BRENNAN
CENTER
FOR JUSTICE

JUDGE SOTOMAYOR'S RECORD IN CONSTITUTIONAL CASES

Monica Youn

Foreword by Professor Burt Neuborne

Brennan Center for Justice *at New York University School of Law*

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ABOUT THE AUTHORS

Monica Youn works as an attorney in the Democracy Program of the Brennan Center, focusing on campaign finance reform and other means to achieve and protect broader participation in the political process. Prior to joining the Brennan Center, she was in private practice. She also served as law clerk to Judge John T. Noonan, Jr., in the United States Court of Appeals for the Ninth Circuit. Ms. Youn received her J.D. from Yale Law School, her M. Phil from Oxford University, where she was a Rhodes Scholar, and her B.A. from Princeton University.

Burt Neuborne has been the Brennan Center's Legal Director since the group's founding in 1995. For three decades he has been one of the nation's most successful civil liberties lawyers, arguing many Supreme Court cases and litigating hundreds of constitutional cases in federal and state courts. He has authored or co-authored four books, including *The Rights of Candidates and Voters* and two volumes of *Political and Civil Rights in the United States*, as well as seventeen law review articles that touch on topics including free speech, legal theory, separation of powers, legal procedure and comparative law.

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Danielle Friedman, *Legal Intern*
Ben Guthorn, *Undergraduate Intern*
Dina Hardy, *Legal Intern*
Angela Migally, *Counsel*
Sarah Nadler, *Undergraduate Intern*
Peter Salzler, *Legal Intern*
Adam Skaggs, *Counsel*
Elliot Tarloff, *Legal Intern*
David Udell, *Director, Justice Program*
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"I cannot . . . suggest the ideal way in which government might blend rationality and empathy . . . each age must seek its own way to the unstable balance of those qualities that make us human, and must contend anew with the questions of power and accountability with which the Constitution is concerned."

William J. Brennan, Jr., *Reason, Passion, and 'The Progress of the Law'*, 10 Cardozo L. Rev. 3, 22 (1988).

"The judge who believes that judicial power should be made creative and vigorously effective is labeled "activist" . . . [W]here yesterday "activist" was pinned on "conservatives," today it's on "liberals." As often as not, however, such labels are used merely to express disapproval of particular decisions."

William J. Brennan, Jr., *In Memory of Justice Abe Fortas*, 91 Yale L.J. 1049, 1051 (1982)

FOREWORD

By Burt Neuborne

Inez Milholland Professor of Civil Liberties
at New York University School of Law

The choice of a new Supreme Court Justice is always an occasion for serious reflection. We owe our freedom, in no small part, to the wisdom of the 110 Justices who, over the past 232 years, have forged a living constitutional link with the Founding generation. Reflections concerning the current Supreme Court vacancy carry particular emotional resonance for the Brennan Center for Justice because it is Bill Brennan's seat that is to be filled. For the past 53 years, the Supreme Court seat currently before the Senate has been filled with particular wisdom, judgment and intellectual brilliance.

William Joseph Brennan, Jr. served for thirty-four extraordinary years. Justice Brennan's opinions continue to speak to the future in the prophetic language of the American dream. The sweep and power of Justice Brennan's contribution to American law challenges our collective imaginations. As Justice Souter has noted,[1] the sheer mass of the Brennan legal legacy exerts an intense gravitational pull on our jurisprudence. In the course of a remarkable tenure that fell short of Chief Justice John Marshall's by a matter of months, Justice Brennan authored 1,573 opinions: 533 opinions for the Court, 694 dissents, and 346 concurrences. Those opinions shaped our nation.

Justice Brennan was succeeded on the Supreme Court by Justice David Souter, who served for nineteen distinguished years before returning to his beloved New Hampshire. Justice Souter's personal kindness to then-retired Justice Brennan in his difficult final year — Justice Souter found time to share coffee with him virtually every morning — reflected David Souter's remarkable personal qualities. Justice Souter leaves a jurisprudential legacy reflective of those personal qualities — a jurisprudence of reasoned intellect. While others shouted and ranted, Justice Souter spoke quietly and with humility. While others pretended to overheated certainty, Justice Souter calmly acknowledged doubt. While others preened, Justice Souter shied from the limelight. But no Justice since John Marshall has written more perceptively about the craft of judging. Justice Souter's powerful opinions about the importance of precedent, and his brilliant reminders of the importance of context, structure and purpose in reading text, will guide future Supreme Court Justices in their demanding tasks long after the shouting and the ideological ranting have ceased.

In recent years, the Senate's discussion of judicial nominations, especially Supreme Court nominees, has become bogged down in an increasingly sterile debate over "strict constructionism" and "judicial activism." It is time to move beyond slogans in assessing Supreme Court nominees. All agree that the Senate confirmation process should assure that proposed nominees possess the intellectual and moral attributes needed for service on the Supreme Court. The Senate has an additional responsibility to determine whether a proposed nominee accepts and understands the consensus model of constitutional judging that has emerged out of the debates of the past generation.

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[1] David H. Souter, *In Memoriam: William J. Brennan, Jr.,* eulogy delivered at the funeral mass for Justice Brennan at St. Matthew's Cathedral, Washington, D.C., on July 29, 1997, reprinted at 111 HARV. L. REV 1 (1997).

CONSTITUTIONAL JUDGING AND RESPECT FOR DEMOCRACY

Whenever the Supreme Court overturns the judgment of elected officials on constitutional grounds, a tension emerges between democracy and judicial review. Beginning with John Marshall's defense of judicial review in *Marbury v. Madison,* we have sought to resolve that tension by viewing the act of constitutional judging as the operation of a syllogism machine. The constitutional judge kick-starts the machine by identifying a governing rule of law in the form of a textual command from the Founders, Congress, or the President. The judge then finds the relevant objective facts. The rule of law is treated as a major premise. The objective facts are treated as a minor premise. The logically compelled conclusion is announced as the court's decision.

The syllogism machine, when it works, resolves the tension between judicial review and democracy because the constitutional judge is merely obeying a command from the Founders. It is, therefore, important for Senators to explore the extent to which a prospective Supreme Court nominee is prepared to respect such a command. But, it is equally important for Senators to explore whether a nominee understands the limits of the syllogism machine, and how the nominee proposes to act when the raw material for the syllogism machine is absent.

Respect for Precedent

The single most important element in making the syllogism machine work is respect for precedent — or *stare decisis*. More than two hundred years into the American experiment, we have generated a body of precedent that guides modern judges in announcing the meaning of the constitutional text. Without respect for precedent, almost every case would confront a judge with a new, highly debatable question of constitutional interpretation. Given the importance of precedent, a Senator should explore a prospective nominee's views concerning *stare decisis*.

Respect for Text

When text issues a clear command, a judge's duty is to obey. The Constitution's insistence that the President be 35 years old, or that two witnesses testify to an act of treason, is the beginning and end of the matter. Someone who believes that age 35 is merely a marker for maturity, or that the two-witness rule is just a reminder that evidence of treason must be strong, has no business serving as a judge in a constitutional democracy.

But text has at least three important limits as a source of external command. First, and most obviously, text — especially constitutional text — is often ambiguous. The very nature of a constitution calls for broad language that does not lend itself to a single literal meaning. One important line of Senatorial questioning should explore how a candidate would approach a text that can have more than one reading.

Second, literal adherence to text can sometimes reach absurd results, and can result in deeply disharmonious law. Justice Souter's opinions remind us that literal text must occasionally be ignored in order to preserve the drafters' purpose.

Third, context and structure may be a more important key to textual meaning than any literal word or phrase. One of the most dangerous misuses of text is to tear a particular word out of its context and pretend to give it a single dictionary meaning. One of Justice Souter's most important contributions to American judging has been his consistent warning to read words in context, and with careful regard to structure.

Respect for Democratic Purpose

When binding precedents are lacking, and the text can be read more than one way, a judge should construe ambiguous text to advance the underlying purpose of the drafter. In a constitutional context, the process is often called "originalism." In a statutory context, the process is often called "purposivism." As with textualism, though, there are three important limits on the ability of originalism to generate single right answers. First, there is the serious issue of whether we should lock the 21st century meaning of the Constitution into an 18th or 19th century mold. *Dred Scott* is an originalist nightmare because it codifies past racism.

Second, it is unclear whose original intent matters. Originalists have bounced from concern with the drafters' intent, to concern with the ratifiers' intent, to concern with the so-called ratifying public's intent. It's hard enough finding the purpose of a legislature acting last year. It's well nigh impossible to find the purpose of persons acting more than two centuries ago, especially when you can't even agree on whose intent matters.

Finally, as with textualism, originalism usually delivers more than one right answer in a hard constitutional case. It turns out that the founding generation was just as divided as we are today over hard questions.

Thus, while Senators should question nominees to make certain that the drafter's purpose will be respected, Senators should also ask a nominee what happens when: (1) doubt exists about what Founders intended; and (2) original intent is inconsistent with modern political morality. *Dred Scott* is probably consistent with original intent. Is there any doubt that it was wrongly decided?

CONCLUSION: CONSTITUTIONAL JUDGING BEYOND THE SYLLOGISM MACHINE

Many cases cannot be decided within the syllogism machine model because neither precedent, nor text, nor purpose delivers a single command to the judge. It is crucial for the Senate to explore a nominee's views on what to do when the comfort of the syllogism machine runs out. If a nominee is not willing to acknowledge that, sometimes, it is necessary to function beyond the protection of the syllogism machine, the nominee is not ready to be a judge in the American system.

Once a nominee recognizes that breaking legal ties about textual meaning is inevitable, a Senator should seek to determine the principles that the nominee will use to select the best meaning of the text. The process is usually called judicial pragmatism or judicial consequentialism. There is nothing inherently liberal or conservative in recognizing that an assessment of consequences is a useful way to choose between two plausible readings of a text when the raw material for the syllogism machine is lacking. It is at this point that a judge's life experience and empathy will aid the judge in assessing consequences in the broadest and fairest way.

EXECUTIVE SUMMARY

The Supreme Court seat to which Judge Sonia Sotomayor has been nominated was held for thirty-four years by an extraordinary jurist and exceptional human being, Justice William J. Brennan, Jr., namesake and inspiration for the Brennan Center for Justice. A singular institution – part think-tank, part public interest law firm, part advocacy group – the non-partisan Brennan Center until now has not participated in the public debate surrounding any Supreme Court nominations since our founding in 1995. Nevertheless, shortly after Judge Sotomayor was nominated, and the predictable rhetoric about "activism" began, the Brennan Center leadership decided that the Center could make a unique contribution to the debate surrounding this nomination.

We take no position on Judge Sotomayor's confirmation. Rather, we have undertaken an unprecedented analysis to provide context and perspective on the continuing debate over "judicial activism." A team of Brennan Center attorneys and legal interns looked at every constitutional case decided by the Second Circuit during the decade of Judge Sotomayor's service – a total of 1194 in all. Using measures for testing judicial activism and deference developed by academics in recent years, the Center analyzed Judge Sotomayor's decisionmaking and compared her record to that of her colleagues on the Second Circuit. We looked at various measures of the relative deference or "activism" of a judge's action in a particular case:

(1) Whether the judge's vote was in accord with his or her colleagues on the bench;

(2) How often the judge upheld the action of another branch of government, such as a statute or other governmental action;

(3) How often the judge deferred to the lower court or agency decision under review.

We also looked at whether Judge Sotomayor's decisionmaking and that of her colleagues varied according to the substantive area at issue in a particular case, specifically cases involving civil rights, criminal law, due process, or the First Amendment. In addition, we examined three other factors: whether it made a difference if the judge had been appointed by a Democrat or Republican president, or if the judge had been a former lower or state judge, or if the judge had prior experience as a prosecutor.

Based on this exhaustive review, the conclusion is unmistakable**: in constitutional cases, Judge Sotomayor is solidly in the mainstream of the Second Circuit.** After we analyzed every constitutional case in the Second Circuit over the past decade, what was striking was the degree of unanimity and consensus on a court roughly evenly split between Democratic appointees and Republican appointees.

- Even given the often-noted collegiality of the Second Circuit, Judge Sotomayor has been in agreement with her colleagues more often than most – 94% of her constitutional decisions have been unanimous.

- She has voted with the majority in 98.2% of constitutional cases.

- When she has voted to hold a challenged governmental action unconstitutional, her decisions have been unanimous over 90% of the time.

- Republican appointees have agreed with her decision to hold a challenged governmental action unconstitutional in nearly 90% of cases.

- When she has voted to overrule a lower court or agency, her decisions have been unanimous over 93% of the time.

- Republican appointees have agreed with her decision to overrule a lower court decision in over 94% of cases.

- She overruled lower court and agency decisions at a rate that closely conforms to the circuit overall average.

Our analysis shows that – far from casting her as an "outlier" – Judge Sotomayor's record is remarkably consistent with that of her colleagues. The analysis also refutes charges made since the day of her nomination that Judge Sotomayor is a "judicial activist." Any honest reading of the facts make it abundantly clear that Judge Sotomayor is a mainstream jurist.

INTRODUCTION

As Judge Sonia Sotomayor's confirmation process gets underway, charges that she is an "activist" or "out of the mainstream" judge have increased both in volume and in frequency.[1] Critics of Judge Sotomayor's jurisprudence extrapolate from her rulings in a handful of cases, for example, *Ricci v. DeStefano*,[2] distorting the judicial record she has amassed in ten years on the Second Circuit. However, such a narrow focus on a few isolated decisions is inappropriate, as Professor Corey Yung has noted, because:

> Simply cherry picking a few cases over the long period she has been [an] appellate judge or relying on sentences out of public statements gives almost no insight into Judge Sotomayor's overall judging philosophy and technique. Further, such selective review of cases offers no information about how similarly situated judges have performed during the same period.[3]

While other commentators, notably those who write for SCOTUSblog,[4] have undertaken broader reviews of Judge Sotomayor's judicial record, focusing on her rulings in cases involving race discrimination and other substantive areas, such analyses cannot address criticisms that Judge Sotomayor is "out of the mainstream" because they do not demonstrate how she compares to her peers on the Second Circuit who have faced a similar mix of cases over the same period of time.

An assessment of hard facts can help clear the fog of controversy and rhetoric that surrounds any Supreme Court nomination. We sought to analyze Judge Sotomayor's record while on the bench of the Second Circuit to assess whether she is out of the mainstream or activist in her jurisprudence.

This report assesses Judge Sotomayor's performance as a member of the Second Circuit Court of Appeals. It looks at every constitutional case decided by the Second Circuit during the decade of

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[1] Charlie Savage, *Uncertain Evidence for 'Activist' Label on Sotomayor*, N.Y. TIMES, June 20, 2009, at A10 (Since her nomination to the Supreme Court, Judge Sonia Sotomayor's critics have continuously called her a "judicial activist."); John Stanton & Jackie Kucinich, *Message in a Battle: GOP Plans to Blast Away over July 4 Recess*, ROLL CALL, June 29, 2009, at 1 (quoting party strategy recess documents arguing that Judge Sotomayor's record and writings "show an out of the mainstream view of the role of a judge"); *see also* Pat Buchanan, *Obama's Idea of Justice*, CREATORS.COM, May 29, 2009, http://www.creators.com/opinion/pat-buchanan/obama-s-idea-of-justice.html; Mark Impomeni, *Sotomayor a Perfect Liberal Activist Judge*, REDSTATE.ORG, May 29, 2009, http://www.redstate.com/mark_i/2009/05/29/sotomayor-a-perfect-liberal-activist-judge/; Ashby Jones, *On the Sotomayor Pick; Views From the Right*, WALL STREET JOURNAL BLOGS, May 26 2009, http://blogs.wsj.com/law/2009/05/26/on-the-sotomayor-pick-views-from-the-right/ (quoting Wendy Long, Counsel to the Judicial Confirmation Network, stating, "Judge Sotomayor is a liberal judicial activist of the first order who thinks her own personal political agenda is more important than the law as written."); Savage *supra*, (quoting Edward Whelan, president of the Ethics and Public Policy Center, stating that Judge Sotomayor's "broader record strongly suggest[s] that she will be a liberal judicial activist").

[2] *Ricci v. DeStefano*, 557 U.S. __ (2009), 2009 WL1835138 (June 29, 2009).

[3] Corey Yung, *Mirror, Mirror on the Wall, Who is the Most Activist of Them All?*, CONCURRING OPINIONS, May 30, 2009, http://www.concurringopinions.com/archives/2009/05/measuring-judicial-activism-by-federal-appellate-judges.html.

[4] *SCOTUSblog's* coverage of the Sotomayor nomination is available at http://www.scotusblog.com/wp/tag/nomination/.

Judge Sotomayor's service on the Court of Appeals — a total of 1194 cases — and records the actions of each Second Circuit judge in every case based on the measures of activism set forth below.

The conclusion is unmistakable. Based on the data, in constitutional cases Judge Sotomayor's record places her squarely in the mainstream of the Second Circuit. After we analyzed every constitutional case in the Second Circuit over the past decade, what was striking was the degree of unanimity and consensus on a court roughly evenly split between Democratic appointees and Republican appointees. Even given the often-noted collegiality of the Second Circuit,[5] Judge Sotomayor has voted with her colleagues more than most — 94% of her constitutional decisions have been unanimous, and she has voted with the majority in 98.2% of constitutional cases. When she has voted to hold a challenged governmental action unconstitutional, her decisions have been unanimous over 90% of the time. Indeed, Republican appointees have agreed with her decision to hold a challenged governmental action unconstitutional in nearly 90% of cases. Similarly, she overruled lower court and agency decisions at a rate that closely conforms to the circuit overall average. In the cases in which Judge Sotomayor voted to overrule a district court or agency, she was in the majority 96% of the time and sided with at least one Republican appointee 94% of the time. Our analysis shows that — far from revealing her as an "outlier" — Judge Sotomayor's record is remarkably consistent with that of her colleagues.

Given that the concepts of "deference" and "activism" are commonly grouped together under the term "judicial activism," we will use that term to encompass both concepts. Briefly, we analyzed each judge's "activism profile" based on three measures: whether a particular judge's view was in accord with other judges on the case, how often the judge upheld the action of another branch of government (such as a statute or other governmental action), and how often the judge deferred to the lower court or agency decision he or she was reviewing. These indicators — derived from academic and public discussion — all measure different aspects of relative "activism" or "deference."

Once this overall "activism profile" of the various judges was charted, we then analyzed whether such profiles appeared to vary for constitutional cases involving particular subject areas: civil rights, criminal law, due process, and the First Amendment. Finally, we analyzed whether certain elements of a judge's background — whether he or she was appointed by a Democratic or Republican president, or whether he or she has prior judicial or prosecutorial experience — made any discernible difference in his or her activism profile. Our methodology is explained in further detail in the Methodology Section, *see infra* Section III, and in Appendix A to this report.

The Brennan Center does not take a position on whether a Supreme Court Justice should display any particular pattern of "deference" or "activism," but instead performs this analysis based on the concepts and values that have featured in the scholarly and public debate. The Brennan Center, does, however, believe that deference alone is an insufficient measure of qualification.

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[5] Adam Liptak, *A Careful Pen With No Broad Strokes*, N.Y. TIMES, May 27, 2009, at A1. By contrast, for example, the U.S. Court of Appeals for the Sixth Circuit has been reported to be sharply divided along ideological grounds. R. Jeffrey Smith, *The Politics of the Federal Bench*, WASH. POST, Dec. 8, 2008, at A1.

In offering this quantitative analysis, the Brennan Center recognizes that any assessment of judicial decisionmaking must, at the end of the day, acknowledge the reality that judging is done "on a case-by-case basis." We hope that the unprecedented scope of our analysis provides much-needed context and perspective to the debate over Judge Sotomayor's judicial record.

I. BACKGROUND: A BRIEF HISTORY OF THE "ACTIVISM" DEBATE

Fears that unelected, life-tenured federal judges will abuse their prerogatives to rule by judicial fiat are as old as the Republic. As Alexander Hamilton stated in *Federalist* No. 78, "The Courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequences would equally be the substitution of their pleasure for that of the legislative body."[6] The Supreme Court has been criticized for judicial activism ever since *Marbury v. Madison*[7] established the federal judiciary's power of judicial review in 1803. Some have viewed the power of judicial review as the essential safeguard of constitutional rights and freedoms against the tyranny of the majority, while others have worried about usurpation of democratic functions by unaccountable elites.

In more modern times, historian Arthur Schlesinger is generally credited for coining the term "judicial activism."[8] In a 1947 article for *Fortune Magazine*, he classed Justices Black, Douglas, Murphy, and Rutledge as "activists" and contrasted them with Justices Frankfurter, Jackson, and Burton, who he deemed "champions of judicial restraint."[9] As Keenan Kmiec, a former clerk for Chief Justice John Roberts, explains, "In its early days, the term 'judicial activist' sometimes had a positive connotation, much more akin to 'civil rights activist' than 'judge misusing authority.'"[10] However, by the mid-1950s, the term had developed a negative connotation.[11]

Accusations of inappropriate "judicial activism" have been hurled at judges at both ends of the ideological spectrum. The Warren Court — including this Center's namesake Justice William F. Brennan, Jr. — is often invoked as "the poster child of judicial activism."[12] However, it bears pointing out that the Warren Court decisions that provoked the most impassioned accusations of "activism" at the time — decisions such as *Brown v. Board of Education*[13] (ending segregation in public schools), *Gideon v. Wainright*[14] (establishing the right to counsel in criminal cases), or *Mapp v.*

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[6] THE FEDERALIST NO. 78 (Alexander Hamilton).

[7] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *see also* ARTHUR SELWYN MILLER, TOWARD INCREASED JUDICIAL ACTIVISM 6 (1982).

[8] Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1446 (2004).

[9] *Id.* (quoting Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE. Jan. 1947 at 202, 208)

[10] *Id.* at 1451.

[11] *Id.* at 1451-52.

[12] STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 3 (2009).

[13] *Brown v. Board of Education*, 347 U.S. 438 (1954).

[14] *Gideon v. Wainright*, 372 U.S. 335 (1963).

Ohio [15] (establishing the exclusionary rule in criminal prosecutions) — are today widely considered to be pillars of our constitutional jurisprudence.[16] More recently, multiple commentators, using various criteria, have dubbed the Rehnquist Court, "the most activist in history."[17] Others have attacked the "judicial activism" of the relatively short track record of the Roberts Court.[18]

The public, political, and academic furor over "judicial activism" shows no signs of dying down. In a 2005 survey conducted by the American Bar Association, a majority of respondents agreed with statements that "'judicial activism' has reached the crisis stage and that judges who ignore voters' values should be impeached."[19] Almost half agreed with a congressman's statement that judges are "arrogant, out-of-control and unaccountable."[20] On the federal bench, accusations of activism are not uncommonly used by judges who disagree with the majority or dissenting opinions on a given case.[21] The term "judicial activism" has been "omnipresent" in Supreme Court confirmation hearings over the past few decades, and Judge Sotomayor's confirmation hearing looks to be no exception.[22]

Garnering less popular attention, but of equal constitutional significance, is the question of whether a judge can be overly deferential in the sense that he or she fails to uphold constitutional values against governmental overreaching. As Professor Kermit Roosevelt points out, "[i]f the Court adopts a deferential doctrinal test, it will uphold laws that in fact violate the Constitution."[23] This concern may have been most powerfully expressed in Justice Jackson's dissent in *Korematsu v. United States*,[24]

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[15] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[16] *See, e.g.*, LINDQUIST & CROSS, *supra* note 13, at 5 ("Notably, one seldom hears criticism today of what are, arguably, among the Warren Court's most activist decisions . . . .").

[17] *See generally* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY (2004); *see also* LINDQUIST & CROSS, *supra* note 13, at 8-9; Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 87 (2001) (arguing that beginning in 1995, the Rehnquist Court developed "a new judicial activism" in which "disrespect for Congress is a fundamental element"); Lori A. Ringhand, *The Rehnquist Court: A "By the Numbers" Retrospective*, 9 U. PA. J. CONST. L. 1033, 1036 (2007) (concluding that the Rehnquist Court was "a more activist Court than was either the Warren or Burger Courts").

[18] *See, e.g.,* Adam Cohen, *What Chief Justice Roberts Forgot in His First Term: Judicial Modesty*, N.Y. TIMES, July 9, 2006, at WK 11 (arguing that his opinions in several important cases "make Chief Justice Roberts seem like a raging judicial activist"); Simon Lazarus, *The Most Activist Court: How progressives should think about and respond to the assaults of the Roberts Court*, AMERICAN PROSPECT, June 29, 2007, http://www.prospect.org/cs/articles?article=the_most_activist_court.

[19] *See* Martha Neil, *Half of U.S. Sees "Judicial Activism Crisis*," 4 No. 40 A.B.A. J. E-REP. 1, 1 Sept. 30, 2005 (reporting results of nationwide survey of 1,016 adults).

[20] *Id.*

[21] Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 579-80 (2007) ("As of October 2007, at least 688 opinions in the United States contained the exact phrase 'judicial activism.'").

[22] Keenan Kmiec, *Have you ever been a 'judicial activist'?*, POLITICO, May 12, 2009, http://www.politico.com/news/stories/0509/22380.html.

[23] KERMIT ROOSEVELT, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 174 (2006); *see also*, *e.g.*, Bruce Ackerman, *The Perils of Judicial Restraint*, SLATE, Apr. 5, 2006, http://www.slate.com/id/2139372/.

[24] *Korematsu v. United States*, 323 U.S. 214 (1944).

the case which upheld the mass internment of citizens of Japanese-American descent during World War II:

> A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.[25]

Public debate over the Sotomayor nomination and other Supreme Court nominees has given little weight to the question whether undue deference, as well as undue activism, can be an inappropriate role for a federal judge.

II. MEASURING JUDICIAL ACTIVISM — A METHODOLOGY

Given the heated and long-standing public, academic, and legal debate regarding judicial "activism," it is perhaps unsurprising that no consensus exists regarding the exact meanings of the term:

> The usual definitions offered by scholars for the term include: striking down statutes or actions by other branches or state governments, ignoring precedent, legislating from the bench, failing to use accepted interpretative methodology, results-oriented judging, issuing "maximalist" and not "minimalist" holdings, and using broad remedial powers.[26]

Of the aspects of "activism" or deference listed above, only a few are amenable to quantitative comparison.[27] Scholars who have attempted quantitative measures of "judicial activism" have recognized that the term "judicial activism" can apply to a variety of judicial actions. In their recently published book *Measuring Judicial Activism,* Professors Stefanie A. Lindquist and Frank B. Cross employ the following indicators of "judicial activism" by Supreme Court justices: (1) justices' votes to invalidate legislative enactments in the federal context; (2) evaluation of justices' votes to invalidate state legislative enactments; (3) justices' votes to invalidate or uphold the actions of the executive

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[25] *Id.* at 246 (Jackson, J., *dissenting*); *see also* LINDQUIST & CROSS, *supra* note 13, at 37 ("It is noteworthy that the *Dred Scott* decision, today considered classically activist by both liberals and conservatives, was centrally grounded in an originalist interpretation of the Constitution.").

[26] Corey Yung, *Defining Judicial Activism by Federal Appellate Judges*, CONCURRING OPINIONS, May 29, 2009, http://www.concurringopinions.com/archives/2009/05/defining-judicial-activism-by-federal-appellate-judges.html; *see also* LINDQUIST & CROSS, *supra* note 13; *see also, e.g.*, Kmiec, *supra* note 9, at 1463-76; Roberts, *supra* note 22, at 574-75.

[27] *See, e.g.*, LINDQUIST & CROSS, *supra* note 13, at 43 ("[S]ome – but certainly not all—dimensions of judicial activism are amenable to systematic, large-N studies of judicial voting behavior that rely on quantified measurements."); Roberts, *supra* note 22, at 573 ("Judicial activism is a creature of loaded qualitative meanings and is thus resistant, in many respects, to quantitative analyses and conclusions.")

branch at both the federal and state levels; (4) actions to grant access to the federal courts and (5) votes to overturn precedent, or *stare decisis*.[28]

As Professor Yung points out, such scholarly definitions of activism involve two common threads: "First, they all involve instances where judges place their judgment above others. Second, the 'others' involved are constitutionally-significant actors: the legislature, state governments, the executive, and other courts."[29] Accordingly, it is appropriate to interpret "activism" as closely related to "deference." Both terms account for a judge's tendency to allow the determinations of other constitutional decisionmakers to take priority over the judge's own determination.

A. COMPARATIVE ANALYSIS

This analysis compares Judge Sotomayor's record against her colleagues on the Second Circuit, who faced a similar caseload and who shared the bench at the same time. The comparison included both those colleagues of Judge Sotomayor who were already on the Second Circuit when Judge Sotomayor joined it as well as those who subsequently joined the Second Circuit. We excluded those judges who had participated in fewer than 50 constitutional cases, since it would have been difficult to generate meaningful percentages from such small sample sizes. In the end, our set of judges included twelve judges appointed by Democratic presidents and twelve judges appointed by Republican presidents.[30] The time period analyzed was from Judge Sotomayor's commission date on the Second Circuit[31] until the date of her nomination to the Supreme Court.

B. THE CONSTITUTIONAL DATASET OF CASES

To allow a comprehensive review in the available time period, the analysis was narrowed to a particular subset of cases — those in which a constitutional issue was involved. This particular subset was chosen because constitutional cases are those in which the federal judiciary wields the most power — the power not merely to interpret the law, but to overturn legislative and executive actions inconsistent with the Constitution. To avoid charges of subjectivity in the pool of cases analyzed, a case was deemed to have raised a constitutional issue if Westlaw's Key Number Digest System marked the case with a "Constitutional Law" Key Number.[32] This search yielded 1194 Second Circuit cases in the relevant time period (hereinafter, the "Constitutional Dataset"). All subsequent analysis was performed on this universe of cases.

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[28] LINDQUIST & CROSS, *supra* note 13 at 43-44.

[29] Yung, *supra* note 27.

[30] The judges who were excluded because they had decided fewer than 50 constitutional cases during the relevant time period were Judges Livingston, Lumbard, and Van Graafeiland.

[31] The date of her commission was October 7, 1998. United States Court of Appeals for the Second Circuit, http://www.ca2.uscourts.gov/judgesmain.htm (last visited July 6, 2009).

[32] An outline of the database is available at http://web2.westlaw.com/digest/default.aspx?rs=WLW9.06&ifm=NotSet&fn=_top&sv=Split&tc=3&tf=2026&vr=2.0&rp=/digest/default.aspx&mt=208.

C. INDICATORS OF "MAINSTREAM" VIEWS AND DEFERENCE

Given the difficulty in defining the term "activism," the Brennan Center endeavored to select those indicators of mainstream views and relative judicial deference that legal scholars have deemed the most relevant and to use the most objective available means to classify and analyze such indicators.[33] We have attempted, whenever possible, to use existing systems of classification in order to minimize any potential subjectivity.

1. Protocol

To determine an "activism profile" for individual judges and for the Second Circuit overall, we analyzed three quantitative measures: (1) degree of agreement or disagreement with the other judges on the panel or en banc (i.e., whether a judge voted unanimously, with the majority, or in dissent); (2) action taken with respect to the challenged governmental action at issue (i.e., whether a judge held the governmental action unconstitutional); and (3) action taken with respect to the lower court or agency (i.e., whether a judge affirmed or overruled the lower court/agency).

Initially, we assessed the degree to which the judge at issue voted with his or her fellow panel or en banc members and how often the judge concurred or dissented. Such a measure is appropriate because a circuit court judge's colleagues on the bench are themselves constitutional actors and because unanimity in an opinion suggests a particular ruling is not an outlier, at least with respect to the other judges in the circuit. In so doing, however, we do not wish to overvalue the concept of unanimity — after all, Justice Brennan found himself dissenting more often than he was in the majority, and was a passionate advocate for the role of dissenting opinions in the development of the law.[34] Instead, our analysis of the relative unanimity of various judges simply responds to characterizations of Judge Sotomayor as an "outlier."[35]

Second, the most commonly used measure of "deference" is the frequency with which a judge chooses to uphold legislative or executive action against constitutional challenge.[36] An appellate court's options with regard to overturning or upholding a challenged governmental action will depend on whether the constitutional claim was fully developed in the court below.[37] Thus, we

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[33] *Cf.* Roberts, *supra* note 22 at 608 ("Valuable empirical goals should be to quantify only those items that are most objective in nature, clarify what the study seeks to do and not do, and then conspicuously acknowledge when the interpretation of the data involves a normative cast.").

[34] *See* William Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986).

[35] *See* Tom Goldstein, Judge Sotomayor and Race – Results from the Full Data Set, SCOTUSBLOG.COM, May 29, 2009, *available at* http://www.scotusblog.com/wp/judge-sotomayor-and-race-results-from-the-full-data-set/ (treating whether Judge Sotomayor has disagreed with her colleagues as "a fair measure of whether she is an outlier").

[36] LINDQUIST & CROSS, *supra* note 13, at 32 (Deference to other government agents is "probably the most frequent criterion in assessing Supreme Court activism.").

[37] For example, where a lower court has summarily dismissed a plaintiff's constitutional claim without allowing factual development, an appellate judge who disagrees with the lower court ruling will generally reinstate the claim and remand the case back to the lower court for the case to proceed, rather than holding the governmental action unconstitutional outright.

broke down the judge's decisions with respect to the challenged governmental action into the following categories:

- upheld a statute or government action against a constitutional challenge (e.g., held that a town ordinance did not offend the Constitution);

- overturned a statute or invalidated a government action on constitutional grounds (e.g., concluded that federal investigators had conducted an unconstitutional search);

- revived a constitutional claim without ruling on the ultimate merits of the claim itself after that claim had been dismissed or denied by a district court or agency (e.g., vacated and remanded the lower court's grant of a motion to dismiss on a constitutional claim);

- reversed a lower court's or agency's finding of a constitutional violation and remanded for further factual findings (e.g., vacated and remanded a district court's summary judgment ruling in favor of a plaintiff asserting a constitutional claim);

- resolved constitutional claims raised among two or more private actors where there was no government action at issue (e.g., a libel claim levied by one private party against another); or

- made no constitutional determination (e.g., merely touched upon broad constitutional principles in *dicta*, dismissed an appeal on mootness grounds, or ruled on an attorney's application to withdraw from an appeal under *Anders v. California*).[38]

Our analysis includes both a measure of the overall frequency with which a particular judge voted to uphold the governmental action at issue as well as a breakdown of whether the governmental action at issue was federal, state, or local.[39] Our analysis also breaks down whether the governmental action at issue in the case was the operation of a statute or an action by an agency or other non-legislative actor.

In assessing judicial "activism," we sought to give due regard to the appellate court's role with respect to the district court or agency decision it is reviewing.[40] A circuit court judge must undertake a complicated process of review involving the application of various levels of deference to different types of factual and legal determinations by the district court. Although this report did not engage in

[38] *Anders v. California*, 386 U.S. 738 (1967).

[39] Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT (eds. Stephen C. Halpern & Charles M. Lamb) 385, 405 (1984) (distinguishing between the overturning of federal legislation as opposed to the overturning of state and local laws and administrative regulations).

[40] Yung, *supra* note 27 ("Since judicial activism at its core is about substituting judgment of other constitutional actors, for federal appellate courts it makes sense to study where they do most of their work: reviewing the judgments of district courts.").

an in-depth analysis of standards of review, it does provide an overall picture of how often a particular judge substituted his or her judgment for that of the lower court.[41]

2. Substantive Issue Areas

We also analyzed whether Judge Sotomayor's constitutional decisionmaking and that of her colleagues varied according to the substantive area at issue in a particular case.[42] Did they rule differently in criminal law cases, for example, than in First Amendment cases? We followed the issue categories established in the widely-used Supreme Court Databases.[43] In order to determine which cases in the Constitutional Dataset belonged in a particular substantive issue area, we again employed the West Key Number Digest System, using any Key Number that fell within a particular constitutional issue area.[44] We omitted those substantive issue areas that failed to generate a meaningful number of cases from the Constitutional Dataset (i.e., those in which the number of judges exceeded the number of cases in that issue area in the dataset). Thus, we developed subsets of constitutional cases in the areas of civil rights, criminal law, due process, and the First Amendment. We then performed comparative analyses to see whether a judge's "activism profile" varied depending upon the particular area of constitutional law at issue.

3. Judge's Background

To determine whether judges from different political or career backgrounds exhibited different patterns of constitutional decisionmaking, each judge was classified according to the political party of the President who appointed him or her to the Second Circuit.[45] Given the extensive discussion of Judge Sotomayor's career background as a former district court judge and prosecutor, we also attempted to determine whether those variables had any measurable effect upon a judge's constitutional decisionmaking. Accordingly, we performed a comparative analysis to determine whether appointees from a particular political party, former lower or state court judges, or former prosecutors showed measurably different "activism profiles" than other Second Circuit judges.

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[41] *But cf.* Corey Yung, *Is Sotomayor an Activist? Not by my Measure*, Sexcrimes Blog, May 26, 2009, http://sexcrimes.typepad.com/sex_crimes/2009/05/is-sotomayor-an-activist-not-by-my-measure.html. (arguing that appellate judges are more "activist" when they reverse district court judgments under a deferential standard at a higher relative rate compared to reversals using a non-deferential standard).

[42] *See generally* Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 45 (2007) (noting that Rehnquist Court justices exhibited differing patterns of deference depending on the subject matter of the case at issue).

[43] *See generally* HAROLD J. SPAETH, DOCUMENTATION, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE 1953-2007 TERMS 42-52 (2008), http://www.cas.sc.edu/poli/juri/allcourt_codebook.pdf.

[44] For a complete list of searches used to generate cases in a particular issue area, see Appendix A.

[45] Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1479 ("Most empirical studies of ideology in decisionmaking use the political party of the judge's appointing president as a proxy for the judge's own political ideology.").

4. Further Considerations

We did not attempt a quantitative analysis of *stare decisis*, or adherence to precedent. First, a circuit court judge has less discretion than a Supreme Court justice to overrule binding precedent. Second, some judicial actions that, in effect, overrule prior precedent often pay lip service to the concept of *stare decisis*, making it difficult to make a non-subjective determination as to when a judge has demonstrated deference to binding authority.[46] In short, it would be very hard to empirically gauge an appeals judge's approach to *stare decisis* — and not necessarily useful to do so.

Finally, it is important to note that a single decision by a judge can exhibit both "deferential" as well as "activist" features. For example, if an appellate judge upholds a federal statute against constitutional challenge, but does so by overturning a lower court's decision on the same legal issue, the appellate judge's decision could be deemed either deferential (to congressional action) or activist (with respect to the lower court).[47] Accordingly, we decided not to attempt to aggregate indicators of deference along these various axes into a single measure of "activism," but, instead, reported each measure separately.[48]

III. RESULTS

A. CONSTITUTIONAL DATASET

In general, judges in the Second Circuit almost always ruled unanimously — in 93% of decisions. They voted to overturn the challenged governmental action in about 1 out of every 6 constitutional cases. In over one-third of those cases, they voted to overturn the lower court or agency's decision. Although Democratic appointees and former lower court judges voted to overturn challenged governmental actions slightly more frequently than other Second Circuit judges, such slight divergences were relatively trivial in light of the general trend towards unanimity in the Circuit's decisionmaking.

Judge Sotomayor's constitutional decisions closely conformed to the overall Second Circuit profile with respect to all three indicators of deference measured here: deference to her peers on the Second Circuit, deference to the governmental action at issue, and deference to the lower court or agency decision. Indeed, Judge Sotomayor's decisions were unanimous in over 90% of constitutional

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[46] *See id.* ("[J]udges justify their conclusions by referring to analogous precedents or other governing texts that, at least purportedly, dictate the judge's decision. One should not accept this self-reporting uncritically.").

[47] *See, e.g.*, Richard W. Garnett, *Judicial Activism and its Critics*, 155 U. Pa. L. Rev. PENNumbra 113 (2007) ("Does 'deference' go to the question of whether the actor whose decision, conduct, or policy is being reviewed got things wrong, or to the question of whether that actor's error should be corrected?"); Yung, *supra* note 27 ("if a judge believes that prior precedent requires him or her to strike down a federal statute, the decision could be construed as activist either way the judge holds").

[48] *But see* LINDQUIST & CROSS, *supra* note 13, at 3 (aggregating various indicators of activism into a "final ranking" of Supreme Court justices based upon single scale of activism).

decisions, and she voted with the majority over 98% of the time. Although Judge Sotomayor voted to overturn challenged governmental action slightly more frequently than Second Circuit judges overall (21.2% of the time as opposed to a circuit overall average of 17.5%), such votes were unanimous over 90% of the time. Indeed, in nearly 90% of cases, Republican appointees joined in her decision to hold a challenged governmental action unconstitutional. Both Judge Sotomayor and the Second Circuit as a whole voted to overrule the lower court or agency in slightly more than 1/3 of decisions. Far from being "extreme" or an "outlier," Judge Sotomayor's decisionmaking in constitutional cases closely comports to the decisionmaking of her peers on the Second Circuit.

Constitutional Dataset: Second Circuit Detailed Findings

In constitutional cases, Second Circuit judges voted unanimously 93.0% of the time. Second Circuit judges voted to overturn the challenged governmental action in 17.5% of their decisions in the Constitutional Dataset, and voted to reinstate a constitutional claim that had been dismissed by the lower court in 5.6% of decisions. Second Circuit judges voted to overrule the lower court or agency in 35.1% of their decisions.

Democratic appointees voted unanimously with almost equal frequency as Republican appointees — 92.6% and 93.6%, respectively. Democratic appointees voted to overturn the challenged governmental action in 18.0% of decisions, slightly more frequently than the 16.8% overturn rate for Republican appointees. Similarly, Democratic appointees voted to reinstate a constitutional claim dismissed by the lower court in 6.4% of decisions, as opposed to a 4.7% overall reinstatement rate for Republican appointees. Democratic appointees also voted to overrule the lower court or agency in 36.5% of decisions, slightly more frequently than the 33.2% rate for Republican appointees.

Former lower court judges were equally as likely as their peers to vote unanimously in constitutional cases. Former lower court judges voted to overturn the challenged governmental action in 18.8% of decisions, somewhat more frequently than their peers on the Second Circuit, who voted to overturn governmental action 15.8% of the time. Similarly, former lower court judges voted to overrule the lower court or agency in 36.6% of decisions, slightly more frequently than other Second Circuit judges, who voted to overrule the lower court or agency 33.1% of the time.

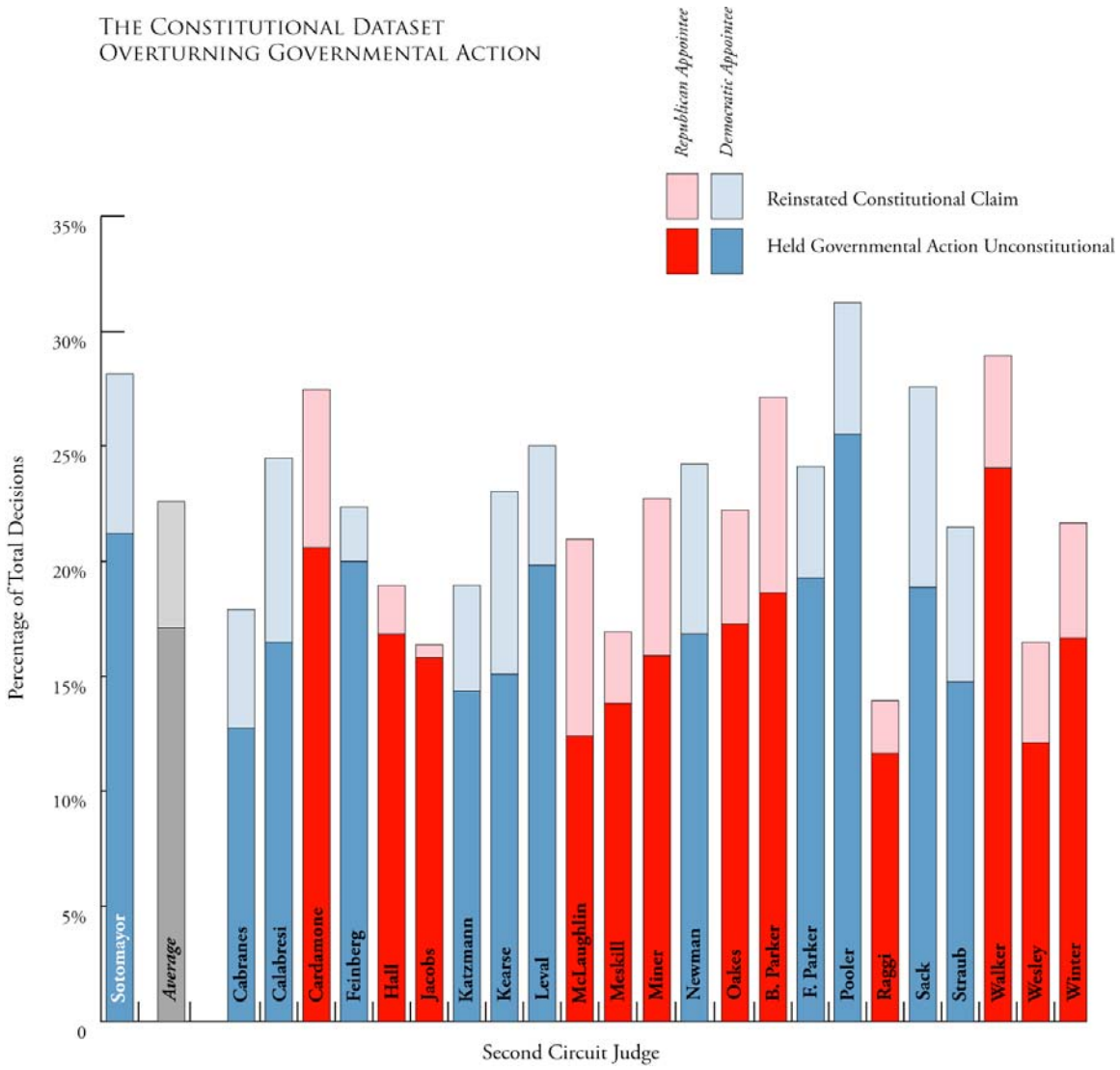
Former prosecutors as a group did not exhibit appreciably different voting patterns than their Second Circuit peers with respect to unanimity, overturning government actions, or overruling lower courts or agencies.

Constitutional Dataset: Judge Sotomayor's Record

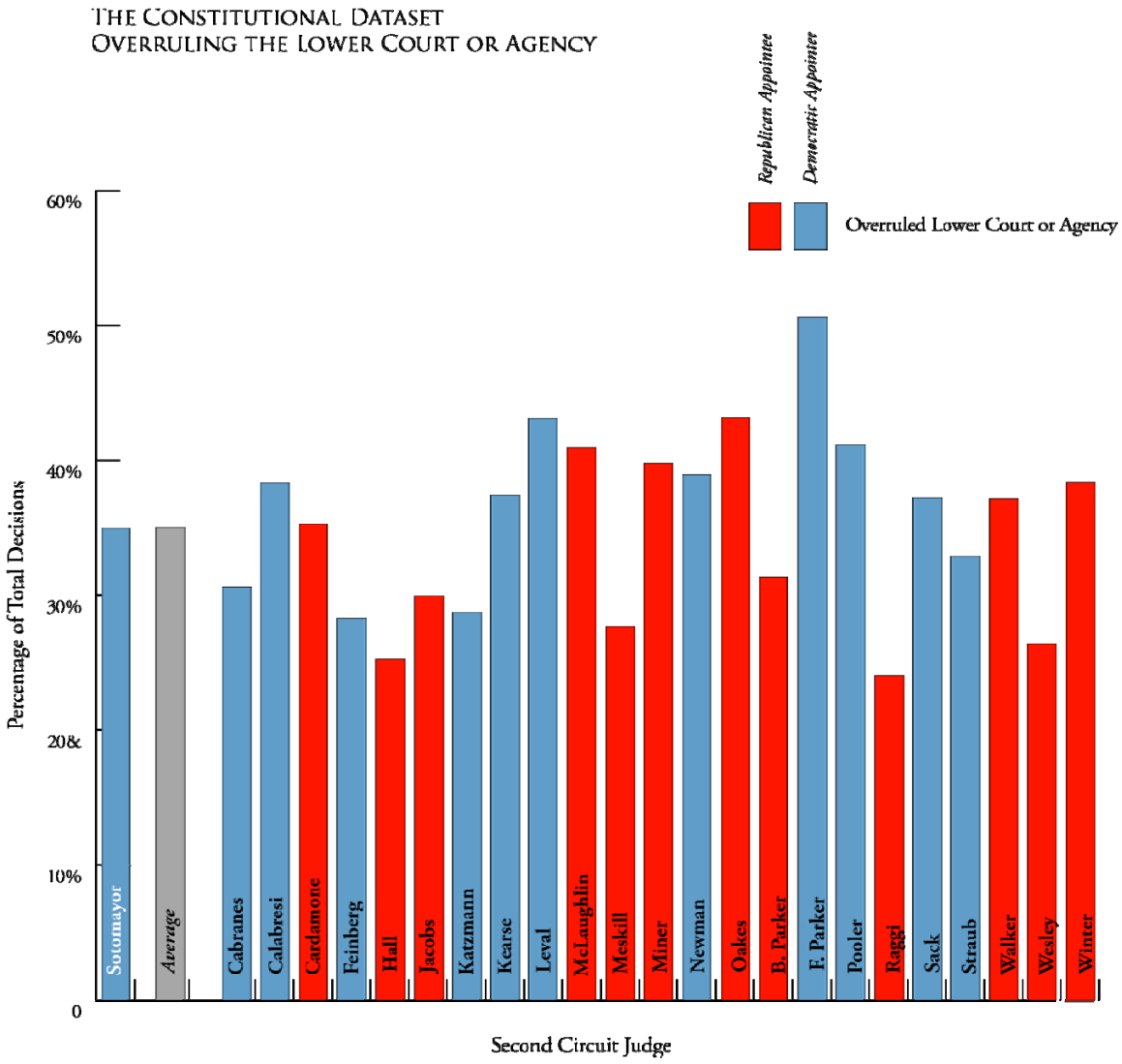
Judge Sotomayor joined unanimous decisions in constitutional cases 94.0% of the time, even more frequently than the Second Circuit rate of 93.0% unanimity. Additionally, Judge Sotomayor was part of the majority in 98.2% of the constitutional cases in which she participated, just slightly more often than the Second Circuit rate of 98.1%. She dissented in only 4 of the 217 cases in which she participated.

Judge Sotomayor voted to hold the challenged governmental action unconstitutional in 21.2% of her constitutional cases, as opposed to a Second Circuit rate of 17.5%, a difference of only 3.7 percentage points. This difference is statistically insignificant. Of the 46 cases in which Judge Sotomayor voted to overturn governmental action, the panel was unanimous in 42 cases, or 91.3% of the time. Furthermore, Judge Sotomayor was in the majority in 45 of the 46 cases, or 97.8% of the time. Out of the 46 cases in which Judge Sotomayor voted to overturn governmental action, 34 included at least one Republican appointee. In such cases, Judge Sotomayor voted with the Republican appointee(s) on the panel in 30 cases, or 88.2% of the time.

Judge Sotomayor voted to reinstate a constitutional claim that had been dismissed by the lower court — without ruling on the merits — in 6.9% of cases, slightly higher than a Second Circuit rate of 5.6%. Judge Sotomayor voted to overrule the lower court or agency in 35.0% of her decisions, essentially the same as the Second Circuit rate of 35.1%. Again, this is statistically insignificant. Out of the 76 cases in which Judge Sotomayor voted to overrule the lower court or agency, 71 of the cases (93.4%) were unanimous, two (2.6%) were divided with Judge Sotomayor in the majority, and Judge Sotomayor dissented in three (3.9%) cases. At least one Republican appointee joined her decision to overrule the lower court or agency in 48 of the 51 cases (94.1%) in which a Republican appointee sat on the panel.



Note: Detailed data for this graph is available in Appendix B at http://www.brennancenter.org/content/resource/sotomayor



Note: Detailed data for this graph is available in Appendix B at http://www.brennancenter.org/content/resource/sotomayor

B. PARTICULAR ISSUE AREAS

1. Civil Rights

On all three measures — disagreeing with other judges on the panel, overturning governmental action, and overruling lower court determinations — Second Circuit judges displayed fewer indications of deference in cases involving civil rights issues than for the Constitutional Dataset overall. With respect to the background factors we tracked, unanimity rates in civil rights cases did not appear to vary noticeably according to whether a judge had been appointed by a Democratic or Republican president or whether a judge had previously served as a lower or state court judge or as a prosecutor. Democratic appointees were slightly more likely to vote to hold the challenged governmental action unconstitutional, to revive a constitutional claim that had been dismissed by the lower court, and to overturn a lower court or agency than were Republican appointees. Similarly, judges who had previously served as lower or state court judges were somewhat more likely to hold the challenged governmental action unconstitutional than other Second Circuit judges.

In general, Judge Sotomayor conformed to the Second Circuit's overall pattern in civil rights cases involving a civil rights issue: she voted to hold the challenged governmental action unconstitutional slightly more frequently than she did for cases in the entire Constitutional Dataset, but her decisions in civil rights cases were more likely than the average to be in accord with the lower court/agency's determination, and nearly 9 out of 10 of her civil rights decisions were unanimous.

Civil Rights: Second Circuit Detailed Findings

Second Circuit judges voted unanimously slightly less often in civil rights cases (90.6% unanimity rate) than for the Constitutional Dataset as a whole (93% unanimity rate). In cases involving civil rights issues, Second Circuit judges voted to overturn the challenged governmental actions in 20.6% of their decisions, as opposed to a 17.5% circuit overturn rate for the Constitutional Dataset overall. Similarly, Second Circuit judges voted to revive a dismissed constitutional claim appreciably more often in civil rights cases (18.3% of their decisions) than for the Constitutional Dataset overall (5.6% of their decisions). Finally, Second Circuit judges voted to overrule the lower court in 50.9% of the time in civil rights cases as opposed to a 35.1% overrule rate for the Constitutional Dataset as a whole.

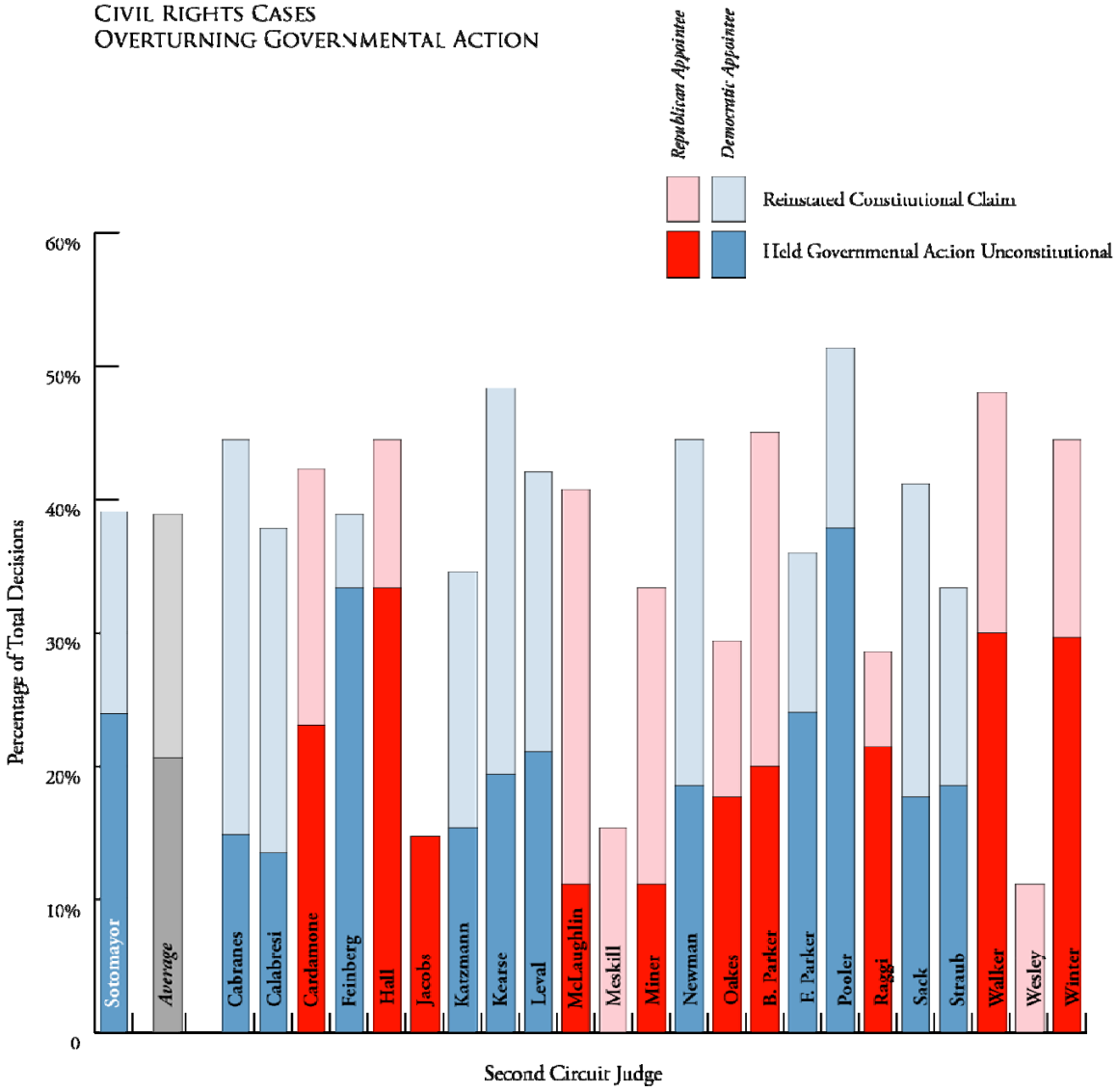
Democratic appointees were slightly more likely to be part of unanimous decisions in civil rights cases (91.1% unanimity rate) than Republican appointees (89.8% unanimity rate). Democratic appointees voted to overturn the challenged governmental action 21.3% of the time, as opposed to 19.7% of the time for Republican appointees. Democratic appointees were also more likely to vote to revive a dismissed constitutional claim in civil rights cases (19.9% reinstated claims rate) than their Republican-appointee colleagues (15.9% reinstated claims rate). Democratic appointees were also slightly more likely to vote to overturn the lower court or agency's decision (51.8% overturn rate) than Republican appointees (49.6% overturn rate).

Former lower or state court judges were as likely to vote unanimously in civil rights cases as their colleagues. Second Circuit judges who had previously served on a lower court were somewhat more likely to hold governmental action unconstitutional in civil rights cases (23.2% overturn rate) than their colleagues who had not been lower court judges (17.0% overturn rate). However, Second Circuit judges who had previously served on a lower court were as likely as their colleagues to overrule the lower court or agency. Moreover, Second Circuit judges who had previously served as prosecutors did not have appreciably different voting behaviors in civil rights cases from those who had not.

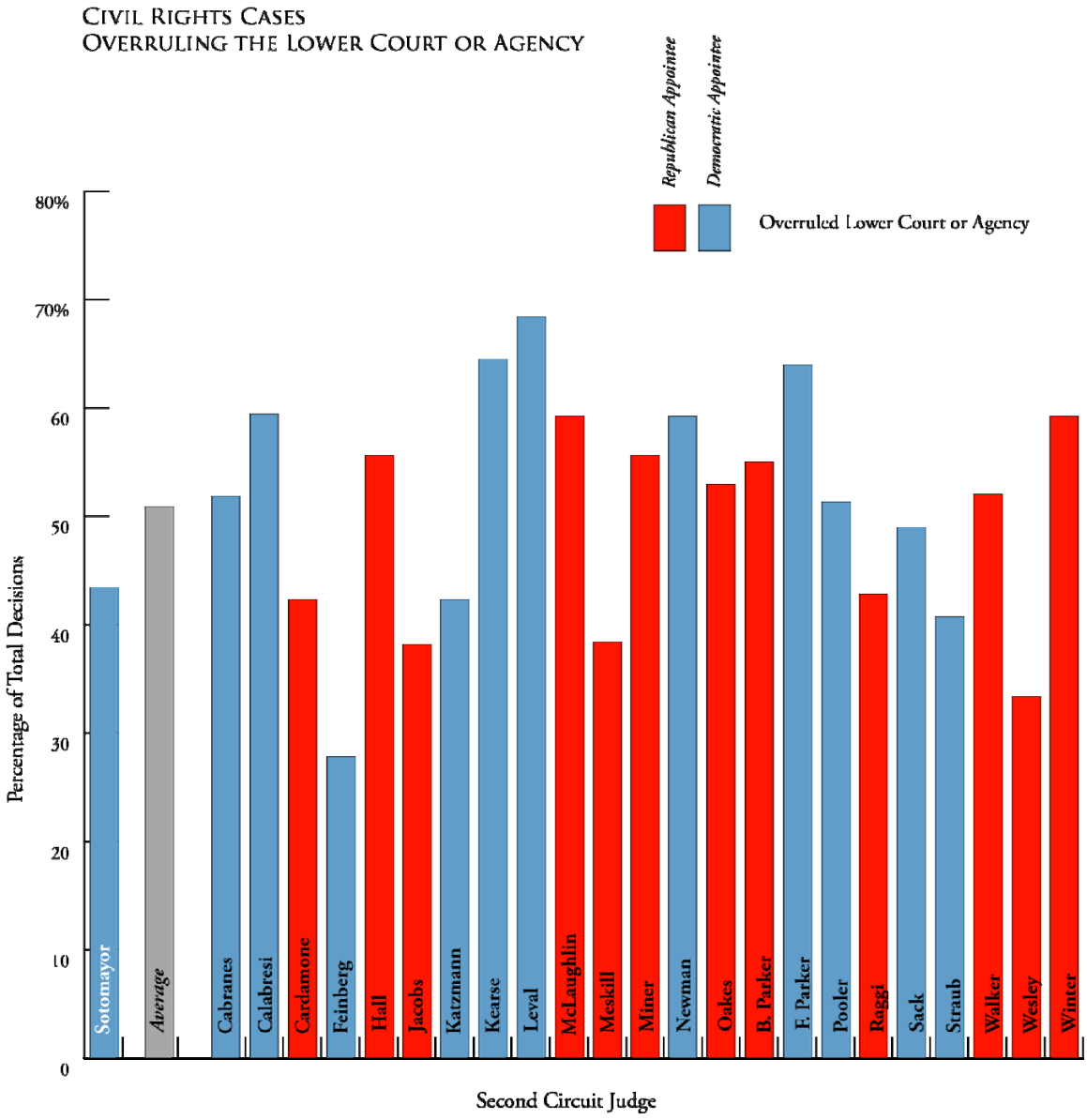
Civil Rights: Judge Sotomayor's Record

Judge Sotomayor joined unanimous decisions in civil rights cases in 89.1% of cases, compared to the circuit rate of 90.6% unanimity. She dissented in only two cases out of her 46 civil rights cases (4.3%) in the Constitutional Dataset, as compared to a 2.7% dissent rate for such cases in the circuit overall. Thus, she voted with the majority in 44 out of 46 civil rights cases, or 95.7% of the time.

In civil rights cases, Judge Sotomayor voted to hold the challenged governmental action unconstitutional in 23.9% of cases, slightly more often than the Second Circuit overturn rate of 20.6% in such cases. However, she voted to overrule a lower court or agency determination in civil rights cases in only 43.5% of her decisions, less frequently than the circuit's 50.9% overrule rate.



Note: Detailed data for this graph is available in Appendix C at http://www.brennancenter.org/content/resource/sotomayor



Note: Detailed data for this graph is available in Appendix C at http://www.brennancenter.org/content/resource/sotomayor

2. Criminal Law

Compared to constitutional cases overall, in criminal law cases, Second Circuit judges voted unanimously even more frequently than in constitutional cases overall. In criminal law cases, Second Circuit judges voted to overturn the challenged governmental action more frequently and voted to overrule the lower court or agency slightly more often. In criminal law cases, Democratic appointees voted to overturn the challenged governmental action at higher rate than the Second Circuit as a whole. Both Democratic appointees and former lower or state court judges voted to overrule the lower court more often than other Second Circuit judges.

Judge Sotomayor was part of the majority in all 44 of her criminal law cases and part of a unanimous bench in more than 9 out of 10 of these cases. In criminal law cases, Judge Sotomayor voted slightly more frequently than her Second Circuit peers to overturn the challenged governmental action. Nevertheless, the overwhelming unanimity of these decisions shows that her decisions were not out of the mainstream of the Second Circuit.

Criminal Law: Second Circuit Detailed Findings

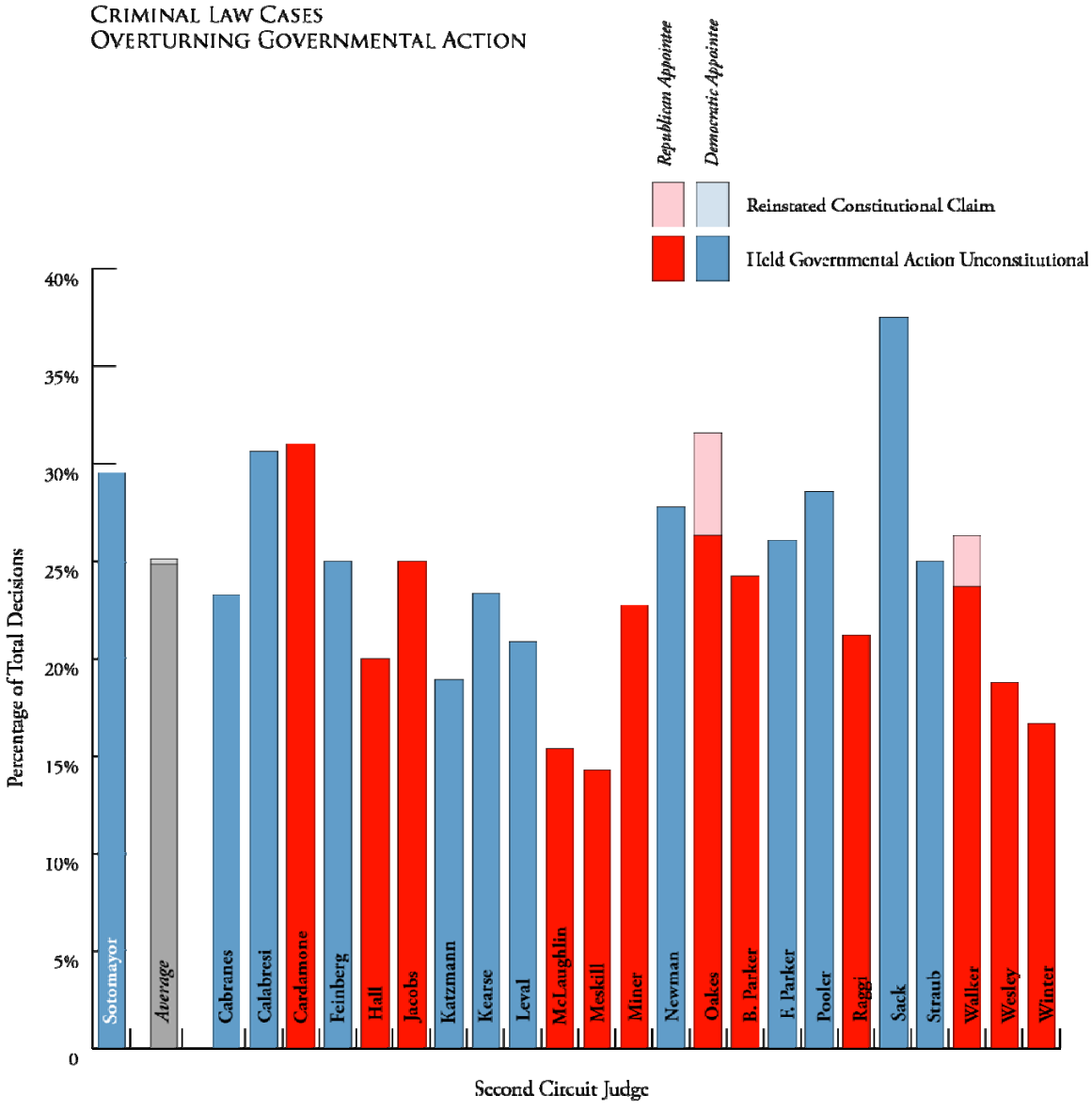
In criminal law cases, Second Circuit judges' unanimity rate was 93.4%, in line with an overall unanimity rate of 93.0% for the Constitutional Dataset as a whole. In criminal law cases, Second Circuit judges voted to hold a challenged governmental action unconstitutional 24.8% percent of the time, more frequently than the 17.5% rate for all decisions in the Constitutional Dataset. Second Circuit judges voted to overrule the lower court or agency 36.7% of the time in criminal law cases, slightly more frequently than the Constitutional Dataset overrule rate of 35.1%.

The unanimity rate of Democratic appointees in criminal law cases was 92.3%, in line with the Republican appointee unanimity rate of 94.7% in such cases. Democratic appointees voted to overturn the challenged governmental action in 26.9% of their criminal law decisions, slightly more often than the Republican appointee's overrule rate of 22.3% in such decisions. Similarly, Democratic appointees voted to overrule the lower court or agency in 38.8% of decisions, somewhat more frequently than the overrule rate of 34.1% for Republican appointees.

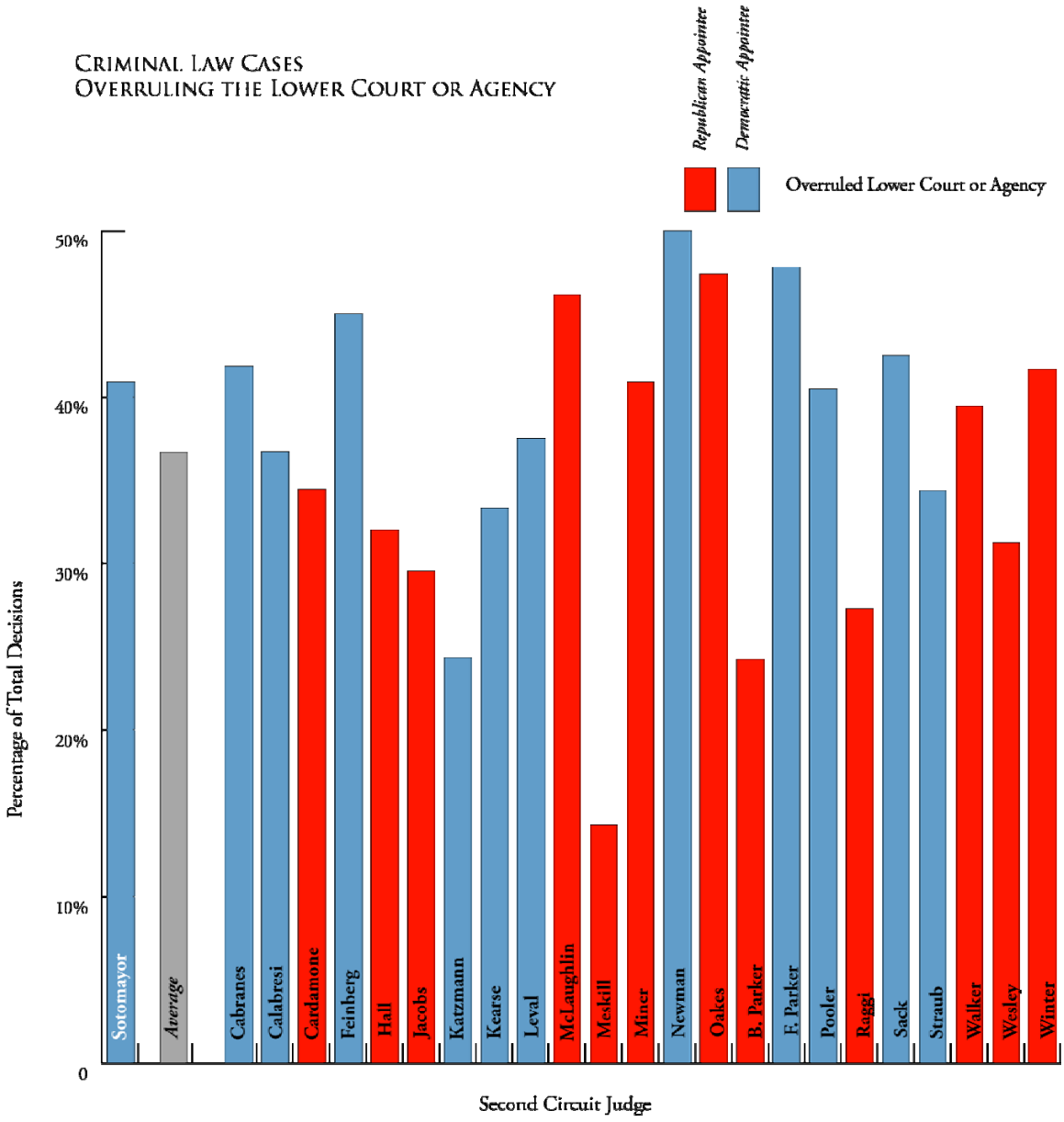
Those Second Circuit judges who had formerly been lower or state court judges voted unanimously as frequently as other Second Circuit judges in criminal law cases. Former state or lower court judges voted to overrule the lower court or agency in 39.4% of criminal law decisions, somewhat more frequently than other Second Circuit judges, who had an overall 33.1% overturn rate. Second Circuit judges who had previously served on the bench were not significantly more or less likely than their peers to overturn governmental action. Additionally, the voting patterns of Second Circuit judges in criminal cases did not appear to vary substantially based on whether a particular judge had formerly served as a prosecutor.

Criminal Law: Judge Sotomayor's Record

Judge Sotomayor voted with the majority in all 44 criminal law decisions involving a constitutional issue that she considered. Moreover, she was part of a unanimous panel in 90.9% of her decisions. Judge Sotomayor voted to overturn governmental action in 29.5% of her criminal law decisions in the Constitutional Dataset, somewhat more frequently than the Second Circuit's overall overturn rate of 24.8% in such cases. Judge Sotomayor voted to overrule the lower court in 40.9% of her criminal law decisions, slightly more frequently than the Second Circuit's 36.7% overrule rate in such cases.



Note: Detailed data for this graph is available in Appendix D at http://www.brennancenter.org/content/resource/sotomayor



Note: Detailed data for this graph is available in Appendix D at http://www.brennancenter.org/content/resource/sotomayor

3. Due Process

Compared to their decisions in the Constitutional Dataset as a whole, Second Circuit judges appeared to display slightly more deference in due process cases for each of the three major indicators analyzed here — deference to their Second Circuit peers, deference to governmental action, and deference to lower court and agency decisions. Democratic appointees voted to overturn the challenged governmental action slightly more often than Republican appointees in due process cases, and both Democratic appointees and former lower court judges voted to overrule the lower court or agency slightly more often than their peers. However, these slight differences were overshadowed by the overall unanimity of these decisions.

Judge Sotomayor was part of the majority in 126 of the 127 due process cases in which she participated, or 99.2% of the time. Moreover, she was part of unanimous decisions 94.5% of the time. In terms of the two other measures of deference considered here, Judge Sotomayor voted to overturn the challenged governmental action as well as to overrule the lower court or agency slightly more frequently in due process cases than her Second Circuit colleagues.

Due Process: Second Circuit Detailed Findings

In due process cases, Second Circuit judges' votes were unanimous in 95.2% of their decisions, somewhat more frequently than for the Constitutional Database as a whole, where the unanimity rate was 93.0%. The Second Circuit voted to overturn governmental action in 15.1% of decisions in the Constitutional Database involving a due process claim, less frequently that the overall overturn rate of 17.5% for the entire Constitutional Dataset. Second Circuit judges voted to overturn the lower court or agency in 31.3% of due process decisions, somewhat less than the 35.1% overrule rate for the Constitutional Dataset overall.

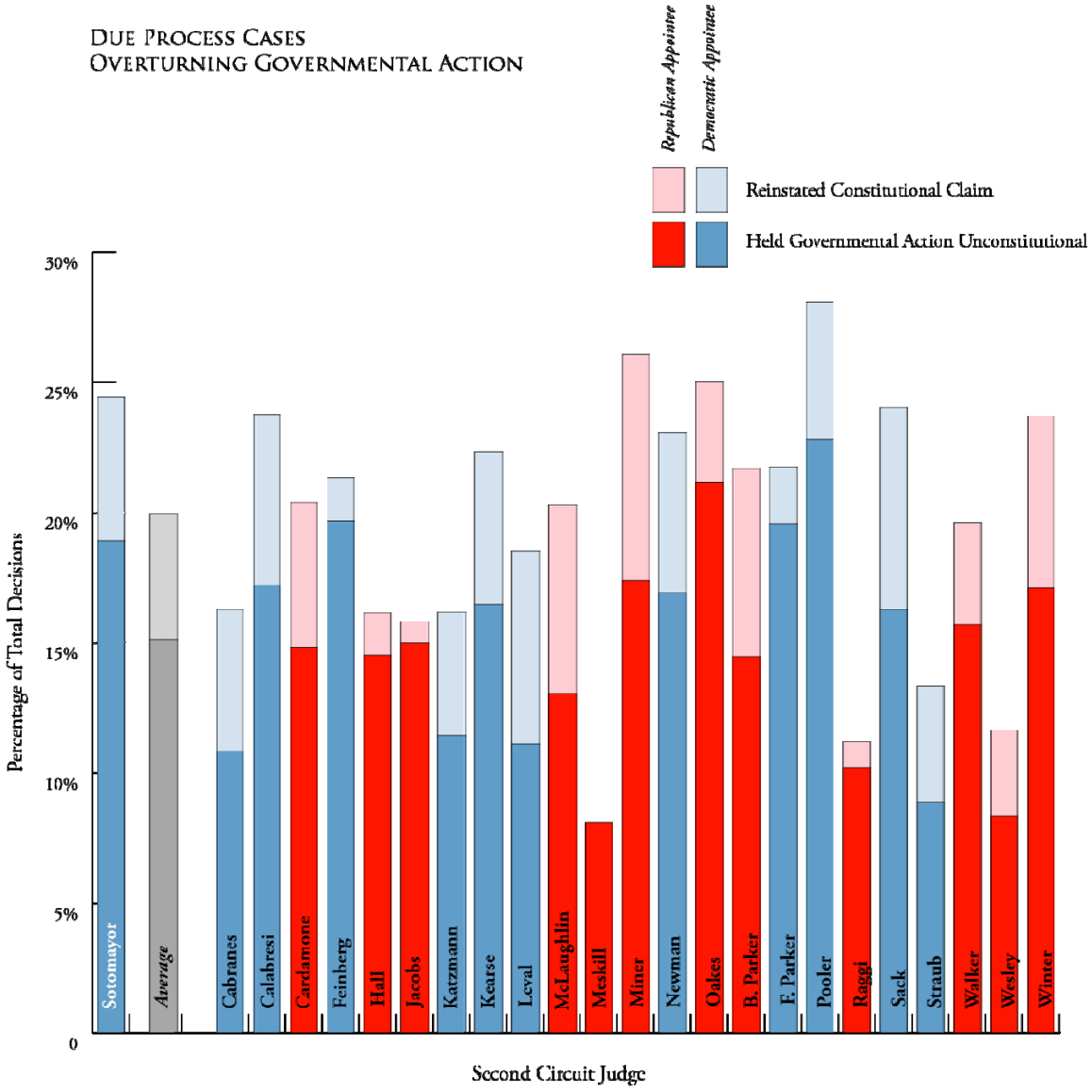
Democratic appointees had nearly the same unanimity rate as Republican appointees in due process decisions — 95.0% and 95.5%, respectively. Democratic appointees voted to overturn governmental action in due process cases in 15.8% of decisions, slightly more often than Republican appointees, whose overturn rate in such decisions was 14.2%. Democratic appointees also voted to overrule the lower court determination in 32.3% of their due process decisions, slightly more frequently than Republican appointee's 29.9% overturn rate in such cases.

Those Second Circuit judges who had formerly been lower or state court judges overruled the lower court or agency in 33.1% of due process decisions, slightly more frequently than their peers who had not formerly served on the bench, whose overturn rate was 29.0%. However, those Second Circuit judges who had formerly been lower or state court judges did not vote to overturn governmental action, nor did they dissent, significantly more often than their colleagues.

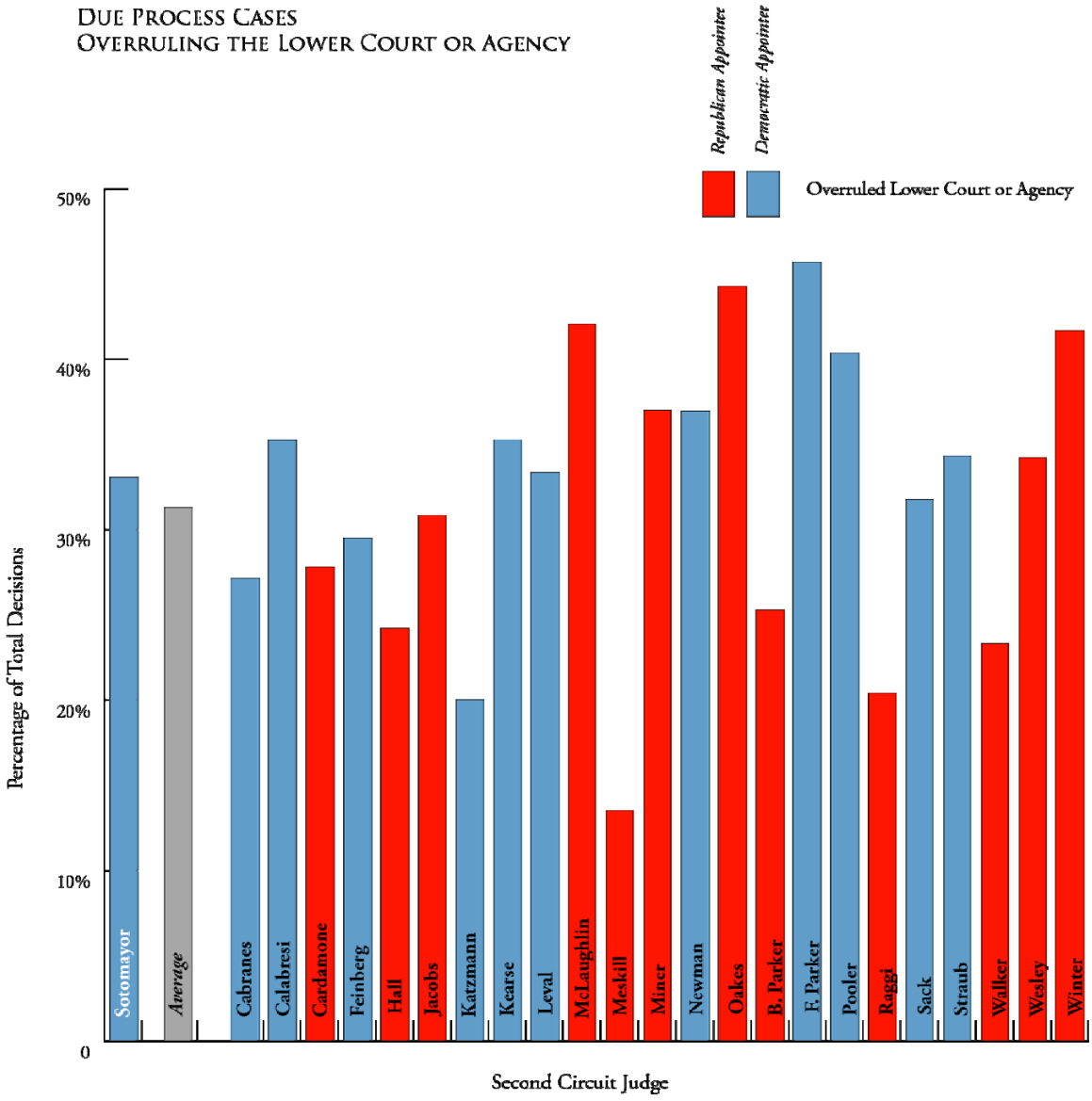
Judges who had formerly served as prosecutors did not appear to exhibit different overall voting patterns in due process cases with respect to the three indicators of deference analyzed here than the other members of the Second Circuit.

Due Process: Judge Sotomayor's Record

Judge Sotomayor was part of unanimous decisions in 94.5% of her due process cases, which is in line with the circuit-wide unanimity rate of 95.2%. She was part of the majority in 126 of the 127 due process cases in which she participated, or 99.2% of the time, and dissented in only one case. Judge Sotomayor voted to overturn governmental action in 18.9% of her decisions in the Constitutional Database involving a due process claim, somewhat more often than the overall circuit rate of 15.1%. Judge Sotomayor voted to overrule the lower court or agency in 33.1% of her decisions in due process cases, in line with a circuit overturn rate of 31.3%.



Note: Detailed data for this graph is available in Appendix E at http://www.brennancenter.org/content/resource/sotomayor



Note: Detailed data for this graph is available in Appendix E at http://www.brennancenter.org/content/resource/sotomayor

4. First Amendment

On all three measures — disagreeing with other judges, overturning governmental action, and overruling lower court determinations — Second Circuit judges displayed fewer indications of deference in cases involving a First Amendment issue than for the Constitutional Dataset overall. These patterns did not appear to vary meaningfully depending on the political party of the appointing President, whether the judge had served as a lower court judge, or whether the judge had formerly served as a prosecutor.

Judge Sotomayor voted unanimously even more often than the overall circuit average in First Amendment cases. Judge Sotomayor voted to hold the challenged governmental action unconstitutional slightly more frequently than the overall circuit percentage in First Amendment cases. However, she was more likely than her peers to affirm the lower court or agency's determination in First Amendment cases.

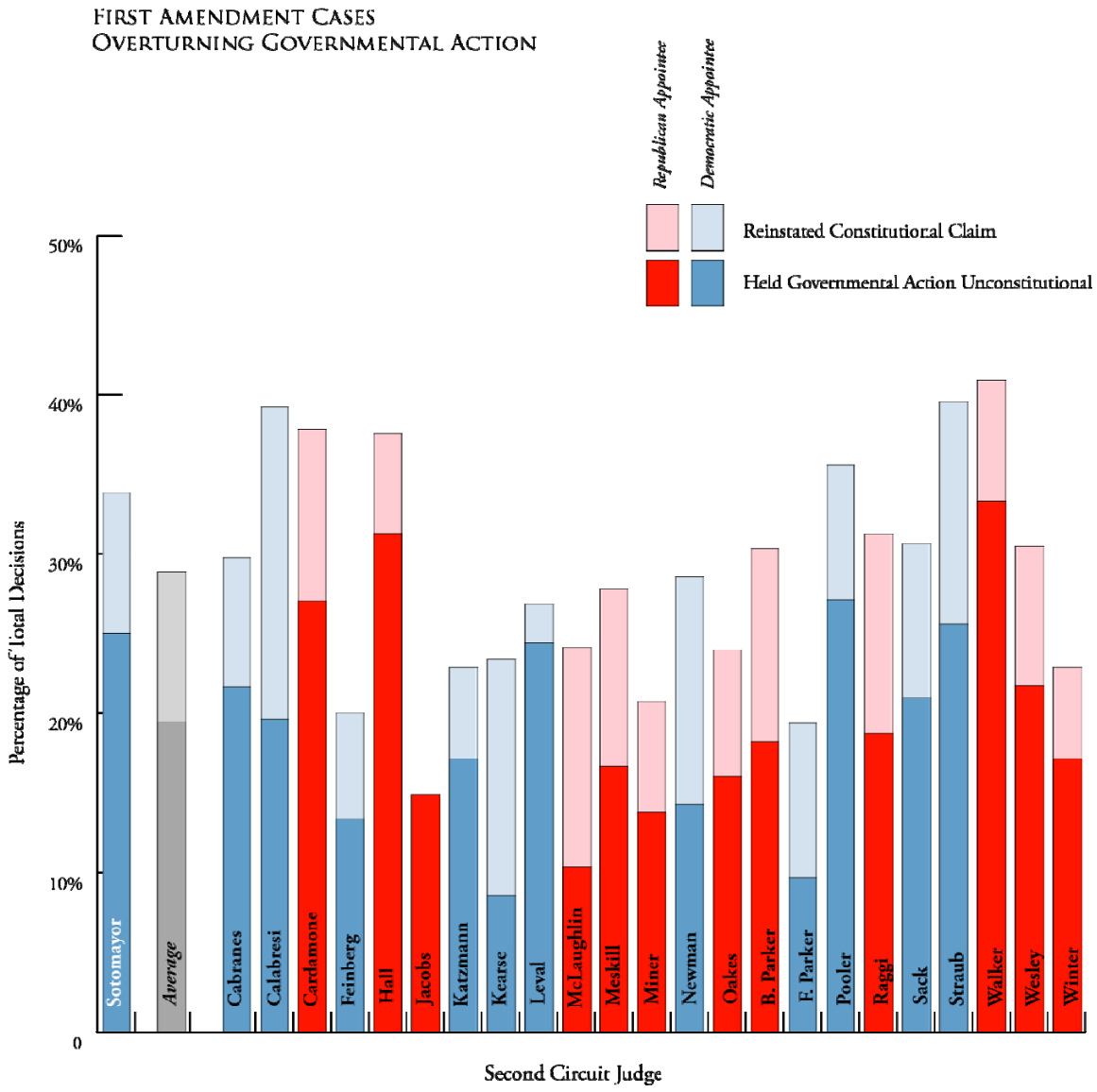
First Amendment: Second Circuit Detailed Findings

In cases involving a First Amendment issue, Second Circuit judges displayed slightly less unanimity than in the overall Constitutional Dataset. They were unanimous in 90.9% of case involving a First Amendment issue, as opposed to in 93.0% of their decisions in the entire Constitutional Dataset. Second Circuit judges were slightly more likely to vote that the challenged governmental action was unconstitutional (20.4% overturn rate) than in the overall dataset (17.5% overturn rate). Similarly, the Second Circuit judges were more likely to revive a dismissed First Amendment constitutional claim — which they did in 9.4% of their First Amendment decisions — than they were in the Constitutional Dataset overall, where they revived a dismissed constitutional claim in 5.6% of their decisions. Additionally, Second Circuit judges were more likely to vote to overrule the lower court or agency's decision in cases involving a First Amendment issue (43.8% overturn rate) than for the Constitutional Dataset overall (35.1% overturn rate).

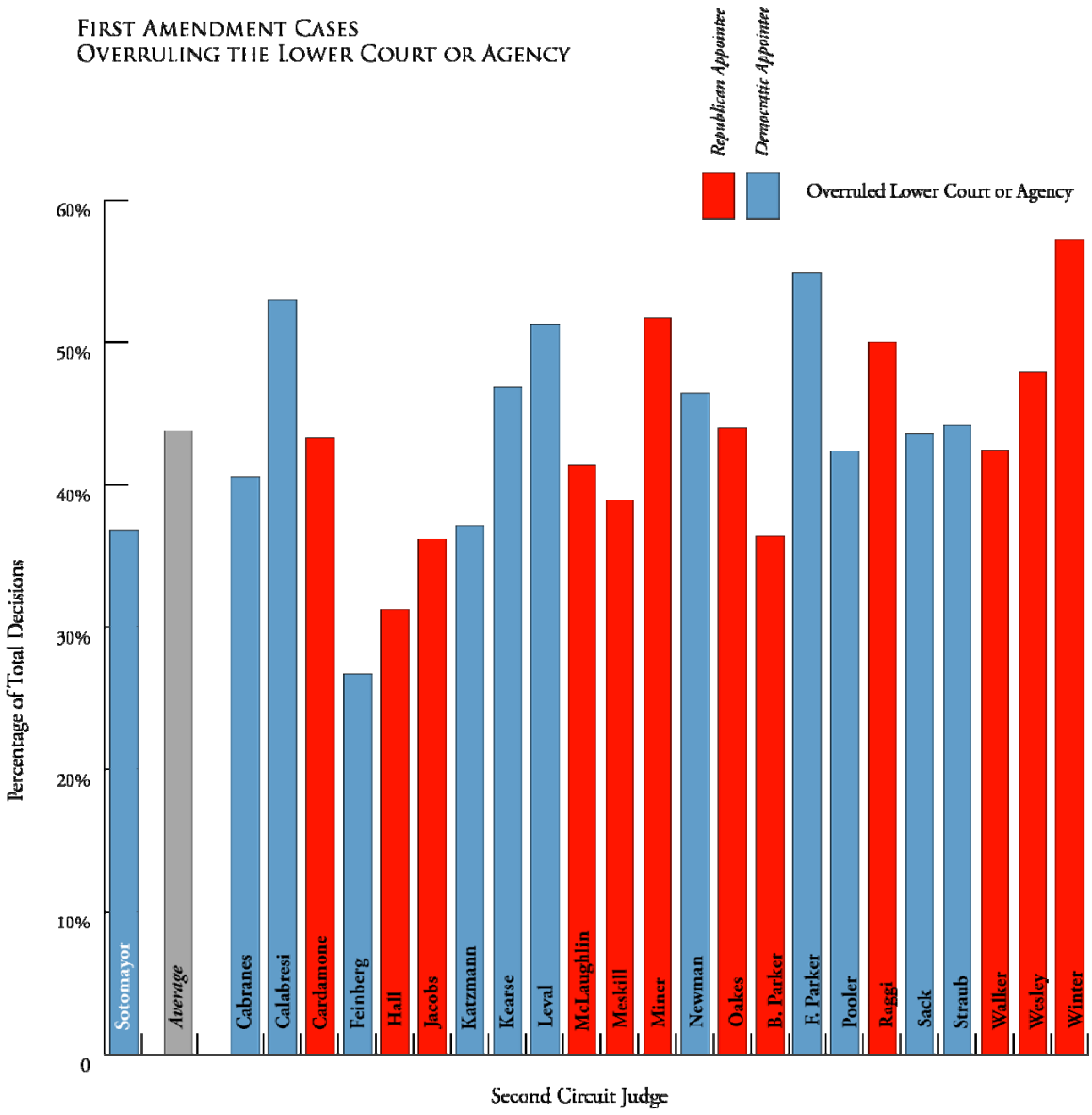
Overall, the voting patterns of Second Circuit judges with respect to the three measures of deference analyzed here did not appear to vary in First Amendment decisions depending on the political party of the appointing President, whether the judge had served as a lower court judge, or whether the judge had formerly served as a prosecutor.

First Amendment: Judge Sotomayor's Record

Judge Sotomayor was part of a unanimous panel in 94.1% of the First Amendment cases in which she participated, more frequently than the Circuit's rate of 90.9%. She dissented in only 3 of her 68 First Amendment cases, or in less than 5% of these decisions. Additionally, in cases involving a First Amendment claim, Judge Sotomayor voted to overturn the challenged government action 25.0% of the time, slightly more than the Second Circuit rate of 20.4%. However, Judge Sotomayor voted to overturn the lower court or agency's decision less frequently than the circuit average — in 36.8% of her decisions as opposed to a circuit rate of 43.8%.



Note: Detailed data for this graph is available in Appendix F at http://www.brennancenter.org/content/resource/sotomayor



Note: Detailed data for this graph is available in Appendix F at http://www.brennancenter.org/content/resource/sotomayor

CONCLUSION

As the Senate Judiciary Committee hearings on this nomination get underway, we can expect days of questioning that attempts to discover whether Judge Sotomayor is, ever has been, or intends to be a "judicial activist." As this study demonstrates, however, fears that Judge Sotomayor is an "activist," "outlier," or "out of the mainstream" have no basis in her record on constitutional cases. Indeed, the overall profile of Judge Sotomayor's constitutional decisions is very much in line with her colleagues on a court noted for its collegiality and emphasis on consensus-building. Even in those cases where Judge Sotomayor has voted to override the decision of either a lower court or a governmental actor – by overruling a lower court or holding governmental action unconstitutional – her decisions have been in accord with judges appointed by both Democratic and Republican presidents.

Given Judge Sotomayor's ample qualifications, this nomination ultimately may not be controversial. Even so, we believe that facts set forth in this report will help stop the careless flinging of accusations of "judicial activism." There may be reasons to vote for or against her nomination, but a lack of appropriate judicial deference is not one of them.

In the weeks ahead, as the nation discusses the judicial qualities appropriate for the next Supreme Court justice, we urge the Senate to steer clear of the rhetoric that has become all too common in nomination battles. How should we judge our judges? Basic principles: respect for precedent . . . respect for text . . . respect for democratic purpose. And less measurable, but most important, a respect for what Justice William Brennan, Jr. called the "simple human decency" at the heart of the Constitution.

APPENDIX A: CODING PROTOCOL

I. BACKGROUND

To conduct our analysis, a team of 11 individuals reviewed the 1194 cases in the Constitutional Dataset (i.e., decisions issued by the Second Circuit Court of Appeals between October 7, 1998 and May 26, 2009 for which Westlaw had assigned a constitutional law "key number").

The basic unit of our review was the individual vote of each Second Circuit judge sitting on a panel or en banc for each of these 1194 constitutional cases, whether that decision was reflected in a unanimous decision, a majority opinion, a concurrence, or a dissent. In other words, we did not simply record the decision in each case but, instead, performed a separate analysis for every individual Second Circuit judge's vote in each of the 1194 cases under review.

II. CODING PROCESS

In assessing each judge's vote in a given case — as reflected in the opinion or opinions that he or she wrote or joined — we focused on three different measures of relative judicial deference: (a) the judge's substantive determination of the constitutional issue at stake; (b) the procedural result of the judge's vote with respect to the decision of the lower court or agency under review; and (c) the degree of agreement among the specific judge and other judges sitting on the particular panel or en banc.

Where applicable with respect to each such measure, we designed our coding protocol so as to capture and highlight any lack of deference to government actors or legislation, lower courts and agencies, or fellow judges reviewing an appeal or petition, as detailed below.

In addition, we identified certain subsets of cases in the Constitutional Dataset that pertained to particular subject areas — for example, Civil Rights — and attempted to determine whether patterns of voting differed within these subsets as compared to the Constitutional Dataset as a whole. Finally, each of the circuit judges whose opinions we reviewed was identified according to his or her professional background, as discussed below.

A. Vote with Respect to Constitutionality or Unconstitutionality

First, each judge's opinion was reviewed to determine what, if any, ruling it contained with respect to the constitutional principle or challenge at issue. As a result of this review, each opinion was assigned to one of six possible categories according to whether it:

- upheld a statute or government action against a constitutional challenge (e.g., held that a town ordinance did not offend the Constitution);

- overturned a statute or invalidated a government action on constitutional grounds (e.g., concluded that federal investigators had conducted an unconstitutional search);

- revived a constitutional claim without ruling on the ultimate merits of the claim itself after that claim had been dismissed or denied by a district court or agency (e.g., vacated and remanded the lower court's grant of a motion to dismiss on a constitutional claim);

- reversed a lower court's or agency's finding of a constitutional violation and remanded for further factual findings (e.g., vacated and remanded a district court's summary judgment ruling in favor of a plaintiff asserting a constitutional claim);

- resolved constitutional claims raised among two or more private actors where there was no government action at issue (e.g., a libel claim levied by one private party against another); or

- made no constitutional determination (e.g., merely touched upon broad constitutional principles in *dicta*, dismissed an appeal on mootness grounds, or ruled on an attorney's application to withdraw from an appeal under *Anders v. California*, 386 U.S. 738 (1967)).

For each opinion upholding a statute or government action, the opinion was further categorized according to whether it upheld or overturned:

- a federal statute;
- a state statute;
- a local statute or ordinance;
- non-legislative action by federal actors;
- non-legislative action by state actors; or
- non-legislative action by municipal actors.

Where the action challenged on appeal was that of a court rather than a party to the dispute, the court was treated as a federal, state, or municipal actor (as appropriate) for coding purposes. For instance, an opinion affirming a denial on the merits of a petition for habeas corpus filed following a state court conviction would be categorized as an opinion that upheld state action, while an opinion concluding that a district court's jury instructions failed to comport with due process requirements would be categorized as an opinion censuring federal action.

In order to highlight instances in which constitutional rulings went against government actors and in keeping with our aim, discussed above, to capture any relevant lack of deference, reviewers categorized opinions as upholding statutes or government action only where the challenged statutes or government actions were upheld in their entirety. Thus, even the partial overturning of a statute or narrow invalidation of a government action on constitutional grounds was coded as an overturning of a statute or government action.

B. Vote with Respect to Affirming or Overruling the Lower Court or Agency Decision

We next evaluated each opinion from a procedural standpoint in order to assess how the opinion treated the district court or agency decision it was reviewing. Thus, where the case came to the Second Circuit on appeal from a district court, the opinion was coded according to whether it affirmed the district court's ruling or, instead, overruled the district court in whole or in part. Similarly, where the matter before the Court of Appeals relates to an agency determination, the opinion was coded as either sanctioning the agency's determination or overruling that determination in whole or in part. Applications under *Anders* were coded according to whether the *Anders* application was granted or whether, instead, the application was denied or further action was required.

As with the first stage of our analysis, we designed our coding protocol for the second stage of our analysis to capture any measurable lack of deference to the lower court's decision. Accordingly, an opinion would be coded as affirming the determination of a lower court or agency only where that determination was affirmed in its entirety; anything less, such as a decision affirming the lower court in part and vacating in part, was coded as an overruling. The coding with respect to review of the lower court/agency decision was not limited to those aspects of each opinion concerned with constitutional issues but, instead, considered the overall ruling reached.

C. Degree of Agreement

In the third stage of our review, we assessed the degree to which each opinion reflected a given judge's expression of agreement with the other judges sitting on the same panel or joining him or her to sit en banc for a particular case. To accomplish this, reviewers first identified whether a case involved the determination of a panel of three judges or, instead, reflected the determination of the Second Circuit sitting en banc. Where a particular case was decided by a panel and that panel was unanimous, reviewers categorized a given judge according to whether he or she:

- wrote the opinion for an unanimous panel;
- joined an unanimous panel without a separate opinion;
- participated in an opinion issued *per curiam*; or
- wrote a separate opinion concurring in whole or in part with the majority opinion.

Where, instead, the panel was divided, reviewers recorded whether a given judge:

- wrote the majority opinion for a divided panel;
- joined the majority opinion of a divided panel;
- wrote an opinion concurring in whole or in part with the majority opinion; or
- wrote a dissent.

For en banc rulings, a similar coding protocol was followed. For unanimous en banc decisions, we tracked whether each judge:

- wrote the opinion for the unanimous circuit sitting en banc;
- joined an unanimous en banc ruling without a separate opinion;
- participated in an opinion issued *per curiam*; or
- wrote a separate opinion concurring in whole or in part with the majority opinion.

For divided en banc decisions, reviewers categorized each judge according to whether he or she:

- wrote the opinion for a majority of the circuit sitting en banc;
- joined the majority en banc opinion;
- wrote an opinion concurring in whole or in part with that majority en banc opinion;
- dissented alone;
- wrote a dissent joined by others; or
- joined another judge's dissenting opinion.

With respect to both panel and en banc rulings, and in keeping with our focus on capturing lack of deference, where a judge took multiple actions with respect to a given decision — such as by joining a majority opinion in part and dissenting in part — the reviewers categorized the judge according to the action that most distinguished him or her from his or her peers. In this example, the judge would have been categorized as dissenting, notwithstanding his or her partial agreement with the majority opinion.

D. Issue Area Classification

We further categorized each case according to whether it involved one or more of the following, potentially overlapping substantive areas:

- Civil Rights (identified through a search of the Constitutional Dataset for Westlaw key number "78 civil rights").

- Criminal Law (identified through a search of the Constitutional Dataset for Westlaw key number "110 criminal law");

- Due Process (identified through a search of the Constitutional Dataset for Westlaw key number "92XXVII due process"); and

- First Amendment (identified through a search of the Constitutional Dataset for Westlaw key numbers "92K13**!," "92K14**!," "92K15**!." "92K16**!," "92K17**!," "92K18**!," "92K19**!," "92K20**!," "92K21**!," "92K22**!," or "92K230*!").

E. Biographical Classification

Finally, for each judge we scrutinized available biographical information about the judge to determine:

- whether the judge was appointed by a Democratic or Republican president;
- whether the judge had formerly served as a state or federal judge prior to his or her appointment to the Second Circuit; and
- whether the judge had formerly served as a prosecutor prior to his or her appointment to the Second Circuit.

III. ANALYSIS OF RESULTS

After the coding process was completed, we used Microsoft Access and Microsoft Excel database software to analyze the data. First, we determined the percentage of the time that each judge voted under each of the aforementioned metrics of judicial deference. We then calculated the overall percentage of the time that judges on the Second Circuit Court of Appeals as a whole voted in a certain manner (to overturn a statute or invalidate a government action on constitutional grounds, for example).

Because some judges heard relatively few cases of a particular type, while others heard many, we utilized weighted means. More specifically, the percentages associated with each judge's voting behavior under a particular metric were "weighted" by the total number of cases that a judge heard under that metric, such that the voting behaviors of judges who heard fewer cases of a particular type exerted a smaller influence on court-wide percentages than those who heard a greater number. This method serves to eliminate potential distorting effects associated with disparate sample sizes among judicial caseloads.

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BRENNAN
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FOR JUSTICE

At New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
www.brennancenter.org