ARTICLE

DELIBERATION AND STRATEGY ON THE UNITED STATES COURTS OF APPEALS: AN EMPIRICAL EXPLORATION OF PANEL EFFECTS

PAULINE T. KIM[†]

Recent studies have established that the decisions of a federal court of appeals judge are influenced not only by the preferences of the judge, but also by the preferences of her panel colleagues. Although the existence of these "panel effects" is well documented, the reasons that they occur are less well understood. Scholars have proposed a number of competing theories to explain panel effects, but none has been established empirically. In this Article, I report an empirical test of two competing explanations of panel effects—one emphasizing deliberation internal to a circuit panel, the other hypothesizing strategic behavior on the part of circuit judges. The latter explanation posits that court of appeals judges act strategically in light of the expected actions of others and that, therefore, panel effects should depend upon how the preferences of the Supreme Court or the circuit en banc are aligned relative to those of the panel members. Analyzing votes in Title VII sex discrimination cases, I find no support for the theory that panel effects are caused by strategic behavior aimed at inducing or avoiding Supreme Court review. On the other hand, the findings strongly suggest that panel effects are influenced by circuit preferences. Both minority and

[†] Associate Dean for Research and Faculty Development and Professor of Law, Washington University School of Law, St. Louis. I am grateful to Cass Sunstein for making his data available, to Christina Boyd for sharing the expanded data set, to Ryan Black for assisting with the statistical analysis, and to Jessica Smith for able research assistance. Thanks also to Andrew Martin, Margo Schlanger, David Law, Bryan Lammon, Katherine Barnes, Scott Baker, Josh Fischman, Aaron Bruhl, and participants in workshops at Washington University Law School, Emory Law School, University of Alabama Law School, University of Kansas Law School, and in the 2008 Conference on Empirical Legal Studies at Cornell Law School for helpful comments on this paper.

majority judges on ideologically mixed panels differ in their voting behavior depending upon how the preferences of the circuit as a whole are aligned relative to the panel members. This study provides evidence that panel effects do not result from a dynamic wholly internal to the three judges hearing a case, but are influenced by the environment in the circuit as a whole as well.

INTRODUCTION

One of the central institutional features of the United States courts of appeals is the use of judicial panels to decide cases. Rather than having a single appellate judge decide each appeal, or even having a group of appellate judges deciding in isolation and tallying their votes, the appeals process is specifically structured to promote a collaborative form of decision making.[1] Three appellate judges are assigned to decide a case together, and they typically share their background research, sit together as a panel to hear oral arguments, meet to discuss their views, and issue a single opinion resolving the appeal.[2] Of course, not all cases are typical, and judges sometimes dissent or

[1] For a detailed description of the organizational structure of the federal appellate courts, see JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS ch. 2 (2002).

[2] *See id.* ch. 5 (discussing the interaction among the judges within a court of appeals).

concur separately. These occurrences are relatively infrequent, however, and cases involving separate opinions are viewed as deviations from the usual model of appellate decision making. Thus, as D.C. Circuit Judge Harry Edwards put it, "judging on the appellate bench is a *group* process."[3]

As a matter of institutional design, why are federal appellate courts structured in this way? Certainly it is not for the sake of efficiency, as the same number of judges sitting alone could decide appeals more quickly than when sitting with two of their colleagues. Most explanations focus on the quality of decision making.[4] Kornhauser and Sager, for example, assert that increasing the number of judges making a decision will increase the probability that a court will reach a correct decision.[5] So long as each judge is more likely than not to decide correctly, a correct outcome is more likely whenever a group of judges decides by majority vote.[6] Others have suggested that this error-reducing effect results from the exchange of ideas and information that occurs during the process of deliberation.[7] For example, Judge Edwards describes the interactions among judges on an appellate panel as "a process of dialogue, persuasion, and revision"[8] that enables them to "find common ground and reach better decisions."[9]

From an empirical perspective, it is difficult to test these claims in the absence of consensus regarding what makes one decision "better" than another. However, scholars *have* collected considerable evidence suggesting that decision making by a federal court of appeals judge sitting on a three-judge panel differs from what one might expect

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[3] Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1656 (2003).

[4] *See, e.g.*, Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2362 (1999) (noting the argument that the purpose of a multimember appellate court is to increase accuracy); Edwards, *supra* note 3, at 1640-41 (arguing that collegiality on appellate panels enables judges to "reach better decisions"); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1035-36 (1991) (suggesting that decisions involving more judges are more likely to be correct); *cf.* Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 40 (1988) (reporting that en banc review is justified by the belief that the involvement "of more judges leads to sounder decisions").

[5] Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 98 (1986).

[6] *Id.* at 97-99.

[7] *See, e.g.*, Caminker, *supra* note 4, at 2372 (suggesting that collegial deliberation will enhance the accuracy of decision making).

[8] Edwards, *supra* note 3, at 1661.

[9] *Id.* at 1641.

from that judge sitting alone. This phenomenon—commonly referred to as "panel effects"—has been documented in a wide variety of legal contexts.

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Although the existence of panel effects is well documented, the reasons that they occur are not clearly understood. Scholars have proposed a number of explanations, but none of these theories has been conclusively established.[18] This Article empirically explores *when* panel effects occur in an effort to better understand *why* they occur. More specifically, it offers an empirical test of two competing types of explanations: deliberative and strategic.

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[16] In nearly all of these issue areas, Sunstein et al. found evidence of both ideological voting and panel effects. The exceptions to this general pattern were cases involving criminal appeals, takings of private property, punitive damage awards, standing to sue, and Commerce Clause challenges. In these areas, they found no difference in the voting patterns of judges based on party affiliation. SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10, at 48. In cases involving abortion restrictions and capital punishment, however, they found that although judges vote ideologically, their votes do *not* appear to be influenced by their colleagues. Cases involving gay and lesbian rights seemed to exhibit a similar pattern of ideological voting, but no influence from panel composition; these cases, however, are too few in number to draw any firm conclusions about whether panel effects are present or not. *Id.*

[17] Republican appointees vote to uphold affirmative action programs 37% of the time when sitting on all-Republican-appointee panels, 49% of the time when sitting with one Republican appointee and one Democratic appointee, and 65% of the time when sitting with two Democratic appointees. Sunstein et al., *Ideological Voting*, *supra* note 10, at 319. For Democratic appointees, the reverse pattern holds: 82% vote in favor of upholding affirmative action programs on an all-Democrat-appointee panel, 80% when sitting with one Democratic appointee and one Republican appointee, and 61% when sitting with two Republican appointees. *Id.*

[18] *See, e.g.*, CROSS, *supra* note 12, at 152 (explaining that the results of the earlier studies could not explain why panel effects occur); Revesz, *supra* note 10, at 1755-56 (stating that his analysis cannot conclusively disentangle competing hypotheses); Sunstein et al., *Ideological Voting*, *supra* note 10, at 307 (explaining that the data are consistent with several different hypotheses for the causes of panel effects).

By deliberative explanations, I mean to identify those theories that emphasize the internal exchanges that occur among panel members and the potential for these exchanges to influence a judge's vote. For purposes of the empirical test undertaken here, the exact mechanism by which judges influence one another is not critical. It may be the case that they come to persuade one another through the exchange of information and the power of reasoned argument.[19] Alternatively, psychological mechanisms—such as conformity pressures or group polarization—may be operative, leading judges to change their minds when confronted with the opinions of their colleagues.[20] The critical point, for purposes of this study, is that pure deliberative accounts attribute panel effects to the dynamics internal to the members of a panel, rather than to any interaction with other actors in the judicial system.

By contrast, strategic theories explain observed panel effects as the result of strategic behavior by appellate judges.[21] These theories posit that when deciding cases, individual judges advance their goals not simply by exercising their discretion in a manner consistent with their policy preferences, but by taking into account the likely responses of other actors as well.[22] Rather than naïvely voting their preferences,

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[19] *See, e.g.*, Edwards, *supra* note 3, at 1600 (arguing that a judge's initial views may shift through the process of collegial deliberation); Farhang & Wawro, *supra* note 12, at 308 and sources cited therein (describing the deliberative model of panel decision making).

[20] *See, e.g.*, SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10, at 63-78.

[21] *See, e.g.*, VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT 61 (2006) [hereinafter HETTINGER ET AL., COLLEGIAL COURT]; Cross & Tiller, *supra* note 10, at 2159.

[22] In recent years, strategic theories of judicial behavior have become prominent in the political science and legal literatures. *See generally* CROSS, *supra* note 12, at 94-122 (testing various strategic theories of court of appeals decision making); Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999) (testing empirically whether Supreme Court Justices engage in strategic voting in certiorari decisions); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (describing strategic interactions between the Supreme Court, Congress, and the President in which each tries to impose its policy preferences in light of the expected responses of other players); Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581 (1996) (testing empirically whether Supreme Court Justices act strategically in changing their votes between the initial conference and final vote); Matthew McCubbins, Roger Noll & Barry Weingast (McNollgast), *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995) (modeling judicial decision making as a product of strategic interactions between upper and lower courts); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a*

court of appeals judges are hypothesized to act with an eye to the expected behavior of the Supreme Court, the circuit sitting en banc, and their panel colleagues.[23] An appellate judge will decide whether to vote her sincere preference or to accommodate the views of her colleagues based on her beliefs about the likelihood of further review and the probable outcome if the case is reviewed. Unlike purely deliberative explanations, strategic theories suggest that panel effects will depend upon the preferences of the Supreme Court and/or the circuit as a whole, and not just upon the preferences of the three judges comprising an appellate panel.

Strategic theories play an important role in some accounts of the federal judicial hierarchy. Many scholars have suggested that the risk of reversal assures that lower court judges follow the doctrines set out in Supreme Court precedent, even those with which they disagree.[24] However, given the tens of thousands of cases decided by the courts of appeals each year, the Supreme Court's limited reversal power can only be effective if it has some mechanism for identifying appropriate cases for review. One hypothesis is that court of appeals judges dissent in order to signal to the Supreme Court that certain cases deviate from established doctrine and should be reviewed.[25] Other scholars have described the relationship between a circuit court and a three-judge panel in a similar manner.[26] Just as the Supreme Court moni-

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Principal-Agent Model of Supreme Court–Circuit Court Interactions, 38 AM. J. POL. SCI. 673 (1994) (modeling the interaction between the Supreme Court and lower federal courts as a principal-agent relationship); Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman, *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294 (1998) (testing empirically whether Supreme Court opinions are written strategically based on an examination of draft opinions).

[23] Cross & Tiller, *supra* note 10, at 2156; *see also* HETTINGER ET AL., COLLEGIAL COURT, *supra* note 21, at 40-41.

[24] *See, e.g.*, Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 102 (2000) (arguing that lower court judges care about reversal because they care about the disposition of cases and their professional reputations); Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 822 (2003) (describing reversal as the Supreme Court's "obvious mechanism of control over lower court judges"); Songer, Segal & Cameron, *supra* note 22, at 680 (theorizing that lower court judges will "shirk" less when the likelihood of reversal is high).

[25] *See* Cross & Tiller, *supra* note 10, at 2173; *see also* HETTINGER ET AL., COLLEGIAL COURT *supra* note 21, at 76-77.

[26] *See, e.g.*, Tracey E. George, *The Dynamics and Determinants of the Decision To Grant En Banc Review*, 74 WASH. L. REV. 213, 245 (1999) (noting "an implicit but incomplete agency agreement" between the circuit court and panel).

tors and occasionally reverses the decisions of the lower federal courts, a circuit sitting en banc can review and revise a panel decision that is inconsistent with circuit precedent or norms. This form of monitoring is costly, however, and so scholars have suggested that the circuit will rely on signals, such as the presence of a dissenting opinion, to identify which panel decisions warrant closer scrutiny.[27]

In order to test these two competing explanations for panel effects, I begin with the observation that strategic accounts—unlike purely deliberative ones—predict that appellate voting behavior will be influenced by interactions with a reviewing court. More specifically, if appellate judges act strategically—with an eye to the likely response of the Supreme Court or the circuit en banc—then observed panel effects should differ depending upon how the preferences of the appellate judges on the panel are aligned relative to those of the Supreme Court or the circuit as a whole. By contrast, if purely deliberative explanations are true, the preferences of the Supreme Court or the circuit as a whole should have no systematic impact on whether or when panel effects are observed.

In the empirical test described here, I analyze data about judges' votes in Title VII sex discrimination cases decided by the U.S. courts of appeals.[28] Sex discrimination cases are often perceived to be ideologically contested, and scholars have documented the existence of both ideological voting and panel effects in these types of cases.[29] Most prior studies of panel effects have used the party of the appointing President as a proxy for judicial ideology[30] and then have compared the voting records of Republican-appointed and Democrat-appointed judges across different panel compositions. In this study, I follow the convention of using the party of the appointing President to define ideological alignments—for example, I assume that a Re-

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[27] *See* HETTINGER ET AL., COLLEGIAL COURT, *supra* note 21, at 76-77; George, *supra* note 26, at 247.

[28] See Section II.C., *infra*, for a more detailed description of the data.

[29] *See, e.g.*, SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10, at 30-31 (finding evidence of both ideological voting and panel effects in sex discrimination cases); Peresie, *supra* note 12, at 1768-69 (finding that both judge gender and judicial ideology significantly affect outcomes in Title VII sex discrimination and harassment cases); Boyd, Epstein & Martin, *supra* note 12, at 20 (documenting large panel effects in sex discrimination cases).

[30] *E.g.*, SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10; Cox & Miles, *supra* note 12, at 3; Cross & Tiller, *supra* note 10, at 2168; Miles & Sunstein, *supra* note 12, at 830; Revesz, *supra* note 10, at 1718-19; Sunstein et al., *Ideological Voting*, *supra* note 10, at 302 n.1.

publican-appointed judge sitting with two Democrat-appointed judges is in the "ideological minority," while the two Democratic appointees are the "majority" judges on that panel.

Unlike prior studies, however, mine does not rely on the "percent liberal" vote to measure judges' voting behavior. Instead, I examine the extent to which judges vote counter-ideologically—that is, in a direction opposite to what a naïve ideological model would predict. This methodological innovation permits a focus on the central phenomenon of interest: the changing likelihood that a judge will vote counter to a naïve ideological prediction depending upon the panel composition. In the empirical test, I examine whether observed panel effects—the changes in the likelihood of a counter-ideological vote under different voting conditions—are contingent upon the preferences of the Supreme Court or the circuit en banc.

Using this method, I find no evidence that panel effects are influenced by the relative preferences of the Supreme Court. More specifically, I observe no difference between the voting patterns of either minority or majority judges on mixed panels regardless of whether the minority judge is more closely aligned with the Supreme Court or with the panel majority. This finding casts doubt on one explanation of hierarchical control—namely, the theory that appellate judges' voting behavior is motivated by the desire to signal noncompliant decisions to the Supreme Court. On the other hand, I find evidence that the tendency of appeals court judges to be influenced by their panel colleagues *does* depend on how the preferences of the circuit court as a whole are aligned relative to those of the panel members. When a minority judge on a panel is ideologically closer to the circuit as a whole than to the panel majority, the majority judges are less likely to vote in a stereotypically ideological direction, while the minority judge is more likely to do so. This result is consistent with a strategic explanation for panel effects, although the exact mechanism by which circuit preferences influence panel behavior remains uncertain. What the results do indicate is that panel effects are not the result of a dynamic wholly internal to the three-judge panel, but are influenced by the circuit environment.

This Article proceeds as follows: Part I surveys the competing theoretical explanations that have been offered to explain panel effects. Part II explains the limitations of existing empirical tests and then describes my approach for testing strategic accounts of panel decision making. In Parts III and IV, I present the results of the empirical tests and then consider the implications of my findings.

I. COMPETING EXPLANATIONS

A. *Panel Effects*

As described more fully in Part II, this study analyzes data on judges' votes in Title VII sex discrimination cases. In the analysis and discussion that follow, I characterize a vote in favor of the sex discrimination plaintiff as "liberal" and a vote against the plaintiff as "conservative."[31] Table 1 shows that, as one might expect, the percentage of cases with a liberal outcome varies depending upon the composition of the panel.

Table 1: Federal Court of Appeals Decisions in Sex Discrimination Cases, 1995–2002, by Panel Composition

Panel Composition	Number of Observations	Percent Liberal Outcomes
RRR	186	25.8%
RRD	354	38.4%
RDD	199	49.2%
DDD	48	79.2%

Table 2 further breaks down the data. Consistent with prior studies, it shows that Democratic appointees vote in favor of plaintiffs in these cases more often than Republican appointees (51.9% of the time as compared with 34.2% of the time), but that judges' votes are influenced by the partisan affiliation of the other members of the

[31] This treatment is consistent with prior studies of judicial decision making in sex discrimination and Title VII cases. *See, e.g.*, SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10, at 19 (describing a vote for a plaintiff in a sex discrimination case as the "stereotypically liberal" vote); Sunstein et al., *Ideological Voting*, *supra* note 10, at 314 tbl.1 (identifying a vote for the plaintiff in sex discrimination cases as voting for the liberal position); Boyd, Epstein & Martin, *supra* note 12, at 19 (treating pro-plaintiff votes in sex discrimination cases as liberal cases).

panel as well as their own. For example, a Republican appointee sitting with two Democratic appointees casts a liberal vote 44.2% of the time. However, her voting pattern becomes steadily more conservative when she sits with one other Republican appointee (37.7% liberal votes) or two other Republican appointees (26.2% liberal votes). A similar pattern holds true for Democratic appointees.

Table 2: Voting of Federal Court of Appeals Judges in Sex Discrimination Cases, 1995–2002, by Party of Appointing President and Panel Colleagues

Republican Appointees			Democratic Appointees		
Panel Colleagues	**Number of Observations**	**Percent Liberal Votes**	**Panel Colleagues**	**Number of Observations**	**Percent Liberal Votes**
DD	199	44.2%	RR	354	41.5%
RD	708	37.7%	DR	398	51.5%
RR	558	26.2%	DD	144	78.5%
All cases	1465	34.2%	All cases	896	51.9%

Of critical importance, the different outcomes across panel composition seen in Table 1 do *not* reflect only simple majoritarian voting. If judges naïvely voted their policy preferences and case outcomes were determined by majority vote, then judges would exhibit a stable voting pattern regardless of the identity of their panel colleagues. As Table 2 clearly shows, this is not the case. Alternatively, one might expect that a judge in the ideological minority might be influenced by her colleagues, but that the two judges in the ideological majority would not. After all, the majority has the votes to achieve its policy goals directly. Once again, however, this is not the case; judges in the ideological majority are also observed to vote differently when a judge affiliated with the opposing party is on the panel. Thus, the phenomenon of "panel effects" encompasses *two* distinct effects: first, that judges in the majority vote differently (in a less stereotypically ideo-

logical fashion) than judges on a homogeneous panel; and second, that judges in the minority vote differently (still less stereotypically ideologically) than judges in the majority.

B. *Theoretical Accounts*

What accounts for these observed panel effects? Scholars have proposed a variety of explanations, encompassing cultural, psychological, institutional, and strategic factors. In order to frame an empirical test, I group these explanations into three basic types. As a caveat, I do not mean to argue that this typology is canonical in any sense, and each type of explanation that I identify encompasses a number of diverse theories. Rather than definitively categorizing theories, this typology merely serves to sharpen the empirical inquiry here.

One type of explanation focuses on the relatively low dissent rates in court of appeals decisions. A simple ideological model of voting would predict frequent dissents whenever a panel of judges is divided ideologically. In fact, the proportion of federal appellate decisions containing dissents is quite low—around 10% overall.[32] Some scholars explain the high levels of unanimity by positing the importance of a "norm of consensus."[33] Frequent dissents are thought to undermine institutional legitimacy and the clarity of legal rules,[34] while unanimous decisions "promote the appearance of legal objectivity, certainty, and neutrality"[35] and encourage compliance with the law.[36] Other scholars emphasize the costliness of dissent to the individual judge.[37] Writing a dissenting opinion requires time and effort, and it

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[32] *See* HETTINGER ET AL., COLLEGIAL COURT, *supra* note 21, at 47 (noting that 9.5% of cases in the U.S. courts of appeals from 1960 to 1996 had dissents).

[33] For an overview, see, for example, CROSS, *supra* note 12, at 160, Burton M. Atkins, *Judicial Behavior and Tendencies Towards Conformity in a Three Member Small Group: A Case Study of Dissent Behavior on the U.S. Court of Appeals*, 54 SOC. SCI. Q. 41, 42-43 (1973), and Farhang & Wawro, *supra* note 12, at 307 and sources cited therein.

[34] *See* HETTINGER ET AL., COLLEGIAL COURT, *supra* note 21, at 19 (claiming that unanimous decisions "may promote institutional legitimacy and effective implementation of individual decisions"); Edwards, *supra* note 3, at 1651 ("What the parties and the public need is [the best] answer, not a public colloquy among judges.").

[35] Farhang & Wawro, *supra* note 12, at 307.

[36] *See* HETTINGER ET AL., COLLEGIAL COURT, *supra* note 21, at 19-20 (describing how "consensual decision making promotes the efficient administration of justice").

[37] *See, e.g.*, CROSS, *supra* note 12, at 160-61 (explaining why the decision not to dissent may be a practical response to the costs of dissenting); SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10, at 64-66 (describing dissents on three-judge panels as "both futile and highly burdensome to produce"); Revesz, *supra* note 10, at 1733

may negatively impact a judge's reputation and collegial relations,[38] while offering very little payoff. A dissent has no substantive effect on the outcome of a case, at least in the short term, and writing one does not relieve a judge of her responsibilities for drafting opinions in other cases. These types of theories offer strong reasons that a judge in the ideological minority might often suppress her disagreement and go along with the decision of the majority.

Although these theories of "suppressed dissent" offer a plausible account of why dissents are relatively infrequent on the courts of appeals, they cannot explain panel effects more generally. As noted above, panel composition influences not only the behavior of the minority judge, but the behavior of the judges who comprise the panel majority as well.[39] As Revesz argued, if judges go along with their colleagues simply to avoid writing a dissent, one would predict that on mixed panels, "the single judge of one party [would be] the only one to moderate his or her views."[40]

The costs of writing a dissent might lead a minority judge to avoid openly expressing her disagreement, but should have no impact on the votes of the panel majority. Similarly, a norm of consensus has more explanatory power for minority than for majority judges. Such a norm might sometimes induce the majority to accommodate the views of the minority, but it seems more likely to lead them to ignore the preferences of the minority, knowing that the strong norm of unanimity will pressure the minority member to go along.[41] Thus, while theories of dissent suppression are certainly relevant, they are insufficient to explain the observed influence of panel composition on the behavior of both minority *and* majority judges on mixed panels.

(suggesting that a judge may "moderate[] his or her views in order to avoid having to write a dissent").

[38] *See* SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10, at 66 ("[D]issenting opinions might also cause a degree of tension among judges . . . ."). Dissents force the majority judges to confront public disagreement with their conclusions and may oblige them to respond to arguments raised by the dissent or to more carefully defend the conclusions that they reach. *See* Ginsburg & Falk, *supra* note 4, at 1017 ("Even one dissident judge can impose upon me the cost, in time and aggravation, of having to respond to a dissenting opinion . . . .").

[39] *See supra* Section I.A.

[40] Revesz, *supra* note 10, at 1734.

[41] As Sunstein et al. point out, "a Democratic majority, or a Republican majority, has enough votes to do what it wishes." SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10, at 12.

The second type of explanation—what I call "internal deliberative" explanations—focuses on dynamics internal to the judicial panel. One such explanation is that panel effects are the product of collegial interactions among appellate judges. This explanation is consistent with the way that many judges describe the decision-making process and has been advanced most forcefully by Judge Harry Edwards. He writes that "if panel composition turns out to have a 'moderating' effect on judges' voting behavior, this is a sign that panel members are behaving collegially."[42]

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Sunstein and his coauthors propose another set of explanations that focuses on internal panel dynamics—explanations rooted in the findings of experimental psychology. They cite studies documenting a "conformity effect," where individuals in experimental settings are observed to yield their views in the face of unanimous group opinion to the contrary,[46] and argue that "judges are vulnerable to similar influences."[47] Analogizing the minority judge to the experimental subject confronted with a unanimous group opinion, they argue that the tendency to conform to dominant opinion explains why dissents are far less common on the courts of appeals than a naïve ideological model would predict.

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[42] Harry T. Edwards, Essay, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358 (1998).

[46] SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10, at 67. As some of those authors explain in a different work, "[t]he yielding . . . occurs partly because of the information suggested by the unanimity of others; how could shared views be wrong? And it occurs partly because of reputational pressures; people do not want to stand out on a limb for fear that others will disapprove of them." Sunstein et al., *Ideological Voting*, *supra* note 10, at 339.

[47] SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10, at 69.

In contrast to dissent-suppression theories and internal-deliberative accounts, strategic explanations focus on interactions between the appellate judges on a panel and the other actors in the judicial system in order to explain panel effects. These accounts posit that appellate judges do not pursue their policy goals naïvely, but rather act strategically, with an eye to the likely response of the Supreme Court or the court of appeals en banc. For example, Virginia Hettinger, Stefanie Lindquist, and Wendy Martinek propose a strategic explanation of when appellate judges dissent. They hypothesize that circuit judges "may choose to dissent to signal the circuit *en banc* that the majority panel opinion is contrary to circuit law or contrary to the preferences of the circuit majority," or "to signal the Supreme Court and thereby invite review by that body."[53]

As they recognize, dissenting opinions might also be suppressed if circuit judges who disagree with the majority opinions nevertheless believe that en banc or Supreme Court review will produce an outcome even worse—from their perspective—than the panel majority opinion. Thus, any prediction about whether or not a circuit judge will dissent "will depend on the configuration of preferences across the relevant actors: the judge, the three-judge panel, and the circuit [or the Supreme Court] as a whole." Their theory, however, focuses narrowly on the decision to dissent, rather than on panel effects generally.

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[53] HETTINGER ET AL., COLLEGIAL COURT, *supra* note 21, at 41; *see also* CROSS, *supra* note 12, at 156.

Cross and Tiller offer a closely related theory of how strategic behavior produces observed panel effects. Similar to Hettinger and her coauthors, they assume that appellate judges use dissents as a signal to the Supreme Court or the circuit en banc. However, they focus not on accounting for dissenting behavior, but on explaining why lower court judges obey precedent.[56] Following doctrine poses no difficulties where it leads to a result consistent with a circuit judge's preferences. However, when existing doctrine does *not* coincide with her policy goals, she may be tempted to disregard it. In such a situation, Cross and Tiller theorize that a panel member who differs ideologically from the majority will act as a "whistleblower." By dissenting, the minority judge can "expose the majority's manipulation or disregard of the applicable legal doctrine,"[57] alerting a higher court to the disobedient decision making and leading to reversal of the original majority opinion. Alternatively, the threat to "expose disobedient decisionmaking by the majority" may cause the majority to acknowledge its "disregard" of doctrine and decide to "keep its decision within the confines of doctrine."[58] Cross and Tiller therefore predict that "courts are more likely to comply with doctrine . . . when the judicial panel is politically or ideologically divided."

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[56] Cross & Tiller, *supra* note 10, at 2156.

[57] *Id.*

[58] *Id.* at 2159. Judge Wald has expressed skepticism about this account based on her experience as a judge on the Court of Appeals for the D.C. Circuit: "[T]hreats of dissent are not particularly effective in changing a panel's course." Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 253 (1999). Judge Harry Edwards has been even more blunt, claiming that "the hypothesis is absurd." Edwards, *supra* note 42, at 1337.

Cross and Tiller also suggest an alternative, psychologically based account of whistleblower effects:

> Judges employ "cognitive shortcuts to process imperfect information" under the legal model, and these shortcuts produce apparently political results. . . . [T]he minority judge can serve as a whistleblower by revealing these biasing cognitive shortcuts. Once the majority can no longer readily rationalize its decision under the legal model, it will frequently concede to the commands of that model.

This whistleblowing theory is consistent with models that positive political theorists commonly use to describe the judicial hierarchy.[60] Briefly, these models analogize the relationship between the Supreme Court and the lower federal courts to a principal-agent relationship. The Supreme Court creates doctrine that their "agents," the lower federal courts, are supposed to apply faithfully. However, lower court judges have their own preferences and may be tempted to deviate from established doctrine. Principal-agent models are thus centrally concerned with questions of supervision and control—that is, "[h]ow and to what extent can the Supreme Court control the behavior of lower federal courts to ensure that its policy dictates are implemented?"[61] One common answer is that lower federal court judges follow Supreme Court doctrine because they "fear exposure of any noncompliance and consequent reversal."[62] The Supreme Court, however, only reviews a tiny fraction of court of appeals decisions—currently less than 1% per year.[63] Cross and Tiller's whistleblowing

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Cross & Tiller, *supra* note 10, at 2174. Sunstein et al. use the whistleblower terminology in this second sense—as a psychological rather than strategic explanation. SUNSTEIN ET AL., ARE JUDGES POLITICAL?, *supra* note 10, at 78-79.

[60] For a more detailed discussion of principal-agent models of the federal judicial hierarchy, see Kim, *supra* note 11, at 391-404.

[61] *Id.* at 393.

[62] Cross & Tiller, *supra* note 10, at 2158; *see also* George & Yoon, *supra* note 24, at 822-25 (noting that the Supreme Court's mechanism of control over lower courts is its power of reversal); McNollgast, *supra* note 22, at 1635-36 (modeling lower court judges "as strategic actors facing a trade-off between pursuing a personal policy agenda and seeing their decisions reversed by a higher court"); Songer, Segal & Cameron, *supra* note 22, at 693 ("If an appeals court anticipates that it will be sanctioned in the form of a reversal, the anticipated response will keep the court in check.").

[63] *See* Kim, *supra* note 11, at 397-98. Scholars have suggested various mechanisms by which even a low rate of reversal might induce compliance. For example, Songer, Segal, and Cameron hypothesize that litigant policing plays a crucial role, suggesting that losing parties are more likely to petition for Supreme Court review when the lower court opinion is "noncompliant," thereby sounding a "fire alarm" that alerts the Court to cases of "flagrant doctrinal shirking." Songer, Segal & Cameron, *supra* note 22, at 693. McNollgast argue that the Supreme Court exercises effective control by establishing a "doctrinal interval" of acceptable outcomes in order to induce lower courts to follow its precedents. McNollgast, *supra* note 22, at 1645-46. These explanations have been criticized on theoretical grounds, and the handful of relevant empirical studies generally do not support the theory that fear of reversal motivates lower court compliance with doctrine. *See* Kim, *supra* note 11, at 399-404 and sources cited therein; *see also* CROSS, *supra* note 12, at 99-101.

theory offers one possible mechanism by which the Supreme Court might efficiently monitor and control the decisions of the courts of appeals—relying on dissenting opinions to signal cases of noncompliance that warrant review.

Theorists have similarly analogized the relationship between a circuit court and its three-judge panels to an agency relationship.[64] On this view, individual judges are not free to decide as they like, but must act as "representatives" of the circuit.[65] A three-judge panel is "deputed to hear and to determine cases in conformity with the law as the full court views it."[66] To ensure that this representative function is carried out faithfully, the majority of the full circuit is permitted to overrule a panel decision by rehearing a case en banc.[67] Like the Supreme Court, however, the circuit as a whole will find it costly to monitor the decisions of each panel. To solve this monitoring problem, the circuit may rely on signals such as the presence of a dissenting opinion to determine which cases to rehear en banc, and circuit court judges, aware of this possibility, may vote strategically in order to invite or avoid en banc review of a panel's decision.[68]

Both Hettinger et al.'s strategic-dissent theory and Cross and Tiller's whistleblower theory draw some support from the fact that the presence of a dissenting opinion is associated with both a greater likelihood that a case will be reheard en banc[69] and that the Supreme Court will grant certiorari.[70] However, this observed correlation does not necessarily prove that dissenting opinions *cause* the circuit en banc or the Supreme Court to review a case. It may be that both the existence of a dissent and the decision to rehear or accept certiorari are the result of some underlying characteristic of the case—for example,

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[64] *E.g.*, George, *supra* note 26, at 245; Ginsburg & Falk, *supra* note 4, at 1011-13; Michael E. Solimine, *supra* note 4, at 49 (1988).

[65] Solimine, *supra* note 4, at 49.

[66] Ginsburg & Falk, *supra* note 4, at 1011.

[67] Solimine, *supra* note 4, at 49.

[68] Litigants may also play a role in monitoring panel decisions for the circuit, because they are more likely to petition for rehearing en banc if they believe that a panel decision is contrary to the preferences of the circuit majority. *See* Michael W. Giles, Thomas G. Walker & Christopher Zorn, *Setting a Judicial Agenda: The Decision to Grant En Banc Review in the U.S. Courts of Appeals*, 68 J. POL. 852, 865 (2006) (presenting empirical evidence that litigants' decisions to seek en banc review are influenced by the ideological preferences of the panel relative to those of the circuit majority).

[69] George, *supra* note 26, at 267; Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991–2002*, 70 GEO. WASH. L. REV. 259, 264 (2002); Ginsburg & Falk, *supra* note 4, at 1046.

[70] Caldeira, Wright & Zorn, *supra* note 22, at 563 tbl.1.

that it involves a particularly difficult or close legal issue. Moreover, even if the relationship between dissents and further review is a causal one, a considerable gap remains between the large number of court of appeals cases containing dissents and the very limited number accepted for Supreme Court or en banc review.[71] Thus, while the presence of a dissent may encourage the Supreme Court or circuit en banc to hear a case, it remains uncertain whether the possibility of a dissent and subsequent review actually influences the panel behavior of court of appeals judges.

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[71] As discussed above, dissents occur in about 10% of federal appellate cases. *See supra* note 32 and accompanying text. In contrast, the probability that a court of appeals decision will be reviewed by the Supreme Court and the probability of review by the circuit en banc are quite small, with both events occurring in less than 1% of cases. *See* Kim, *supra* note 11, at 391 n.30 ("[T]he chance that a given court of appeals decision will be reviewed by the Supreme Court is approximately 0.14%."); *see also* Michael W. Giles, Virginia A. Hettinger, Christopher Zorn & Todd C. Peppers, *The Etiology of the Occurrence of En Banc Review in the U.S. Courts of Appeals*, 51 AM. J. POL. SCI. 449, 450 (2007) (explaining that while the incidence of en banc hearings varies significantly across circuits and across time, the incidence is "uniformly low"); Ginsburg & Boynton, *supra* note 69, at 266 tbl.6 (reporting that the percentage of cases heard en banc from 1997 to 1999 varied between 0.10% and 0.58% depending upon the circuit); Ginsburg & Falk, *supra* note 4, at 1045 tbl.5 (reporting that 1.03% of argued cases and 0.2% of nonargued cases were reheard en banc by the D.C. Circuit from 1981 to 1990); Solimine, *supra* note 4, at 46 tbl.2 (reporting that less than 1% of court of appeals cases were heard en banc in the 1980s).

One might argue that the low percentage of cases actually reviewed by the Supreme Court or the circuit en banc does not necessarily indicate a lack of control by the reviewing courts, but rather the rate of review is low because control is effective and extensive oversight is not necessary. Thus, the actual rate of review cannot establish the true level of effective control.

If, however, a reviewing court is relying on the threat of review to exercise control over panel decisions, that threat must be at least a credible one. Cross describes the problem in the context of the Supreme Court:

> [T]here surely must be some credible threat of admonishment to maintain control on the playground. It is doubtful that nine teachers (the Supreme Court justices), who are capable of admonishing at most around one hundred students a year, could effectively keep order on a playground populated by more than fifty thousand students.

CROSS, *supra* note 12, at 100.

Given resource constraints, neither the Supreme Court nor the circuits have the capacity to increase significantly the proportion of panel decisions reviewed. Thus, while the threat of review might sometimes make actual review unnecessary, the limited capacity of the reviewing courts suggests that fear of reversal may not play a dominant role in appellate panel decision making.