges actually vote. Some of the institutional constraints that are part of the legal model are also apparent in the strategic model. For example, a judge acting strategically is aware of the necessity of getting other judges to join her particular view. If she brazenly avoids the facts, law and precedence, it will only frustrate her intention. In this tempered approach, the attitudinal model measures what a single judge’s intentions are focused on in regard to her policy preferences.

For evidence of the personal attributes model, one only needs to consider the selection process. The Executive is looking for characteristics of a person’s background foretelling how a candidate may vote in the future.

VI. Sunstein Paper


The Sunstein article cited Segal and Spaeth “Insofar as party effects are present, our findings are broadly supportive of this idea (the attitudinal model).” Sunstein, however, went beyond just testing the attitudinal model. He also looked at what he labeled the “sociological model,” or the effects that sitting on a court panel may have upon the decision-making of justices. Don’t be confused; the sociological model is not the same thing as the “social background” or “personal attributes model.” The sociological model is concerned with the influence that

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45 Id. at 17.
48 Id. at 309.
49 Id.
50 Id.
other actors in the same grouping have upon each other. The personal attributes model focuses on attributes that a judge brings with her to the position of being a judge. There is a relation to the second component of Epstein and Knights’ strategic model which stresses that judges need to be cognizant of the wishes of others in the group.\footnote{LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE, 9-10 (1998).}

Sunstein hypothesized that a judge’s ideology comes into play in the decision-making of the Circuit Court of Appeals judges.\footnote{Sunstein et al., supra note 63, at 304.} He used the proxy of the appointing President’s political party to determine a judge’s ideology. Through the testing of his first hypothetical,\footnote{Id.} he found that ideological voting is prevalent in “a subset of possible case types, focusing on a number of controversial issues that seem especially likely to reveal divisions between Republican and Democratic appointees.”\footnote{Id. at 329.}

The findings of the Sunstein article show that judges are split by political party in several law areas but come together at times to conform when sitting on a judicial panel. For example, a Democratic Court of Appeals judge, sitting with two like-kind Republican judges on a three-person panel, is more likely to vote conservative, thus dampening the Democrat judges vote (and vice versa); whereas a panel consisting of three Democratic judges will likely vote to extend, or amplify a liberal vote.\footnote{Id. at 313.}

Sunstein’s hypothesis two and three,\footnote{Id. at 329.} state that sitting on a legal panel can either dampen or amplify a judge’s vote depending on the composition of the three judges.\footnote{Id. at 329.} It is important to point out that Sunstein is making the assumption that judges appointed by a Democratic President will be liberal and judges appointed by a Republican President will be conservative.\footnote{Id. at 329.}

As stated above, Sunstein’s assumption was that the political ideology of a circuit court judge could be determined by the political party of the appointing President. Using this assumption appeared to work for the time span he covered, 1995 to 2002.\footnote{Id. at 329.} Applying this assumption to earlier periods of the 20\textsuperscript{th} century is more problematic, however, when covering the findings from the school
desegregation study. Application of this assumption over a longer period of time in our nation’s history becomes equal part foolish and mistaken.60

Sunstein measured 13 different legal topic areas: campaign finance, affirmative action, EPA, sex discrimination/harassment, Commerce Clause, piercing the corporate veil, Americans with Disabilities Act, abortion, capital punishment, Title VII/racial discrimination, federalism, criminal appeals, and the takings clause. Sunstein claimed confirmation of his three hypotheses in eight of the 13 areas: affirmative action,61 sexual discrimination/harassment,62 campaign finance,63 piercing the corporate veil,64 Americans With Disabilities Act,65 contracts clause violations, Title VII/racial discrimination,66 and EPA regulations.67

Sunstein reported a repudiation of his three hypotheses in the areas of the Commerce Clause, federalism, takings claims68 and criminal appeals.69 Two other topical areas, abortion and capital punishment, supports Sunstein’s first hypothesis but not the second or third. In regard to abortion and capital punishment, Sunstein stated that judges appeared to be voting their convictions and were not being swayed by panel effects.70

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61 Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 Va. L. Rev. 301 at 315 (2004). In regard to affirmative action cases surveyed from 1978 through 2002, Republican appointees voted in favor of supporting affirmative action programs 48% of the time compared to 74% of the Democratic appointees).
62 Id. at 319-20 (In sex discriminations cases surveyed from 1995 through 2002, Republican appointees voted for plaintiffs 35% of the time compared to 51% for the Democratic appointees).
63 Id. at 320 (From the years 1976 through 2002, ideological voting also supported individual judicial voting on campaign finance. Eighty-seven Democratic appointees cast 46% of their votes in upholding campaign finance laws compared to only 28% of their Republican counterparts.)
64 Id. at 321 (In regard to piercing the corporate veil, where the plaintiff acts to have the assets be reached, Sunstein surveyed 106 cases. Eighty-five Republican appointees accept these actions at a significantly lower rate than their Democratic counterparts, 27 to 41%).
65 Id. at 321-22 (Republican appointees, under the American with Disabilities Act, in data collected during the years 1998 to 2002, voted 26% in favor of plaintiffs. During the same period, Democratic appointees voted in favor of the plaintiffs 43% of the time).
66 Id. at 324 (On Contracts Clause violations, Democratic appointees voted for the plaintiffs 30% of the time from 1977 through 2002 and Republican appointees did so 24% of the time. On Title VII cases, Republican appointees voted for plaintiffs 35% of the time compared with 41% of the Democratic appointees).
67 Id. at 343 (One hundred and forty-two cases were surveyed involving environmental regulations from 1970 through 2002. In these 142 cases, Democratic appointees voted against industry challenges to EPA regulations 64% of the time compared to 46% of the time for the GOP counterparts).
68 Id. at 352 (“It might be surprising to find that in some controversial areas, the political affiliation of the appointing president is not correlated with judicial votes, and hence that in those areas, none of these effects can be observed. This is the basic finding for criminal appeals, takings, and federalism.”).
69 Id. at 325 (“It might be anticipated that Democratic appointees would be sympathetic to criminal defendants and that Republican appointees would be relatively unsympathetic. This is a popular platitude about judicial behavior. Hence, the three hypotheses might be anticipated to receive support. But all of them are rejected, at least in three courts of appeals from 1995 to the present.”).
70 Id. at 335 (Abortion and capital punishment stir beliefs that are often fiercely held. In cases of this kind, it is natural to assume that votes will be relatively impervious to panel effects).
VII. School Desegregation in the 1960’s and 70’s

The school desegregation study applies Sunstein’s same three hypotheses and tests a law area that he suggested appropriate for future research: the effects of judges’ political ideology on deciding the matter of segregation in the 1960’s and 1970’s.\footnote{Id. at 309.} One hundred and three circuit court cases, spanning the years from 1960 through 1973, were analyzed. This was a sufficient number of cases to test an area of law and capture indications of political ideology on the part of the judges.\footnote{Sunstein studied less than 100 cases in two areas of law. The school desegregation study analyzed 103 cases.} Sunstein, as stated above, analyzed 14 different legal topical areas.\footnote{Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 Va. L. Rev. 301 at 311-13 (2004).} Some of these areas produced hundreds of cases for Sunstein to test; while other areas, such as campaign finance and contracts clauses, produced less than 100.\footnote{Id. at 312.}

The school desegregation study, as with the Sunstein study, only analyzed published cases. One practical reason for this is that, unlike the contemporary time period that Sunstein studied, few, if any, unpublished circuit court cases were available to be analyzed from the 1960’s and 70’s.\footnote{Kenneth F. Hunt, Saving Time or Killing Time: How the Use of Unpublished Opinions Accelerates the Drain on Federal Judicial Resources, Syracuse L. Rev. 315, 320-21 (2011).} The second reason is a reason Sunstein gave: published cases are more likely to involve complex or difficult issues, issues that are more likely to bring forth a pattern of ideology on the part of the judges.\footnote{Sunstein et al., supra note 89 at 313.} An unpublished opinion, on the other hand, is normally thought to be more of the general and straightforward type, not the type of decision that will lend itself easily to political ideological analysis.\footnote{See, e.g., Brian T. Damman, Guess My Weight: What Degree Of Disparity Is Currently Recognized Between Published And Unpublished Opinions, and Does Equal Access to Each Form Justify Equal Authority For All? 59 Drake L. Rev. 887 (2011).}

As stated above, 103 published school desegregation decisions decided by three-judge United States Circuit Court Judge panels were examined. Starting with the year 1960, each successive year was examined until at least 103 cases had been examined by the year 1973.\footnote{This included the whole year of 1973 that we canvassed, along with the previous 12 years from 1960.} The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and the D.C. Circuits were examined.\footnote{The Eleventh Circuit, which split up the traditional Fifth Circuit, was not yet in existence.} As was stated above, the party of the nominating President served as the proxy.\footnote{Sunstein et al., supra note 89 at 303 (In following Sunstein’s example, per).}

The overall number of cases studied is illustrated by Table 1 below, along with a breakdown of the circuits and the numbers that each separate circuit heard.
When one considers contemporary notions of what does and does not constitute the terms “liberal” and “conservative,” the definitions may be different for different readers. For the purposes of this paper, a rather simple but effective definition from Charles Dunn and David Woodward is used that appears consistent for both the contemporary time period Sunstein covered and the time period of this study covering the 1960’s and early 1970’s.  

Dunn and Woodward stated that at the governmental level, those who identify with liberal ideology believe that the national government is the most effective agent in influencing policy to affect society. Conservatives, in contrast, believe state and local government are the best suited to indirectly influence society. An example related to the time period of the school desegregation study may give further understanding of these distinctions. In 1961, before a regional gathering of Southern Republican leaders in Atlanta, Georgia, Barry Goldwater, who later took a public stance against the Civil Rights Act, stated that school integration, was “the responsibility of the states. I would not like to see my party

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82 Id. at 30-31.
assume it is the role of the federal government to enforce integration in the schools.\textsuperscript{84}

While Goldwater seemed to be speaking for the Republican Party at the time, the message was likely intended to gain Southern support. Certainly, he was not speaking for the whole party because there was a strong liberal flank that still existed in the Republican Party in the 1960’s.\textsuperscript{85} Goldwater would later attempt to exploit this liberal flank when running for President in 1964.\textsuperscript{86} Both the Republican and Democratic Parties seemed split in regard to civil rights in the 1960’s. To use the same proxy that Sunstein used, that of the ideology of the appointing President’s party, the results will be different because the ideologies of the political parties in the 1960’s and early 1970’s were not so cut and dry.

In the 1950’s the Democratic Party still had a strong block of conservatives, almost entirely located in the South and the Republicans had many conservatives but also many moderates with a block of liberal Republicans in the Northeast.\textsuperscript{87} The country was still experiencing the lasting effects of a prevailing ideology shaped by the notion of liberalism defeating poverty and fascism.\textsuperscript{88} The elected President in 1952 was war hero, Dwight D. Eisenhower. A small group of the progressive northeastern Republicans, led by Henry Cabot Lodge, had drafted Eisenhower to run for President.\textsuperscript{89}

Eisenhower was moderate. He did not turn back New Deal policies, which conservatives wanted him to do. He extended Social Security and started the National Highway system.\textsuperscript{90} He was moderate to liberal concerning civil rights. Some scholars criticize Eisenhower on his civil rights record.\textsuperscript{91} Some disapprove him just from what Earl Warren stated about Eisenhower in his Memoirs,\textsuperscript{92} which were published eight years after the President’s death. Warren wrote about un-

\begin{itemize}
\item \textsuperscript{84} Jack Bass, \textit{That Old-time Southern Strategy}, \textsc{Salon} (July 8, 2011), http://www.salon.com/2004/03/25/southern_strategy/singleton/.
\item \textsuperscript{86} \textit{Anders}, supra note 99, at 134.
\item \textsuperscript{87} Jonathan Schoenwald, \textit{We Are an Action Group: The John Birch Society and the Conservative Movement in the 1960s}, in \textit{The Conservative Sixties}, 25 (David Farber & Jeff Roche eds., 2003).
\item \textsuperscript{88} David Farber, \textit{Democratic Subjects: National Politics, Cultural Authenticity, and Community Interests}, 11-13 (David Farber & Jeff Roche eds., 2003).
\item \textsuperscript{89} See, e.g., \textit{Herbert S. Parmet, Eisenhower and the American Crusades} (Macmillan 1972).
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Peter Irons, \textit{A People’s History Of The Supreme Court: The Men And Women Whose Cases And Decisions Have Shaped Our Constitution}, 393 (Viking, 1999).
\item \textsuperscript{92} See \textit{Earl Warren, The Memoirs of Earl Warren} (Doubleday, 1st ed. 1977) (“I have always believed that President Eisenhower resented our decision in Brown v. Board of Education and its progeny.” Many scholars and commentators continually repeat this damning statement Warren attributed to Eisenhower from a personal conversation. In another un-collaborated personal conversation between the two, Warren contenended that Eisenhower said that the appointment of Warren was the biggest mistake he ever made. Herbert Brownwell, Eisenhower’s first Attorney General, and the one most responsible for Eisenhower appointing so many progressive judges in the South, called this particular Warren statement, “apocryphal.” Brownwell Interview, Oral History 362, Eisenhower Library, Abilene, Kansas, July 7, 2012).}
\end{itemize}
collaborated personal conversations he had with Eisenhower.\footnote{Warren Memoirs, \textit{Id.} at 289-92.} One irony about this is that Warren needed the support of the Fifth Circuit if his mandate in \textit{Brown v. Board of Education} was to be enforced in the Deep South and Eisenhower gave him that with his nomination of a progressive Fifth Circuit Court.\footnote{See e.g., David A. Nichols, \textit{A Matter Of Justice: Eisenhower and the Beginning Of The Civil Rights Revolution}, 91-110 (Simon & Schuster, 2007) (Excellent read on the complicated Eisenhower Warren relationship).}

Eisenhower ended up electing many Federal judges who went on to have very progressive records on civil rights. He refused to appoint a Southerner or a segregationist to the Supreme Court despite enormous political pressure.\footnote{\textit{Id. at 77.}} For Federal judicial appointments, Eisenhower did something unique, rather than relying on the recommendations of senators and congressmen, like so many other Presidents, he delegated the process to his attorney general. Herbert Brownwell\footnote{Herbert Brownwell & John P. Burke, \textit{Advising Ike: The Memoirs of Attorney General Herbert Brownwell} (Univ. Pr. of Kans. 1993).} knew what Eisenhower was looking for and consistently recommended men of quality who held open minds in regards to civil rights.\footnote{\textit{Id.} 82-83.} Eisenhower also tried to stay away from segregationists in his appointments of lower Federal judges.\footnote{\textit{Id.}}

\section*{IX. Disaggregating by Circuit}

Sunstein broke down the voting by circuit in part of his study.\footnote{Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, \textit{Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation}, 90 Va. L. Rev. 301, 332-46 (2004).} This paper will do the same. We found and surveyed at least one panel decision on school desegregation in all eleven circuits covering the period from 1960 to 1973. Only seven of the eleven circuits, however, had decided as many as five panel school desegregation cases in this period.\footnote{These included the Second, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits.}

The Sunstein article articulated what is considered to be a common belief for the most recent decades, and that is that while the Seventh and newer Fifth Circuits are the most conservative,\footnote{\textit{Id.}} the Ninth, Third and Second Circuits are the most liberal.\footnote{\textit{Id.}}

In the school desegregation survey, the effects of ideology differed significantly across circuits. The circuits in which the most school desegregation cases were heard in the period from 1960 through 1973 were the circuits in which
the most plaintiffs could be gathered, in the circuits containing the most Southern States as depicted in Table 2 below. The Fifth Circuit decided the most school desegregation cases. The Fifth Circuit during the period covered in the survey included Texas, Louisiana and Mississippi in addition to what would eventually become the Eleventh Circuit in 1981, including the states of Alabama, Georgia and Florida.

After Brown II, the law had changed but not much else. With the nearly ubiquitous absence of local school board compliance, the onus fell upon black parents to bring suit. The NAACP would search for these brave parents throughout the Deep South who would attempt to place their students in all white public schools. This was a difficult task for the NAACP. Not only did they need to find willing black parents, they also needed to meet with the school board to go over the usual denial. If there was no satisfaction from this school board meeting the NAACP would file suit in Federal court.

Filing suit was just the beginning. Many of the school desegregation cases would languish in the courts for years while the public schools remained segregated. After Brown I in 1954 and until 1961, the vast majority of state Legislatures and Governors in the South would do anything within their power to keep their public school segregated. New Orleans was considered to be the capital of segregated schools in the South. To lose it to desegregation would be a devastating loss to the South.

With the delay in the courts, it is not surprising that only 103 school desegregation cases were found to be surveyed between the years 1960 through 1973. Factors such as the non-specific and standard-less language of the two Brown decisions offering little guidance for courts coupled with the resistance that potential black plaintiffs felt from the school boards and public at the time slowed the desegregation movement to a crawl. In addition, we counted a particular opinion once regardless of the number of renditions that made their way through the appeals court.

There were 43 cases surveyed from the Fifth Circuit alone. See Table 1 above. The decisions in 36 of the 43 cases were liberal. A decision was considered liberal if the court was moving for immediate desegregation or ruled in a way that exhibited a steadfast commitment toward desegregation. A decision was considered

103 These included the Fifth, Sixth, Eighth and Fourth Circuits.
106 Peltason, J.W., FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION, 104 (Univ. of Ill. 1971).
107 Id.
conservative if the court appeared to be slowing down the process. A tell-tale sign of this conservatism was when a court would use the code phrase for delay “with all deliberate speed” taken from \textit{Brown II}.\footnote{Brown \textit{v. Bd. of Educ.}, 349 U.S. 294, 301 (1955).}

Seventy-nine percent of the judges appointed by Democratic Presidents voted for school desegregation in the Fifth Circuit compared to 91 percent of the judges appointed by Republican Presidents. Having read the Sunstein article, these numbers may strike the reader as counter to what would be expected, but as stated above, party lines in the 1960’s and early 1970’s did not line up neatly with contemporary ideology.

The Circuit with the second most school desegregation cases surveyed was the Sixth Circuit with 14. The Sixth Circuit includes the states of Kentucky, Michigan, Ohio and Tennessee. There is a definite Southern flavor to the Sixth Circuit with the Southern state of Tennessee and border state of Kentucky. The judges in the Sixth Circuit proved to be more conservative than those in the Fifth. The cases split down the middle. Seven were conservative and seven were liberal. As was the case with the Fifth Circuit, the voting in the Sixth Circuit did not split evenly along party lines. The Democratic appointees voted liberally 48 percent of the time and their Republican counterparts voted liberally 54 percent of the time. To see how the Circuits ranked according to ideology refer to Table 2 below.

The Eighth Circuit had the third most school desegregation cases surveyed with 13. It included the seven states: North and South Dakota, Minnesota, Nebraska, Iowa, Missouri and Arkansas. With Arkansas and Missouri, a border state, the Eighth Circuit proved to be one of the four circuits that heard the most school desegregation cases in the period studied. Of the 13 desegregation cases studied, 10 were liberal decisions. Democratically-appointed judges voted liberally 63 percent of the time in this circuit and Republican-appointed judges voted liberally 87 percent of the time. Much like the Fifth Circuit and to a lesser extent, the Sixth, the ideological shift of the judges was apparent with the Republican judges voting more liberal overall than their Democratic brethren. This circumstance will be explored in more detail below in the personal attributes section.

The next circuit with the most school desegregation cases decided was the Fourth Circuit with 10. It was surprising to see the Fourth Circuit, with the most Southern states outside of the Fifth Circuit, deciding only 10 three-judge panel cases on school desegregation. Additional research would be needed to offer more than a conjecture at his point. The Southern states of North and South Carolina, Virginia, West Virginia and Maryland make up the Fourth Circuit. Of the 10 cases decided, four were deemed to be liberal. The ideological bent in the Fourth Circuit
during the 1960’s and early 1970’s is the closest to what would be considered more
typical to what a reader today would expect. The Democratic appointees were
voting liberally 50 percent of the time and the Republican appointed judges were
voting liberally just 31 percent of the time.

None of the other seven circuits had as many Southern or Border States and
the resultant number of school desegregation cases decided reflected this. Of the
remaining circuits, the Second, Seventh and Tenth decided the most school
desegregation cases with only five school desegregation cases each.

Table 2

|--------------------------|--------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|----------------|

X. School Desegregation and Models

A. Attitudinal Model

Of the three hypotheses presented by Sunstein in the Ideological Voting
article, the first hypothesis dealt with the attitudinal model. It stated:

Ideological voting. In ideologically contested cases, a
judge’s ideological tendency can be predicted by the party
of the appointing president; Republican appointees vote
very differently from Democratic appointees. Ideologically

contested cases involve many of the issues just mentioned, such as affirmative action, campaign finance, federalism, the rights of criminal defendants, sex discrimination, piercing the corporate veil, racial discrimination, property rights, capital punishment, disability discrimination, sexual harassment, and abortion.\textsuperscript{112}

Sunstein found in most of the law areas he investigated that the political party of the appointing president was “a fairly good predictor of how individual judges will vote.”\textsuperscript{113} In 11 of the 14 law areas that Sunstein surveyed, the first hypothesis was supported.\textsuperscript{114} In regard to some of the areas; affirmative action cases (surveyed from 1978 through 2002) and sex discrimination cases (surveyed from 1995 through 2002), showed evidence of ideological voting.\textsuperscript{115} Sexual harassment (a subset of the sex discrimination data collected by Sunstein) was not one of the 14 law areas identified but was still reported by Sunstein due to the level of judicial ideology involved. Republican appointees voted in favor of plaintiffs 37 percent of the time in these cases compared to 52 percent of the Democratic appointees.\textsuperscript{116}

Disability was another area that Sunstein surveyed that demonstrated judicial ideology.\textsuperscript{117} There were also indications of ideological voting, but to a lesser degree, in the areas of contract clause violations and Title VII.\textsuperscript{118} Abortion and capital punishment were two other legal areas that were indicative of individual ideological voting.\textsuperscript{119} Republican appointees cast pro-choice votes 49 percent of the time compared to their Democratic counterparts who voted pro-choice 70 percent of the time.\textsuperscript{120} The area of capital punishment provided a demonstrable ideological difference of approximately 20 percent. Democratic appointees voted for defendants at a rate of over 40 percent, doubling the times that Republican appointees voted for defendants.\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{112} Id. at 304.
\item \textsuperscript{113} Id. at 305.
\item \textsuperscript{114} Id. (These 11 areas were: affirmative action, campaign finance, sex discrimination, piercing the corporate veil, disability, environmental regulation, capital punishment, sexual harassment, abortion, contract clause violations and Title VII).
\item \textsuperscript{116} Id. at 320.
\item \textsuperscript{117} Id. at 321.
\item \textsuperscript{118} Id. at 324.
\item \textsuperscript{119} Id. at 306.
\item \textsuperscript{120} Id. at 328.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id.
\end{itemize}
In regard to attitudinal voting and school desegregation cases surveyed in this paper, there was no significant party ideological distinction. Democratic appointed justices voted for school desegregation 65 percent of the time compared to 64 percent for the Republican appointees. These numbers cover all circuits for the 103 cases surveyed.

B. Personal Attributes Model

This part of the paper will examine those judges who sat on the most school desegregation panel cases on the Fifth, Sixth, Eighth and Fourth Circuits to determine if any personal attributes were present that could be an indicator as to how they voted on school desegregation cases. The personal attributes model (sometimes referenced as the “Social Background Theory”) originated with C. Neal Tate.

Table 4 below lists the names of the judges who voted on at least three panel decisions involving school desegregation. Table 4 also lists how liberal a judge voted in regard to his decision-making on school desegregation cases. Judges who voted consistently conservative had an ideological score of +1. A judge who voted liberal every time had an ideological score of -1. A judge who voted equally for and against school desegregation would have a score of 0. Any other voting score would be indicated by a percentage accompanied with a plus or negative dependent on whether more of their votes were conservative or liberal.

One judge in the Fifth Circuit, Ben Cameron, was a force for the segregation cause and a thorn in the side of the Fifth Circuit Four. The Fifth Circuit Four were four staunch pro civil rights judges (Wisdom, appointed from Louisiana; Rives, appointed from Alabama; Brown, appointed from Texas; and Tuttle, appointed from Georgia) that helped drive desegregation through the Fifth Circuit. Cameron is included in this survey even though he was only on two three-judge panels deciding school desegregation during the period covered because of his influence on civil rights. Earlier in the 1950’s, Judge Cameron sat on more civil rights panels involving constitutional challenges to state laws, but Richard Rives, the acting Chief Justice of the Fifth Circuit, disengaged Cameron from

123 This represents the total votes from all the judges in all the circuits.
127 Godbold voted three times, Goldberg four times, and Tuttle five times.
128 See PELTASON, J.W., FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION, 104 (Univ. of Ill. 1971). (Rives was
hearing more civil rights panel cases when the judge from Mississippi stated that he “considered himself on the court to represent the people of Mississippi and didn't believe Brown should be enforced there.”

Cameron issued continual complaints against Rives and his successor, Chief Justice Tuttle with the contention that the panels deciding civil rights cases were being packed with liberals. He even took his complaint public, stating his criticism in a penned dissent. Tuttle showed little sympathy, especially since Cameron refused to apply the Fourteenth Amendment to civil rights cases. Judge Cameron will be discussed more below.

### i. Law School Education

There has been a common criticism by conservatives that the federal judiciary is made up of liberal activists from elite Ivy League law schools. In the Fifth Circuit, justices serving in the 1960’s and early 70’s, attended several different law schools. Fifteen justices represent the Fifth Circuit in Table 4 below, and only three of those judges had attended Ivy League schools: John Cooper Godbold, Irving Goldberg and Elbert Tuttle. Interestingly, these three judges do meet the common conservative argument noted above. All three judges held an impressive liberal voting record (11 to one) on school desegregation panel decisions. The most socially conservative justice on the Fifth Circuit during this period was states-righter and segregationist, Benjamin Cameron. Cameron, appointed by Eisenhower early in his first term, did not attend an Ivy League school but did attend a private, well-healed southern law school named

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130 See Peterson, supra note 143 (Tuttle was one of the “Fifth Circuit Four”).
131 Id. at 1047-50.
133 Brown & Lee, supra note 144, at 1062-63.
137 Godbold voted three times, Goldberg four times and Tuttle six times.
138 David Marcus, Flawed but Noble Desegregation Litigation and Its Implications for the Modern Class, 63 Fla. L. R. 657, 693 (2011) ("Cameron, who described the South as a 'conquered province' victimized by the so-called 'Civil Rights Statutes.'").
139 Cameron was appointed on March 16, 1955.
Tuttle, also appointed by President Eisenhower, attended Cornell and was one fourth of the “Fifth Circuit Four,” along with Brown, Wisdom and Rives. Brown attended the University of Michigan, Wisdom attended Tulane, and Rives, the only member of the group that was not an Eisenhower appointee and not a Republican (he was a Democrat appointed by Truman), did not attend law school.

There was only one Eighth Circuit Judge of the eight that were more closely studied from that circuit that had an Ivy League education. Harry Blackmun attended Harvard, and was a member of the Republican Party. He was another example of a socially liberal Republican appointed by Eisenhower. He voted for the plaintiffs in each of the three school desegregation panel cases in which he was involved. The other six justices in the Eighth Circuit either attended public law schools or read the law.

There are eight judges from the Sixth Circuit listed in Table 4. Two of those judges attended the Ivy League, Justices McCree and Miller. Again, the Ivy-Leaguers proved to vote liberally, with McCree voting liberally each of the four times he voted, and Miller voting for plaintiffs four of the five times he voted. These two justices stand out, particularly in the Sixth Circuit, which turned out to be more conservative than the Fifth or Eighth Circuits. Only Edwards, of the remaining six justices in the Sixth Circuit, had a liberal voting record in regard to school desegregation.

The Fourth Circuit bucked the pattern of the other three circuits in having two Ivy League educated justices voting conservatively. Justice Bryan, who graduated from Columbia, voted against the plaintiff in each of the three cases surveyed and Justice Haynesworth, from Harvard, voted against the plaintiff in two of the three cases in which he was involved. If Bryan and Haynesworth had been exposed to liberal tendencies in their legal education these findings tend to indicate that other personal attributes or influences may have outweighed this exposure, such as where they practiced law or the direct influences of the other conservative judges in the Fourth Circuit.

To summarize when looking at the effects of an Ivy League legal education, six of the eight Ivy Leaguers voted primarily for the plaintiff while two voted

140 Alumni of this prestigious school include two Supreme Court Justices and one Nobel Peace Prize recipient.
143 These eight judges were Henry Blackmun, Myron Bright, Floyd Gibson, Gerald Heaney, Donald Lay, Marion Matthes, Martin Van Oosterhout and Charles Vogel.
145 Id. (Justice Edwards attended the Detroit College of Law, a Jesuit law school).
conservatively. The eight had a voting ideological score of 79 percent liberal. This is considered significant but the sample was very small. This would be an area for more research. Other research possibilities would be comparing justices who attended public versus private law schools or elite law schools versus other law schools (Ivy League schools aren’t the only elite schools).

ii. Religion of Judges

Tate and other disciples of the model of personal attributes hold out religion as another possible influence on how judges vote. Some believe there is some systematic difference in how judges vote depending on their religious affiliation. Jewish justices, for example, have been viewed by some to vote for the underdog largely because of their own historical outsider status. Despite various conservative rules governing the Roman Catholic Church, there is the thinking among most that American Catholics are more liberal than most non-American Catholics. Evangelical judges are generally thought to be conservative.

Those religious groupings that fall under the rubric of what has historically been deemed liberal Protestantism, such as Episcopalians, Presbyterians, Methodists and Congregationalists (now the United Church of Christ), have held and exerted extraordinary power, of both an intellectual and social construct, on American culture since the early 19th century. The liberal Protestants helped elect one of their own in President Woodrow Wilson. Wilson, the son of a Presbyterian pastor, wrestled long with the decision as to whether to enter the United States in the Great War. When he eventually did, it helped change the minds of many of the previously pacifist members of the liberal Protestant churches.

From about 1875 to 1925, liberal Protestants and Evangelical sects had come together to create “undisputed sway” in America. This power connection ended with the Scopes Trial, with its resultant fallout causing most Evangelicals at

146 This warrants more research.
149 Roberts, supra note 167, at 395.
that time to fall largely out of the public eye.\textsuperscript{156} The liberal Protestants were now free from the Evangelicals after Scopes but continued a lesser, but still uncomfortable, relationship with rural Fundamentalists. There was also a growing criticism of the sentimental pretensions of the liberal Protestant church.\textsuperscript{157} These issues continued to afflict the liberal Protestant sects throughout the first half of the 20th century. Eventually a new cause grabbed the imagination of liberal Protestantism, the Civil Rights fight in the 1950’s and 60’s.\textsuperscript{158}

The “Fifth Circuit Four” were all liberal Protestants. Justices Brown and Rives were both Presbyterian and Justices Wisdom and Tuttle were both Episcopalian.\textsuperscript{159} Interestingly, conservative segregationist Justice Cameron was also Episcopalian.\textsuperscript{160} The Fifth Circuit had several other liberal Protestants on the bench. David Dyer, who voted four to zero for school desegregation, was an Episcopalian.\textsuperscript{161} Ivy-Leaguer John Cooper Godbold, who voted consistently for school desegregation, was also Methodist.\textsuperscript{162} Justice Joe Ingraham, a Republican, first appointed by President Eisenhower to the position of a United States District judge and later appointed by President Nixon to the Fifth Circuit in 1969,\textsuperscript{163} was a Presbyterian who consistently voted for the plaintiffs in school desegregation cases.\textsuperscript{164}

Two other justices in the Fifth Circuit who were liberal Protestants voting liberally on school desegregations cases were Lewis Morgan, Presbyterian,\textsuperscript{165} a Georgia Democrat appointed by John F. Kennedy and William Thornberry, a Texas Republican appointed by Lyndon Baines Johnson.\textsuperscript{166}

Other non-liberal Protestant judges sitting on the Fifth Circuit during the 1960’s and early 1970’s who were affiliated with other faiths were also notable in regard to their involvement in school desegregation cases. James Coleman, an LBJ

\textsuperscript{156} GERRY WILLS, HEAD AND HEART: A HISTORY OF CHRISTIANITY IN AMERICA, 368 (Penguin Books 2008).
\textsuperscript{157} Id.
\textsuperscript{158} FOX & KLOPPENBERG, supra note 167, at 397.
\textsuperscript{160} Drey, Email Inquiry to the 5th Circuit; Lawrence Kestenbaum, Index to Politicians: Cameron, THE POLITICAL GRAVEYARD, (Jan. 18, 2013), http://politicalgraveyard.com/bio/cameron.html.
\textsuperscript{161} RICHARD WIGHTMAN FOX & JAMES T. KLOPPENBERG, A COMPANION TO AMERICAN THOUGHT 394 (Blackwell Publishers 1998); Drey, Email Inquiry to the 5th Circuit.
\textsuperscript{164} Id.
\textsuperscript{165} Email Inquiry to the University of Georgia, Russell Library of Political Research and Studies (July 7, 2011).
\textsuperscript{166} William Homer Thornberry & Joe B. Frantz, William Homer Thornberry Oral History Interview (Dec. 21, 1970) (transcript available in the Lyndon B. Johnson Library, Austin, Texas).
appointee was Baptist. Many Baptist sects were, and still are, very fundamental and conservative. This includes the contemporary Black Baptist Church, which recently, under the leadership of the Coalition of African-American Pastors, suggested that Black Baptists parishioners withdraw their support for President Obama in the 2012 election due to his support of gay marriage. Anders Walker in his book, The Ghosts of Jim Crow, takes a very harsh look at J.P. Coleman, particularly during his days as Governor of Mississippi, from 1956 through 1960.

Later on in his career Coleman would sit on the Fifth Circuit Court of Appeals. Coleman had tempered his earlier segregationist stance on civil rights and eventually voted moderately on school desegregation. A Southern judge, unlike Coleman, who voted consistently for school desegregation was Texan, Ivy-Leaguer, Irving Goldberg. He was appointed by LBJ in 1966. Goldberg was Jewish. John Milton Simpson was another Fifth Circuit judge who voted consistently for plaintiffs. He voted for school desegregation each of the five times he voted. Despite continued efforts, we were unable to uncover his religion, if indeed he had one.

In the Eighth Circuit, Harry Blackmun and Donald Lay were both Methodist. Marion Matthes was Presbyterian. All three voted consistently for the desegregation of schools. The fourth justice in the Eighth Circuit that voted mostly liberal on school desegregation was Martin Van Oosterhout, a member of the

167 Id.
168 Id. (Among other things, Anders Walker attacks Coleman on his endorsement as Governor of “pupil placement” as a means to circumvent Brown; for his controversial response to both the Emmitt Till scandal and the Medgar Evers killing, the slain Mississippi civil rights activist. Walker also takes Mississippi Attorney General Coleman to task on his prosecution of Willie McGee, an alleged black rapist who was put to death for what the evidence seemed to prove was no more than an affair with a white woman. There was a national outcry for his release).
169 Id. (In May, 2012, the Coalition of African American Pastors (CAAP) called the President’s stance “disgraceful” and launched a marriage petition in a nation-wide campaign to rally African Americans to withdraw support from the President).
170 Id.
171 Id. (Among other things, Anders Walker attacks Coleman on his endorsement as Governor of “pupil placement” as a means to circumvent Brown; for his controversial response to both the Emmitt Till scandal and the Medgar Evers killing, the slain Mississippi civil rights activist. Walker also takes Mississippi Attorney General Coleman to task on his prosecution of Willie McGee, an alleged black rapist who was put to death for what the evidence seemed to prove was no more than an affair with a white woman. There was a national outcry for his release).
172 Id. (Coleman was appointed to the Fifth Circuit by LBJ in 1965).
173 Id. (Coleman was appointed to the Fifth Circuit by LBJ in 1965).
174 Id. (Among other things, Anders Walker attacks Coleman on his endorsement as Governor of “pupil placement” as a means to circumvent Brown; for his controversial response to both the Emmitt Till scandal and the Medgar Evers killing, the slain Mississippi civil rights activist. Walker also takes Mississippi Attorney General Coleman to task on his prosecution of Willie McGee, an alleged black rapist who was put to death for what the evidence seemed to prove was no more than an affair with a white woman. There was a national outcry for his release).
Reformed Church. The Reformed Church is an offshoot of Calvinism and was originally a very conservative denomination that used to associate with Evangelicals. Starting in the 1950’s and 1960’s the Reformed Church was becoming more moderate to progressive being at the forefront of the civil rights movement. Van Oosterhout’s votes for school desegregation would be consistent with this.

The Sixth Circuit in regard to school desegregation was conservative. Two members associated with liberal Protestantism but voted mostly against plaintiffs in school desegregation cases were Lester Cecil, a Methodist, and John Peck, an Episcopalian. Two other Sixth Circuit judges who voted mostly conservative and were members of two denominations that certainly had conservative members were Judges Clifford O’Sullivan, Catholic, and Harry Phillips, Baptist.

There were three other judges associated with liberal Protestantism in the Sixth Circuit who voted mostly liberal: William Miller, George Edwards and Wade McCree. William Miller, a Republican appointed by Eisenhower, was Methodist. George Edwards, a Democrat, was an Episcopalian appointed by LBJ, and Wade McCree, also a Democrat, but appointed by JFK, was a Unitarian. Unitarianism, since the 19th century, has sometimes been called "liberal Christianity."

In the Fourth Circuit, there were two justices who voted conservatively on school desegregation, Herbert Boreman and Albert Vickers Bryan, Sr. Boreman and Bryan were both appointed by Eisenhower and both were Episcopalian. Judge Simon Sobeloff, appointed by Eisenhower, voted mostly liberal on civil rights issues and school desegregation and he was Jewish.

In summary, there seems to be a possible correlation between how some judges voted and the liberal leanings, or lack thereof, of the faiths they were associated with.

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177 See infra note 260; Email Inquiry to Joan Voeiker, Eighth Circuit Court Library (June 20, 2011).
179 Id. see Voeiker, Email Inquiry to the Eighth Circuit Library.
180 Email Inquiry to Rita Wallace, Sixth Circuit Library (June 22, 2011).
181 Id.
182 Id.
183 Id.
184 Id.
185 Id.
187 See infra Table 4, at 54.
188 Id.
189 Id.
190 Id.
associated with. As stated above, the “Fifth Circuit Four”\textsuperscript{191} all happened to be liberal Protestants, which lines up nicely with a liberal ideology. Of the 21 judges associated with liberal Protestantism described above, 16 voted liberally compared to five who did not. As with the other attributes studied in this manuscript however, a truly effective method of isolating a particular attribute when studying many is an imperfect science.\textsuperscript{192} It is very difficult to assess the impact.\textsuperscript{193}

### iii. Prior Work Experience

Prior work experience is another personal attribute that some Scholars have found to be an influence on how United States Court of Appeals Justices vote. Corey Rayburn Yung has tested particular attributes and their potential effect on contemporary Federal Circuit Judges and has discovered that a judge’s prior work experience in the government (outside of the judiciary) will tend to indicate a liberal voting preference.\textsuperscript{194}

Songer, Sheehan and Haire in their book, \textit{Continuity and Change on the United States Court of Appeals},\textsuperscript{195} state that prior to 1960, Republican presidents tended to appoint judges with previous federal judicial experience and Democratic presidents tended to appoint judges with strong ties to their home state.\textsuperscript{196} James Brudney states that the research shows that after 1960, these attributes had less to offer Presidents in their selection of potential judges and that “the party affiliation became a significant predictor of voting patterns by federal judges.”\textsuperscript{197} Songer, et al., seemed to be in line with Brudney stating that since 1960 the career paths of judges seemed to become less significant when choosing judges.\textsuperscript{198} This is not to be confused, however, with the idea that previous federal judicial experience had no influence on judicial decision-making.

In the school desegregation survey Richard Rives, sitting on the Fifth Circuit, was the sole Democrat appointed by Truman that was a member of the

\textsuperscript{191} Email Inquiry to Marian Drey at the 5th Circuit Library (July 7, 2011); \textsc{Richard Wightman Fox \\& James T. Kloppenberg}, \textit{A Companion To American Thought} 394 (Blackwell Publishers 1998).
\textsuperscript{192} Dan Simon, \textit{A Psychological Model of Judicial Decision Making}, 30 \textsc{Rutgers L. Rev.} 1, 101 (1998) (Any attribute that can be isolated with ease when studying several is ambiguous).
\textsuperscript{196} Id. at p. 236.
\textsuperscript{197} James J. Brudney, \textit{Recalibrating Federal Judicial Independence}, 64 \textsc{Ohio St. L.J.} 149, 162 (2003).
\textsuperscript{198} Songer, supra note 210, at 44, 236.
“Fifth Circuit Four.” Rives spent almost all of his prior work in private practice, Eisenhower appointed the other three judges. John Wisdom, the last of the Fifth Circuit Four appointed by President Eisenhower in 1958, had worked in private practice but also had been a law professor at Tulane. John Brown spent his prior work life as an admiralty lawyer in Houston and Galveston. Elbert Tuttle, the first of the Fifth Circuit Four appointed by Eisenhower, spent most of his career in private practice in Atlanta, Georgia, but also had been working a short time for the United States Treasury Department just prior to his appointment. Ben Cameron spent the lion’s share of his previous career in private practice, but also had been a federal prosecutor, which is another work-related attribute shared by many conservative judges.

Kennedy’s Southern federal appellate appointees tended to be more conservative than Eisenhower’s. Kennedy seemed to bow to the custom of “senatorial courtesy” and appoint federal judges for the South that were acceptable to the conservative Southern Dixiecrat Senators. Walter Gewin, a Democrat that practiced in various towns and cities in Alabama also served as a prosecuting attorney in Hale County, Alabama, for nine years. Gewin was “decidedly conservative” regarding “race cases” early on in his career as a judge, but he did take on a transformation over the years. Gewin voted for desegregation in five out of eight school desegregation cases. His background as a prosecuting attorney may have also had an early influence on his early conservative years.
Griffin Bell, a Southern Baptist Democrat from Georgia, who later became Jimmy Carter’s United States Attorney General, was appointed by President Kennedy to the Fifth Circuit in 1961. Bell spent years in private practice in Georgia except for the three years prior to his judicial appointment when he served as the Chief of Staff for the segregationist Georgia Dixiecrat Governor, Ernest Vandiver. Griffin Bell was a complicated man and his tribulations mirrored those of the changing South. His record on school desegregation was conservative to moderate. He voted for school desegregation three of the seven times he voted on the topic. He was viewed by many on the court as a moderating voice who could bring the two factions to the table. Speculation is that perhaps the civil rights of Blacks would have been better championed in the early 1960’s if a Republican or a Democrat, who was willing to alienate the South, had been in the Oval Office.

Lyndon Baines Johnson appointed several appeals court judges who voted for plaintiffs in school desegregation cases, such as Lewis Morgan from Georgia. Morgan voted consistently for the plaintiffs on school desegregation cases. John Milton Simpson was another of the Johnson appointed judges who was consistently pro-plaintiff. Very involved in Florida state government, Simpson was an assistant state attorney in Florida, a judge in Duval County and a circuit judge on the Florida Court of Appeals before being appointed to the United States District Court for the Southern District of Florida. In 1966 LBJ appointed Simpson to sit on the Fifth Circuit.

James Coleman, another judge appointed by President Johnson for the Fifth Circuit, was Southern Baptist. Coleman had been everything from a District Attorney in Mississippi to a Mississippi Circuit Judge, to the Governor of Mississippi. He had been a self-described moderate Southerner who appeased Mississippi at the time he served by stating he would uphold segregation. Anders Walker makes a case that Coleman was actually a closet segregationist, hoodwinking his way through Mississippi state government claiming to be moderate. He did vote moderately on school desegregation, but this was later in his career as a federal circuit judge. The reason Johnson appointed him to the Fifth

211 Id.
212 See e.g., REG MURPHY, UNCOMMON SENSE: THE ACHIEVEMENT OF GRIFFIN BELL, (Longstreet Press 2001).
213 Id.
214 Id.
215 Derrick A. Bell, Jr., Civil Rights Lawyers on the Bench, 91 YALE L.J. 814, 822-24 (1982).
217 Id. see Milton Simpson.
218 Id. see James Coleman.
219 Id.
Circuit in the first place was part of a quid pro quo to appease Southern legislators so Johnson could get his man, Thurgood Marshall, into the seat of the Solicitor General.  

John Godbold and Irving Goldberg were two judges Johnson appointed that had primarily practiced law before their appointments. Nothing about their work appeared to forecast their eventual voting patterns. Johnson also appointed two pro-plaintiff judges to the Fifth Circuit previously appointed to the United States District Court by President Kennedy. David Dyer was a Democrat and William Thornberry was a Republican. Dyer spent most of his pre-judicial career in private practice while Thornberry had been involved in state government, serving a brief time as a district attorney in Travis County, Texas, before serving in the United States Congress for 14 years.

Joe Ingraham, a Nixon appointee who consistently voted for desegregation, spent several years as a United States District Court Judge in the Texas Southern District having been appointed to the position by President Eisenhower. He spent most of his pre-judicial career in private practice.

Two judges that Eisenhower appointed for the Sixth Circuit who proved to be conservative on school desegregation were Lester Cecil and Clifford O’Sullivan. Cecil had been a prosecuting attorney before he became a judge in the Court of Common Pleas in Ohio. O’Sullivan had spent his prior work in private practice. Another Eisenhower appointee, Paul Weick, proved to be moderate on school desegregation. Weick spent his working years prior to his appointment working in private practice.

Kennedy Democratic appointee, Wade McCree, voted consistently pro-plaintiff on school desegregation. He had previously been a Commissioner on Michigan’s Workers Compensation Commission and Michigan State Circuit

223 Id., see Irving Goldberg.
224 Id., see David Dyer.
225 Id., see William Thornberry.
226 Id.
227 Id., see Joe Ingraham.
228 Id.
229 Id., see Lester Cecil.
230 Id., see Clifford O’Sullivan.
231 Id., see Lester Cecil.
232 Id., see Clifford O’Sullivan.
233 Id., see Paul Weick.
234 Id.
Judge. 235 Kennedy continued to appoint conservative Southern judges with his choice from Tennessee, Harry Phillips. Phillips had been a member of the Tennessee State House of Representatives and an Assistant State Attorney General of Tennessee before he went to private practice. 236 George Edwards, 237 Democrat, was a moderate appointed by Kennedy and was sworn in after Kennedy’s death. Edwards had been very involved in Michigan government before becoming a United States Circuit Court judge. He served as Chairman for the Detroit Election Commission, was President of the Detroit Common Council, and spent time serving as a probate judge and circuit judge before becoming the Chief of Police in Detroit. 238

Johnson appointed Ohioan John Peck, 239 a conservative-leaning Democrat, to the Sixth Circuit. Peck had been very active at the state level in his native Ohio, having served as the Executive Secretary to the Ohio Governor. He also served as the State Tax Commissioner and served as a judge on the Court of Common Pleas in Ohio. 240 Peck also served in the U.S. Army JAG for four years, which may have contributed to his conservative-leaning. 241 William Miller, Republican, appointed by Richard Nixon, proved to be a judge that voted for plaintiffs more often than not. Miller had been a state court Chancellor in Tennessee before being appointed to the United States District Court by President Eisenhower. 242

Eisenhower’s appointments in the Eighth Circuit resembled the appointees he made for the Fifth Circuit. His appointees he made for the Eighth Circuit were progressive on civil rights. Justices Blackmun, Matthes, Van Oosterhout and Vogel cast a combined 14 to two vote total for plaintiffs on school desegregation. Blackmun, a Republican, had been in private practice for years. Before being appointed by Eisenhower, he was counsel for the Mayo Organization in Rochester, Minnesota. 243 Both Marion Matthes, 244 a Missourian, and Van Oosterhout, 245 an Iowan, were involved in state posts and their respective state legislative bodies before being appointed to the Eighth Circuit. Matthes, also a lecturer at Washington University School of Law in St. Louis, had been a city attorney very early in his

235 Id., see Wade McCree.
236 Id., see Harry Phillips.
237 Id., see George Edwards.
238 Id.
239 Id., see John Weld Peck.
240 Id.
241 Id.
242 Id., see William Ernest Miller.
243 Id., see Harry Andrew Blackmun.
244 Id., see Marion Charles Matthes.
245 Id., see Martin Donald Van Oosterhout.
career,²⁴⁶ whereas Van Oosterhout had been a state district judge.²⁴⁷ Charles Vogel,²⁴⁸ a Democrat, got the wheels of integration rolling at Central High School in Little Rock with his 1957 opinion, *Aaron v. Cooper.*²⁴⁹ Vogel spent most of his career in private practice but had run unsuccessfully for the seat of U.S. Senator from North Dakota before being appointed by Roosevelt for the United States District Court.²⁵⁰

Kennedy appointed a Missouri Democrat, Floyd Gibson,²⁵¹ for the Eighth Circuit. Floyd practiced law and spent several years in both the Missouri House of Representatives and Senate before being appointed.²⁵² He proved to be a moderate on school desegregation, voting for the plaintiff half of the time. Lyndon Johnson’s appointments in the Eighth Circuit proved again to be more progressive than Kennedy’s. Donald Lay,²⁵³ an Illinois Democrat, had attended Iowa Law School and spent most of his career, prior to judging, as a law professor.²⁵⁴ Gerald Heaney,²⁵⁵ and Myron Bright,²⁵⁶ both Democrats from Minnesota and alumni of the University of Minnesota Law School, spent their prior work life in private practice.

In the Fourth Circuit, Eisenhower appointed Herbert Boreman,²⁵⁷ who was termed by one of his Court of Appeals colleagues, Judge Donald Russel, as “a conservative of conservatives.”²⁵⁸ Boreman fits one of the attributes that has been identified as a precursor to becoming a conservative judge in that he had been a prosecuting attorney in West Virginia.²⁵⁹ Eisenhower also appointed Simon Sobeloff who served in several different governmental posts in his native state of Maryland, including city solicitor, United States Attorney for Maryland, Chairman of the Commission on the Administrative Organization of Maryland, Chief Judge of the Maryland Supreme Court, and, ultimately, Solicitor General of the United

²⁴⁶ *Id.*, see Marion Charles Matthes.
²⁴⁷ *Id.*, see Van Oosterhout.
²⁴⁸ *Id.*, see Charles Joseph Vogel.
²⁴⁹ *Aaron v. Cooper*, 243 F.2d 361 (8th Cir. 1957) (As a judge on the Eighth Circuit, Vogel wrote the opinion that started the process of integration at Central High School in Little Rock. It was a gradual process of integration he proposed that the Arkansas State Court had previously enjoined).
²⁵¹ *Id.*, see Floyd Gibson.
²⁵² *Id.*
²⁵³ *Id.*, see Donald Pomery Lay.
²⁵⁴ *Id.*
²⁵⁵ *Id.*, see Gerald William Heaney.
²⁵⁶ *Id.*, see Myron H. Bright.
²⁵⁷ *Id.*, see Herbert Stephenson Boreman.
States before becoming a Federal judge.\textsuperscript{260} During his first several years on the court, he “deferred to the school systems' attempts to rectify prior segregation.”\textsuperscript{261} He grew over time to become more progressive in school desegregation cases, becoming increasingly impatient with Southerner’s stalling tactics. “In future desegregation cases, Sobeloff accelerated the time table for desegregation with increasing court involvement.”\textsuperscript{262}

Another Eisenhower appointee, Clement Haynesworth Jr., a moderate Democrat in 1957,\textsuperscript{263} who had not been active “in the effort to continue segregated schools,”\textsuperscript{264} would turn out to be a bit more conservative on the bench.\textsuperscript{265} He became more famous as the unsuccessful Nixon appointment to the U.S. Supreme Court in 1969.\textsuperscript{266} He spent most of his pre-judicial work in private practice.\textsuperscript{267}

President Kennedy had the opportunity to appoint two judges to the Fourth Circuit, Spencer Bell\textsuperscript{268} and Albert Bryan.\textsuperscript{269} Spencer Bell spent his previous judge life practicing law. He also served on the North Carolina state senate. Albert Bryan, termed “a conservative in the deepest old-Virginian sense,”\textsuperscript{270} led a life in private practice until President Truman tabbed him for the United States Eastern District Court of Virginia in 1947.\textsuperscript{271} Like several of Kennedy’s other Southern Appointees, Bryan proved to be a conservative vote on school desegregation. Spencer Bell, however, proved to be a moderate vote on school desegregation. There were no justices appointed by either Presidents Johnson or Nixon for the Fourth Circuit that were active on panels deciding school desegregation cases.

In conclusion, there appears to be no clear correlation generally between work experience and liberalism or conservatism in school desegregation cases, at least from this limited sample. In addition, there appears to be no correlation between being a conservative judge and previously serving as a prosecutor, at least in regard to the small sample of Court of Appeals judges more closely examined. With the exception of Jones and Matthes, the other four former prosecutors

\textsuperscript{262} Id. at 512-13.
\textsuperscript{264} Id.
\textsuperscript{266} Id.
\textsuperscript{268} Id., see J. Spencer Bell.
\textsuperscript{269} Id., see Albert Vickers Bryan.
\textsuperscript{270} Id., see Widener.
\textsuperscript{271} Id., see Bryan.
Eisenhower appointed were conservative. Eisenhower appointed three prior prosecutors, Gewin, Phillips and Gibson. Gewin and Gibson proved to be conservative, while Gibson was more moderate in regard to voting on school desegregation. LBJ appointed six judges with prosecutorial experience: Milton Simpson, Coleman, Morgan, Thornberry, Peck and Dyer.

Only Coleman and Peck matched the correlation while Simpson, Morgan, Thornberry and Dyer were not conservative, at least regarding school desegregation. Nixon only appointed two of the 38 judges more closely examined and neither one had previously been a prosecutor. In sum, from this small sample of former prosecutors appointed and later confirmed to be Federal Court of Appeals Judges, only eight of 15 were conservative.

In looking at Corey Rayburn Yung’s contention that Democratic Presidents look for candidates that had strong governmental work experience (not judicial) prior to their judgeship, both LBJ and JFK fit the contention. Ten of LBJ’s 12 appointments in this study had significant prior government experience and five of the seven JFK appointments in this study had similar experience. Eisenhower also had some appointees with governmental experience but five of these appointments had been Federal district judges. See Table 4 below.

Other attributes that Tate wrote about that could be correlated with how a judge may actually vote, such as the region of the country from which the judge came, the judge’s race and gender and the age of the judge proved to be too elusive or too homogeneous amongst the sample to be worthy of analyzing. There were some possible correlations, as mentioned above, in examining the Personal Attributes Model, for instance the congressional influence on President Kennedy’s Southern appointments, which suggests that this model is ripe for further exploration and research.

C. Legal Model

The legal model is concerned with precedent. Justices are simply to follow precedent in a mechanical way. There will be no grey areas as long as the law has been previously decided. This model has been largely criticized over the last 20 years for its rigidity and lack of consideration for changing social and economic conditions. The legal model is often contrasted with the personal attributes model, which focuses on the characteristics of the judge themselves, such as their political affiliation and personal beliefs. Although the legal model is not widely accepted, it still plays a role in the decision-making process of judges.
years or so.\textsuperscript{275} In 1960, the \textit{Brown} rulings were the law. \textit{Brown I} \textsuperscript{276} prohibited intentional racial discrimination. What the law did not do was the main problem. \textit{Brown II}, \textsuperscript{277} the case that was supposed to implement the parameters to apply \textit{Brown I}, ended up adding confusion and ultimate relief to the segregated South.\textsuperscript{278} According to \textit{Brown II}, school districts were expected to use “all deliberate speed”\textsuperscript{279} in taking steps to eliminate discrimination in their schools.

As Joel Goldstein stated, the “adjectives suggested integration not happen immediately.”\textsuperscript{280} The South took considerable advantage of this non-specific language responding with resistance and delay.\textsuperscript{281} Segregationist judges could legitimately contend that they were following the rule of law with their slow down tactics.\textsuperscript{282} As late as 1964 only two percent of all black children in the South attended schools with white children.\textsuperscript{283} Historian James Patterson stated “virtually all southern black children who entered first grade in 1954 and who remained in southern schools graduated from all-black schools 12 years later.”\textsuperscript{284} Many Southern courts came to endorse what became known as the Briggs Dictum,\textsuperscript{285} which stated that the Constitution does not require integration but it only forbids “the use of governmental power to enforce segregation.”\textsuperscript{286}

Things started to change in 1964 with the passage of the Civil Rights Act,\textsuperscript{287} which was hastened by the southern resistance to the \textit{Brown} rulings.\textsuperscript{288} In 1968, the Supreme Court finally put an end to “all deliberate speed.” Justice Brennan, who wrote the opinion to \textit{Green v. County School Board of New Kent County},\textsuperscript{289} stated that the school board must “come forward with a plan that promises realistically to work, and promises realistically to work now.”\textsuperscript{290}


\textsuperscript{278} Jordan M. Steiker, \textit{Brown’s Descendants, 52 HOW. L.J.} 583, 610 (2009).

\textsuperscript{279} \textit{Brown}, 349 U.S. at 301.


\textsuperscript{281} Id.


\textsuperscript{284} Id. at 54.


\textsuperscript{286} Ryan, supra note 299, at 55.


\textsuperscript{288} Ryan, supra note 299, at 55.


\textsuperscript{290} Id. at 435.
The *Green* case suggested a new day for desegregation. Lester Maddox, Georgia State Governor, responded to the *Green* ruling by having all state flags flown at half-mast. No longer could Southern leaders contend they were moderates by applying pupil placement plans. The plans that had given local school districts discretion to term Black students “unfit” Southern school districts were finally on alert that they needed to come forth with real plans that would implement integration. In 1971, three years after *Green*, the U.S. Supreme Court penned another important pro-plaintiff ruling, *Swann v. Charlotte-Mecklenburg Board of Education*, which stated lower courts should and will order busing if needed to secure desegregation.

The hope and promise that was symbolized, if not actually fulfilled, by the *Brown* cases was seemingly finally coming to fruition. The hope and promise was quickly deeply curtailed, however, with two Lewis F. Powell opinions, *San Antonio v. Rodriguez* and *Milliken v. Bradley*. *Rodriguez* protected local control over finances so property-affluent suburban school districts did not have to share their wealth with the severely strapped city schools. *Milliken* preserved local control and insulated suburbs from having to cross school boundaries and desegregate with city schools. Both rulings, penned by Southerner United States Supreme Court Jurist Powell, placed significant constraints on integration ever since. Powell had served as chairman of the Richmond School Board from 1952 to 1961 and was not a supporter of *Brown*. Powell was not an advocate for desegregation. In 1961, when Powell left as chairman “after eight years of service, only two of the city’s 23,000 black children attended school with white children.”

If the legal method were in play, the constraints placed on conservative judges with the *Green* and *Swann* case would suggest a pro-plaintiff shift in decision-making. If there was a shift, however, the *Rodriguez* and *Millikan* cases would suggest its impact was short lived and significantly curtailed. There is more on the possible effects below. The *Rodriguez* and *Millikan* cases, more than any other two United States Supreme Court cases, established the great disparity in

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291 RYAN, supra note 299, at 56.
294 Id. at 70.
298 Rodriguez, 411 U.S. 1.
299 Milliken, 418 U.S. 717.
resources and finances between city and suburb public schools around the country. This is an area where further research would be very welcome.

Friedman and Martin effectively argued that collectively there is little that the legal model adds to empirical scholarship.\textsuperscript{303} They made an interesting exception however, in studies where the author had measured the affect a key precedent or set of precedents had on how judges\textsuperscript{304} evaluate cases in a particular legal area. It is important to note that, according to Friedman and Martin, this method of using the legal model is not predictive of how judges may vote in the future. It is only to be used as a method of analyzing past decision-making in a very specific and well-defined legal area.\textsuperscript{305}

The authors in the studies they offered as consideration of this exception had carefully “developed a tailored legal model”\textsuperscript{306} that provided for a “precise hypothesis in a particular area of the law.”\textsuperscript{307} Applying this logic to this paper could provide for an interesting study in how the \textit{Green} and \textit{Swann} cases may have affected how United States Circuit Court Judges evaluated cases regarding school desegregation. Addressing the \textit{Rodriguez} and \textit{Millikan} cases for this paper will not work because the case gathering ended in 1973,\textsuperscript{308} the year that \textit{Rodriguez} was decided. \textit{Millikan} was decided a year later.

This proposed study would be a paper in itself but for the purposes of this paper there are enough findings to at least consider it anecdotally. There were 16 Federal Court of Appeals cases in our study that cited \textit{Green} from late 1968 though the year 1973. Eleven of these cases were liberal or for the plaintiff(s). Likewise there were 18 cases in the study that cited \textit{Swann} from late 1970 through 1973. Thirteen of these 18 cases were decided for the plaintiff(s). Eleven cases cited both \textit{Green} and \textit{Swann} but only slightly over half of them (six) were decided for plaintiff(s). There were many more United States Court of Appeals cases decided during this period that cited either or both \textit{Green} and \textit{Swann} but due to the determined importance of the subject matter were decided by the full court or had not made our original study due to a lack of apparent ideology.\textsuperscript{309}

It would be misleading to read too much into these scarce results from this paper other than the fact that the two pro-plaintiff cases of \textit{Green} and \textit{Swann} were at least getting attention and determining positive outcomes for plaintiffs to some

\begin{footnotesize}
\begin{enumerate}
\item Id. pp 154-56 (In each of the three studies Friedman and Martin identified the judges were United States Supreme Court Justices).
\item Id. p 156.
\item Id. p 155.
\item Id. p 156.
\item This is the year in which the legal profession surpassed over 100 cases that were decided by panels and could be determined to be liberal or conservative.
\item The cases were procedural, for example, and offered no obvious ideological leanings.
\end{enumerate}
\end{footnotesize}
degree. Some of the conservative decisions would mention Green or Swann in a string cite and then explain why this line of legal thought is not controlling in this particular case or for this unique record. These cases and the few others that cited Green or Swann and didn’t hold them as controlling suggests that the legal model, for this short period of time for these specific cases decided on the limited legal area of school desegregation, was not being followed. Again, a study beyond these anecdotal findings is needed to truly test the legal model in regard to the effect of Green and Swann on decision-making and shortly thereafter the counter effect from the Rodríguez and Milliken cases.

D. Strategic Model

The chosen strategic model for this paper has three components: 1) judges want to see their policy preferences reflected in their decisions; 2) judges are deciding cases with their brethren’s ideology in mind; and 3) judges are considering the institutional context in which the decisions are being made.

Sunstein tested two other hypotheticals besides the first that dealt with the attitudinal model. The second hypothesis according to Sunstein states:

_Ideological dampening._ A judge’s ideological tendency, in such cases, is likely to be dampened if she is sitting with two judges of a different political party. For example, a Democratic appointee should be less likely to vote in a stereotypically liberal fashion if accompanied by two Republican appointees, and a Republican appointee should be less likely to vote in a stereotypically conservative fashion if accompanied by two Democratic appointees.

Note that Sunstein used phrases like “stereotypically liberal” and “stereotypically conservative” throughout his article. He stated it was for the sake of simplicity but admitted it would be “foolish to predict that Republican appointees will always vote against sex discrimination plaintiffs or in favor of challenges to affirmative action programs.” For the purposes of the school

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313 Id. at 304.

314 Id. at 304-05, 307, and 314.

315 Id. at 304.
desegregation study it will become clearer below that it will be considered “foolish” to predict that Republican appointed justices voted “stereotypically conservative” on school desegregation cases or vice versa (Democratic appointed justices voting “stereotypically liberal”). Sunstein’s third hypothesis states:

_Ideological amplification._ A judge's ideological tendency, in such cases, is likely to be amplified if she is sitting with two judges from the same political party. A Democratic appointee should show an increased tendency to vote in a stereotypically liberal fashion if accompanied by two Democratic appointees, and a Republican appointee should be more likely to vote in a stereotypically conservative fashion if accompanied by two Republican appointees. 316

In the case of the strategic model, the Federal appellate judge with life tenure has several competing considerations to examine. She has her own preferences and ideology to consider in addition to taking into account the goal of consensus (Federal Courts try hard to stave off dissents)317 while experiencing the outside political pressures.

In considering hypothetical two, regarding ideological dampening, Sunstein found that a Republican (or a Democrat) appointee was less likely to vote in a stereotypically conservative (or stereotypically liberal) fashion if accompanied by two other Democrat (or two other Republican) appointees on several legal topics.318 In our school desegregation study, however, this hypothesis did not hold well. Something I term as “reverse ideological dampening” took place. Reverse ideological dampening will find a Republican (or Democrat) appointee more likely to vote in a stereotypical conservative (or stereotypical liberal) fashion if accompanied by two Democratic (or by two Republican) appointees, as long as the two other judges are non-stereotypical in regard to their particular ideology.

An example of reverse ideological dampening in practice is a case decided in the Eighth Circuit, _Smith v. Board of Educ. of Morrilton School District_.319 In this case, the appellate court was to rule on a matter that the district court had dismissed on its merits. The case involved an Arkansas school district arguing to continue segregation, contending that black teachers did not understand the problems of white pupils. The contention was that black teachers were unable to

316 Id. at 304-05.
318 Sunstein, _supra_ note 327, at 315.
create a rapport with white students primarily due to the inferior education they had received at “Arkansas negro colleges.”

The plaintiffs appealed and Henry Blackmun, later to become a Supreme Court justice, wrote the opinion for the Eighth Circuit. Blackmun could be conservative but he was mostly progressive on civil rights matters. Van Oosterhout, another Republican, would also vote for the plaintiff on civil rights matters more often than not and Gibson was one of the conservative Democrats that Kennedy could get through the Southern congress. Perhaps Gibson was best described as an “accommodationist.”

According to past practices, Gibson voted in a non-stereotypical conservative fashion while Blackmun and Oosterhout voted in a non-stereotypical liberal fashion. This is an example of reverse ideological dampening and a real category in the school desegregation study because the ideologies of many Republican and Democrat United States Court of Appeals Judges in the 1960’s and early 70’s, especially in regard to civil rights, were atypical by contemporary standards. Starting in the mid-sixties with the passing of the 1964 Civil Rights Act and for years to come, large numbers of Democrats, particularly white democrats (Dixiecrats) in the South, would eventually leave their party when it became clear to them that their former party supported Blacks and their causes.

Another panel effect category that is new for this paper is called the “Ideological Homogenous” category. In this instance, there still exists one judge from one party and two judges from another party making up the panel but there does not appear to be any dampening taking place one way or the other. An example of a case that falls into this category of “Ideological Homogenous” is Louisiana State Bd. of Educ. v. Baker where the defendant, the Louisiana State Board of Education, contended that Louisiana state law legally allowed them to deny seven qualified black applicants admission to Nicholls State College. In Baker, two Democratic judges, Rives and Morgan, and one Republican judge, Wisdom, issued an order that restrained the Louisiana State Board of Education from denying the admission of the seven qualified blacks.

In Baker, the three judges voted their convictions without any obvious indication of influence from the other judges. Two legal areas that Sunstein examined where the composition of the panel had no influence were abortion and

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320 Id. at 780-81.
324 Id.
325 Id.
capital punishment. In these two areas the justices were, according the Sunstein, voting their convictions. It doesn’t take very much imagination to place school desegregation into this same category, dealing with youth, their well-being and future. Therefore, it can be argued that the area of law, school desegregation, is one that can take on the characteristics of an area that transcend panel effects, legal and institutional restraints.

In considering Sunstein’s third hypothetical, ideological amplification, he hypothesized that unified groups of three Democrat-appointed (or Republican-appointed) judges were far more likely comparatively to vote in an amplified “liberal” (or “conservative”) manner. Sunstein found this hypothesis to be true for many of the legal areas he tested. As previously mentioned, the contemporary liberal and conservative ideologies that Sunstein was comfortable with were not so cut and dry in the school desegregation study. Never the less, there still were several cases of ideological amplification taking place with circuit judges in the 1960’s and early 1970’s. There were three cases with a unified Republican panel voting in a conservative manner and eight cases with a unified Democratic panel voting in a liberal manner. What should not be too surprising to the reader was the fact that there were even more occurrences of unified Republican and Democratic panels voting liberal and conservative respectfully. For the purposes of this study, this added category is called “Reverse Amplification.” Refer to Table 3 below to see how the categories broke down.

Reverse amplification transpired simply when a unified Republican panel voted in a liberal fashion or a unified Democratic panel of judges voted in a conservative fashion, or in an atypical or non-stereotypical manner. In the school desegregation study, there were eight panels of unified Republican judges who voted liberally and five panels of unified Democratic judges who voted conservatively.

An example of reverse amplification in the school desegregation study is the case Bossier Parish School Bd. v. Lemon. In this case, a school board denied black children admittance to their white school. On appeal to the Fifth Circuit, the panel consisting of three Republicans, Justices Wisdom, Brown and Burger, stated that this denial was illegal because under the Civil Rights Act of 1964 a condition

327 Id. at 306.
328 Id. at 304-05.
329 Id.
330 The author is aware of the misleading potential associated with connoting the notions of “liberal” and “conservative” to different time periods but for purposes of this document, is using Sunstein’s categories as a point of reference.
of receiving federal funds was that the school district accept black students.\(^{332}\) Therefore, we have a unified panel of Republican judges voting liberally.

### Table 3

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### XI. Conclusion

Remember at the beginning of the paper it was stated that the conclusion would summarize the merits of the four models and whether any of the four models appeared to be useful in determining the decision-making process of the circuit court judges deciding the school desegregation cases of the 1960’s and early 1970’s? It can be asserted, after conducting the school desegregation study, that there are some useful insights on the attitudinal model. The model, explained in great detail above, is one that allows judges to vote in a way that reflects their own policy preferences.\(^{333}\) Our study showed that there was no significant party ideological distinction across the board. Democratic appointed justices voted for school desegregation 65 percent of the time compared to 64 percent for the Republican appointees.\(^{334}\)

The next model we studied was the personal attributes model. Some insights of the personal attributes model are that the attributes exist independent of the judge’s vote, so there is no circularity involved. In addition, there is a time sequence involved with judges’ attaining certain attributes and making them part of their personal experience. This is almost at an unconscious level at times prior to a judge sitting on the bench. Some of these experiences later seem to play a significant role in the judge’s policy preferences. Another insight is that these attributes can be measured reliably. Either the judge has the attribute or not

\(^{332}\) Id. at 850-51.


In our school desegregation study the decision was made to test for only three attributes: law school attended (specifically Ivy), religion of the judge and prior work experience. In regard to the law school attended there may be a relationship, at least in the 1960’s and early 1970’s, between judges attending Ivy League Law Schools and having a propensity to vote liberally as a judge. In the four circuits scrutinized, there were eight justices with Ivy League jurist doctorates and six of those eight justices voted more for the plaintiff. In fact, four of the justices consistently voted for the plaintiff: Tuttle, Blackmun, McCree and Goldberg. Both of the Ivy Leaguers who voted conservatively were in the more conservative Fourth Circuit, Justices Bryan and Haynesworth.

It took great persistence to find most of the various religions of the justices. More than several of the associated religions were found via the Internet. The website Political Graveyard and online obituaries were particularly helpful. In several cases, we got the answers from living family members we could locate. In some cases, requests to the area library or historical society that archived their papers proved fruitful. We ended up with a few judges that we just couldn’t associate with any particular religion. In regard to the various judges we could associate with a religion, there were some patterns discussed above in the paper.

There were members of the traditional liberal Protestant sects, for example, the Fifth Circuit Four, who voted liberally. There were also other members who were very conservative, such as Ben Cameron. There were Baptists that were conservative and Jews that were liberal and Roman Catholics who were both conservative and liberal with an overall bent toward conservatism. But, again, the sample size was too small to suggest a definitive correlation. Further research would be welcome but there is a real barrier confronting any interested potential researcher to this area.

The barrier has nothing to do with the time and effort it took to garner the information in this study but rather many people today consider their religion to be a “strictly private and personal” affair. During the confirmation process to be a Federal judge, a judge is asked to disclose memberships to various groups, including churches, synagogues or any other faith-based organization. This sort of information will later appear on the Internet at various biographical sites if provided. Most judges today, however, do not fill out this particular form, leading

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335 Lawrene Kestenbaum, POLITICAL GRAVEYARD (Feb. 19, 2013) politicalgraveyard.com/.
336 My faculty fellow, Andrew Wrenn, did yeoman’s work in helping me track these sources.
338 See Id.
some scholars to think that judges now think it’s a private matter.\footnote{Id.} Others speculate that the separationist aspect of the Church and State provision is influencing them.\footnote{Id.}

The prior work experience attributes seemed to offer the least promise of the three attributes studied. Amongst the small sample of fifteen judges with prosecutorial experience amongst the 38 more closely examined judges, only eight turned out to be conservative.\footnote{Tate, supra note 348.} The notion that Republican Presidents, prior to 1960, tended to appoint individuals with prior Federal judging experience was accurate from the study but with only Eisenhower to study our paper does next to nothing to support the contention.\footnote{Corey Rayburn Yung, Judged By the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Court of Appeals, 51 B.C. L. Rev. 1133 (2010).} This is ripe for further research. There was some evidence in the paper that Democratic Presidents did pick potential judges who had significant governmental (but not judicial) experience.\footnote{Brown v. Bd. of Educ. of Topeka, et. al., 349 U.S. 294, 301 (1955).} To see exactly what prior work attributes each of the 38 judges had refer to Table 4 below.

How about the legal model? Could the lawyer in 1974 anticipate the outcome of his school desegregation case based on established precedent? After reading this paper the answer to this is a definite, no. The \textit{Brown} decisions were very important for ending segregation but they didn’t supply the country with any practicable means of gaining that end. Not until the \textit{Greene} case in 1968 and \textit{Swann} in 1970 did the United States Supreme Court finally take the steps necessary to end segregation,\footnote{See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Milliken v. Bradley, 418 U.S. 717 (1974).} only to lose most of the gains to \textit{Rodriguez} and \textit{Millikan}.\footnote{D.R Songer, R.S. Shieban, & S.B. Haire, Continuity and Change on the United States Court of Appeals, 28-29 (Univ. of Mich. Press 2000).} In the end, the legal model was not helpful during the time of the school desegregation study with the possible exception of suggesting further study on the effects of the isolated precedents of \textit{Green}, \textit{Swann}, \textit{Rodriguez} and \textit{Millikan} on the decision-making of judges in the 1970’s. The model is not to be used for predictive purposes.

The last model is the strategic model. Judges want to vote their values and there is ample evidence of this in the paper. A successful judge also needs to be cognizant of what the other judges are thinking because she will need the other judges’ support to make the policy ideas she favors come to fruition. The judge will also need to be aware of the institutional restraints like precedent and outside political pressures to name two. Sometimes judges desire to vote more liberally or
conservatively but restraints will inhibit them from doing so. There were cases in the South of federal district judges, who lived in the very area their rulings would take effect, voting for desegregation and suffering terrible consequences. Circuit Court judges, most of the time geographically removed from the areas in dispute, were largely removed from this type of peril.

Sunstein’s second and third hypotheticals are not attitudinal because they go beyond the policy preference of the individual judge. They represent the aspect of a strategic model in which a judge is aware and sensitive to what the other judges are thinking. Is the school desegregation study explained by the strategic model? Let’s consider the numbers. Fourteen of the 103 cases analyzed had a dissenting opinion. There were 24 cases that fell under the “ideological homogenous” category indicating judges lack of consideration of other judges’ views. If the 24 ideological homogeneous decisions are added to the 14 dissenting decisions, there are 38 of 103 decisions, equaling 37 percent of all cases that show an open disregard for what other judges are doing with their vote. Perhaps Justice Griffin Bell best described the atmosphere at the time when he said there is no collegiality. Every judge is going in their own direction.

The legal model is one institutional restraint that can be part of the third component of the strategic model chosen for this study but this paper has already contended that in totality the legal model is lacking. Political institutional restraints from the outside can be another form of institutional restraint but it seemed as though the pressures and intimidation were concentrated more on the federal district court judges in the South as opposed to their higher court brethren. The personal attributes model was interesting and some attributes appeared to have a correlation but the sample size was too small to be definitive. This may be an area for more research with a bigger sampling size.

Of the four models studied in this paper, the attitudinal model is the most useful in using the available data to determine the judges’ decision-making. The school desegregation voting did not support hypothesis two or three of the Sunstein paper. Therefore, school desegregation could have been the type of legal area that

350 Id. at 303 (“…a judge's likely vote is influenced by the other two judges assigned to the same panel.”).
351 None of the opinions falling under the category “ideological homogenous” had a dissent.
tended to make judges vote their convictions, rather than be swayed by other factors.

What can we learn from this article that can be applied to today’s legal world? Connoting a political party with a particular ideology may work in the short run but it may not work well when applying it to a different historical era. The 1960’s and early 1970’s was a different era when the two main political parties were not solely identifiable with being either liberal or conservative. There were liberal Republicans and conservative Democrats. Things certainly have changed since that era and the author of the popular book *What’s the Matter with Kansas?: How Conservatives Won the Heart of America*, depicts how the country, over the last 30 years, has shifted right, stating that “vast reaches of the country have gone from being liberal to being stoutly conservative...” 353

Without getting into the causes for the most recent shift and other previous ideological shifts in our country’s history, 354 there certainly does seem to be a cyclical aspect to both parties’ ideological beliefs. 355 This will need to be taken into consideration for future research. A corollary worth mentioning, political party ideology and its role in judges’ decision-making has been around for a very long time. Look no further than the *Marbury* case and Chief Justice Marshall’s policy-laden decision. 356

What else can we learn from this paper? I suggest the use of the attitudinal and personal attributes models for historical empirical research. The attitudinal model was most effective because it clearly laid out the fact that Republican appointed judges deciding the school desegregation cases in the 1950’s and 1960’s basically were just as liberal as the Democratically appointed judges at that time, at least in regard to voting on school desegregation cases. I would encourage those interested in using the attitudinal model in their research to do so.

The personal attributes model was surprising in the correlations it showed. There really seemed to be some correlation between the Law School a judge attended and his ideology (at least for the Ivy League Law graduates). I suggest that more research be done with a bigger pool of judges and to go beyond the Ivy League to test private versus public law schools or top law schools (in the top 25) versus law schools ranked lower (perhaps below the second tier). Of course, this


354 Whole books have been written on this subject. See generally JULIUS WITCOVER, PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS (Random House 2003); LEWIS GOULD, GRAND OLD PARTY: A HISTORY OF THE REPUBLICANS (Random House 2003); MORTON KELLER, AMERICA’S THREE REGIMES: A NEW POLITICAL HISTORY, (Oxford Univ. Press 2007).


begs the question of whether the USNEWS rankings really mean anything in the first place.

There did seem to be some religious correlation for liberal Protestants and Jewish judges to vote liberally. The Baptists and to a lesser extent, the Catholics tended to be more conservative. In regard to the judges’ prior work environment there were correlations but not as distinct as with the other two attributes studied. Prior to 1960, Republican-appointed circuit judges with a history of being a Federal District Judge did have a better chance of being appointed. Prosecutors, more often than not,\textsuperscript{357} turned out to become conservative justices and while both LBJ and JFK readily chose people that had worked in the government, so did Eisenhower at even a greater rate, so Yung’s theory did not apply well to this era. My suggestion is for future researchers to take a good look at the Personal Attributes Model and test it against larger pools of judges.

\begin{footnote}{357} Eight of the fifteen judges who were former prosecutors turned out to be conservative.\end{footnote}
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<tr>
<th>Judge</th>
<th>Circuit</th>
<th>DOB + Location</th>
<th>Law School</th>
<th>Prior Experience</th>
<th>Pros. Exp.</th>
<th>Political Party of Nominating President</th>
<th>Religion</th>
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