

## MR. JUSTICE POSNER? UNPACKING THE STATISTICS

STEPHEN J. CHOI & G. MITU GULATI\*

### INTRODUCTION

Obscurity defines the lives of most judges in the United States. Judges run trials, issue orders, and write opinions. The media occasionally reports on some high-profile case, but rarely focuses on the individual judge who wrote the opinion, issued the order, or ran the trial.<sup>1</sup> There are exceptions, of course, such as the O.J. Simpson trial and the U.S. Supreme Court's decision in *Bush v. Gore*, when the identities of the judges play a central role in accounts of the cases. But for the most part judges are treated as interchangeable cogs in a dispassionate justice system, and this seeming reluctance to take account of the individual judge's role extends to most academic discussions of cases that arise at any level other than the Supreme Court. This remains true despite widespread agreement in both the theoretical and empirical literature on judicial behavior that the individual characteristics of a judge will at least sometimes make a difference in determining the outcome of a case.

If obscurity defines the careers of most judges, notoriety defines that of Judge Richard A. Posner of the Seventh Circuit Court of Appeals. When his opinions are discussed, whether in an aca-

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\* Professors at New York University School of Law and Georgetown University Law Center, respectively. Thanks for helpful conversations with Scott Baker, Robert Blomquist, Devon Carbado, Edeanna Johnson, Ed Kitch, Kim Krawiec, Jim Rossi, Michael Solimine, Larry Solum, David Vladeck, and Un Kyung Park. Thanks also to Chris Kellett for excellent research assistance.

1. One of us used to ask the students in his Securities Regulation class every year to fill out a note card listing, among other things, the names of five *active* federal judges (*not* justices) whose cases the students had found interesting in prior classes. The purpose of the exercise was to put together a set of cases that the students would enjoy for the "recent cases" portion of the class. The justices on the Supreme Court were explicitly excluded because the Court decides very few Securities Regulation cases and all of the important ones are assigned to the students anyway. Among the names that frequently showed up on the students' note cards were Brennan, Holmes, Cardozo, Friendly, and Hand (all dead and, therefore, definitely *not active*); Rehnquist, Scalia, and O'Connor (alive, but all justices on the Supreme Court); and Judy (apparently a judge on television). Needless to say, the note cards did not serve their intended purpose. But it was interesting that there was one name that made it onto 487 out of the approximately 500 note cards that were filled out before we gave up handing them out: Judge Richard A. Posner.

demic context or in the media, his name is likely to be invoked. This notoriety is such that he has been profiled in the pages of the *New Yorker*,<sup>2</sup> debated Ronald Dworkin in the *New York Review of Books*,<sup>3</sup> excoriated the 9/11 Commission Report in the pages of the *New York Times Book Review*,<sup>4</sup> criticized the field of critical-race theory in the pages of the *New Republic*,<sup>5</sup> and used the opportunity of delivering the Holmes lectures at Harvard Law School to condemn the entire field of moral philosophy as producing work of little or no value to legal analysis.<sup>6</sup> He has written best-selling books ranging from his classic treatise on the economic analysis of law<sup>7</sup> to books covering sex, literature, aging, the federal courts, public intellectuals, and moral philosophy, all the way to the Monica Lewinsky affair.<sup>8</sup>

It is no news that Judge Posner is a judicial, academic, and media star. Whether they would agree with his ideas or not—and the present authors would take exception with more than a few—most academics would agree that Posner is one of the most creative thinkers in the recent history of the legal academy. He is also one of the fathers of the “law and economics” movement. Two decades ago, this field occupied the margins of the legal academy; now, thanks largely to the ubiquitous Posner, it dominates significant portions. Posner’s contributions to basic areas such as antitrust, contracts, torts, discrimination, sexual harassment, evidence, intellectual property, and judicial behavior (the list could go on) are

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2. Larissa MacFarquhar, *The Bench Burner*, THE NEW YORKER, Dec. 10, 2001, at 78. There have, of course, been many other articles about Judge Posner (many of which are nominally in the form of book reviews of something that Posner wrote, but spend a good deal of time discussing Posner himself). See, e.g., James Ryerson, *The Outrageous Pragmatism of Judge Richard Posner*, LINGUA FRANCA, May/June 2000, at 26.

3. Emily Bazelon, *Sounding Off*, LEGAL AFF., Nov./Dec. 2002, at 30, 31 (describing the debate between Posner and Dworkin in the pages of the *New York Review of Books*).

4. Richard A. Posner, *The 9/11 Report: A Dissent*, N.Y. TIMES BOOK REV., Aug. 29, 2004, at 1.

5. Richard A. Posner, *The Skin Trade*, THE NEW REPUBLIC, Oct. 13, 1997, at 40.

6. Richard A. Posner, *1997 Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

7. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed., 2003).

8. RICHARD A. POSNER, *SEX AND REASON* (1992); RICHARD A. POSNER, *LAW AND LITERATURE* (rev. and enlarged ed., 1998); RICHARD A. POSNER, *AGING AND OLD AGE* (1995); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1996); RICHARD A. POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* (2001); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* (1999).

considered so foundational that they are often the starting point for law school discussions of the topics, even where the professor is using Posner only as a foil to make her own point about how the doctrine in question should be understood. Posner has also produced foundational scholarship in areas yet untapped by most legal academics: what, for example, are the optimal regulatory responses to epidemics such as AIDS and obesity?<sup>9</sup>

Why, given his creativity, notoriety, academic achievement, and more than twenty years on the Seventh Circuit Court of Appeals, has Judge Posner not been elevated to the Supreme Court? A Supreme Court justice plays a very different role from that of a provocative academic or public intellectual. Would Posner's success on the Seventh Circuit translate into a successful stint on the Supreme Court? We don't know. Nevertheless, we argue that, given Posner's long career as a judge, data exists that can provide at least a starting point to evaluate his fitness for the job of Supreme Court justice.

In a recent article, "Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance" (referred to in this essay as the "*Choosing* article"), we reported that Judge Posner far outdid his judicial colleagues by almost every measure we used.<sup>10</sup> We intended a simplistic empirical analysis, one that would, at best, represent a first analysis of judicial performance at the circuit-court level, an analysis that would invite further investigation. Our hope was that by setting forth objective measures of what most people would view as related to merit, we could place the burden on politicians to explain in more detail the justifications behind the choices of nominees to the Court.

Once confronted with a ranking based on objective characteristics, we envisaged several ways politicians and others could look behind the numbers to assess the true merits of a nominee. For example, for any given high-scoring judge, what factors underlay

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9. See TOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (1993); Tomas Philipson & Richard A. Posner, *Public Spending on AIDS Education: An Economic Analysis*, 37 J.L. & ECON. 17 (1994); Tomas J. Philipson & Richard A. Posner, *The Long-Run Growth in Obesity as a Function of Technological Change* (Nat'l Bureau of Econ. Research, Working Paper No. 7423, 1999), available at <http://www.nber.org/papers/w7423.pdf>.

10. See Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004). Our work stands on the shoulders of others who pioneered the empirical examination of judicial performance including most prominently William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Court of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998).

the high scores? Were the high scores really representative of extraordinary performance or were they the result of luck? Did they suggest a venal judge who successfully gamed the system or a judge who in fact attempted to do justice, display judicial temperament, and be fair?<sup>11</sup>

In the present paper, we make a preliminary attempt to look behind the numbers for Posner. What drives his high scores? What does that tell us about him and his fitness for the high court?

For the active federal circuit-court judges during the 1998 to 2000 period who were still active as of 2003 (there were ninety-eight of them), we report data drawn from our *Choosing* article on three categories of judicial performance: productivity, quality, and independence. We assume that the willingness to work hard, produce high-quality work, and think and act independently are qualities that the majority of people consider desirable. We term these “widely held criteria.” A politician who supports a particular nominee because of that nominee’s narrowly held ideology (*e.g.*, legislating school prayer) would find it difficult to convince the broader public that the nominee was the best for the job if the nominee scored near the bottom of our objective measures.

We intended the measures described in the *Choosing* article to serve only as a starting point for our inquiry into the problem of judicial merit. In the present essay, we attempt to determine what these measures may reveal about Posner as a possible nominee to the Supreme Court.

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11. For discussions of what light empirical estimations of judicial performance at the circuit-court level can throw on a judge’s fitness for the Supreme Court, see Choi & Gulati, *supra* note 10; Daniel Farber, *Supreme Court Selection and Measures of Past Judicial Performance*, 32 FLA. ST. U. L. REV. (forthcoming 2005, manuscript on file with the NYU Annual Survey of American Law); Larry Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. (forthcoming 2005, manuscript on file with the NYU Annual Survey of American Law); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. (forthcoming 2005, manuscript on file with the NYU Annual Survey of American Law); David Vladeck, *Keeping Score: The Utility of Empirical Measurements in Judicial Selection*, 32 FLA. ST. U. L. REV. (forthcoming 2005, manuscript on file with the NYU Annual Survey of American Law); Stephen J. Choi and G. Mitu Gulati, *Which Judges Write Their Opinions?*, 32 FLA. ST. U. L. REV. (forthcoming 2005, manuscript on file with the NYU Annual Survey of American Law). See generally Steven Gey & Jim Rossi, *Empirical Measures of Judicial Performance: An Introduction to the Symposium*, 32 FLA. ST. U. L. REV. (forthcoming 2005, manuscript on file with the NYU Annual Survey of American Law) (draft available at <http://ssrn.com/abstract=614550>) (reviewing an array of articles on the topic of empirical research on judicial performance).

I.  
PRODUCTIVITY

Federal circuit court judges face overwhelming case loads. As a result, they are able to issue published opinions in only a small fraction of cases. We regard the number of published opinions produced by a particular judge as a rough measure of the amount of effort that judge has expended in the judicial process. A judge who publishes more opinions, other things held equal, probably exerts more effort or possesses greater skill at writing. Obviously, this is a rough measure, since there are many other factors that determine publication rates: the circuit's case load, the kinds of cases that the judge hears, the judge's seniority level, etc. In Table 1, taken from the *Choosing* article, we report the top ten judges in our sample based on productivity.<sup>12</sup>

**Table 1: Published Opinions Written from 1998–2000**  
(for the ten judges with the highest number of published opinions)

Judge	(A) Total Number of Published Opinions	(B) Total Number of Published Majority Opinions	(C) Circuit
Richard Posner	269	254	7
Frank Easterbrook	233	213	7
Joel Flaum	202	192	7
Diane Wood	194	173	7
Kenneth Ripple	182	151	7
Michael Kanne	177	176	7
Morris S. Arnold	175	152	8
John Coffey	168	162	7
James B. Loken	167	147	8
Roger L. Wollman	158	154	8

Summary Statistics for (A) (n=98): Mean = 98.1; Median = 85.5; Standard Deviation = 42.8; Kurtosis = 2.501; Skewness = 1.418.

Summary Statistics for (B) (n=98): Mean = 83.6; Median = 74.0; Standard Deviation = 41.5; Kurtosis = 2.918; Skewness = 1.576.

Table 1 reveals a wide margin between Judge Posner and the others. In a three-year period, Posner published 269 opinions, whereas the mean number of published opinions for the 98 active judges in our sample was 98.1. Even Easterbrook, the judge with the second-highest number of published opinions, published forty fewer opinions during this period. What explains this? Does Posner spend all his time writing opinions or forcing his clerks to write

12. See Choi & Gulati, *supra* note 10, at 44.

opinions? Or does he simply publish rubbish while his colleagues publish high-quality material?

Other than an article published in the *New Yorker* and a week-long diary that he kept for the online magazine *Slate*,<sup>13</sup> we lack detailed personal knowledge of how Posner spends his workday. We *do* know that he spends at least some time doing things other than writing opinions. He writes multiple books and articles every year, regularly teaches classes at the University of Chicago, participates in the faculty workshops and lunchtime roundtables at the University of Chicago Law School, and gives multiple workshops and lectures around the country; and those are only the activities that we know about as outsiders. As of this writing, he had even begun, along with Gary Becker, a blog site.<sup>14</sup> What is going on?

We investigated this question in the course of research for a paper that examined judicial authorship.<sup>15</sup> In that paper, we reported that Posner scores highly on several objective measures designed to assess the likelihood that a judge writes his own judicial opinions.<sup>16</sup> Informal discussions with former law clerks and members of the judiciary confirmed this result: Posner apparently writes every single word of his opinions—not most words or the majority of words, but every single word! And it must be borne in mind that this feat of authorship is accomplished in the context of a federal judiciary where most judges are *not* writing books and articles,

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13. See MacFarquhar, *supra* note 2; Richard Posner, *Diary*, SLATE, Jan. 14–18, 2002, at <http://slate.msn.com/?id=2060621&entry=2060676>.

14. Gary Becker & Richard Posner, THE BECKER-POSNER BLOG, at <http://www.becker-posner-blog.com> (last visited Apr. 5, 2005). Judge Posner has also been a guest blogger on sites such as the one run by Lawrence Lessig. Richard Posner, *Lessig Blog Archives: Richard Posner Guest Entries*, LESSIG BLOG, at <http://www.lessig.org/blog/archives/posner.shtml> (last visited Apr. 5, 2005).

15. See Choi & Gulati, *supra* note 11.

16. See *id.* In the authorship paper, we first examined a number of “generic” tests of authorship drawn from computational linguistics. We failed, however, to control for subject matter of the opinion and this led to spurious results. We also examined a number of tests more tailored for the judicial context that are more robust in respect to subject-matter differences across opinions. Using these more robust tests, we found that Posner consistently scored in the top 10 in terms of self-authorship of judicial opinions. See *id.* (manuscript at 40–51). Our results must be accompanied by two caveats however. First, our robust tests may in fact not be measuring authorship. If this is the case then the fact that Posner scores highly is meaningless. Indeed, we start from the presumption that Posner writes his own opinions (based on informal inquiries among members of the judiciary) and use this to calibrate the effectiveness of our authorship tests. Second, more precise tests that explicitly control for subject matter of opinions are nonetheless required if we are to make more definitive statements with respect to who authors their own opinions.

teaching classes, sitting by designation on the district court, and giving workshops, yet are reputed to delegate large portions of the opinion-writing task to their law clerks. What is more shocking is that Posner uses only two of the four law clerks to which he is entitled.<sup>17</sup> Apparently, he does not have enough work for four clerks. And even those two clerks are said to have relatively little to do.<sup>18</sup>

Seven of the top ten publishers of opinions sit on the Seventh Circuit. This raises the possibility that there is some kind of higher-than-average publishing norm on the Seventh Circuit. Perhaps the credit for the high publication numbers is at least partially attributable to the circuit itself, such that to the extent Posner gets special credit, it should only be to the extent that he publishes more than his colleagues on the circuit.<sup>19</sup>

In an earlier paper, one of us reported a comparison between the Seventh Circuit's publication rates and those of the Third Circuit (another circuit with a relatively unremarkable docket) at the time Posner joined the Seventh Circuit.<sup>20</sup> The Third Circuit rates remained relatively flat while there is a sharp upward trajectory in the Seventh Circuit just as Posner became a judge.<sup>21</sup> Did Posner cause the jump, or was there some other external factor at work?

In the course of presenting our objective measures of judicial performance at workshops around the country, we heard a variety of stories about the "Posner effect" on the Seventh Circuit's produc-

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17. In 2003, he began using three law clerks (apparently, as an experiment to see whether there would be any value to having an additional member of the chambers).

18. Much the same appears to be true for Judge Easterbrook, who also manages to teach, write multiple articles a year, and do all his own writing with the use of only two clerks to provide research assistance. One interesting difference between Posner and Easterbrook appears to be that while Posner does ask his law clerks to help him with background research, Easterbrook seems to do much of his own research in addition to doing all of his own writing (that is, all but the one or two opinions a year that he might allow his law clerks to draft). And that raises the puzzle of what exactly it is that Easterbrook's clerks do. That question perhaps will be answered by whoever tries to unpack the Easterbrook data.

19. We also ranked the circuit-court judges in our sample, while controlling for intercircuit differences. Under this control, we adjusted the mean number of publications in each circuit to be identical. Rankings therefore turned on how far away a particular judge is from the mean publication number for her particular circuit. Even under this alternate measure of productivity, Posner again ranks first among all the judges in terms of productivity. See Choi & Gulati, *supra* note 10, at 46.

20. Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141, 1180–81 (2002).

21. *Id.*

tivity. All of the stories started with the anecdote that Posner, having quickly dealt with all the cases that he had been assigned, was bored. He could have turned to his articles or books or teaching. But he had just become a judge and wanted to do more judging-related tasks. So he went to the chief judge at the time, Judge Cummings, explained that he was underworked, and asked if he could be assigned some additional cases.<sup>22</sup> At this point, the stories start to diverge. Some versions say that Posner began taking cases from his colleagues and writing opinions for them. Other versions have Posner simply being assigned more of the cases, especially those, such as some of the motions and habeas cases, that did not generally require oral argument. Still other versions say that his colleagues were outraged and annoyed, felt that he was trying to show them up and, while ostracizing him from their social gatherings, began to work harder themselves.

The real story is more mundane. Posner did go to Judge Cummings and offer to do additional work. But Cummings explained that there was a strict norm on the circuit that all the active judges were assigned the same number of cases. The only way that Posner could be assigned additional cases was to do cases at the district court level. Posner did (and still does) sit by designation every year at the district court level.<sup>23</sup> And while he was not initially successful in increasing his case load at the Seventh Circuit, his persistence in producing high-quality published opinions (as opposed to unpublished opinions) did eventually result in the other judges on the circuit also increasing the numbers of their published opinions.

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22. We report the mildest version of this anecdote (and, based on our limited ability to verify, the one most likely to be true). In some of the versions that we have heard, Posner not only asks to be assigned additional cases, but actually starts doing that additional work, and then, not finding that enough, asks for even more.

23. Posner appears to find the dynamics of sitting as a trial judge (and the question of why judges in many cases seem to work so hard to prevent certain issues from going to trial) fascinating. Put differently, he seems to think that one cannot get a meaningful understanding of the posture of a case on appeal without understanding the dynamics at the lower court level. Unfortunately, we have not been able to gather comparative data on how many times the different circuit judges sit by designation on the district courts. But, anecdotally, our sense is that most circuit judges rarely sit as district court judges. That said, many circuit judges, unlike Posner, had extensive trial court experience in their prior careers and probably don't need to sit as a trial court judge to understand the dynamics there. Nevertheless, this information would be relevant to those who think that Posner is less qualified for the Supreme Court because he lacks trial court experience. If the data demonstrates that he does sit extensively at the trial court level, perhaps this critique of Posner could be removed.



We are aware of no sudden change in the caseload of the Seventh Circuit that corresponds to the increase in publication rates that can be observed at the time Posner joined the circuit. Posner therefore appears to be at least partially responsible for the increase in productivity of published opinions on the Seventh Circuit.

## II. QUALITY

Judicial opinions are a type of product and the “customers” for this product include other judges, legal academics, and lawyers. The products all have the same price (essentially zero for legal academics and judges) and, as a result, customers do not make choices based on price. We infer that choices are made based on quality.

As a rough measure of the quality of judicial opinions, we use a variety of citation counts. Citation counts are a measure of the level of use of the product and indirectly, therefore, quality. Of course judges do not all decide the same case. They produce different types of products, not just products of different qualities. A judge who writes a securities law opinion may receive fewer citations than a judge who writes an opinion dealing with the Constitution. Nevertheless, we assume that over a long period of time, as judges write across a number of different substantive areas of law, such differences will even out.<sup>24</sup>

Table 2 reports a snapshot of citation scores for a variety of measures taken from our *Choosing* article.<sup>25</sup> We look at (A) the total number of outside-circuit citations, defined to include citations from circuit courts outside of a judge’s home circuit, state court citations, and U.S. Supreme Court citations. We also look at (B) the number of citations by the U.S. Supreme Court as well as (C) the number of citations by law reviews and periodicals. Lastly, we look at (D) the number of times a judge cites to her own opinions (self-citations). Landes, Lessig, and Solimine suggest that judges who write more of their opinions engage in more self-citations (due to their greater familiarity with their own self-authored opinions).<sup>26</sup>

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24. Not all circuit courts are the same however. The D.C. Circuit in particular hears a disproportionate number of administrative law-related cases.

25. See Choi & Gulati, *supra* note 10, at 50.

26. See Landes et al., *supra* note 10, at 274.

**Table 2: Citations to Opinions Published from 1998–2000**  
(for the ten judges with the highest total number of outside citations)

(A) = Total Outside Circuit Citations; Z(A) = Z-Score of normalized (A)  
 (B) = SCT Citations; Z(B) = Z-Score of normalized (B)  
 (C) = Law Review and Periodical Citations; Z(C) = Z-Score of normalized (C)  
 (D) = Self-Citations; Z(D) = Z-Score of normalized (D)  
 (E) = Circuit

Judge	(A)	Z(A)	(B)	Z(B)	(C)	Z(C)	(D)	Z(D)	(E)
Richard Posner	1406	2.61**	16	2.31**	1033	2.41**	392	2.35**	7
Frank Easterbrook	1340	2.52**	14	2.11**	790	1.83	257	1.95*	7
Sandra L. Lynch	1023	1.99**	5	0.62	684	1.52	178	1.60	1
Bruce M. Selya	949	1.85	3	-0.04	727	1.65	364	2.28**	1
Paul J. Kelly	799	1.51	0	-2.29**	388	0.30	103	1.07	10
Michael Kanne	768	1.44	4	0.32	512	0.90	181	1.61	7
Joel Flaum	743	1.37	3	-0.04	613	1.29	126	1.27	7
Kenneth Ripple	730	1.34	4	0.32	545	1.03	168	1.54	7
Diane Wood	678	1.20	3	-0.04	513	0.90	127	1.27	7
Harvie Wilkinson III	662	1.15	4	0.32	648	1.41	23	-0.36	4

\*\* Indicates a Z-Score of 1.96 or higher (representing a two-sided probability of <5% for a normal distribution). The Z-Score provides a statistical measure of the distance of a particular data point from the mean. Outside circuit citations measured to May 31, 2003. Normalized (A) is equal to LN(Total Outside Circuit Citations). Normalized (B) is equal to LN(1+SCT Citations). Normalized (C) is equal to LN(Law Review and Periodical Citations). Normalized (D) is equal to LN(Self Citations).

Summary Statistics for (A) (n=98): Mean = 417.3; Median = 383.0; Standard Deviation = 229.5; Kurtosis = 5.028; Skewness = 1.795.

Summary Statistics for normalized (A) (n=98): Mean = 5.903; Median = 5.948; Standard Deviation = 0.515; Kurtosis = 0.025; Skewness = -0.020.

Summary Statistics for (B) (n=98): Mean = 3.837; Median = 4.000; Standard Deviation = 2.757; Kurtosis = 4.583; Skewness = 1.547.

Summary Statistics for normalized (B) (n=98): Mean = 1.410; Median = 1.609; Standard Deviation = 0.616; Kurtosis = 0.438; Skewness = -0.657.

Summary Statistics for (C) (n=98): Mean = 374.2; Median = 375.0; Standard Deviation = 172.0; Kurtosis = 1.408; Skewness = 0.992.

Summary Statistics for normalized (C) (n=98): Mean = 5.822; Median = 5.927; Standard Deviation = 0.464; Kurtosis = -0.497; Skewness = -0.148.

Summary Statistics for (D) (n=98): Mean = 56.51; Median = 30.50; Standard Deviation = 69.05; Kurtosis = 9.287; Skewness = 2.807.

Summary Statistics for normalized (D) (n=98): Mean = 3.508; Median = 3.418; Standard Deviation = 1.049; Kurtosis = 0.509; Skewness = -0.149.

Judge Posner is at the top for all of these measures.<sup>27</sup> He is cited more by his colleagues on the Seventh Circuit, by other circuit judges, by law professors, and by the Supreme Court. More striking

27. One possible objection to our various measures in Table 2 is that Posner enjoys an advantage due to his productivity. A judge who writes 500 opinions will have more citations compared with a judge who only writes 100 opinions. To control for the productivity effect, we looked at the average number of outside-circuit citations per opinion as well as the total number of outside-circuit citations to the twenty opinions by each judge that received the most outside-circuit citations. While Posner is the fourth-highest ranking judge in terms of the number of outside-circuit citations to his top twenty opinions, he does not place in the top 10

than the variety of measures on which Judge Posner out-performs his colleagues is the degree by which he out-performs them. Apart from his Seventh Circuit colleague, Frank Easterbrook, no one else comes close.

Are Posner's opinions really that much better than everyone else's? Or is there some underlying dynamic that produces the illusion of a difference in quality? We attempt to unpack the data in four ways that address these questions: (A) by determining the extent of Posner's dominance by most of the citation measures (what we call the "superstar effect"); (B) by identifying the nature of those opinions that garner a large number of citations; (C) by identifying any biases among judges who cite Posner; and (D) by considering whether high citation counts are the product of a "citation game" among judges.

#### A. *The Superstar Effect*

Posner has more than three times the number of outside-circuit citations than the average judge in our sample of ninety-eight active circuit-court judges. Even if Posner writes better-argued or more elegantly phrased opinions than most of his judicial colleagues, surely he is not fourteen times better than those at the low end of the scale or more than three times better than those at the mean.<sup>28</sup>

As Dan Farber points out, the distribution of outside-circuit citations (and many of the other citation count distributions) is skewed.<sup>29</sup> Most judges are bunched together at the lower end of the distribution and a few outliers, such as Posner, dominate the higher end. Farber suggests that there may be a superstar effect at play.<sup>30</sup> Since the price of using a particular opinion is the same regardless of the quality of the opinion, every customer has an in-

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for the average number of outside-circuit citations per majority opinion. *See* Choi & Gulati, *supra* note 10, at 53.

As an additional measure of opinion quality we looked at the number of times a particular judge was not only cited but also "invoked." An invocation involves a reference to the cited judge by name—something we took as a special sign of respect for the judge and the judge's particular opinion. Posner again ranks highest in terms of both total invocations as well as average invocations per opinion. *Id.* at 60.

28. Karen Henderson of the DC Circuit received the lowest number of outside circuit citations (109 citations) in our sample. *See id.* at 94–99.

29. *See* Farber, *supra* note 11 (manuscript at 17, 22).

30. *Id.*

centive to use the best opinion.<sup>31</sup> This will be so even if the second- and third-best opinions are only slightly inferior to the best one. The best opinions will capture the lion's share of the citations and all the other opinions on the same subject will capture very few. One therefore needs to be cautious in interpreting the large citation differences between Posner and the others as an indication of the *magnitude* to which Posner's opinions are better than those of the others.

Large differences in citation counts can also be produced by small initial differences in factors such as prior reputation (with which someone like Posner came to the bench endowed).<sup>32</sup> In other words, the judge receiving the largest number of citations might not be the best opinion writer. Citation measures may be significant indicators, but we must exercise caution in reaching conclusions based on citation numbers alone. Farber nonetheless points out that there are other measures, such as the number of law-review citations and the number of outside-circuit citations to a judge's top twenty opinions, that *do* seem to be normally distributed.<sup>33</sup>

### B. *Opinions Garnering Numerous Citations*

In this section, we will examine those Posner opinions that are cited most frequently. There are at least two questions as to which we hope to gain preliminary insights. First, are Posner's citations the results of extensive discussions of basic (and trivial) matters such as the standard of review? Almost every judicial opinion, as a matter of course, contains a discussion of the standard of review. So, the judge who invests a great deal of resources into writing a good description of the standard of review might obtain a large number of cites. But, from a social point of view, her resources might be better spent deciding cases and providing explanations for her decisions, rather than coming up with flowery descriptions

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31. We are here talking about the nominal price. The real price differs because it takes into account opportunity costs and the opportunity costs of using a bad (that is, one that is unclear or inadequately explained) opinion will presumably be higher than those of using a good opinion.

32. Larry Solum also makes this point, albeit in slightly different terms than Farber. Farber refers to both the literature on superstar economics and network effects, whereas Solum focuses on the latter. *See* Solum, *supra* note 11 (manuscript at 16). Our understanding is that the underlying dynamics of the two stories are slightly different, although the end result in both cases is the explication of a dynamic where initial difference in endowments of luck or prior reputation can result in dramatic differences in final outcomes.

33. *See* Farber, *supra* note 11 (manuscript at 21).

of the standard of review that are more likely to be cited. A higher number of citations for providing the best discussion of the standard of review might therefore not be a good indicator of fitness for the Court. On the other hand, if the citations were for elegant solutions to highly complex questions (that is, cutting proverbial Gordian knots), we might suspect such solutions to have merited citation.

The second question has to do with the types of cases for which Posner obtains his citations. Since the question at issue is fitness for the Supreme Court, the question arises whether his citations are primarily in the types of cases that the Court does not handle. Given that his fame as an academic is primarily the result of his insights about common law cases and those other areas that most directly implicate economic analysis—in such areas as torts, contracts, antitrust, corporations, securities regulation—perhaps those are the types of cases where he gets his citations. And those are not the types of cases that dominate the Court's docket. Conversely, maybe he does not get cited for his discussions of how to interpret complex federal statutes; the types of questions that do dominate the Court's docket.

As a preliminary step towards the painstaking research that such an inquiry would entail, we looked at the subjects of Posner's twenty most-cited opinions, as reported below in Table 3.

**Table 3: Subject Matter of Posner's Top 20 Published Opinions Receiving Outside Citations Reported From 1998–2000**

<i>Subject Matter of the Opinion</i>	<i># Opinions</i>
Applicability of the federal habeas corpus statute	4
Administrative law (involving the NLRB and Social Security Administration respectively)	2
Diversity jurisdiction suit—contract law-related issue	2
Employee Retirement Income Security Act (ERISA)	2
Equal Protection Clause—§ 1983 action	2
Americans with Disabilities Act	1
Class action involving Racketeer Influenced and Corrupt Organizations Act (RICO)	1
Class action involving the Truth in Lending Act, Illinois Consumer Fraud and Deceptive Business Practices Act, and Illinois Uniform Deceptive Trade Practices Act.	1
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)	1
Criminal law (federal narcotics charges)	1

<i>Subject Matter of the Opinion</i>	<i># Opinions</i>
Family and Medical Leave Act, Pregnancy Discrimination Act, and Fair Labor Standards Act	1
Federal Communications Act	1
Title VII, Americans with Disabilities Act, and Age Discrimination in Employment Act	1

Posner's most-cited opinions are not on basic procedural or substantive legal points. For that matter, nor do they arise out of corporate, securities, or antitrust cases. The latter category of cases do not tend to dominate the Supreme Court's docket, although one might expect them to attract the attention of someone like Posner with a background in law and economics. Instead, among the twenty most-cited Posner decisions, the largest concentration of cited opinions is on the applicability of the federal habeas corpus statute. The next largest concentration of opinions deals with ERISA, the review of administrative agency decisions (the NLRB and Social Security Administration), and the Equal Protection Clause. Note, however, that two of Posner's opinions are diversity jurisdiction opinions dealing with issues related to contract law. Among the remaining opinions are decisions dealing with a number of complex federal statutory schemes, including RICO, CERCLA, and Title VII. At least from our preliminary analysis, most of Posner's top citation garnering opinions are in the types of cases that the Supreme Court handles. And the citations do not appear to be the product of discussions of basic procedural questions such as standards of review. To the contrary, Posner's opinions appear remarkably bereft of the routinely extensive discussions of matters such as the standard of review that other judges seem to regard as necessary.

### *C. Bias*

Posner may receive more than his fair share of citations for reasons unrelated to the quality of his judicial opinions. It may be, for example, that judges with a background in academia tend to write in an especially provocative and pedagogic fashion. This style, as opposed to substance, might generate high citation numbers. Putting aside the difficult question of whether style can be separated from substance when determining the quality of an opinion, it seems worthwhile examining whether an academic bias has favored the citation of Posner's opinions.

A quick perusal of citations reveals that a number of former academics—Posner, Easterbrook, Wood, Moore, and Wilkinson—do extremely well on a number of the measures. Tracey George's

empirical 2001 study<sup>34</sup> allows us to look further at the performance of the nine academics in our sample whom she identifies as such. George's empirical study, based on a somewhat different data set, suggests that academics perform differently than the rest of their judicial colleagues in a variety of ways, including citation counts, publication practices, and reversal rates.<sup>35</sup> Table 4 below describes the nine academics' performance on our citation-count measures:

**Table 4: Citations for Academic Judges for Opinions Published from 1998–2000**

<i>Judge</i>	<i>(A) Total Outside-Circuit Citations</i>	<i>(B) SCT Citations</i>	<i>(C) Outside-Circuit Citations to Judge's Top Twenty Opinions</i>
Posner	1406	16	570
Easterbrook	1340	14	667
Wood, D.	678	3	327
Wilkinson	662	4	425
Bowman	573	4	371
Calabresi	566	7	371
Sloviter	403	5	277
Cabranes	396	1	229
Arnold, M.S.	369	6	188

Academic Judges are those judges in our dataset with a prior academic career as identified in Tracey George, *Court Fixing*, 43 ARIZ. L. REV. 9 (2001).

Summary Statistics for (A) (n=98): Mean = 417.3; Median = 383.0; Standard Deviation = 229.5; Kurtosis = 5.028; Skewness = 1.795.

Summary Statistics for (B) (n=98): Mean = 3.837; Median = 4.000; Standard Deviation = 2.757; Kurtosis = 4.583; Skewness = 1.547.

Summary Statistics for (C) (n=98): Mean = 277.9; Median = 256.5; Standard Deviation = 121.2; Kurtosis = 2.608; Skewness = 1.382.

Academic judges, as a group, generally score above the mean on the three citation counts that we looked at. That said, Table 4 also suggests that the Posner and Easterbrook numbers are driven by something other than academic background alone. For example, for the first two measures—outside-circuit citations and Supreme Court citations—Posner and Easterbrook have nearly *double* the number of citations attained by the academic who ranks third in the table. And on the third measure, outside-circuit citations to each judge's top twenty opinions, Posner has almost 250 more citations than the judge in third position. While academics do seem to do better than the mean on these citation measures, academic

34. Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9 (2001). George limits her analysis to only certain types of opinions (*e.g.*, en banc opinions, opinions with an academic judge on the panel, etc.) and only certain circuits. *See id.* at 47, 51.

35. *See id.* at 43–54.

background alone does not seem to explain the Posner and Easterbrook numbers.<sup>36</sup>

Another source of bias that may affect citation counts is the political affiliation of the citing judges. Do Republicans cite other Republicans more? Do they cite famous Republicans even more than ordinary Republicans? Is there some Republican conspiracy to ensure that Posner is at the top of the rankings? Research suggests both (a) that a judge's party of appointment does seem to influence a variety of judicial outcome variables<sup>37</sup> and (b) that citation scores often reflect hidden biases such as informal citation clubs where like-minded folks cite each other.<sup>38</sup>

To test the claim of political bias, we look at the citations to Posner's opinions by the other judges in our sample of ninety-eight active circuit-court judges. If citations occur along party lines, then we hypothesize that the rate at which Posner is cited by Republican appointees should be substantially higher than the rate at which he is cited by Democratic appointees. Table 5 categorizes the ninety-seven other active circuit judges in our sample as to political affiliation by the political party of the president who nominated each and reports the number of times each judge cited a Posner opinion written from 1998 to 2000.

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36. It is not clear to us why a particular measure should be deemed problematic just because it favors certain people more than others. The very idea of merit is based on the premise that some will do better than others. If the measure favors academics because academics produce higher quality products, then the measure is capturing exactly what it is meant to capture. The problem instead seems to be one of possible bias in those suggesting the measure (that is, the two authors of this essay). It looks suspicious when two academics suggest a measure of merit that seems to favor academics over others. And there is a large literature on self-serving biases that suggests that there may be a problematic dynamic at work here. We hope not in this case, but it is possible. For a critique of our treatment of judicial merit, see Patrick S. Shin, *Judging Merit*, 78 S. CAL. L. REV. 137 (2004). See also Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353 (2005) (discussing whether merit can be defined separately from ideology in the judicial appointments process).

37. See Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 305 (2004); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997).

38. There is an extensive body of work in economics and elsewhere that examines patterns of citations as a means to study the evolution of ideas. Among the findings in this literature have been those of citation clubs or clusters where those at the same institution or within the same theoretical cluster tend to cite each other more. On the subject, see George Stigler & Claire Friedland, *The Citation Practices of Doctorates in Economics*, 83 J. POL. ECON. 477 (1975) (finding evidence of citation clusters). For more recent findings, see Kenneth W. Clements & Patricia Wang, *Who Cites What?*, 79 ECON. REC. 229 (2003).



**Table 5: Outside Circuit Court Judges Citations to Posner from 1998–2000**

<i>Democrat-Appointee Judge</i>	<i>Circuit</i>	<i>Citations</i>	<i>Republican-Appointee Judge</i>	<i>Circuit</i>	<i>Citations</i>
Lynch	1	8	Selya	1	5
Cabranes	2	1	Torruella	1	5
Calabresi	2	2	Boudin	1	7
Parker	2	0	Jacobs	2	2
McKee	3	1	Walker, Jr.	2	3
Sloviter	3	1	Scirica	3	3
Rendell	3	2	Alito	3	4
Michael	4	1	Nygaard	3	0
Motz	4	2	Roth	3	0
Benavides	5	1	Widener	4	1
Dennis	5	1	Niemeyer	4	2
Stewart	5	3	Wilkinson	4	2
King	5	5	Williams	4	3
Martin, Jr.	6	1	Wilkins	4	0
Daughtrey	6	0	Luttig	4	0
Moore	6	2	Davis	5	1
Clay	6	3	Garza	5	1
Cole	6	3	Jones	5	1
Gilman	6	4	Barksdale	5	2
Murphy	8	2	Higginbotham	5	2
Hawkins	9	1	Jolly	5	2
Pregerson	9	2	Smith	5	3
Schroeder	9	2	Wiener	5	0
Reinhardt	9	3	DeMoss	5	0
Tashima	9	3	Batchelder	6	1
Thomas	9	0	Boggs	6	4
Briscoe	10	1	Bowman	8	1
Lucero	10	2	Loken	8	1
Murphy	10	2	Wollman	8	2
Henry	10	4	Arnold	8	3
Seymour	10	7	Kelinfeld	9	1
Hull	11	1	Nelson	9	1
Barkett	11	2	Trott	9	2
Marcus	11	3	O'Scannlain	9	6
Anderson III	11	0	Kozinski	9	0
Edwards	DC	1	Rymer	9	0
Rogers	DC	1	Tacha	10	1
Tatel	DC	1	Kelly	10	2
Garland	DC	3	Ebel	10	8
			Birch	11	1
			Dubina	11	1
			Black	11	3
			Carnes	11	6
			Tjoflat	11	0
			Edmondson	11	0
			Ginsburg	DC	1
			Henderson	DC	1
			Randolph	DC	1
			Sentelle	DC	0

Note first that there is no significant difference between Democrat- and Republican-nominated judges. Both groups range from 0

to a maximum of 8 citations to Posner for the time period. Democrats cited Posner an average of 2.10 times over the three-year period; Republicans cited Posner 1.96 times (two-sided t-test of the difference of the means = 0.359; statistically insignificant). Indeed, 89.7% of the Democratic judges cited to Posner at least once during the 1998 to 2000 time period. Only 77.6% of the Republican judges cited to Posner at least once during the same period. If anything, Democratic judges are more inclined to cite Posner than Republican judges.

In addition, we may gain insight by examining the distribution of citations to Posner. If the distribution of citations to Posner opinions across different judges outside the Seventh Circuit has a flat pattern (low kurtosis), we may conclude that the judges view Posner roughly in the same manner. (Given Posner's high overall citation count, this is presumably a positive view.) If instead, the distribution curve of citations to Posner opinions across the different outside-circuit judges has a thick center or multiple peaks, this supports the view that Posner is viewed differently by the various judges, with some viewing him a great deal more positively than others. The kurtosis for the distribution of citations to Posner by all judges is 2.00, indicating a relatively flat distribution.

We also collected two years of data on whom Posner himself cited from 1997 to 1998.<sup>39</sup> If there is a high correlation between the citations *by* Posner and the citations *to* him, this would suggest the potential for some kind of reciprocal dynamic (that is, I will cite you if you cite me). Excluding Seventh Circuit judges, Posner cites to at least one opinion written from 1997 to 1998 for 86.1% of our active circuit-court judges. Posner, however, is not as uniform in his citation practice as the others are to him. The ten judges receiving the most citations by Posner account for over 40% of the total number of citations to outside-circuit opinions in our sample that Posner makes during the time period. The kurtosis measure for the distribution is 22.4 (indicating a peaked distribution). Posner plays decided favorites in whom he cites (despite the relatively even number of citations he receives from the active circuit judges as reported in Table 5 above). Table 6 details the top ten judges cited by Posner from 1997 to 1998, excluding judges from the Seventh Circuit. In a sense, this might be seen as Posner's ranking of the judges outside his circuit (although, to say anything meaningful on that point, we would have to look at a larger number of years).

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39. The 1997 to 1998 time period corresponds to a new study for which we are currently collecting data pertaining to the citation patterns of federal circuit court judges.

**Table 6: Top 10 Judges Cited by Posner Outside of the Seventh Circuit**

<i>Party</i>	<i>Judge Cited</i>	<i>Circuit</i>	<i>Total Citations by Posner</i>
R	Selya	1	44
R	Wilkinson	4	28
D	Edwards	D.C.	17
R	Boggs	6	12
R	Boudin	1	12
D	Calabresi	2	11
R	Higginbotham	5	11
R	Smith	5	10
R	Ebel	10	9
R	Wollman	8	9

*D. Understanding the Citation Game*

Among other topics, Posner has written on the question of judicial greatness and how to measure it empirically. Posner has evaluated the careers of both Cardozo and Learned Hand in statistical terms and has used citation analysis in both instances.<sup>40</sup> In addition, he has written on citation analysis itself.<sup>41</sup> All of this suggests that Posner has thought about the question of what kinds of opinions are likely to get cited more. And given his intellectual abilities and the fact that he does get cited so much more than almost anyone else, it is not a big jump to infer that he may have figured out how to win the citation game.

Suppose for argument's sake that Posner in fact does tailor his opinions to generate more citations. This fact alone does not mean that his citation counts are not valid measures of quality. To reach the latter conclusion one would have to specify the types of citations that are invalid and the types that are valid. One might decide, for example, that citations to lengthy expositions on basic procedural issues that everyone already understands (but that always require a citation) should not be counted, whereas clear expositions of complex issues that heretofore were not understood well should be counted. Such an analysis of citation type would, of course, be subjective. But an empirical test could be run, as we have done somewhat crudely in Table 3 above, which listed the subject matter of

40. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 74–91 (1990); Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 *YALE L.J.* 511, 534–40 (1994) (book review).

41. See Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 *AM. L. & ECON. REV.* 381 (2000).

the twenty Posner opinions that received the most citations from 1998 to 2000. Our sense from reading a considerable volume of Posner opinions is that his opinions are valued more for the latter type of analysis—clear exposition—than the former. This, however, is a question worth examining in further detail.

### III. INDEPENDENCE

We used two measures of independence in our *Choosing* article. First, we looked at the number of dissents and concurrences that a judge wrote.<sup>42</sup> Writing a dissent or concurrence takes time and effort. Moreover, a dissent or concurrence puts the authoring judge in opposition to the majority opinion judge. A willingness to write dissents or concurrences therefore provides an indication of a judge's independence. Such a measure is, of course, imperfect. A measure of the number of dissents and concurrences may track cantankerousness and unwillingness to compromise as opposed to real independence.

Second, in our *Choosing* article, we looked at the number of times a judge was in opposition to another judge of the same political party (as proxied by the political party of the president who nominated the judge). We termed this the "ideological bias" measure.<sup>43</sup> Opposing opinions included both the dissents that a judge writes and the dissents that are written against that judge. We then developed an "expected" dissent rate against judges of the same political party if a judge simply dissented against (or was dissented against by) other judges on the same circuit at random. If 90% of the other judges on the circuit were Republican, we would expect 90% of the opposing opinions to be against a Republican judge. To determine independence, we looked at the differential between the actual dissent rate against judges of the same political party and the expected rate. Table 7, taken from the *Choosing* article, reports on the two independence measures.<sup>44</sup>

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42. Choi & Gulati, *supra* note 10, at 62.

43. *Id.* at 63.

44. *Id.* at 108–12.

**Table 7: Number of Opposing Opinions and Independence Ratings for the Period 1998–2000**  
(twenty judges with best independence ratings)

(A) = Independence Rating  
(B) = Number of Dissents and Concurrences  
(C) = Adjusted Dissents and Concurrences for Inter-circuit Differences

Judge	(A)	(B)	(C)	Z-Score for (C)	Circuit
David M. Ebel	0.000	12	25	0.16	10
R. L. Anderson III	0.000	10	24	0.06	11
Michael J. Luttig	-0.006	19	26	0.35	4
Samuel A. Alito	-0.015	18	29	0.65	3
Carl E. Stewart	-0.017	2	10	-1.49	5
E. Grady Jolly	-0.018	10	18	-0.56	5
Juan R. Torruella	-0.018	10	27	0.44	1
Diane Wood	-0.018	21	27	0.44	7
Richard Posner	0.019	15	21	-0.26	7
Edward Earl Carnes	-0.022	14	28	0.53	11
Anthony J. Scirica	-0.023	2	13	-1.22	3
Mary M. Schroeder	0.023	5	5	-2.12**	9
Terrence Evans	0.024	18	24	0.09	7
Harold R. DeMoss, Jr.	0.024	30	38	1.78	5
Daniel Manion	0.028	20	26	0.33	7
Merrick B. Garland	-0.037	3	15	-1.01	D.C.
Frank Easterbrook	-0.042	20	26	0.33	7
Sandra L. Lynch	-0.043	7	24	0.09	1
Stephen Trott	-0.044	19	19	-0.49	9
Joel Flaum	-0.044	10	16	-0.84	7

\*\* Indicates a Z-Score of 1.96 or higher (representing a two-sided probability of <5% for a normal distribution). The Z-Score provides a statistical measure of the distance of a particular data point from the mean. The number of dissents and concurrences for each judge is adjusted so that the mean number of total dissents and concurrences for each circuit is identical and equal to 23.167 (the unadjusted mean number of total opinions for the Ninth Circuit).

Summary Statistics for (A) (n=98): Mean = -0.062; Median = -0.057; standard deviation = 0.189; Kurtosis = 0.307; Skewness = 0.307.

Summary Statistics for (B) (n=98): Mean = 14.469; Median = 13.00; standard deviation = 9.692; Kurtosis = 1.344; Skewness = 1.042.

Summary Statistics for (C) (n=98): Mean = 23.170; Median = 22.869; standard deviation = 8.557; Kurtosis = 0.796; Skewness = 0.646.

The independence measure based on sheer number of dissents and concurrences is the one measure by which Posner does not score exceptionally well. His dissents and concurrences are not statistically different from the mean.<sup>45</sup>

On the independence measure based on our metric of ideological bias Posner scores ninth-highest out of the ninety-eight judges.<sup>46</sup> However, a close look at the data may lead us to question Posner’s high showing in the ideological bias measure of indepen-

45. *Id.*

46. *Id.*

dence and serve to underline the highly preliminary nature of the tests in our *Choosing* article. Looking at the top ten judges receiving outside circuit citations from Posner in Table 6 above, we see that Posner displays a preference for citing Republicans. While 56% of our sample of active circuit judges consists of Republicans, eight of the ten judges cited most frequently by Posner are Republican. Of the other judges, Posner cites at least once to 97.5% of the Republican-nominated judges while citing to only 71.4% of the Democratic-nominated judges (two-sided t-test of the difference between means = 3.38: significant at the 1% level). On the other hand, aside from citations to Selya, Wilkinson, and Edwards (a Democratic-appointee), the number of citations by Posner ranges fairly narrowly from 0 to 12.

The relatively small number of dissents and concurrences authored by Posner is also surprising to those of us who are more familiar with his academic identity. As an academic, he has always been something of a provocateur. The dissent data suggests the possibility that Posner's judicial identity may differ from his academic identity: he may not be quite as provocative a judge as an academic. In addition, the low dissent rate suggests that Posner gets along quite well with his judicial colleagues. There does not appear to be any real animosity between him and any of his colleagues on the circuit.

To assess whether Posner has shown a consistent pattern of infrequent dissent against his colleagues, we examined his dissents over the course of his career. Table 8 provides summary data on the number of dissenting opinions and total opinions over Posner's career to 2000.<sup>47</sup>

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47. Posner was appointed to the Seventh Circuit at the relatively early age of 42, giving him a particularly long tenure. For more on the average length of federal judicial tenure, see Albert Yoon, *Love's Labor's Lost? Judicial Tenure among Federal Court Judges: 1945-2000*, 91 CAL. L. REV. 1029 (2003).

**Table 8: Posner's Dissents Over Time**

<i>Year</i>	<i>Total Opinions</i>	<i>Dissents</i>	<i>Dissent Rate</i>
1982	78	6	7.7%
1983	81	9	11.1%
1984	76	7	9.2%
1985	89	9	10.1%
1986	78	5	6.4%
1987	79	3	3.8%
1988	70	5	7.1%
1989	74	3	4.1%
1990	86	5	5.8%
1991	73	5	6.8%
1992	80	5	6.3%
1993	97	3	3.1%
1994	100	1	1.0%
1995	89	3	3.4%
1996	103	2	1.9%
1997	88	1	1.1%
1998	82	2	2.4%
1999	92	5	5.4%
2000	78	3	3.8%

Early in his judicial career, Posner appears not to have been as collegial and to have dissented far more frequently. For his first four full years on the Seventh Circuit, the number of dissenting opinions he wrote averaged 9.6% of the total number of his opinions. For the four years ending in 2000, the number of dissenting opinions accounted for only 3.2% of the total number of Posner's opinions (two-sided t-test of the difference between means = 4.17; significant at the 1% level). There may be other explanations, of course, for this drop in dissent rate. It may be that all judges tend to dissent more frequently early in their judicial career.<sup>48</sup> The composition of judges in the Seventh Circuit may have shifted over the course of Posner's career towards judges more sympathetic to Posner's views, thus leading to fewer dissents. Our summary numbers on Posner's dissent rate over his career therefore remain only a pre-

48. The so called "freshman effect" that has been discussed in some of the political science literature works the other way, suggesting that judges are more reluctant to dissent early in their careers (especially as freshmen) but dissent more as they gain confidence. For an inquiry into the various factors that determine separate opinion writing, including the freshman effect, see Virginia A. Hettinger et al., *Separate Opinion Writing on the United States Courts of Appeals*, 31 AM. POL. RES. 215, 235–36 (2003).

liminary attempt to examine both Posner's independence and his collegiality.<sup>49</sup>

#### CONCLUSION: SHOULD POSNER BE ON THE SUPREME COURT?

This brief study cannot establish beyond doubt that Posner should be on the Supreme Court. We would assert that knowing a judge's propensity to work hard, ability to write high-quality opinions, and willingness to stand up to colleagues are all important for the assessment of judicial merit. Because Posner does so much better on most of those measures than everyone else, we ask why he isn't at least on the President's short list. We concede, however, that such objective measures only begin to scratch the surface of key questions, such as a judge's propensity to be fair, do justice, exercise judgment, and demonstrate judicial temperament. Nonetheless, if someone has been a judge for more than twenty years, as is the case with Posner, there is ample data from which to make further inferences on the merits of that judge. Such an investigation will require more work than we have done so far, work that may well be justified in view of the importance of Supreme Court appointments.<sup>50</sup> Data and transparency in the evaluative process are important if we (the outsiders to the nomination and confirmation process) do not fully trust the rationales put forth by the decision makers in power (the president and the Senate). The more objective measures of merits we can obtain, the greater the burden we can place on politicians to reveal their true—perhaps narrowly held and ideological—motivations in championing a particular judge as a nominee to the Supreme Court.

We end with a final note about Judge Posner that might provide further insight into the question of his fitness for the High Court. We suspect that Posner himself does not think that he should be on the Supreme Court. The Supreme Court, as Posner explained in a recent article in the Florida State University Law Re-

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49. For a more detailed inquiry into Judge Posner's pattern of dissents over his career that also observes the declining fraction of dissents, see Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner's First Decade of Dissenting Opinions, 1981-1991—Toward an Aesthetics of Judicial Dissenting Style*, 69 *MO. L. REV.* 73 (2003).

50. Some of this work has already been done by scholars like Robert Blomquist. Blomquist's painstaking deconstruction of Posner's dissents, for example, sheds light on Posner's ability to show compassion. Robert F. Blomquist, *Judge Posner's Dissenting Oeuvre and the Aesthetics of Canonicity* (Mar. 2005) (unpublished manuscript, on file with the NYU Annual Survey of American Law).



view, is a highly political body.<sup>51</sup> A key component of the Court's function is to determine how to finesse high-profile, high-volatility cases such as *Bush v. Gore*. The job of a Supreme Court justice may therefore be better suited for those with a political background and the willingness and ability to negotiate and build consensus, while at the same time taking the pulse of the public and its willingness to accept change. We suspect that the implicit message in his Florida State University Law Review piece is that the foregoing job description does not fit him all that well. Yet doubt remains. It is probably true that the Supreme Court would be dysfunctional if it comprised nine clones of Posner. But as David Vladeck, one of our critics,<sup>52</sup> said to us (perhaps tongue in cheek): "What about *one*? Things on the Supreme Court would surely be a lot more interesting with Posner on it."

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51. See Posner, *supra* note 11 (manuscript at 24). See also Richard A. Posner, *The Anti-Hero*, THE NEW REPUBLIC, Feb. 24, 2003, at 27, 30 (book review) (expressing the view that the Supreme Court is a highly political body, with a legislative-like function).

52. For an exposition of his criticisms, see Vladeck, *supra* note 11.

