

HIGH COURT STUDIES: THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DISSENTING AT NEW YORK'S FEDERAL APPEALS COURT: AN EMPIRICAL STUDY OF SECOND CIRCUIT DISSENTS AND THE FREQUENT DISSENTER, JUDGE ROSEMARY POOLER

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I feel intuitively that there is another good reason for dissenting—in a way, maybe the best of all. If you think that you are right and the other judges are wrong, it is right to say so and explain why—no other justification is needed. There is a moral obligation to say what you think—not an absolute obligation, of course; certainly, there are times when the right thing to do is keep silent. But the duty to say what you think is, itself, entitled to some weight.¹

I. INTRODUCTION

While those in the legal profession spend much time focusing on courts' majority decisions, exploring how those opinions explain and evolve the law, the dissenting opinions of a court are unfortunately often overlooked.² Dissents not only show the dissenter's own view of the issue, but also force the majority to redefine and clarify their ultimate decision.³ Thus, dissents play a useful role by forcing the majority to craft a more definite decision in an effort to clearly distinguish the majority from the dissent.⁴

Analysis of dissenting decisions is also relevant for legal scholars

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¹ Robert S. Smith, *Dissenting: Why Do It?*, 74 ALB. L. REV. 869, 874 (2010/2011).

² Jessica R. Vigers, *The First Department: An Empirical Study of the Court at the Heart of New York City*, 74 ALB. L. REV. 879, 879 (2010/2011).

³ Daniel Gross, *An Empirical Study of the Vindicated Dissents of the New York Appellate Division, Fourth Department, From 2000 to 2010*, 74 ALB. L. REV. 931, 931–32 (2010/2011) (citing Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 406 (1999)).

⁴ Smith, *supra* note 1, at 872.

and practitioners interested in how a judge rules. A dissent is a clear indication of where a judge “felt strongly enough . . . [to] use his staff and resources to compose a personal statement to say that his colleagues are wrong.”⁵ Agreeing with a majority opinion is undoubtedly the easiest choice—one that will appease the majority of the court and result in the judge being on the winning side—but a dissenter must take the time to draft a separate opinion knowing that the effort will have no immediate effect on the outcome of a case.⁶

This paper presents an empirical study of dissents at the Second Circuit Court of Appeals, with a focus on the one judge, Judge Pooler, who has dissented most in the time period studied. Part II begins by presenting an overview of the Second Circuit Court of Appeals, including the composition and procedure of the court. Part III overviews dissents at the Second Circuit, noting the number of times each Judge has dissented. Part IV discusses Judge Pooler, currently the court’s biggest dissenter, and analyzes the types of cases in which she dissents. Finally, Part V will conclude with an overview of the meaning of Judge Pooler’s dissents and the practical results of this study.

It is important to note that this study is simply a study. It does not purport to be perfect. Many Second Circuit dissents have come down before and after the time frame of this study. Thus, the numbers of cases and dissents have surely changed from the dates used. The study does, however, present an overview of how Second Circuit judges have dissented in the time period examined in the hopes that the findings are representative of a trend. More specifically, this paper develops an apparent pattern in the dissents of the frequent dissenter, Judge Pooler.

II. COMPOSITION AND PROCEDURE OF THE SECOND CIRCUIT

The United States Court of Appeals for the Second Circuit is one of twelve United States Circuit Courts.⁷ Like other circuit courts, the Second Circuit can hear cases from any of the district courts in

⁵ Vincent Martin Bonventre, *Justice Alito’s Goat—What Gets It? (Part 1)*, N.Y. CT. WATCHER BLOG (Feb. 16, 2010), <http://www.newyorkcourtwatcher.com/2010/02/justice-alitos-goat-what-gets-it.html>.

⁶ *Id.*

⁷ *Federal Courts: Courts of Appeals*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals.aspx> (last visited Feb. 1, 2012).

the circuit or directly from an administrative agency.⁸ The states comprising the jurisdiction of the Second Circuit are New York, Connecticut, and Vermont.⁹ Thus, appeals generally come from the District of Connecticut, the District of Vermont, and the Northern, Southern, Eastern, and Western Districts of New York.¹⁰ There are currently twelve active judges¹¹ and eleven senior judges on the court.¹² Each case is initially heard by one panel, consisting of three judges.¹³ Occasionally, if a judge has a particularly heavy caseload, another judge may be temporarily placed on a panel of the court.¹⁴

The Chief Judge of the court, Dennis Jacobs, also serves as the court's administrative head.¹⁵ In this capacity, the Chief Judge prepares the calendar and assigns each judge the period he or she must sit for.¹⁶ The Chief Judge is selected in order of seniority from those who satisfy the following criteria: under the age of sixty-five, tenure as a circuit judge for at least one year, and never having previously served as Chief Judge.¹⁷ Once selected, the Chief Judge may serve for seven years or until reaching the age of seventy, whichever is sooner.¹⁸ After serving as Chief Judge, the judge resigns, becoming a member of the court.¹⁹ Judges also have the option of taking senior status after satisfying the "Rule of Eighty," or when a judge's age plus time served equals eighty.²⁰ Although senior judges are able to hear fewer cases than their active counterparts, senior status is not retirement and many continue to be equally as active.²¹

⁸ *Id.*

⁹ COMM. ON FED. COURTS, THE ASS'N OF THE BAR OF THE CITY OF N.Y., *APPEALS TO THE SECOND CIRCUIT* 1 (9th ed. 2007).

¹⁰ *Id.*

¹¹ See *Second Circuit Judges*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/judgesmain.htm> (last visited Feb. 24, 2012) (listing as the current twelve active judges on the court: Chief Judge Dennis Jacobs, José A. Cabranes, Rosemary S. Pooler, Robert A. Katzmann, Reena Raggi, Richard C. Wesley, Peter W. Hall, Debra Ann Livingston, Gerard E. Lynch, Denny Chin, Raymond J. Lohier, Jr., Susan L. Carney, and Christopher F. Droney).

¹² *Id.* (listing Jon O. Newman, Amalya L. Kearse, Ralph K. Winter, John M. Walker, Jr., Joseph M. McLaughlin, Pierre N. Leval, Guido Calabresi, Chester J. Straub, Robert D. Sack, and Barrington D. Parker as the current eleven senior judges on the court).

¹³ COMM. ON FED. COURTS, *supra* note 9, at 1 (citing 28 U.S.C. § 45 (2011)).

¹⁴ COMM. ON FED. COURTS, *supra* note 9, at 2.

¹⁵ *Id.* at 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Frederic Block, *Senior Status: An "Active" Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 536 (2007) (citing 28 U.S.C. § 371(c) (2011)).

²¹ Block, *supra* note 20, at 536.

In a four to six week time frame each judge will generally sit for approximately one week.²² Since each three-judge panel is necessarily comprised of different judges each time, in order to remain consistent, judges will often discuss important issues amongst themselves.²³ If there is a particularly important case which would either clarify a circuit decision or resolve a conflict among the circuits, the court may hear that case en banc or with the entire court sitting.²⁴ Although often requested, the court will very rarely grant a rehearing en banc unless it deals with an issue of “exceptional importance.”²⁵

Finally, the Second Circuit may certify a question to a state’s highest court for a determination of an unsettled state law issue that would control the outcome of the case at the Second Circuit.²⁶ Certification can be brought up either by a party or by the court *sua sponte*.²⁷ Certification happens quite frequently at the court but is completely discretionary for both the state’s highest court and the Second Circuit.²⁸

III. DISSENTS AT THE SECOND CIRCUIT

In the time period studied, approximately five years, the Second Circuit averaged around two to three thousand cases each year, totaling almost twelve thousand cases.²⁹ Of course many of these cases are in fact court orders or routine decisions. Out of these cases only 117 were split decisions, meaning at least one judge dissented. Including cases where multiple judges dissented, there were a total of 122 dissenting opinions. Split decisions more effectively show the cases that actually caused conflict within the court, not just the “easy cases.” To get a better idea of how the Second Circuit judges dissent on important issues, this article mainly examines the split decisions within the court.

²² COMM. ON FED. COURTS, *supra* note 9, at 1.

²³ *Id.*

²⁴ *Id.* at 101–02.

²⁵ *Id.* at 97, 102 (quoting *Landell v. Sorrell*, 406 F.3d 159 (2d Cir. 2005)).

²⁶ COMM. ON FED. COURTS, *supra* note 9, at 108. For a more complete discussion of certified questions from New York’s Court of Appeals to the Second Circuit, see Sol Wachtler, *Federalism is Alive and Well and Living in New York*, 75 ALB. L. REV. 659 (2011/2012).

²⁷ COMM. ON FED. COURTS, *supra* note 9, at 108.

²⁸ *Id.* at 108–09.

²⁹ The period of this study spans from August 1, 2006 through October 1, 2011.

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TABLE 1: DISSENTING OPINIONS OF THE CURRENT JUDGES AT THE SECOND CIRCUIT³⁰

Judge	Status	Number of Split Decision Cases Heard ³¹	Dissents Authored ³²	Percent of Dissenting Opinions in Split Cases
Pooler	Active	38	15	39.5
Straub	Senior	22	13	59.1
Livingston	Active	23	10	43.5
Jacobs	Active	31	08	25.8
Wesley	Active	26	06	23.1
Kearse	Senior	14	06	42.9
Walker	Senior	22	06	27.3
Cabranes	Active	27	05	18.5
Sack	Senior	21	05	23.8
Winter	Senior	12	05	41.7
Calabresi	Senior	19	04	21.1
Raggi	Active	27	04	14.8
Katzmann	Active	18	03	16.7
Parker	Senior	22	03	13.6
Leval	Senior	06	02	33.3
Lynch ³³	Active	10	02	20.0

³⁰ Table 1 presents only those dissents for a current judge; there are twenty-two more dissents written by judges who were either temporarily appointed no longer sit on the court.

³¹ Search terms in Lexis Nexis: 2nd Circuit Cases: DISSENT(dissent!) and JUDGES(Pooler).

³² Search terms in Lexis Nexis: 2nd Circuit Cases: DISSENTBY(Pooler). The author counted only those dissents which corresponded with different cases, such that a dissent from an amended case was not counted.

³³ Judge Lynch began his service on the Second Circuit on September 21, 2009 in the middle of the dates of this study. *Second Circuit Judges, supra* note 11.

Chin ³⁴	Active	04	01	25.0
Hall	Active	25	01	4.0
Carney ³⁵	Active	00	00	00
Lohier ³⁶	Active	02	00	00
McLaughlin	Senior	07	00	00
Newman	Senior	06	00	00

Table 1 outlines which judges dissent the most, including the number of split cases they sat on. An initial observation is that active judges dissent more in raw numbers, but if percentages are considered, Judge Straub and Judge Kearse, both senior judges, have a higher rate of dissent. This is instructive because, although Judge Pooler has the largest number of dissents, Judge Straub has dissented at a higher percentage, notable especially because he is a senior judge.³⁷ Judge Livingston has the next highest number of dissents and also a high percentage.³⁸ Chief Judge Dennis Jacobs is ranked next in pure number but slightly lower in percentage; interesting because of his role as Chief Judge.³⁹ Other judges, such as Judge Parker, have fewer dissenting opinions, however, these are equally important because these limited cases show exactly what issues entice that judge enough to decide to write a dissent.⁴⁰

³⁴ Judge Chin began his service on the Second Circuit on April 23, 2010 in the middle of the dates of this study. *Id.*

³⁵ Judge Carney began her service on the Second Circuit on May 17, 2011, in the middle of the dates of this study. *Id.*

³⁶ Judge Lohier was began his service on the Second Circuit on December 21, 2010, in the middle of the dates of this study. *Id.*

³⁷ Given the time frame of this study and the cases decided after this date, Judge Straub could arguably be the biggest dissenter at the Second Circuit. For a more complete discussion of Judge Chester J. Straub, see Danielle L. Levine, *Staying True to the Ideals of Fundamental Fairness: An Empirical Study of the Dissents of Judge Straub*, 75 ALB. L. REV. 1163 (2011/2012).

³⁸ For a discussion on Judge Debra Ann Livingston's dissents, along with dissents of Judge Reena Raggi, see Michael C. Tedesco, *Conservatism in the Second Circuit: An Analysis of the Dissenting Opinions of Judge Debra Livingston & Judge Reena Raggi*, 75 ALB. L. REV. 1205 (2011/2012).

³⁹ For a discussion of the dissents by Chief Judge Dennis Jacobs, as well as Judge Wesley, see Robert J. Brenner, *Institutional Conservatism and Its Impact on Appellate Decision-Making: An Empirical Study of the United States Court of Appeals for the Second Circuit*, 75 ALB. L. REV. 1145 (2011/2012).

⁴⁰ For a discussion of Judge Parker's and Judge Sack's dissents, see Christina L. Shifton, *Decision-Making at the Second Circuit: Judges Barington D. Parker, Jr. and Robert D. Sack*, 75 ALB. L. REV. 1187 (2011/2012).

IV. JUDGE POOLER AND HER DISSENTING OPINIONS

Judge Pooler, who has dissented the most during the period of this study, has a variety of interesting dissents. As discussed above, dissents say a lot about how a judge makes decisions. Further, analysis of a judge's dissenting opinions gives a clearer insight into what values, classes of people, and issues a judge strives to protect. Often, by the time a case gets to an appellate level court like the Second Circuit, it is one of the cases where Justice Cardozo would say there is no decisive law or precedent for the judge to simply apply to the case.⁴¹ In this type of case, a judge has the ability to actually create precedent.⁴² To accomplish this, a judge must "deal with such considerations . . . [by leaving] the very ground and foundation of judgments inarticulate, and often unconscious"⁴³ Thus, not only do dissenting opinions show what a judge's conscious decisions are, but also give a view into a judge's subconscious views or inclinations.

A. Judge Rosemary S. Pooler

Before analyzing Judge Pooler's dissents, it is important to observe her biography, including how she rose to the bench and what impact her personal history might have on her decisions at the Second Circuit. Judge Pooler began her career at a small general practitioners firm.⁴⁴ After taking time off to have children, Judge Pooler became involved in local politics where she was eventually appointed the consumer lawyer for the citizens of Syracuse.⁴⁵ After Judge Pooler was asked to be the enforcer of a consumer ordinance in Syracuse, she subsequently became the consumer advocate for New York State.⁴⁶

Pooler was next appointed a Commissioner of the New York Public Service Commission.⁴⁷ Judge Pooler subsequently shifted her attention to state politics, running for Congress.⁴⁸ Although she

⁴¹ BENJAMIN NATHAN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21 (1921).

⁴² *Id.*

⁴³ *Id.* at 119.

⁴⁴ Colloquy, *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 ALB. L. REV. 973, 984 (1994).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 985. "This is the Commission that rules on rates, building expansion, and long range planning of the regulated monopolies who provide gas, electric, water, and telephone in New York State." *Id.*

⁴⁸ *Id.*

lost her campaign, Judge Pooler, noted that these races allowed her to “learn[] something about public skills that lawyers sometimes do not learn in the private practice of law.”⁴⁹

Finally, Judge Pooler ran for and won a seat on the Supreme Court in the Fifth Judicial District.⁵⁰ Judge Pooler was appointed to the Northern District of New York as a District Judge in 1994.⁵¹ She served as a district court judge until her appointment to the Second Circuit in 1998.⁵² Both appointments were by then-President William J. Clinton.⁵³

B. Judge Pooler’s Dissenting Opinions

Although Judge Pooler has dissented the most in the time period studied and certainly has the most dissents out of the active judges at the Second Circuit, it is significant to note her dissents compared to her majority and concurring opinions in split cases. As depicted in Table 2, Judge Pooler has written the majority opinion only two times, a concurring opinion three times, and has dissented fifteen times out of the thirty-eight split decisions in cases Judge Pooler has heard. This table shows that Judge Pooler’s written decisions, especially her dissents, will give invaluable insight into her actual views.

TABLE 2: JUDGE POOLER’S WRITTEN DECISIONS

Opinion	Number of Opinions Authored on Split Decisions	Percentage of Total Split Cases Heard (38)
Majority Opinion	2	5.3
Concurring Opinion	3	7.9
Dissent	15	39.5

⁴⁹ *Id.*

⁵⁰ *Id.* at 986.

⁵¹ FED. BAR COUNCIL, SECOND CIRCUIT REDBOOK, 2010–2011, at 40 (Jeanette Redmond ed., 2010).

⁵² *Id.*

⁵³ *History of the Federal Judiciary: Biographical Directory of Federal Judges: Pooler, Rosemary S.*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1910&cid=999&ctype=na&instate=na> (last visited Feb. 24, 2012).

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Table 3 separates the types of dissents by Judge Pooler. In the time period studied, Judge Pooler dissented, overwhelmingly, for the rights of the accused in both civil and criminal matters. Next, Judge Pooler dissented four times for the consumer in business cases, twice for the employee in employment cases, and once for the right to contract. Although this is a simplified overview, it certainly presents helpful insight into Judge Pooler's judging. This, however, is not the end of the inquiry; it is also important to examine Judge Pooler's dissenting opinions in some detail in order to discern who is being dissented for, the reasons why, and, ultimately, what motivates her dissent.

TABLE 3: TYPES OF DISSENTS BY JUDGE POOLER

Type of Case	Number of Dissents	Percentage of Total Dissents (15)
Criminal: For Rights of the Accused	4	26.6
Civil: For Rights of the Accused	4	26.6
Business: For the Consumer	4	26.6
Employment: For the Employee	2	13.3
Contract: Rights to Contract	1	6.6

1. Rights of the Accused

As mentioned above, most of Judge Pooler's dissents arise in the context of the rights of the accused. Specifically, eight out of the fifteen dissents authored by Judge Pooler, or fifty-three percent of the time Judge Pooler dissented, the case involved the rights of the accused. Half of the rights of the accused cases are in the criminal context and the other half are civil cases. Each of Judge Pooler's dissents in this context is examined.

a. Criminal Cases and Standing up for Rights of the Accused

First, *United States v. Fell* deals with a petition by a criminal

defendant for a panel rehearing or an en banc review.⁵⁴ In this case, the defendant stabbed his mother and her companion to death in Vermont, kidnapped another woman, stole her car to drive to New York, and subsequently killed her as well.⁵⁵ The murder in New York was eligible for capital punishment under federal law because of the interstate kidnapping.⁵⁶ A jury found the defendant guilty and sentenced him to death, a decision affirmed by the Second Circuit.⁵⁷ Faced with a petition for panel rehearing, the Second Circuit denied the petition, upholding the defendant's conviction.⁵⁸ Although the other dissenters argue evidentiary and constitutional issues,⁵⁹ Judge Pooler dissents because "[t]here are concerns of constitutional dimension in this death penalty case that warrant further inquiry."⁶⁰

In the next case, *United States v. Cavera*, the criminal defendant plead guilty to firearms trafficking.⁶¹ Taking into account that the guns defendant was trafficking were ultimately ending up in New York City, the district court judge opined that transporting weapons to places with existing high crime, like New York City, should face more severe punishment and imposed an "above-guidelines" sentence on defendant.⁶² In reviewing this decision en banc, the majority agreed with the district court's decision, explaining that stricter guidelines may serve as a deterrent.⁶³ Judge Pooler wrote a brief dissent joining various parts of her colleague's dissents.⁶⁴ First, Judge Pooler joined a dissent by Judge Straub, who argued that there was no evidence supporting an increased profitability, as the district court argued.⁶⁵ Judge Pooler also joined the part of Judge Sotomayor's dissent which discussed the necessity for a closer standard of review because the criminal sentence conflicted with sentencing guidelines.⁶⁶

In the third case, *United States v. Zedner*, the defendant was

⁵⁴ *United States v. Fell*, 571 F.3d 264, 264 (2d Cir. 2009).

⁵⁵ *Id.* at 265.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 283–84 (Calabresi, J., dissenting).

⁶⁰ *Id.* at 295 (Pooler, J., dissenting).

⁶¹ *United States v. Cavera*, 550 F.3d 180, 184 (2d Cir. 2008), *aff'd in part, vacated in part en banc*, 505 F.3d 216.

⁶² *Id.* at 184–85.

⁶³ *Id.* at 195–96.

⁶⁴ *Id.* at 216 (Pooler, J., dissenting).

⁶⁵ *Id.* at 214, 216 (Straub, J., dissenting).

⁶⁶ *Id.* at 216–17 (Sotomayor, J., dissenting).

initially indicted for attempting to defraud financial institutions; that case was dismissed without prejudice.⁶⁷ Shortly thereafter, the defendant was found guilty for attempted bank fraud and sentenced to time served subject to a three-year supervised release.⁶⁸ Defendant appealed both the dismissal with prejudice of the prior indictment, and his subsequent conviction.⁶⁹ While the appeal was pending, the defendant requested permission to travel to Israel where his brother had recently passed away.⁷⁰ While in Israel, defendant had a difficult time obtaining a passport to travel back to the United States and ran into problems with the police.⁷¹ The court found that the fugitive disentitlement doctrine applied because once the defendant did not return to the United States he became a fugitive; under that doctrine, any pending appeal of a fugitive may be dismissed.⁷² The majority applied the doctrine and dismissed the case with prejudice.⁷³ In Judge Pooler's dissent she argued that the district court did not have jurisdiction to hear the case because the Second Circuit never issued a mandate.⁷⁴ Thus, argued Judge Pooler, the court should not have even reached the merits of the fugitive disentitlement doctrine.⁷⁵ Even applying the doctrine, Judge Pooler argues that because of defendant's severe mental problems, the court should have declined to apply the doctrine.⁷⁶ Judge Pooler explains:

I agree with the district court when it stated, in overseeing the government's first prosecution of [the defendant]: "It seems like a miscarriage in a way of what I perceive to be justice, that you are perhaps prosecuting someone who in my book doesn't have the appropriate capacity to defend himself or know what he is doing."⁷⁷

Finally, in *United States v. Snow*, three defendants were convicted by a jury of crimes related to narcotics trafficking.⁷⁸ Defendants Marcus Snow and Rahad Ross challenged their

⁶⁷ *United States v. Zedner*, 555 F.3d 68, 70 (2d Cir. 2008).

⁶⁸ *Id.* at 70.

⁶⁹ *Id.* at 71.

⁷⁰ *Id.*

⁷¹ *Id.* at 72, 74.

⁷² *Id.* at 71, 78.

⁷³ *Id.* at 80.

⁷⁴ *Id.* at 81–82 (Pooler, J., dissenting).

⁷⁵ *Id.* at 84.

⁷⁶ *Id.* at 85.

⁷⁷ *Id.* at 84 (citation omitted).

⁷⁸ *United States v. Snow*, 462 F.3d 55, 58 (2d Cir. 2006).

convictions and defendant Fred Snow challenged his sentence.⁷⁹ The majority began by upholding the conviction of Marcus Snow and Fred Snow, holding that there was sufficient evidence for the jury's conviction.⁸⁰ Next, the court dealt with Ross's contention that there was insufficient evidence to show proof of conspiracy, possession, and maintaining drug premises.⁸¹ The majority held that the evidence failed to show actual possession but, alternatively, the evidence was sufficient as to constructive possession.⁸² Judge Pooler concurs with most of the majority opinion, dissenting only regarding the conviction of Ross for possession.⁸³ Judge Pooler argues that the evidence, only inferred from the circumstances, is insufficient to show constructive possession.⁸⁴ Judge Pooler points out that although Ross may still be guilty of conspiracy, this should have no impact on the actual or constructive possession verdict.⁸⁵

Every time Judge Pooler dissented in a criminal matter, she dissented in favor of the accused. In *Fell*, Judge Pooler was protecting the criminal from the death penalty.⁸⁶ In *Cavera*, Judge Pooler was arguing against stricter sentencing standards.⁸⁷ In *Zedner*, she argued in favor of a mentally ill defendant.⁸⁸ Finally, in *Snow*, Judge Pooler argued the prosecution had failed to present its case.⁸⁹ Thus, her dissents in this context show a clear pattern favoring the rights of the accused, at least in the criminal context. Reading the dissents closely it also becomes apparent that Judge Pooler focuses on individual rights and tends to support the individual, such as the mentally ill defendant in *Zedner*. Although she has different reasoning for each case, in each dissent authored by Judge Pooler where a criminal defendant's rights were potentially interfered with, she dissented in favor of the criminal defendant's rights.

b. Upholding Rights of the Accused in Civil Cases

The other half of Judge Pooler's dissents regarding the rights of

⁷⁹ *Id.* at 61, 72–73.

⁸⁰ *Id.* at 61–62.

⁸¹ *Id.* at 68–70.

⁸² *Id.* at 69–70.

⁸³ *Id.* at 73 (Pooler, J., dissenting in part).

⁸⁴ *Id.*

⁸⁵ *Id.* at 73–74.

⁸⁶ *United States v. Fell*, 571 F.3d 264, 295–96 (2d Cir. 2009).

⁸⁷ *United States v. Cavera*, 550 F.3d 180, 217–20 (2d Cir. 2008).

⁸⁸ *United States v. Zedner*, 555 F.3d 68, 81–86 (2d Cir. 2008).

⁸⁹ *Snow*, 462 F.3d at 73.

the accused are in civil matters. First, in *Sorto v. Herbert*, the petitioner was arrested and convicted by a jury for assault and murder.⁹⁰ The defendant brought a civil case to challenge the prosecution's use of preemptory strikes in jury selection as discriminatory.⁹¹ Although the prosecution had used its preemptory strikes four times, all on minorities, the court found that the petitioner failed to prove that the trial court's denial of Batson challenges was unreasonable.⁹² Thus, the majority upheld the determinations of the lower court.⁹³ In her dissent, Judge Pooler points out that the prosecution used sixty-six percent of its strikes against minorities and had stricken one hundred percent of Hispanic and African American jurors.⁹⁴ Thus, Judge Pooler argued that there was clear evidence to review the trial court's decision and the majority did "both defendants and ordinary citizens a disservice when [it] create[d] unnecessary obstacles to the vindication of such rights."⁹⁵

Second, in *Rosario v. Ercole* the court considered a criminal defendant's petition for a rehearing en banc on his ineffective counsel claim.⁹⁶ The issue was whether defendant's counsel's refusal to allow two extra alibi witnesses to testify rose to the level of ineffective counsel.⁹⁷ Without explicitly discussing any problems with New York standards, the court noted that state courts should assess each claim under both the federal and state guidelines and denied the petition.⁹⁸ In a dissent joined by Judge Pooler, Judge Jacobs describes that under Federal law counsel must act objectively reasonably, while under New York law the representation is considered in its entirety and fairness as a whole.⁹⁹ Although the New York standard is generally more protective of defendant's rights,¹⁰⁰ this case, argues Jacobs, was one where the defendant was "seriously prejudiced" and, because such prejudice is what triggers the federal standard, the New York standard is constitutionally defective.¹⁰¹ Although Judge Pooler

⁹⁰ *Sorto v. Herbert*, 497 F.3d 163, 167 (2d Cir. 2007).

⁹¹ *Id.* at 167.

⁹² *Id.* at 167–68, 171–72.

⁹³ *Id.* at 174–75.

⁹⁴ *Id.* at 176 (Pooler, J., dissenting).

⁹⁵ *Id.* at 178.

⁹⁶ *Rosario v. Eracole*, 617 F.3d 683, 683–84 (2d Cir. 2010).

⁹⁷ *Id.* at 685–86.

⁹⁸ *Id.* at 686.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 684.

¹⁰¹ *Id.* at 686–87.

joins the dissent by Judge Jacobs, she also writes her own dissent to “highlight the injustice this court’s denial permits” by pointing out that “[t]he state standard can act to deny relief despite an egregious error from counsel so long as counsel provides an overall meaningful representation.”¹⁰² Thus, Judge Pooler believed that the case should be reexamined by an en banc rehearing.¹⁰³

Third, in *Aczel v. Labonia* a plaintiff sued two police officers for constitutional violations, including false arrest and use of excessive force, as well as various state law claims.¹⁰⁴ The case went before a jury and the jurors decided that although the qualified immunity defense applied, the defendants should still compensate the plaintiff.¹⁰⁵ The judge informed the jury that finding the qualified immunity defense applicable was inconsistent with awarding damages to plaintiff and sent the jurors back to deliberate; however, they could not resolve their differences.¹⁰⁶ The district court decided to construe the initial verdict to be consistent; that is, accept the finding of the jury that the defendant was entitled to qualified immunity and ignore the damages award.¹⁰⁷ The Second Circuit upheld this decision, explaining that a possible inconsistency was mere speculation.¹⁰⁸ Judge Pooler dissents on the grounds that the jury verdict was inconsistent and an impermissible compromise.¹⁰⁹ Although it is not certain what the jury actually intended, it is clear, Judge Pooler argues, that the inconsistencies of the verdict can only be reconciled by a new trial.¹¹⁰

Finally, *Doe v. Pataki* stems from a series of cases regarding New York’s Sex Offender Registration Act (“SORA”), which requires different levels of sex offenders to register their status for different lengths of time.¹¹¹ A class of convicted sex offenders sued the state for violations of procedural due process and the matter was resolved with a settlement where the plaintiff-class agreed to register on the list for a period of ten years from a particular date.¹¹² After the agreement, however, there were various amendments to SORA,

¹⁰² *Id.* at 688 (Pooler, J., dissenting).

¹⁰³ *Id.*

¹⁰⁴ *Aczel v. Labonia*, 584 F.3d 52, 54 (2d Cir. 2009).

¹⁰⁵ *Id.* at 55.

¹⁰⁶ *Id.* at 55–56.

¹⁰⁷ *Id.* at 56.

¹⁰⁸ *Id.* at 59–60.

¹⁰⁹ *Id.* at 62 (Pooler, J., dissenting).

¹¹⁰ *Id.* at 66.

¹¹¹ *Doe v. Pataki*, 481 F.3d 69, 70, 72 (2d Cir. 2007).

¹¹² *Id.* at 73–74.

including an increase in the length of registration, which resulted in this case.¹¹³ In deciding that the extension applied to the settlement agreement, the court reads the contract to be an illustration of what the current law was; it was meant to evolve, argues the majority, with the changing law.¹¹⁴ In dissent, Judge Pooler asserts that the majority has “ignored basic principles of contract law” and should apply the plain meaning of the contract, not the intent of the parties.¹¹⁵ Finally, Judge Pooler asserts, even if the intentions of the parties were the appropriate analysis, the court should have remanded the issue to the district court to investigate the parties’ intent.¹¹⁶

Each dissent by Judge Pooler in the civil cases regarding the rights of the accused was in favor of the accused, with a focus on individual rights. In *Sorto v. Herbert*, Judge Pooler dissented in favor of a defendant’s right to jury selection, particularly minority jurors.¹¹⁷ In *Rosario v. Ercole*, Judge Pooler argued in favor of the defendant in his ineffective counsel claim.¹¹⁸ In *Aczel v. Labonia*, Judge Pooler dissented in favor of a defendant, arguing that he was the victim of excessive force.¹¹⁹ Finally, in *Doe v. Pataki*, Judge Pooler used the theory of contract law to defend the rights of criminals.¹²⁰ In each of Judge Pooler’s dissents where one criminally accused is requesting civil relief, Judge Pooler has dissented in favor of the accused.

Judge Pooler overwhelmingly dissents in favor of the accused regardless of whether the case concerns their civil or criminal trial. Thus, whether in the civil or criminal context, where the rights of the accused are at issue, Judge Pooler may find these rights important enough to write a dissenting opinion in favor of them. Further, by reading and analyzing each dissent, it becomes apparent that Judge Pooler tends to focus on the rights of the individual defendant.

2. Civil Cases

There are three types of cases where Judge Pooler dissents in the

¹¹³ *Id.* at 71–72, 74–75.

¹¹⁴ *Id.* at 79.

¹¹⁵ *Id.* at 80–81 (Pooler, J., dissenting).

¹¹⁶ *Id.* at 85.

¹¹⁷ *Sorto v. Herbert*, 497 F.3d 163, 175–78 (2d Cir. 2007).

¹¹⁸ *Rosario v. Ercole*, 617 F.3d 683, 688 (2d Cir. 2010).

¹¹⁹ *Aczel v. Labonia*, 584 F.3d 52, 62 (2d Cir. 2009).

¹²⁰ *Doe*, 481 F.3d at 80–86.

civil context. Not surprisingly, as shown in Table 3, five of Judge Pooler's fifteen dissents relate to business and four out of those five address issues impacting the consumer. Finally, Judge Pooler dissents twice in employment cases.

a. For Consumer Rights in the Business Context

The first case, *In re DBSD North America, Inc.*, reviews the bankruptcy court's plan of reorganization of DBSD North America.¹²¹ Two objectors to the plan, Sprint and DISH sued.¹²² DBSD was subject to three main claims: the first lien debt, the second lien debt, and Sprint's claim.¹²³ Sprint argues the plan violates the absolute priority rule of the Bankruptcy Code by failing to give Sprint first relief.¹²⁴ DISH also objected to the reorganization plan because the bankruptcy court found DISH was acting in bad faith.¹²⁵ The court first found that that Sprint had standing to appeal the decision because of the possibility of direct financial injury.¹²⁶ Next, the court determined that because shareholders with junior interests had their claims satisfied before Sprint, the reorganization plan violated the absolute priority rule.¹²⁷ Regarding DISH's objections, the court ultimately found that their original vote was, as a matter of law, in bad faith and consequently they were not entitled to the subsequent vote.¹²⁸ Judge Pooler concurs in much of the decision but dissents to the extent of Sprint's claim.¹²⁹ Judge Pooler argues that Sprint failed to make a showing that they are entitled to any money under the plan and, therefore, lacked standing.¹³⁰ Thus, Judge Pooler concludes that the court should not have even considered Sprint's arguments.¹³¹

The next case, *Tamoxifen Citrate Antitrust Litigation v. Barr Labs. Inc.*, arises from a prior case of patent infringement where Barr Labs attempted to manufacture a generic version of tamoxifen, patented by Zeneca.¹³² Zeneca sued Barr and the case was settled

¹²¹ See *In re DBSD N. Am., Inc.*, 634 F.3d 79, 85 (2d Cir. 2011).

¹²² *Id.* at 85.

¹²³ *Id.* at 86.

¹²⁴ *Id.*

¹²⁵ See *id.* at 88.

¹²⁶ *Id.* at 90.

¹²⁷ *Id.* at 95, 97–98.

¹²⁸ *Id.* at 105.

¹²⁹ *Id.* at 108 (Pooler, J., concurring in part, dissenting in part).

¹³⁰ *Id.* at 108, 110.

¹³¹ *Id.* at 110.

¹³² *Tamoxifen Citrate Antitrust Litig. v. Barr Labs. Inc.*, 466 F.3d 187, 190 (2d Cir. 2006).

under a settlement agreement where Barr was given twenty-one million dollars and a license to sell Zeneca's tamoxifen in exchange for Barr not marketing their generic version, also known as a reverse payment.¹³³ Because this agreement resulted in those two pharmaceutical companies being the only sellers of tamoxifen, the settlement agreement was directly challenged multiple times.¹³⁴ The majority explored reverse payments—those where the holder of the patent pays the alleged infringer as part of the settlement agreement—and finds that these provisions do not, per se, result in an anti-trust violation.¹³⁵ The majority concludes that the settlement did not violate anti-trust laws, and even if the payments were excessive, the court would not disrupt the settlement reached by the parties.¹³⁶ In Judge Pooler's dissent, she asserted that the general standard of reasonableness should apply in this case and the inquiry should be the strength of the underlying patent judged at the time the settlement agreement was entered into.¹³⁷ Here, at the time of the agreement, a district court judge had found that Zeneca's patent was invalid, thus the value of the patent was low.¹³⁸ Therefore, argues Judge Pooler, dismissal was improper; the court should have been allowed the benefits of discovery to determine if the litigation was in fact, a sham.¹³⁹

The same case was brought to the court after a petition for rehearing en banc.¹⁴⁰ Although the court denied the petition, Judge Pooler once again dissented, pointing out that the reverse exclusion settlements involved here were problematic, ultimately costing consumers billions of dollars each year and warranting a hearing en banc.¹⁴¹

Next, the court considered a class action case in *Estate of Pew v. Cardarelli*.¹⁴² There, the plaintiffs purchased money market certificates from an insolvent Agway who subsequently declared bankruptcy.¹⁴³ Plaintiffs filed in state court and Agway removed the case to the Federal District Court for the Northern District of

¹³³ *Id.* at 193–94.

¹³⁴ *Id.* at 195–96.

¹³⁵ *See id.* at 205–06.

¹³⁶ *Id.* at 213, 218.

¹³⁷ *Id.* at 228, 230 (Pooler, J., dissenting).

¹³⁸ *Id.* at 230.

¹³⁹ *Id.* at 229, 231.

¹⁴⁰ *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 625 F.3d 779, 779 (2d Cir. 2010).

¹⁴¹ *Id.* at 780–81 (Pooler, J., dissenting).

¹⁴² *Estate of Pew v. Cardarelli*, 527 F.3d 25, 26 (2d Cir. 2008).

¹⁴³ *Id.* at 27.

New York under 28 U.S.C. section 1332(d)(9)(c), allowing an exception to a grant of federal jurisdiction in class actions.¹⁴⁴ This decision was appealed to the Second Circuit.¹⁴⁵ After determining that the court had jurisdiction to hear the case, the court determines the merits of the case, i.e., whether the state law consumer fraud claim filed by the plaintiff fell within the exception of section 1332(d)(9)(c).¹⁴⁶ Although the court found that subsection ambiguous, the majority concluded that the exception does not apply and the case was properly venued in federal court.¹⁴⁷ In her dissent, Judge Pooler also looked at the plain meaning of the statute but did not find the statute ambiguous.¹⁴⁸ Judge Pooler argues that it is clear that the exception in section 1332(d)(9)(c) applies.¹⁴⁹ Thus, the majority should have looked only at the plain meaning of the statute and allowed the case to remain in state court.¹⁵⁰

Given Judge Pooler's background as the consumer lawyer in Syracuse and the consumer advocate for the state of New York, it is not surprising that when she disagrees with the majority, Judge Pooler finds cases relating to consumer rights important enough to dissent. Given her background, again not surprising is the observation that in each of the consumer cases, Judge Pooler dissented in favor of the rights of the consumer and generally against the larger business. In *In re DBSD*, Judge Pooler voted to uphold the bankruptcy reorganization plan that is favorable to the smaller business and presumably helpful to consumers. Similarly in *Tamoxifen* and subsequent cases, Judge Pooler once again dissented, articulating her dislike of the settlement and its purported violation of anti-trust laws, which ultimately hurts the consumer. Finally, in *Estate of Pew*, Judge Pooler dissented, voting to allow various consumers to join in a class action against a larger company. Thus, in each consumer related case where Judge Pooler authored a dissent, she has done so in favor of the consumer's rights.

b. Preference for Enforcement of the Plain Meaning of Contracts

A consistent theme in Judge Pooler's dissents is to articulate the

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ *Id.* at 29–30.

¹⁴⁷ *Id.* at 30, 32–33.

¹⁴⁸ *Id.* at 33 (Pooler, J., dissenting).

¹⁴⁹ *Id.* at 35.

¹⁵⁰ *Id.* at 38.

need to enforce contracts entered into by the parties. Similarly, Judge Pooler makes it clear that when interpreting a contract, the court should look at the plain meaning of the text and refrain from exploring parties' intentions or other extrinsic information. In the contract case *ReliaStar Life Insurance Company v. EMC National Life Co.*, a conflict arose between ReliaStar and EMC regarding coinsurance policies.¹⁵¹ The contract included an arbitration agreement and a clause that each party should bear their own expenses of arbitration.¹⁵² In accordance with the contract, the parties went to arbitration to settle a dispute; however, the arbitrator entered an award for ReliaStar and ordered EMC to pay fees and costs.¹⁵³ ReliaStar sought to confirm the award and EMC opposed the award of fees and costs.¹⁵⁴ The court held that the contract had given the arbitrator broad rights to sanction bad faith conduct and that the arbitrator's award was proper.¹⁵⁵ In dissent, Judge Pooler argues that the arbitrator's award "plainly contradicts an express and unambiguous term of the contract."¹⁵⁶ Further, Judge Pooler points out that although a court can award sanctions for bad faith, an arbitrator does not have this inherent power; all of the arbitrator's power comes from the contract of the parties.¹⁵⁷

Although this is the only dissent Judge Pooler has authored during this study explicitly favoring contractual rights, Judge Pooler seems to articulate, through the language in this and other dissents, her opinion that a contract should be enforced according to its plain meaning. For example, Judge Pooler articulates this opinion in both the *Doe v. Pataki* and *Estate of Pew* dissents. In her dissenting opinion in *Doe*, Judge Pooler focused on the plain meaning of the statute, stating that the "plain meaning' approach to contract construction is the well-established law"¹⁵⁸ and that the notification procedures in the statute were "agreed to, and indeed bargained for."¹⁵⁹ Judge Pooler further explains:

The importance of our steadfast adherence to the plain

¹⁵¹ *ReliaStar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81, 84 (2d Cir. 2009).

¹⁵² *Id.* at 84.

¹⁵³ *Id.* at 84–85.

¹⁵⁴ *Id.* at 85.

¹⁵⁵ *Id.* at 89.

¹⁵⁶ *Id.* at 90 (Pooler, J., dissenting).

¹⁵⁷ *Id.* at 93, 91.

¹⁵⁸ *Doe v. Pataki*, 481 F.3d 69, 81 (2d Cir. 2007) (citing *Roberts v. Consol. Rail Corp.*, 893 F.2d 21, 24 (2d Cir. 1995)); *O'Neil v. Ret. Plan for Salaried Emps. of RKO Gen., Inc.*, 37 F.3d 55, 58–59 (2d Cir. 1994); *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002)).

¹⁵⁹ *Doe*, 481 F.3d at 82.

meaning rule becomes clear when we consider the unbridled freedom an appellate court has when it is abandoned; we could then rewrite any contract to correspond with what we believe to be the intentions of the parties, utilizing the exceptional equitable remedy of reformation under the guise of contract construction.¹⁶⁰

Similarly, in *Estate of Pew*, Judge Pooler once again asserts that the court is “bound by the text of the enactment” and should look to the “plain terms” of any exception.¹⁶¹ Judge Pooler goes on:

We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete.¹⁶²

Judge Pooler has presented a similar argument to uphold the contractual rights and clear meaning bargained for in both contracts and statutes. It is apparent from these cases that Judge Pooler favors the plain meaning of not only contracts but also statutes, giving force to the unambiguous terms in each.

c. For Individual Rights in the Employment Category

In *Caidor v. Onondaga County*, a plaintiff filed a race discrimination case against his former employer after being fired for failing to report his criminal record on his application.¹⁶³ The plaintiff obtained a lawyer and sued. However, when the parties reported being close to settlement, plaintiff’s counsel withdrew.¹⁶⁴ The case continued with discovery but because plaintiff, acting pro se, served unreasonable requests on defendant, the judge denied plaintiff’s subsequent motion to compel discovery.¹⁶⁵ Then, because the plaintiff because failed to file an objection within the required ten-day period, the defendants were granted summary judgment.¹⁶⁶ The general rule is that if a litigant is acting pro se, a court will waive the ten-day rule on any dispositive decision.¹⁶⁷ Here, although the plaintiff asks the court to extend this rule to any

¹⁶⁰ *Id.* at 81.

¹⁶¹ *Estate of Pew v. Cardarelli*, 527 F.3d 25, 33 (2d Cir. 2008).

¹⁶² *Id.* at 37 (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

¹⁶³ *Caidor v. Onondaga Cnty.*, 517 F.3d 601, 603 (2d Cir. 2008).

¹⁶⁴ *Id.* at 603.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 604.

¹⁶⁷ *Id.* (citing *Small v. Sec’y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989)).

decision, the majority decides that the plaintiff should have been aware of the rule and thus, cannot appeal the decision.¹⁶⁸ Judge Pooler dissented, arguing that the majority should not have explicitly dealt with this issue because it was unnecessary to dispose of this case.¹⁶⁹ Even if the court had allowed further discovery, argued Judge Pooler, there was no evidence to support the plaintiff's claim, thus, the summary judgment motion would have been granted.¹⁷⁰ Therefore, argues Judge Pooler, the majority articulated "rights of pro se litigants without giving meaning to those rights" and, as a result, there was "no merit to this ungenerous little opinion."¹⁷¹

Finally, in *Meacham v. Knolls Atomic Power Laboratory*, the claim arose in the context of alleged employment discrimination.¹⁷² Plaintiffs, former employees of defendant, lost their jobs during layoffs and sued for age discrimination under federal and state law.¹⁷³ After a series of appeals, the Supreme Court remanded the case to be re-decided in light of the Court's ruling in *Smith v. City of Jackson*.¹⁷⁴ The Second Circuit began its analysis by establishing the rule in light of *Smith*; that after the plaintiff presents a prima facie case of disparate impact, the employer must give a reasonable justification.¹⁷⁵ Then, asserts the majority, the burden shifts back to the plaintiff to prove that the employer's purported justification is unreasonable.¹⁷⁶ Here, although plaintiff satisfied its prima facie case, the employer was able to prove that the layoffs were business justified; since plaintiff was unable to prove the proffered justification unreasonable, the majority granted defendant judgment as a matter of law.¹⁷⁷ In her dissent, Judge Pooler disagrees with the majority's interpretation in *City of Jackson*.¹⁷⁸ She argued that analyzing the statutory language and the legislative intent, it is the employer's burden to prove that their actions and business justifications were reasonable.¹⁷⁹ In short,

¹⁶⁸ *Caidor*, 517 F.3d at 605.

¹⁶⁹ *Id.* (Pooler, J., dissenting).

¹⁷⁰ *Id.* at 606.

¹⁷¹ *Id.* at 605–06.

¹⁷² *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 138 (2d Cir. 2006), *vacated*, 554 U.S. 84 (2008).

¹⁷³ *Id.* at 138.

¹⁷⁴ *Id.* (citing *Smith v. City of Jackson*, 544 U.S. 228 (2005)).

¹⁷⁵ *Meacham*, 461 F.3d at 139–40.

¹⁷⁶ *Id.* at 141.

¹⁷⁷ *Id.* at 139, 144, 146–47.

¹⁷⁸ *Id.* at 147 (Pooler, J., dissenting).

¹⁷⁹ *Id.* at 149, 151.

argues Judge Pooler, a reasonable business justification is an exception to an ostensibly discriminatory act, and therefore an affirmative defense for employers.¹⁸⁰

In both employment cases, Judge Pooler dissents in favor of the individual employee. First, in *Caidor*, although Judge Pooler recognizes that the employee still might lose, the court unnecessarily restricted rights of a pro se defendant.¹⁸¹ Thus, Judge Pooler once again dissents in favor of the individual's right, here in the employment context. Similarly, in *Meacham*, Judge Pooler dissents in favor of a purportedly discriminated employee, arguing to uphold the rights of employees in discrimination cases and limit defenses for the business.¹⁸²

IV. CONCLUSION

In general, examining dissents at the Second Circuit provides a useful overview of the judges who dissent the most and those who tend to vote with the majority. Of course, the most helpful analysis is examining individual judges. Since Judge Pooler dissented most in the time period observed, she is an important judge to recognize, because therefore she is also more likely than others to dissent in the future.

By simply reading and analyzing Judge Pooler's dissents, patterns clearly emerge. There are certain classes of parties that Judge Pooler tends to dissent in favor of. First, Judge Pooler dissents heavily in favor of the rights of the accused in both civil and criminal cases. Second, Judge Pooler favors consumers and small business rights in favor of what may be seen as big business. Finally, Judge Pooler respects the rights of the individual in both criminal cases, as well as in employment cases, dissenting in their favor.

The bottom line of any empirical study is how to make the statistics work. Although this study looked strictly at dissents, they show the issues that Judge Pooler feels passionate about, which should correlate to majority votes. Any party looking for Judge Pooler's vote may gain a few pointers from this study. First, if a party is in one of the groups that tend to evoke sympathy from Judge Pooler, the party should be relieved she is on their panel and

¹⁸⁰ *Id.* at 149.

¹⁸¹ *Caidor v. Onondaga Cnty.*, 517 F.3d 601, 605–06 (2d Cir. 2008) (Pooler, J., dissenting).

¹⁸² *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 153 (2d Cir. 2005) (Pooler, J., dissenting).

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craft an argument that she can support. Second, if the party is in one of Judge Pooler's "favored groups" discussed above, focusing on the party's status as an individual may lead to a favorable vote. Finally, especially for these favored parties—and even for those who are not—focusing an argument on the plain meaning of either a statute or contractual term is likely to be successful. Given the weight Judge Pooler gives to the plain meaning interpretation in her dissents, crafting this type of argument will likely give Judge Pooler a good reason to support that argument, especially if she would have tended to support that party anyway.

By approaching a study without preconceptions and strictly examining the data it is easy to pick up on trends that emerge. While this approach may overlook important dynamics of each particular judge, this type of study is helpful from a practical point of view. In conclusion, the author hopes to have given a brief insight into Second Circuit dissents, particularly those of Judge Pooler with the hope that these studies will both inform and provoke a deeper exploration of the Second Circuit.