Judicial Laterals

*Jonathan Remy Nash**

INTRODUCTION 1911
I. JUDICIAL LABOR MARKETS AND LATERALING 1914
II. EXPECTATIONS AND HYPOTHESES 1915
III. EMPIRICAL ANALYSIS 1924
A. The Dataset 1924
B. Testing the Hypotheses 1927
IV. DISCUSSION OF RESULTS 1933

INTRODUCTION

Lawyers already in practice at one law firm often move to another law firm. This type of move is referred to as "lateraling." A lawyer might choose to lateral for many of the reasons we often think people in general take new positions: better job security, better pay, better benefits, greater prestige, more interesting work, better future job prospects, more leisure time, and/or more predictable hours.[1]

In contrast to lawyers in private practice, we do not commonly associate judges with lateraling. But the fact is that, just as some judges are reassigned or promoted within a judicial system (for example, a federal district judge being elevated to the court of appeals), some judges occasionally engage in a practice to which we logically might refer as "judicial lateraling": they move from being a judge in one

---

* Robert Howell Hall Professor of Law, Emory University School of Law. I benefited from participation in conferences at the Emory University School of Law and the Vanderbilt Law School. I received valuable feedback from Yonathan Arbel, Christina Boyd, Tracey George, Gbemende Johnson, Michael Kang, Daniel Klerman, Clarisa Long, Jacob Nussim, Joanna Shepherd, and Albert Yoon, and from participants in presentations at the *Vanderbilt Law Review* Symposium, the American Law and Economics 2017 annual meeting at Yale Law School, and the Society for Institutional and Organizational Economics 2017 annual meeting at Columbia University.

1. *See, e.g.*, NALP FOUND. FOR RESEARCH & EDUC., THE LATERAL LAWYER: WHY THEY LEAVE AND WHAT MAY MAKE THEM STAY 21–29 (2001) (summarizing factors that have most commonly been reported to be of particular importance in law firm associates' decisions to make job changes).

judicial system to being a judge in another. Since judges are usually (inexorably) tied to a particular jurisdiction,[2] the reality is that a judicial lateral will move either from a state judiciary to the federal judiciary, or from the federal judiciary to a state judiciary. For example, William J. Brennan, Jr. was serving as an associate justice on the Supreme Court of New Jersey when President Dwight D. Eisenhower appointed him as an Associate Justice of the Supreme Court of the United States. As another example, Joseph Lamb Bodine was appointed as a United States district judge on the United States District Court for the District of New Jersey by President T. Woodrow Wilson in 1920; he served in that capacity until he resigned in 1929 to take a position as an associate justice on the Supreme Court of New Jersey.[3]

Just as judges lateral much like lawyers in private practice, we might expect that judges lateral *for the same reasons*. Indeed, as Judge Richard Posner has argued, judges value the same things everyone else does.[4]

The prevailing wisdom is that judges will lateral (if they have the opportunity) from a state judicial system to the federal judiciary.[5] And, indeed, several factors bolster this view. Federal judges enjoy great job security (life tenure[6]), pay that generally exceeds the pay of state judges, assurance that their compensation will not be reduced,[7]

2. On rare occasions, the president has appointed an individual working in the judiciary of one state's jurisdiction to a position in the federal judiciary that lies outside the original state. By far, the most common example of this phenomenon is where the president appoints a state judge to the federal judiciary in the District of Columbia. By contrast, because the federal judicial system spans all U.S. state and territorial jurisdictions, a judge can be promoted within the federal judicial system and in so doing move from a "jurisdiction" in one part of the country to one in another. For example, Karen LeCraft Henderson was appointed to the federal district court in South Carolina by President Ronald Reagan, and was subsequently appointed by President George H.W. Bush to the United States Court of Appeals for the District of Columbia Circuit. *Karen LeCraft Henderson*, U.S. CT. APPEALS FOR D.C. CIR., https://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Judges+-+KLH (last visited Oct. 5, 2017) [https://perma.cc/64P5-T279].

3. *Joseph Lamb Bodine*, HIST. SOC'Y U.S. DISTRICT CT. FOR DISTRICT N.J., http://www.history.njd.uscourts.gov/judges/district_bios/Joseph_Lamb_Bodine (last visited Oct. 5, 2017) [https://perma.cc/MG7K-VVJK].

4. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 4 (1993) (presenting an economic theory of the behavior of judges premised on the notion that they are analogous to ordinary people).

5. *See, e.g.*, Kathleen A. Bratton & Rorie L. Spill, *Moving Up the Judicial Ladder: The Nomination of State Supreme Court Justices to the Federal Courts*, 32 AM. POL. RES. 198, 199 (2004) (identifying the factors that influence the nomination of state supreme court justices to the federal courts).

6. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."). This assumes that the judge's position within the federal system is an Article III judgeship.

7. *See id.* (guaranteeing to federal judges "a Compensation, which shall not be diminished during their Continuance in Office").

and attractive retirement benefits.[8] Moreover, the federal judicial system is generally seen as more prestigious—along a variety of metrics[9]—than the various state judiciaries.

At the same time, there are reasons that one might expect at least some federal judges to be attracted to at least some positions in a state judiciary. First, the judicial system in which a judge works is only one measure of the hierarchical prestige she is thought to enjoy. In addition to their relative hierarchical positions—what we might call "intersystemic hierarchical positions"—judicial systems have their own *internal* hierarchies. These internal hierarchies resemble one another closely, with trial courts in the bottom tier, high courts in the top tier, and (for most jurisdictions today) intermediate appellate courts in the middle. Within this hierarchical structure that transcends judicial systems—what we might call "transsystemic hierarchy"—higher positions in the hierarchy are thought to be more prestigious than are lower positions. Thus, a federal district judge seeking greater prestige might be open to pursuing a position on a state appellate court or, perhaps especially, the state's high court.

Moreover, increased prestige in terms of transsystemic hierarchical position is not the only feature that might make such a lateral move potentially attractive. The appellate court positions that generally lie higher on the transsystemic judicial hierarchy offer not only prestige but also (at least for some) the promise of more interesting work, more predictable hours, and even more leisure time.[10]

On this logic, while we should generally expect to see far more laterals from the state judiciaries to the federal judiciary, we might expect to see a few jurists—like Justice Bodine—move from low levels of the federal judicial hierarchy to higher levels of the state judiciaries.

---

8. Federal judges are entitled to retire and continue to receive their full salaries provided that they meet governing statutory requirements. *See* 28 U.S.C. § 371(a) (2012). As Albert Yoon explains:

> The current standard is what is commonly referred to as the "Rule of 80," which requires that the retiring judge be at least sixty-five years of age, with age and total years of service on the bench totaling at least eighty years. 28 U.S.C. § 371(c) (2002). Prior to 1985, judges were required to be at least sixty-five years of age and to have served on the bench fifteen years. Prior to 1954, judges were required to serve on the bench until they were at least seventy years old, with ten years of service. 28 U.S.C. § 371(b) (1952).

Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945-2000*, 91 CALIF. L. REV. 1029, 1056 n.86 (2003).

9. *See infra* text accompanying notes 15–23.

10. *See, e.g.*, Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1265 (2005) ("[T]he salary and prestige differences between district and circuit judges are small, though the workload is lighter in the appellate court.").

Moreover, all state judiciaries are not the same. Commentators have compiled evidence confirming that some state judiciaries are more "professional" than others[11]—indeed, a select few are, on some measures, more professional than the federal judiciary.[12] This suggests that we might observe different lateral patterns for different jurisdictions. In particular, for some state jurisdictions that feature (or at least are perceived to enjoy) low levels of professionalism, the relevant hierarchy might place the entire federal judiciary above the entire state judiciary (with the levels of each judicial system arranged hierarchically, i.e., with the high court above the intermediate court of appeals, and both above the trial court). But, for other state jurisdictions that feature higher levels of professionalism, one can imagine a more complex interlocking hierarchy where the state's appellate courts (or at least its high court) lie between the federal district court and the federal court of appeals. Beyond professionalism, the standard judicial term in office and the salaries the state pays its judges also may determine whether an interlocking hierarchy inheres.

In this Article, I undertake to examine these questions empirically. I rely upon a novel database of movements by judges from a state judiciary to the federal judiciary, or from the federal judiciary to a state judiciary.

In Part I, I provide a general overview of the judicial labor market. In Part II, I generate expectations, and then testable hypotheses, about judicial lateral moves into, and out of, the federal judiciary. In Part III, I test those hypotheses, generally finding support for all of them. Part IV discusses the empirical results.

I. JUDICIAL LABOR MARKETS AND LATERALING

It is well accepted among scholars from various disciplines that judges function within a labor market. The judicial labor market is, in some sense, a subset of the broader market for attorneys. Indeed, studies suggest that attorneys (to some degree at least) compare the features of working as an attorney with those of working as a judge when deciding whether to pursue (or continue in) judicial positions.[13]

11. I rely below upon Professor Peverill Squire's professionalism measure for state high courts, which bases professionalism on state high court salary, the extent to which the state high court enjoys discretion over its docket, and the extent of the state high court's staff. *See* Peverill Squire, *Measuring the Professionalization of U.S. State Courts of Last Resort*, 8 ST. POL. & POL'Y Q. 223, 228 (2008).

12. *See id.* at 229.

13. *See, e.g.*, James M. Anderson & Eric Helland, *How Much Should Judges Be Paid? An Empirical Study of the Effect of Judicial Pay on the State Bench*, 64 STAN. L. REV. 1277, 1319

It is also true, however, that the judicial labor market is a market unto itself.[14] To be sure, it has its idiosyncrasies. Unlike most jobs, some judges enjoy life tenure once they ascend to the bench. Also, U.S. judges do not enjoy the promise, or even the freedom, to move "up in rank" as do participants in many labor markets. Finally, the judicial labor market is not nationwide; instead it is largely limited to the state in which the judge currently sits.

Still, the judicial labor market is worthy of study. Many attorneys remain judges for the bulk of their careers and it is the final legal job for many (only in part because of the life tenure enjoyed by some judges).[15] And, as my dataset demonstrates, the market for judicial laterals is an active one: out of 3,580 federal judges in the Federal Judicial Center's biographical collection of all Article III judges, I found 925 instances of a judge moving (directly) from a state judiciary to the federal judiciary or from the federal judiciary to a state judiciary.[16] In other words, judicial lateraling is not an uncommon phenomenon. And, with the growth in the size of the federal judiciary, it has, if anything, become more common.

II. EXPECTATIONS AND HYPOTHESES

In this Part, I develop expectations, and then hypotheses, about the movement of judges from state judiciaries to the federal judicial system, and from the federal judiciary to the various state judiciaries. Conceptualizing the judiciaries as employers and judges as employees, the question becomes how we should consider the incentives present in the judicial labor market. Consistent with what others have said, I assume that judges want what employees typically want: some combination of (1) prestige, (2) the opportunity to work in a setting that recognizes and values professionalism, (3) substantial pay, (4) job security, and (5) expanded leisure time and/or more control over their schedules.

In order to develop expectations for why judges might choose to lateral (or choose not to lateral) between judicial systems, I construct hierarchies between state and federal judiciaries, and between

---

(2012) (finding that increases in judicial salary increase the likelihood that those with private sector legal experience will join the bench).

14. *See* LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 25 (2013) (discussing judges' participation in a labor market); Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017, 2041 (2016) (describing the judge as being a participant in the judicial labor market).

15. *See* Bratton & Spill, *supra* note 5, at 198–99.

16. *See infra* text accompanying note 35.

positions in those judiciaries, that judges reasonably might perceive. As we shall see presently, judges who value different factors may perceive the hierarchies differently.

Let us begin with the uncontroversial proposition that most U.S. judiciaries share a common *internal* hierarchical structure: there are trial courts, intermediate appellate courts, and the jurisdiction's high court. (A few U.S. jurisdictions lack intermediate appellate courts;[17] the internal hierarchy is otherwise the same.) The trial courts lie at the bottom of the hierarchy, and the high court at the top. To see why, consider first that cases generally enter the system through the trial courts; appellate courts have the power to review the decisions of trial courts, and the high court has the final say even over the intermediate appellate courts.

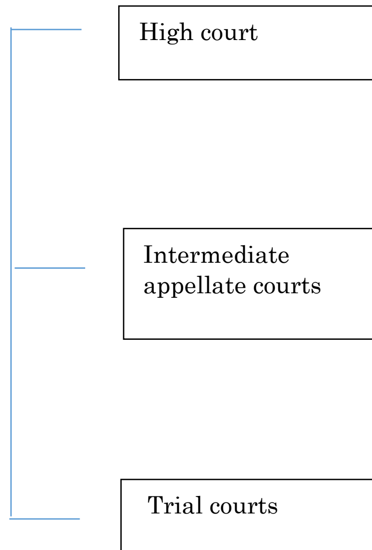
Consider next the relative attributes (in any judicial system) of working as a trial judge as opposed to an appellate judge (including as a high court judge). Trial judges are seen to be at the bottom of each judiciary's hierarchy. In addition, trial judges' schedules are generally less predictable as a result of having to deal with discovery disputes, trials, and settlement conferences. By contrast, appellate judges generally have more predictable schedules, with case hearings set far in advance and with far less contact with attorneys. Finally, appellate judges are generally paid more than trial judges, with high court judges generally paid more than intermediate appellate court judges. This suggests that, all else equal,[18] judges should prefer to move higher in the hierarchy *within a single judiciary*—that is, a trial judge should prefer to be an intermediate appellate court judge or (even better) a state high court judge, while an intermediate appellate court judge should aspire to be a state high court judge.

The *transsystemic judicial hierarchy*—that reflects the typical U.S. judicial system, with trial courts on the bottom and the high court on the top—is depicted in Figure 1.

17. *See, e.g.*, Andrew P. Morriss, *Opting for Change or Continuity? Thinking About 'Reforming' the Judicial Article of Montana's Constitution*, 72 MONT. L. REV. 27, 35 (2011) ("Thirty-nine states have such [intermediate] courts; the remainder do not.").

18. An individual may prefer being a trial court judge, the benefits of working as an appellate judge notwithstanding.

FIGURE 1: THE TRANSSYSTEMIC JUDICIAL HIERARCHY



Let us next consider the hierarchical relationship between the federal judiciary on the one hand, and the various state judiciaries on the other. To be sure, many have noted that as a general matter—and even in most side-by-side comparisons—the federal judiciary fares well as compared to state judiciaries on several metrics. On the question of job security, federal judges enjoy life tenure while most state judges do not. The federal judicial system is generally seen as more prestigious than its state counterparts. Federal judges hear some cases that state courts cannot, including habeas cases where the federal courts—even the lower federal courts—sit in judgment of state court criminal decisions.[19] Moreover, while state courts hear cases that federal courts do not, there is a sense that those are less interesting or important. And, to the extent that state and federal courts enjoy concurrent jurisdiction over most cases,[20] there is a sense that the federal courts—whether

19. *See* 28 U.S.C. § 2254(a) (2012):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

20. *See, e.g.*, Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–08 (1962) ("Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.").

because of the actions of litigants[21] or the federal courts themselves[22]—wind up with the share of those cases that includes more interesting issues[23] (and even if that is not in fact the case, the perception may nevertheless persist[24]). In addition, federal courts enjoy a power advantage over the state courts: their judicial power exceeds that of state courts,[25] and, indeed, federal courts can exert power over state courts in a way that state courts cannot exert power over their federal counterparts.[26] Moreover, the perceptions of judges and the broader legal community likely match (if not exceed) the reality.[27] Finally, federal courts are generally thought to receive greater funding and to offer more of a professional setting in which to work.[28] For all these reasons, we might conceive of the federal courts as hierarchically superior—and therefore more attractive to judges—than the various

---

21. For example, plaintiffs in diversity and federal question cases have the freedom to file suit in federal district court. 28 U.S.C. §§ 1331, 1332 (2012). At the same time, if a plaintiff in one of those cases chooses instead to file suit in state court, the defendant has the freedom to remove the case to federal court (unless the suit is a diversity case that is brought in the defendant's home state). *Id.* § 1441. And "[t]he empirical evidence relating to forum choice . . . indicates that attorneys perceive a competence gap between the state and federal courts and that this gap plays a prominent role in filing decisions." Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 148 (2009); *see* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115–30 (1977) (detailing practical reasons that might likely induce federal constitutional plaintiffs to prefer a federal trial forum to a state trial forum).

22. For example, abstention doctrines and certification afford federal courts the discretion to retain certain cases (or portions of cases) or to afford the state courts adjudicatory authority. *See generally* Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1875–77 (2008) (describing the devices by which federal courts can obtain feedback from the state court system as to the appropriate resolution of state law issues).

23. *See, e.g.*, Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 127–131 (2009) (arguing that federal courts use certification procedure as an opportunity to send less important, tedious questions of state law to state courts for resolution, opting to retain the more interesting questions for themselves).

24. *See, e.g.*, Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 531 (2012) ("State courts may perceive an imprecise jurisdictional boundary as enabling federal courts to 'cherry-pick' more interesting and momentous cases.").

25. *See generally* Nash, *supra* note 22, at 1904 ("[A]ll state courts are directly inferior to a part of the federal court system: the United States Supreme Court[,]" while "the federal courts only need to apply state law by virtue of the Court's decision in *Erie*, and then only when Congress has seen fit to extend jurisdiction over questions of state law." (footnote omitted)).

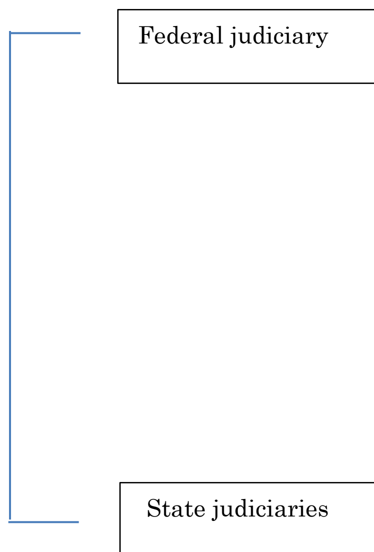
26. *See id.* at 1905 ("[F]ederal courts may stay actions in state court under appropriate circumstances, but state courts may not as a general matter stay actions in federal court." (footnote omitted)).

27. The perception may be that the power disparity is gendered. *See* Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1693 (1991) (describing "a perception that the world of the federal courts is populated by and is about men").

28. *See* Seinfeld, *supra* note 21, at 148 (noting that federal judges generally enjoy a resource advantage over state court judges with regard to clerks, support staff, information management, and physical facilities).

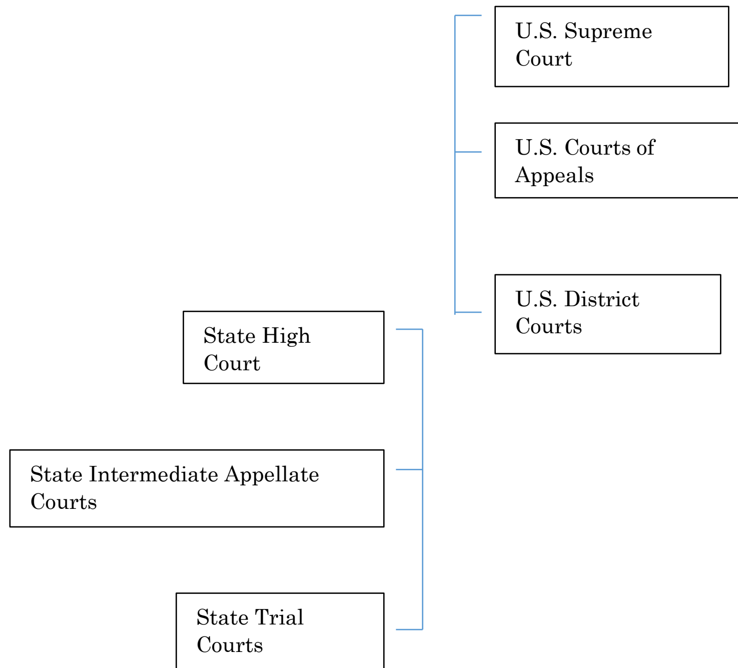
state judiciaries. This intersystemic hierarchical relationship is reflected in Figure 2.

FIGURE 2: THE INTERSYSTEMIC JUDICIAL HIERARCHY



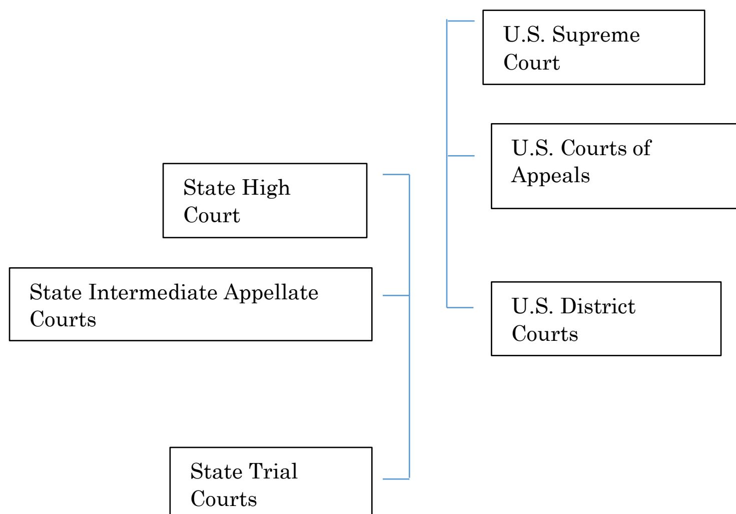
How might we combine the transsystemic hierarchy in Figure 1 with the intersystemic hierarchy in Figure 2 to produce a unified hierarchy that reflects the relative hierarchical positions of the various courts in the federal and state judiciaries? One possibility is that Figure 2's intersystemic hierarchy is dominant, such that federal courts of all levels lie higher in the hierarchy than all state courts. This is reflected in Figure 3.

FIGURE 3: HIERARCHICAL RELATIONSHIP THAT PLACES THE FEDERAL JUDICIARY ABOVE THE STATE JUDICIARY



There is another, more nuanced way that one might combine Figure 1's transsystemic hierarchy with Figure 2's intersystemic hierarchy. Such a hierarchical relationship allows for overlap between the federal judiciary and state judiciaries, even if the U.S. Supreme Court remains at the top of the hierarchy and state trial courts at the bottom. To see the logic behind such a unified hierarchy, we must not only factor in the hierarchy of the judiciary within which the judge now sits, but also the extent to which the judge might offset (1) the intersystemic hierarchical advantage of one judicial system over another against (2) the transsystemic hierarchical advantage of a better judicial position (notwithstanding the judicial system in which the position lies). To be more concrete, a judge reasonably might prefer a position as an appellate court judge in a state judiciary to a position as a federal trial judge. This hierarchical arrangement appears in Figure 4.

FIGURE 4: HIERARCHICAL RELATIONSHIP THAT FEATURES OVERLAP BETWEEN THE FEDERAL AND STATE JUDICIARIES



The two different unified hierarchies reflected in Figures 3 and 4 give rise to different expectations, and in turn hypotheses, about judicial laterals. On the basis of the hierarchy depicted in Figure 3, one would expect that a judge working in a state judiciary would (all else equal) prefer a position in the federal judiciary more frequently than a federal judge would prefer a position in a state judicial system. This translates to Hypothesis 1.

> **Hypothesis 1**: *We should observe more judges moving from state judiciaries to the federal judiciary than from the federal judiciary to state judiciaries.*

We may reach a more nuanced expectation when we consider the transsystemic hierarchy of judicial positions and factor in the relative professionalism of the various judiciaries. On the logic of the hierarchical structure depicted in Figure 4, we might expect that a federal judge might be willing to accept a move to a state judiciary that offsets the relative detriments of the transfer to the state judiciary with a move up the transsystemic hierarchy of judicial positions—what I refer to as a "step-up" in the transsystemic judicial hierarchy. In contrast, a "step-down" in the transsystemic judicial hierarchy occurs when a judge moves down the transsystemic hierarchy of judicial positions. For example, a federal trial judge might be unwilling to accept a position as a state trial judge, but open to accepting a position

as a state appellate—or high court—judge (which would constitute a step-up). This point is embodied in Hypothesis 2.

> **Hypothesis 2**: *To the extent that we observe judges moving from the federal judiciary to state judiciaries, we should rarely observe those judges accepting a step-down in the transsystemic hierarchy of judicial positions, and instead should more often observe judges gaining a step-up in the transsystemic hierarchy of judicial positions.*

In addition, one might conclude that a lateral move involving a *step-up* in judicial position is more likely to be observed when the lateral move is *out of* the federal judiciary rather than *into* it. This is not because a judge would be averse to a step-up in judicial position combined with a move from a state judiciary to a federal judicial position; to the contrary, one would generally expect a state judge to welcome such a lateral move. Rather, insofar as (consistent with Figure 3) state judges would welcome a move to the federal judiciary, the president would have his pick of state judges to fill a federal judicial position. Given that, the president ought to be able to find a judge who would experience a step-down in the hierarchy of judicial positions—or at least who would remain at the same level—to fill the open federal judicial position. In contrast, consistent with Figure 4, a state might need to offer a step-up in judicial position in order to entice a judge to surrender a federal judicial position. Thus, steps-up in judicial position should be more likely when a judge moves out of, rather than into, the federal judicial system. This is reflected in Hypothesis 3.

> **Hypothesis 3**: *A lateral move involving a* step-up *in judicial position is more likely to be observed when the lateral move is* out of *the federal judiciary rather than* into *it.*

A separate reason that a judge might perceive the relevant hierarchy as presented in Figure 4, as opposed to Figure 3, is that some state judiciaries are perceived to be more professional than others.[29] Indeed, the work of Professor Peverill Squire suggests that a couple of elite state judiciaries are perceived to be more professional than the

---

29. *See* Burton M. Atkins & Henry R. Glick, *Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort*, 20 AM. J. POL. SCI. 97, 103 (1976) (comparing state courts according to variables including perceived professionalism); Paul Brace & Melinda Gann Hall, *"Haves" Versus "Have Nots" in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases*, 35 LAW & SOC'Y REV. 393, 402–03 (2001) (finding that professionalism varies among state courts); Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 98 (1983) (describing the vast range of judicial professionalism in state courts); Squire, *supra* note 11, at 228 (ranking state courts by professionalism); *see also* DANIEL BERKOWITZ & KAREN B. CLAY, THE EVOLUTION OF A NATION: HOW GEOGRAPHY AND LAW SHAPED THE AMERICAN STATES 169–89 (2012) (presenting empirical evidence that legislatures in states with civil law origins that predate statehood fund their state judiciaries at lower rates).

federal judiciary.[30] Thus, for some state judiciaries, the hierarchy presented in Figure 4 might be more plausible than the hierarchy presented in Figure 3.

On this logic, one might conclude that the higher the state judiciary is perceived to fare on professionalism, the *less likely* it will be for a state judge to accept a move to a less prestigious judicial position—i.e., a step-down in the transsystemic hierarchy of judicial positions—in the federal judiciary.[31] One also might expect that the higher the state judiciary is perceived to fare on professionalism, the *more likely* it will be for a federal judge to accept a move to a state judiciary. These points are reflected in Hypotheses 4 and 5.

> **Hypothesis 4**: *The greater the professionalism of a state judiciary, the* less likely *it should be for a state judge to accept a step-down in the transsystemic hierarchy of judicial positions when moving from that judiciary to the federal judiciary.*

> **Hypothesis 5**: *The greater the professionalism of a state judiciary, the* more likely *it should be for a federal judge to accept a move from the federal judiciary to that state's judiciary.*

Next, one might believe that the frequency with which a state court judge faces the prospect of seeking reelection or reappointment might affect that judge's willingness to accept a step-down in the transsystemic hierarchy of judicial positions in moving to a federal judicial position. This is reflected in Hypothesis 6.

> **Hypothesis 6**: *The longer the length of term in office enjoyed by judges in the state, the* less likely *it should be for a state judge to accept a step-down in the transsystemic hierarchy of judicial positions when moving from the state judiciary to the federal judiciary.*

Finally, one might expect that salary is especially important to a judge's decision to make a lateral move.[32] In particular, one might think that a judge would be reluctant to accept salary reductions in connection with a concomitant reduction in either the judge's level in

30. *See* Squire, *supra* note 11, at 229.

31. Bratton & Spill, *supra* note 5, at 204 (State supreme court "[j]ustices who have achieved a high level of seniority or who serve on prestigious courts may not have much incentive to pursue federal judicial service.").

32. *See, e.g.*, Jenna Greene, *From Baker Botts to the Bench and Back: When Being a Judge Isn't the Ultimate Job*, AMLAW LITIG. DAILY (June 19, 2017), http://www.litigationdaily.com/id=1202790408430/From-Baker-Botts-to-the-Bench-and-Back-When-Being-a-Judge-Isnt-the-Ultimate-Job?slreturn=20170730131418 [https://perma.cc/9KRR-GSLB] (noting that being a judge is demanding public service work for a salary similar to a big law associate). The measure for professionalism of a state's judiciary that I employ takes into account the salary of judges on the state's high court. A judge on a lower state court (or contemplating a move to a lower state court) might be swayed instead by the compensation his or her current position (or the position he or she is contemplating taking) offers.

the transsystemic judicial hierarchy—i.e., if the judge receives a step-down—or the judge's judicial system on the intersystemic judicial hierarchy—i.e., if the judge moves from the federal judiciary to a state judicial system. This idea is reflected in Hypotheses 7 and 8.

> **Hypothesis 7**: *Only rarely will a judge accept a step-down in moving from a state judiciary to the federal judiciary without a salary increase.*

> **Hypothesis 8**: *Only rarely will a judge agree to move from the federal judiciary to a position in a state judiciary without a salary increase.*

I test these eight hypotheses in the next Part.

III. EMPIRICAL ANALYSIS

In this Part, I present my empirical analysis. In Section A, I explicate the content of my dataset and methodology. In Section B, I explain the extent to which the eight hypotheses I introduced in Part II are validated by the data.

A. The Dataset

The unit of analysis was lateral moves by judges either into or out of the federal judicial system. I started with data from the "Biographical Directory of Federal Judges" on the Federal Judicial Center ("FJC") website, and searched for judges whose "Professional Experience" information included time spent as a "judge" or "chancellor" on a "court." This yielded a set of 2,065 judges (out of 3,580 in the entire FJC database). I then read through the biographies of those 2,065 judges and eliminated (1) judges who never a worked as a state judge before or after their federal judicial service,[33] and (2) federal judges whose work in a state judiciary did not immediately predate or postdate their federal judicial work.[34]

This left a set of 925 instances where a federal judge worked in a state judiciary either immediately before, or immediately after, his or her federal judicial service.[35] For each judge who moved from a state judiciary to the federal judiciary, I coded the judge's name, the year the

33. The FJC database included within the employment field a judge's previous failed nominations to federal courts. *See Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., https://www.fjc.gov/history/judges/ (last visited Oct. 27, 2017) [https://perma.cc/L24X-UYWU]. My search included such judges within its ambit.

34. Where the FJC database was unclear whether there was a gap between one judgeship and another, I consulted other sources.

35. In very few cases, a judge moved both ways, and thus appears in the database twice.

judge switched judicial systems, the judge's age at the time of that switch, the state judicial system in which the judge worked, the last position held by the judge in that state judicial system, and the first position held by the judge in the federal judiciary. I then translated the level of the judge's last position in the state judiciary and the level of the judge's first position in the federal judiciary (using a "0" for trial court level,[36] "1" for intermediate appellate court level,[37] and "2" for high court level[38]). By subtracting the level of the earlier (state) judicial position from the level of the later (federal) judicial position, I arrived at the "change in hierarchical judicial position"—or "step"—represented by the switch. (For example, a judge who switched from being a state supreme court justice to being a federal trial judge had a step of 0 – 2 = -2.) Steps ranged from -2 to +2, with a step of "0" indicating no change in the hierarchical level of judicial position after the lateral move.

I coded switches of judges from the federal judiciary to a state judiciary similarly, except that I coded the last position held by the judge in the *federal* judiciary and the first position held by the judge in the *state* judiciary. Again, the step was calculated by subtracting the level of the earlier (federal) judicial position from the level of the later (state) judicial position.

Table 1 summarizes the meaning of the various values for the "step" variable.

36. I coded a state court as a "1" regardless of its moniker or relative status. Thus, I coded as "1" both probate courts and state trial courts of general jurisdiction.

37. I coded the old federal circuit courts as "1" even though they exercised original as well as appellate jurisdiction.

38. I coded a high court as "2" even if (as was generally the case through the nineteenth century, and remained the case for a few jurisdictions into the twentieth century) a jurisdiction had no intermediate appellate judicial tier.

TABLE 1: MEANINGS OF THE VARIOUS VALUES FOR THE "STEP" VARIABLE

Value of "Step" Variable	**Meaning**
-2	Judge moved from being a supreme court justice in one system to a trial judge in the other system.
-1	Judge moved from being a supreme court justice in one system to an intermediate appellate judge in the other system; or from being an intermediate appellate judge in one system to a trial judge in the other system.
0	Judge's move between judicial systems did not affect the level of the court on which the judge serves.
+1	Judge moved from being a trial judge in one system to an intermediate appellate judge in the other system, or from being an intermediate appellate judge in one system to a supreme court justice in the other system.
+2	Judge moved from being a trial judge in one system to a supreme court justice in the other system.

Finally, throughout the dataset, I entered a "professionalism" score for the state judicial system for which the judge worked (whether before or after the lateral move). I used the scores developed by Professor Squire based upon state high court salary, the extent to which the state high court enjoys discretion over its docket, and the extent of the state high court's staff.[39] I also coded each judge's salary, before and after the lateral move.[40]

Table 2 presents descriptive statistics for the dataset.

39. Squire offers four measures of state high court professionalism. They correlate at high levels. *See* Squire, *supra* note 11, at 228. To the extent I relied upon state court professionalism in the analysis below, I ran regressions using all four of the measures; the results were similar to what I report.

40. For jurisdictions where the salary changed during the year of the lateral move, I coded the new, higher salary. Also, for some judicial positions in some jurisdictions, the state provided part of the judge's salary, with local government augmenting the salary; I coded the entire salary that the judge would receive.

TABLE 2: DESCRIPTIVE STATISTICS FOR THE DATASET

	STEP					TOTAL
	-2	-1	0	+1	+2	
Lateral moves from a state judiciary to the federal judiciary	83	126	662	32	8	911
Lateral moves from the federal judiciary to a state judiciary	0	0	2	5	7	14
TOTAL	83	126	664	37	15	925

B. Testing the Hypotheses

According to Hypothesis 1, we should observe more judges moving from state judiciaries to the federal judiciary than from the federal judiciary to the state judiciaries. This conclusion is manifestly and unquestionably supported by the data, with 911 (98.5%) of the 925 lateral moves in the dataset constituting moves from a state judiciary to the federal judiciary.[41]

According to Hypothesis 2, to the extent that we observe judges moving from the federal judiciary to state judiciaries, we should observe those judges rarely accepting a step-down and more often gaining a step-up in the hierarchy of judicial positions. While we do not have enough examples of lateral moves out of the federal judiciary for meaningful statistical analysis, the data we do have clearly conform to this hypothesis: of the fourteen lateral moves out of the federal judiciary, *none* constituted a step-down, and twelve constituted a step-up.

According to Hypothesis 3, a lateral move involving a *step-up* in judicial position is more likely to be observed when the lateral move is *out of* the federal judiciary rather than *into* it. Table 3 presents a cross tabulation of whether a lateral move was state-to-federal and whether a lateral move constituted a step-up in judicial position. Approximately 5.62% of the 925 lateral moves in the dataset constituted steps-up in judicial position. Thus, in the absence of a relationship between the

41. This is statistically significant under a binomial test at the 1% level.

direction of the lateral move and whether the lateral move constituted a step-up, one would expect to see steps-up approximately 5.62% of the time, regardless of the direction of the lateral move. In fact, for lateral moves *out of* the federal judiciary, there were steps-up approximately 85.71% of the time; for lateral moves *into* the federal judiciary, there were steps-up approximately 4.39% of the time. Not surprisingly, the difference between the observed and expected values is statistically significant at the 1% level ($p = 0.000$) according to a Fisher's exact test with one degree of freedom. The data indicate that a lateral move *out of* the federal judiciary was in excess of 130 times more likely to result in a step-up in judicial position than was a lateral move *into* the federal judiciary.[42]

TABLE 3: CORRELATION BETWEEN WHETHER A LATERAL MOVE WAS STATE TO FEDERAL, AND WHETHER A LATERAL MOVE CONSTITUTED A STEP-UP IN JUDICIAL POSITION

		Whether the lateral move constituted a step-up in judicial position.		
		No	Yes	Total
Whether the lateral move was from a state judiciary to the federal judiciary.	No	2 (14.29)	12 (85.71)	14 (100.00)
	Yes	871 (95.61)	40 (4.39)	911 (100.00)
	Total	873 (94.38)	52 (5.62)	925 (100.00)

NOTE: Row percentages are reported in parentheses. The *p*-value from a Fisher's exact test is 0.000***.

KEY: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

According to Hypothesis 4, the greater the professionalism of a state judiciary, the *less likely* it should be for a state judge to accept a step-down in the transsystemic hierarchy of judicial positions when

42. We can compare the chance of a partial reversal where the district court denied summary judgment with that where the district court granted summary judgment by dividing the odds of such a vote for summary judgment denials (.857/.143) by the odds of such a vote for summary judgment grants (.044/.956). The odds ratio (5.993/.046) indicates that a court of appeals panel is 130.28 times more likely to partially reverse a summary judgment denial than a summary judgment grant.

moving from that judiciary to the federal judiciary. I tested this hypothesis by running a logistic regression. The dependent variable was whether the lateral move involved the judge accepting a step-down in the transsystemic hierarchy of judicial positions. The key independent variable was the state judiciary's professionalism score, which I operationalized as Professor Squire's measure of state high court professionalism.[43] Since others have found a judge's age to be a predictor of judicial lateral moves,[44] I included the judge's age at the time of the lateral move as a control variable. Finally, since the professionalism scores apply only to states and were generated based on recent data, I excluded lateral moves (1) made from the judicial systems in Puerto Rico and the District of Columbia, and (2) made in 1980 or before. This left a dataset of 440 lateral moves.

Table 4 reports the results of the logistic regression. Both independent variables—the state high court's professionalism score and the judge's age—have a statistically significant relationship with whether a lateral move to the federal judiciary constituted a step-down in judicial position. The older the judge, the more likely the judge was to accept a step-down.

TABLE 4: LOGISTIC REGRESSION OF WHETHER A LATERAL MOVE (AFTER 1980) FROM A STATE JUDICIARY TO A FEDERAL JUDICIARY CONSTITUTED A STEP-DOWN

Variable	**Coefficient**	**Odds Ratio**	**Standard Error**	***p*-Value**
State high court professionalism score	-3.7213	0.0242	0.0165	0.000***
Age of judge	0.1060	1.1118	0.0242	0.000***
Constant	-4.0663	0.0171	0.0198	0.000***

N = 440. Log likelihood = -207.421. Pseudo-R^2 = 0.111. * $p < 0.1$. ** $p < 0.05$. *** $p < 0.01$.

Consistent with Hypothesis 4, the higher the state high court's professionalism score, the *less likely* was a lateral move to constitute a step-down. The odds ratio indicates essentially that, holding age constant, as the state judiciary that the judge lateraled from shifts from the lowest ranked to the highest ranked in terms of professionalism, the odds of the lateral move constituting a step-down in position were 0.024 times lower (with a 95% confidence interval of [0.006, 0.093]). Put another way, holding the other variables constant, having a lateral

43. *See supra* note 39 and accompanying text.

44. *See* Bratton & Spill, *supra* note 5, at 212–13.

depart a very professional state judiciary decreased the odds of the lateral move constituting a step-down by nearly 98%.

According to Hypothesis 5, the greater the professionalism of a state judiciary, the *more likely* it should be for a federal judge to accept a move from the federal judiciary to that state's judiciary. Once again, we have very few examples of lateral moves out of the federal judiciary: there are fourteen in total, only seven of which occurred after 1980 (the time period during which we might have some confidence that the state high court professionalism scores are meaningful).[45] Of those seven lateral moves, five (a whopping 71.4%) were lateral moves to the California state judiciary, and a sixth was to the Michigan state judiciary; California and Michigan are both near the very top of the professionalism score measure.[46]

Hypothesis 6 posits that the longer the term in office enjoyed by judges in the state, the *less likely* it should be for a state judge to accept a step-down in the transsystemic hierarchy of judicial positions when moving from that judiciary to the federal judiciary. To test this hypothesis, I coded the length of the typical term in office enjoyed by justices on each state's supreme court. While some state appellate court judges might enjoy terms in office of a different length from state supreme court justices, I chose to rely on supreme court justice terms on the logic that state appellate court judges might aspire both to elevation to the state high court and to a federal judicial position. And, for the few states where judges enjoy lifetime appointments,[47] I coded the term length as twenty-five years.[48] Finally, as above, I restricted the analysis to lateral moves occurring in 1981 or later.

---

45. The lateral moves out of the federal judiciary occurred in 1791, 1806, 1813, 1824, 1929, 1936, 1944, 1983, 1984, 2001, 2006, 2008, and 2014.

46. California is ranked first along three of Squire's professionalism measures, and second under the fourth; its professionalism ranks ahead of the federal judiciary's professionalism along three of the four measures. Michigan ranks third on three of Squire's measures, and second on the fourth. *See* Squire, *supra* note 11, at 228–29. The only other judge who lateraled from the federal judiciary to a state judiciary after 1980 is a federal district judge who lateraled back to the same Illinois circuit (trial) court where he had begun his judicial career. He had previously been elevated to the Illinois Appellate Court, whence he had lateraled *to* the federal judiciary years earlier. *See infra* note 49 and accompanying text.

47. *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 79 n.44 (2011) ("Judges in Massachusetts and New Hampshire are appointed for permanent tenure to age seventy, and Rhode Island grants its judges life tenure."). I also coded New Jersey as a "life tenure" state. New Jersey governors appoint state supreme court justices (and New Jersey superior court judges) to initial seven-year terms, and then can (but need not) reappoint sitting justices (and judges) for tenures that last until mandatory retirement at age 70. *See* N.J. CONST. art. VI, § 6, para. 3.

48. I chose 25 years to reflect the notion that a supreme court justice might likely be appointed in his or her 40s and conceivably serve around 25 years until his or her retirement

I ran a logistic regression of whether a judge accepted a step-down against state high court professionalism score, state high court term length, and judge's age. Table 5 reports the results of this regression.

TABLE 5: LOGISTIC REGRESSION OF WHETHER A LATERAL MOVE (AFTER 1980) FROM A STATE JUDICIARY TO A FEDERAL JUDICIARY CONSTITUTED A STEP-DOWN

Variable	**Coefficient**	**Odds Ratio**	**Standard Error**	***p*-Value**
State high court professionalism score	-3.8279	0.0218	0.8035	0.000***
State high court term length	-0.0523	0.9491	0.0341	0.125
Age of judge	0.1079	1.1139	0.0220	0.000***
Constant	-3.8405	0.0215	1.1715	0.001***

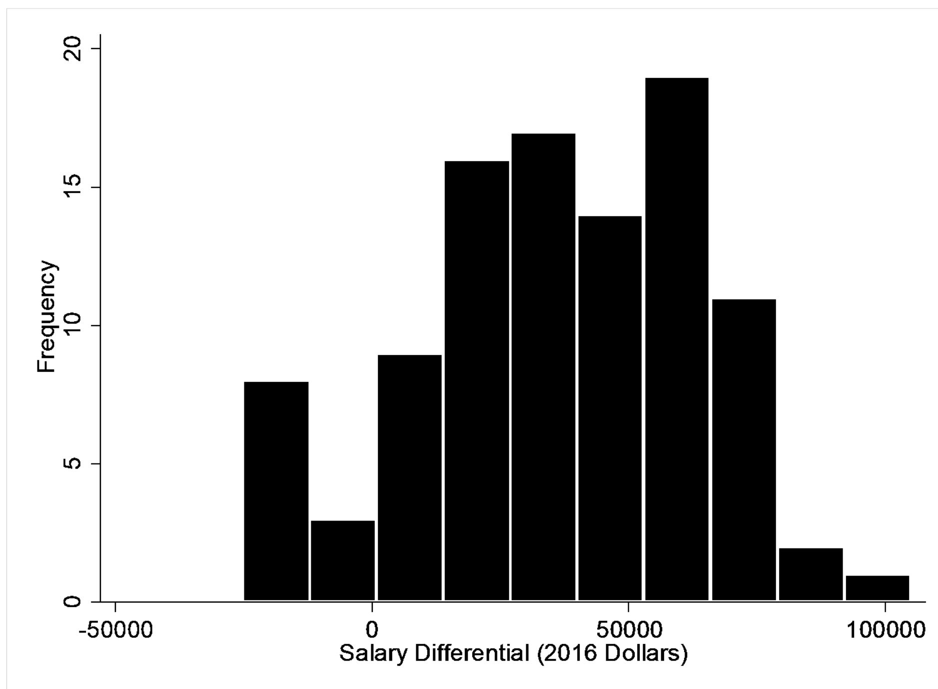
N = 440. Log likelihood = -206.534. Pseudo-R^2 = 0.115. * $p < 0.1$. ** $p < 0.05$. *** $p < 0.01$.

Consistent with Hypothesis 6, the longer the state high court term length, the *less likely* was a lateral move to constitute a step-down. While the state high court term length variable is not statistically significant, it does approach significance at the 10% level.

Hypotheses 7 and 8 considered the effect of salary on judicial laterals. Hypothesis 7 posited that only rarely would a judge moving from a state judiciary to the federal judiciary accept a step-down absent a salary increase. Figure 5 presents a histogram of salary differentials (in 2016 dollars) for the one hundred judges who accepted a step-down in moving from a state judiciary (including the District of Columbia local court system) to the federal judiciary after 1980. The mean salary differential was an increase of $36,694. A few judges accepted salary *reductions* (the largest reduction being $25,145). But by far the vast majority—90.0%—received salary *increases* (the largest increase being $104,961). These findings are consistent with Hypothesis 7.

(bearing in mind that only one "life tenure" state does not have a mandatory retirement age of 70, *see supra* note 47). The longest non-life-tenure term for a high court judge is 14 years for a judge on the New York Court of Appeals, N.Y. CONST. art. VI, § 2(a); several state supreme courts feature terms of 12 years, *e.g.*, CAL. CONST. art. VI, § 16(a).

FIGURE 5: HISTOGRAM OF SALARY DIFFERENTIALS (IN 2016 DOLLARS) AMONG JUDGES WHO LATERALED AFTER 1980 FROM A STATE JUDICIAL POSITION TO THE FEDERAL JUDICIARY AND ACCEPTED A STEP-DOWN



Hypothesis 8 set out the expectation that few judges would move from the federal judiciary to a state judicial position absent a salary increase. Out of the seven judges who made such a move after 1980, five received salary increases (and also received steps-up). Of the two judges who accepted salary reductions, one—Judge Patricia Boyle—also received a step-up in the transsystemic judicial hierarchy—from a position as a federal district judge in Michigan to a seat on the Michigan Supreme Court. The other—Judge Michael McCuskey—did not enjoy a step-up in position; rather, he returned to an Illinois trial court position he had held before his appointment as an Illinois federal district judge.[49] Overall, the data are consistent with Hypothesis 8.

49. *See supra* note 46 (noting the judge's lateral move back to the circuit court where he began his career). Perhaps he enjoyed his state judicial service better, or geographical considerations drove his decision. *See* Gary L. Smith, *Michael McCuskey Retires from Federal Bench, Will Serve as Marshall County Presiding Judge*, J. STAR (Jan. 4, 2015, 9:54 PM), http://www.pjstar.com/article/20150104/News/150109742 [https://perma.cc/X7WC-U38Z] ("After chafing at the constraints of sentencing mandates and other aspects of the federal system, McCuskey said that the grassroots-level judging in the rural counties is what he craves.").

IV. DISCUSSION OF RESULTS

The results of the analysis in the prior Part provide statistically significant support for Hypotheses 1, 3, and 4. There are not enough data points to secure meaningful statistical analysis of Hypotheses 2, 5, and 8. However, the limited data are certainly entirely consistent with those hypotheses. In the statistical analysis, state high court term length did not prove to be a statistically significant predictor of whether a state court judge would accept a step-down in the transsystemic hierarchy of judicial positions in moving to the federal judiciary, as Hypothesis 6 predicted; the variable, however, did approach significance at the 10% level. And the data are entirely consistent with Hypothesis 7's prediction that lateral moves from a state judiciary to the federal judiciary accompanied by a step-down and a salary reduction would be rare.

One might object that the data set suffers from problems of selection bias. First, the data set includes no failed attempts to lateral, nor does it include failed efforts by (for example) presidents or senators to induce sitting state judges to lateral to the federal judiciary. The response to this objection is that the data set includes precisely those judges who were willing, and able, to make lateral moves. It is impossible to know whether a failed lateral move was the result of (for example) insufficient prior judicial experience, prior judicial experience at an insufficiently high level of the originating judiciary, or some other reason.

Another objection is that the data set omits judges who were judges in another judiciary previously, but not immediately prior to the second judgeship. It is of course possible that a judge successfully joins a second judicial system because of prior judicial experience in another system, even if that experience does not immediately precede the second judgeship. And it is also possible that a judge who joins a second judicial system directly from another judicial system secured the second position more because of *other* experience than the prior judicial position. Indeed, perhaps that other experience was the reason the individual successfully obtained positions in *both* judiciaries. Still, the definition of lateral that I use here is consistent with the term's use in other settings. Moreover, the inclusion of judges who worked elsewhere between judgeships would distance the inquiry from its focus on those who have chosen judging as a career. Not all those who move directly from one judgeship to another are career judges, but many are. That said, in the future, it would be beneficial to extend the analysis to those whose career paths take them from one judiciary to another, but with other career stops along the way.