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Review Essay

COLLEGIAL IDEOLOGY IN THE COURTS

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ARE JUDGES POLITICAL? by Cass R. Sunstein, David Schkade, Lisa M. Ellman, and Andres Sawicki. (Washington, DC, Brookings Institution Press 2006).

JUDGING ON A COLLEGIAL COURT by Virginia A. Hettinger, Stefanie Lindquist, and Wendy L. Martinek (Charlottesville, University of Virginia Press 2006).

INTRODUCTION

Two recent books shed new light on judicial decisionmaking in the U.S. circuit courts of appeals.[1] Although these books are aimed at different audiences, use different data and methods, and attack judicial decisionmaking from different perspectives, they are quite complementary.[2] Together, they illuminate the intersection of ideological preferences and collegiality.

Collegiality and ideology inevitably conflict. Given the range of ideological preferences and political "hot button" issues facing courts today, one would expect judges to disagree about the resolution of certain legal issues.[3] Because such disagreement puts collegiality and individuality in conflict,

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[1] Although more attention is paid to the U.S. Supreme Court, the circuit courts are the main source of American law. *See* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1459 (2003) (noting that circuit court decisions "are far more numerous and of far greater practical significance"). Hence, studies like these are especially valuable in understanding the course of our law.

[2] CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? (2006) is aimed at a broad audience, uses its own data, and directly examines ideological influences on judicial decisionmaking (while still emphasizing the influence of other panel members). VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT (2006) is aimed at an academic audience, uses an established extensive data set of opinions, and directly examines collegial influences on judicial decionmaking (but controls for ideological effects). Interestingly, the first two words of this book are "Cass Sunstein," referring to his earlier work on dissent.

[3] *See* Sheldon Goldman & Charles M. Lamb, *Prologue* to JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS 1, 2 (Sheldon Goldman & Charles M. Lamb. eds., 1986) [hereinafter JUDICIAL CONFLICT AND CONSENSUS] (noting the "passionate nature of many disputes brought to appellate courts").

any model of judicial decisionmaking must account for the interaction of these potentially opposing factors. This Review Essay explores new information about that interaction presented in the two books and then proposes a new model of judicial decisionmaking that accounts for both collegiality and ideology.

Part I briefly reviews the prior research on which the books build. A considerable amount of empirical research on judicial decisionmaking demonstrates that political ideology is a statistically significant determinant of judicial outcomes. This effect is not pervasive, however, and the research admits of other effects, such as collegiality. While collegiality is more difficult to study directly, empirical research on dissents and the interaction of panel members provides useful information on collegiality's role in the judicial decisionmaking process.

Parts II and III review the theses and extensive empirical analyses contained in the books being reviewed. I begin with *Are Judges Political?*, which analytically demonstrates that ideology matters in judicial decisionmaking. Notably, *Are Judges Political?* also reveals that panel composition matters in many cases, depending on the legal question at issue. *Judging on a Collegial Court* directly examines dissenting and concurring behavior, and I review its findings on the determinants of such dissensus, including but not limited to matters of judicial ideology.

Part IV presents a new model of judicial decisionmaking that integrates the ideological and collegial roles revealed in both prior research and the findings of these books. This model incorporates judicial preferences with the costs of disagreement to the potential dissenter and also to the majority. The model spacially describes how and when compromises or dissenting opinions occur.

Part V considers actions that may enhance the quality of the judicial decisionmaking process. These actions are predicated on the finding that a measure of intrapanel dissensus has value for the quality of circuit court decisions, but that an excess of such dissensus, appearing in the form of numerous published dissents or concurrences, is undesirable. A variety of ministerial actions have been proposed, such as reducing circuit sizes, but these can have only a limited effect. I conclude by suggesting that the legislative filibuster for circuit court appointments is a promising tool for synthesizing ideology and collegiality.

I. BACKGROUND RESEARCH ON IDEOLOGY AND COLLEGIALITY

The books do not write on a clean slate, but build on a background of research. Although the circuit courts are relatively understudied, a great deal of research, conducted primarily by political scientists, has examined the impact of judges' ideological preferences on their decisions.[4] This re-

[4] *See, e.g.*, FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 11–38 (2007).

search categorizes federal judges and judicial outcomes as either liberal or conservative. Judges are typically labeled based on the political party of the President who nominated them, and judicial outcomes are labeled according to the legal issue in dispute. For example, a decision upholding an antiabortion statute would be labeled conservative, and a decision striking it down would be labeled liberal. The research then looks for correlations between judges' presumed ideological preferences and their judicial decisions.

While much of this research has focused on the Supreme Court, there is ample evidence that ideology has an impact at the circuit court level, as well. One early study found clear associations between ideology and circuit court decisions, varying by area of law.[5] Another study found significant correlation between ideology and outcome in all areas of law.[6] Additionally, a meta-analysis of over twenty studies involving more than 79,000 court of appeals decisions found that political party affiliation of the circuit court judge explained about 24% of the variance in circuit court outcomes.[7]

A recent comprehensive study of ideological decisionmaking, conditioned by other possible determinants, again found a statistically significant association between ideology and appellate decisions.[8] For example, a panel of three judges appointed by Democrats affirmed a liberal decision 63.5% of the time, while a panel of three Republicans affirmed the liberal decision only 50.7% of the time.[9] The magnitude of this disparity varied by appointing President, with Reagan-Bush-I appointees showing the greatest ideological difference.[10] While these findings confirmed the significance of judicial ideology, ideological preferences were not overpowering. For all judges, ideology explained only a little over five percent of the differing outcomes, leaving considerable room for other influences.[11]

Collegiality among judges may be one such additional influence, though it has been the subject of fewer studies. One study proposed, the "team model" of judicial decisionmaking, contends that judges share a common conception of "right answers" that they strive to maximize.[12] The

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[5] Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 495 (1975).

[6] Donald R. Songer & Martha Humphries Ginn, *Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals*, 55 POL. RES. Q. 299 (2002).

[7] Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 236 tbl.3 (1999).

[8] Cross, *supra* note 1.

[9] *Id.* at 1504.

[10] *Id.* at 1506–07.

[11] *Id.* at 1508–09.

[12] *See* Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1613 (1995); *see also* Lynn A. Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1607 (2002) (suggesting that judges are also motivated by doing a "good job of judging").

first major study of circuit courts found a "shared sense of participation and responsibility for organizational objectives" that used "informal processes of mutual influence."[13]

Circuit court judge and law professor Harry T. Edwards has provided the most extensive analysis of collegiality.[14] Complaining that "[l]egal scholars generally have given judicial collegiality short shrift,"[15] Judge Edwards sought to dispel claims that ideology dictated judicial outcomes, but conceded its influence.[16] He stressed that "collegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions."[17] Judge Edwards did not equate collegiality with friendliness or universal agreement among circuit court judges, however. Instead, he defined collegiality as:

> a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered. Specifically, it is my contention that collegiality plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.[18]

He observed that while collegiality was not a given—having varied over the time of his service on the D.C. Circuit[19]—a collegial court involves considerable give-and-take among panel judges to produce a decision more consonant with the law's dictates.[20] Collegiality is not inconsistent with the existence of dissent, and in fact makes dissents "more precise, focused and useful to the development of the law."[21] Edwards stressed that quantitative studies of ideological decisionmaking should be viewed with caution and

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[13] J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 191 (1981). The author quoted one judge as stating that "after a while you develop a healthy respect for the capacities of your colleagues." *Id.* at 205.

[14] *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) [hereinafter Edwards, *The Effects of Collegiality*]; Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998).

[15] Edwards, *The Effects of Collegiality*, *supra* note 14, at 1643.

[16] *See id.* at 1677–78 (observing occasions when "ideology took over and effectively destroyed collegiality").

[17] *Id.* at 1640–41.

[18] *Id.* at 1645.

[19] *Id.* at 1648.

[20] *Id.* at 1649–1650.

[21] *Id.* at 1651.

concluded that "collegiality merits serious discussion to generate a fuller understanding of judicial decision making."[22]

Some have argued that recent developments have undermined the level of collegiality on the federal circuit courts. For example, commentators have posited that the growth of circuit courts reduces the amount of interaction between specific judges and may consequently reduce collegiality.[23] For a time, the government considered the "maximum feasible size" of an appellate court to be nine judges.[24] With its twenty-eight judges, the Ninth Circuit Court of Appeals arguably has compromised intracircuit collegiality. This effect may be exacerbated by the geographic size of that circuit, with judges interacting even less because they sit in distant locations.[25] Growing appellate caseloads across all the circuits may also threaten collegiality through increased delegation of decisionmaking to staff, a reduction in the number of cases receiving oral argument, and greater use of unpublished opinions or simple judgment orders.[26]

The influence of collegiality on judicial decisionmaking has seen less empirical analysis than the impact of ideology, which may make existing studies on ideology "inherently suspect, because they fail to account for the effects of collegiality on judicial decision making."[27] That being said, collegiality has been examined indirectly. Much of this research has focused on judicial dissent. While most of this analysis has addressed the Supreme

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[22] *Id.* at 1643. Judges appreciate the value of collegiality for substantive reasons that go beyond the interpersonal. A survey found that "most judges expressed a desire for greater collegial deliberation to improve the quality of opinions . . . ." HOWARD, *supra* note 13, at 212. Judge Patricia Wald declared that collegiality was "all important" to appellate courts. Patricia M. Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals*, *in* THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 171, 178 (Cynthia Harrison & Russell Wheeler eds., 1989); *see also* Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1017 (1991) (reporting that "[i]n all the courts of appeals, the judges must value collegiality").

[23] *See, e.g.*, FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING AND JUDGING 216 (1994) ("The threatened dilution of collegiality in federal courts has led some to propose capping the numbers of appellate and trial judges."); Diarmuid F. O'Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313, 315 (1996) (suggesting that "[a]s the court of appeals continues to grow, it becomes increasingly difficult to maintain the collegiality necessary for the court to do its job"); Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 414 (1981) (suggesting that the "[s]ize of the court is directly related to likelihood of dissent").

[24] HOWARD, *supra* note 13, at 213 (describing recommendations of the Judicial Conference of the United States).

[25] *See* Edwards, *The Effects of Collegiality, supra* note 14, at 1676 (noting "[t]he potential adverse effects of a large or geographically spread out court" while suggesting that technological advances could mitigate these effects).

[26] On the steady elimination of oral arguments in circuit court cases, see JOE S. CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS (1987).

[27] Edwards, *The Effects of Collegiality*, *supra* note 14, at 1641; *see also* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2298 (1999) (arguing that researchers had "paid insufficient attention to the ways in which the vote of each individual judge is influenced by the views of her colleagues").

Court, some studies have examined the circuit courts.[28] Dissents are reasonable proxies for collegiality, as they are said to represent "ruptures in the cloak of consensus ordinarily worn by collegiality."[29] Judge Kermit Lipez of the First Circuit suggested that "dissents may offend colleagues and worry court watchers who expect consensus."[30] They are by nature "a threat to collegiality on an appellate court."[31] Justice Brandeis recognized that dissents should be "saved for major matters if the Court is not to appear indecisive and quarrelsome," the appearance of which "are drains on the energy of the [Judiciary]."[32]

Research has shown that dissent rates are influenced by numerous factors. A study of state supreme courts found that dissent rates were influenced by factors such as issue complexity, whether judges were elected or appointed, and whether opinions were assigned randomly or by the court's chief justice.[33] Another study on state supreme courts found that such institutional and legal factors were better predictors of dissent than ideology.[34] A study of federal circuit courts found that new appointees to these courts are less likely to issue separate opinions.[35] The study also found that judges who are members of racial minorities appear somewhat more likely to author a dissent.[36] A study of the U.S. Supreme Court found that dissent probability was influenced by the Chief Justice's attitude toward dissents.[37]

One possible measure of the effect of collegiality on dissent would be judicial co-tenure—judges who have served together for a longer period of time might be more collegial and collaborative.[38] One recent analysis found

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[28] *See, e.g.*, Donald R. Songer, *Factors Affecting Variation in the Rates of Dissent in the U.S. Courts of Appeals*, *in* JUDICIAL CONFLICT AND CONSENSUS, *supra* note 3; Virginia Hettinger et al., *Separate Opinion Writing on the United States Courts of Appeals*, 31 AM. POL. RES. 215 (2003).

[29] COFFIN, *supra* note 23, at 224.

[30] Kermit V. Lipez, *Some Reflections on Dissenting*, 57 ME. L. REV. 313, 314 (2005).

[31] *Id.* at 342; *see also* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986) (noting that dissents "can threaten the collegiality of the bench"); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142 (1990) (suggesting that "[c]oncern for the well-being of the court on which one serves, for the authority and respect its pronouncements command, may be the most powerful deterrent to writing separately").

[32] Jerome P. Frank, *Book Review*, 10 J. LEGAL ED. 401, 404 (1958).

[33] Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 66 (1990).

[34] Tara W. Stricko-Neubauer, *Dissent in State Supreme Courts: An Integrated Model* 33 tbl. 5, *presented at* the Annual Meeting of the Midwest Political Science Association (Apr. 15–18, 2004).

[35] Virginia A. Hettinger et al., *Acclimation Effects and Separate Opinion Writing in the U.S. Courts of Appeals*, 84 SOC. SCI. Q. 792, 792 (2003).

[36] *Id.* at 803 tbl.1, 804–05 (finding this effect to be statistically significant, though gender was not).

[37] Gregory A. Calderia & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 900 (1998).

[38] This is not obviously true, of course, as long as co-tenure may produce greater antagonism. Supreme Court Justices of the Rehnquist Court served together for years without any pronounced suppression of dissent. Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*,

that length of judicial co-tenure reduced dissent to a statistically significant degree on both the Seventh and D.C. Circuits, but did not do so on the First and Ninth Circuits.[39] Moreover, even on the Seventh and D.C. Circuits, the reduced dissent rate was small.[40] Of course, dissents are not intrinsically inconsistent with collegiality if they are respectful, but a higher rate of dissent is presumably evidence of a reduced willingness to make compromises, and a willingness to compromise is a likely byproduct of a collegial court.

Other indirect studies of collegiality examine "panel effects"—the influence that each member of the circuit panel has on the votes of the other panel members. Walter Murphy long ago contended that judicial votes "are the result of interaction," so that standing alone such votes "tell very little about the force or direction of any interpersonal influence that may exist."[41] More recently, quantitative empirical studies have confirmed a material role for such interpersonal influences. These conclusions support Judge Edwards's claim that "collegiality mitigates judges' ideological preferences."[42]

A study of environmental regulatory challenges in the D.C. Circuit found that although a judge's ideological preferences mattered to his or her vote, so too did the preferences of the other members of the panel.[43] Indeed, "the ideology of one's colleagues is a better predictor of one's vote than one's own ideology."[44] Cass Sunstein reached a similar finding in his independent study of circuit court voting.[45] Furthermore, a study of circuit court opinions applying the *Chevron* deference standard showed that panel composition was very important in explaining the final result.[46] When a unified panel of Republican or Democratic appointees confronted a regulatory decision that was ideologically contrary, they tended not to give it deference.[47] However, the presence of just a single appointee from the other party nearly doubled the deference rate.[48] The authors posited that the result could be

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154 U. PA. L. REV. 1665, 1694 (2006) (showing a very slight decline in dissents during the era of the Rehnquist Court, leaving over 50% of cases with dissenting opinions).

[39] Jason J. Czarnezki & William K. Ford, *An Empirical Analysis of Dissensus on the United States Courts of Appeals* 17 tbl. 4, *presented at* the First Annual Conference on Empirical Legal Studies (Oct. 2006).

[40] *Id.*

[41] Walter F. Murphy, *Courts as Small Groups*, 79 HARV. L. REV. 1565, 1566 (1966).

[42] Edwards, *The Effects of Collegiality*, *supra* note 14, at 1640–41.

[43] Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997).

[44] *Id.* at 1764.

[45] Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 316–17 (2004).

[46] Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2173 fig.2 (1998).

[47] *Id.*

[48] *Id.*

explained by the "collegiality and collaborative decisionmaking of multi-judge panels."[49]

The research on panel effects has primarily examined ideological influences within panels. Political scientists engaged in this research have characterized judicial opinions as "politically negotiated statements of policy."[50] This is an obvious inference from the ideological intrapanel effects, but such influence may be legal in nature rather than political. The type of influence and the overall role of panel effects can be viewed in an interesting natural experiment involving federal district court decisions on the constitutionality of the federal sentencing guidelines.[51] In some districts, these decisions were made in the conventional way, with separate one-judge district court decisions, while other districts sat en banc to render a district-wide decision.[52] The latter setting produced greater uniformity in district-wide outcomes than did the former.[53]

Consider the following scenario, which further illustrates this concept. Two judges of a given ideology on an appellate panel review the facts and law of a case and reach a preliminary decision on its proper resolution. This preliminary decision need not be a direct product of their ideology but instead may be their honest evaluation of the law.[54] A third judge of a contrary ideology examines the cases and reaches a contrary conclusion about its appropriate outcome. While this judge might simply dissent, she would prefer to persuade the majority of its error. As Judge Flanders of the Rhode Island Supreme Court declared, "the best way in which a separate judicial opinion can improve the majority's opinion is by *becoming* the court's opinion."[55] An ideological argument is likely unpersuasive, given the contrary ideology of the majority. Instead, this judge is likely to try to persuade the majority that its preliminary conclusion was legally erroneous—that their initial honest evaluation of the law was incorrect. This is the most likely explanation of the identified panel effects.

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[49] *Id.* at 2174.

[50] Goldman & Lamb, *Prologue* to JUDICIAL CONFLICT AND CONSENSUS, *supra* note 3, at 3.

[51] *See* Ahmed E. Taha, *How Panels Affect Judges: Evidence from United States District Courts*, 39 U. RICH. L. REV. 1235, 1235 (2005).

[52] *Id.*

[53] *Id.*

[54] A psychological feature known as motivate reasoning suggests that even people's sincere efforts to find the correct answer are biased by their predispositions. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 482–83 (1990). In this approach, individuals search for "beliefs and rules that could support their desired conclusion" in an attempt to "be rational and construct a justification of their desired conclusion that would persuade a dispassionate observer." *Id.*

[55] 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, 408 (1999). Unpublished dissents can provide "internal corrective functions." *Id.* at 409.

As an example of panel effects, consider circuit court deference to certain trial court findings.[56] If circuit court judges were entirely ideological, one would expect to see no effect from this deference. In fact, deference to trial court findings is a powerful determinant of circuit court decisions, typically more significant than the ideological preferences of panel members.[57] Research has shown that dissents are in fact much more common in circuit court reversals than in their affirmances.[58] These dissents are of course failed examples of persuasion. Nevertheless, the data on panel effects and the statistical significance of affirmance deference suggest that these failures are but the tip of the iceberg, and that intrapanel persuasion may succeed in many more decisions.

Research has also noted panel effects from nonideological judicial background factors. An early study of Supreme Court decisionmaking found that decisions could be determined by judicial background factors beyond ideology.[59] More recently, researchers have found that a judge's background, including such factors as religion, has a distinct effect on decisionmaking.[60] These effects tend to be much weaker, though, than the ideological measures.[61]

Some general psychological research supports the persuasion effect for judges making decisions in a group setting. One study determined that a persistent minority may alter a majority's conclusions.[62] Another compared, in part, an expert-based approach to group decisionmaking with a devil's advocate approach and found the latter improved the decisionmaking process.[63] Another found that in the presence of dissensus, "minority positions are evaluated, objectively appraised, and one's own positions (and

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[56] *See, e.g.*, Cross, *supra* note 1, at 1500 (discussing the standard of review).

[57] *See id.* at 1509.

[58] *See* Songer, *Factors Affecting Variation in Rates of Dissent in the U.S. Courts of Appeals*, *in* JUDICIAL CONFLICT AND CONSENSUS, *supra* note 3, at 117, 129 (reporting dissent rates are much higher in reversals).

[59] C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Libaralism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355, 363–66 (1981).

[60] *See, e.g.*, DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 88–91 (2003) (reporting religious effect in gay rights cases); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1470–80 (1998) (reporting an effect of employment background on decisions in rulings on the sentencing commission).

[61] CROSS, *supra* note 4, at 69–93 (reviewing prior research and presenting additional analysis of personal background on circuit court decisions and finding the effect to be small).

[62] Serge Moscovici et al., *Influence of a Consistent Minority on the Responses of a Majority in a Color Perception Task*, 32 SOCIOMETRY 365, 377 (1969) (finding that a determined minority could persuade majority that blue slides were actually green).

[63] David M. Schweiger et al., *Group Approaches for Improving Strategic Decision Making: A Comparative Analysis of Dialectical Inquiry, Devil's Advocacy, and Consensus*, 29 ACAD. MGMT. J. 51, 51 (1986).

biases) are thus re-evaluated."[64] Taken together, this research suggests that human groups strive for consensus and seek to address concerns of minorities.

In review, there is a large body of research indicating that political ideology impacts judicial decisionmaking on collegial courts. Research on dissents and panel effects suggest that collegiality can also produce significant effects on decisions. The next two Parts review two recent books that add to our understanding of whether and how collegiality affects judicial decisionmaking.

II. ARE JUDGES POLITICAL?

Are Judges Political? examines the "question of whether, and in what sense, appellate judges can be said to be 'political.'"[65] The authors analyze over nineteen thousand votes by judges in federal circuit court cases in twenty-three distinct legal issue areas to determine whether judges appointed by Democratic Presidents vote differently from judges appointed by Republican Presidents. For each vote, the authors examine not only the judge's own appointing President, but also the appointing President of the other members of the panel deciding the case.

The party affiliation of the deciding judge made a material difference in certain case categories (e.g., Democrats were 40% more likely than Republicans to vote for a gay rights plaintiff, and 28% more likely to vote to uphold an affirmative action plan).[66] For many other categories of cases, however, party affiliation was not significant, for example, decisions to uphold punitive damages, federalism cases, criminal appeals, and takings cases.[67] The deciding judge's vote was also substantially affected by the party affiliations of that judge's fellow panel members. The book shows that a deciding judge's vote might vary considerably, depending on whether their fellow panel members were appointed by Republicans or Democrats. This effect was quite significant in some case policy areas, as high as 43%.[68] While the effect was not uniform, it was typically small for those case types that showed little ideological effect on judicial votes, such as de-

[64] Gordon B. Moskowitz & Shelly Chaiken, *Mediators of Minority Social Influence: Cognitive Processing Mechanisms Revealed Through a Persuasion Paradigm*, *in* GROUP CONSENSUS AND MINORITY INFLUENCE 60, 63 (Carsten K.W. De Dreu & Nanne K. De Vries eds., 2001).

[65] SUNSTEIN ET AL., *supra* note 2, at vii.

[66] *Id.* at 20–21, tbl.2.1.

[67] *Id.* In other cases, where the law was less clear, ideological amplification had a pronounced effect. However, the presence of a contrary ideological opinion on the circuit court panel would counteract any ideological amplification effect, "moving [the decision] in the direction of greater moderation." *Id.*

[68] *Id.*

cisions to uphold punitive damages, federalism cases, criminal appeals, and takings cases.[69]

The panel effects found in *Are Judges Political?* have been explained as moderating an effect called "ideological amplification."[70] This ideological amplification means that groups of ideologically likeminded judges, without any "devil's advocate," will migrate to very ideological positions.[71] In some case types, "the law (as established by Congress, the Supreme Court, or by previous appellate decisions) is clear and binding," and ideological effects are therefore trivial.[72] In many case types, though, the panel effects were pronounced, and the authors suggested that this revealed a counteraction of the ideological amplification effect, "moving [the decision] in the direction of greater moderation."[73]

The findings of ideological amplification and potential moderating panel effects fit with much of Sunstein's earlier research. While he has conducted other studies on judicial dissent, he has also examined dissent more broadly as a positive feature of all decisionmaking.[74] For Sunstein, dissent provides heterogeneous perspectives, which can prevent groupthink or cascading in the direction of unwise policy choices. But dissent also has a cost: it can undermine the cohesion necessary for communities.[75] His conclusion, reinforced by the research noted in this Review Essay, is that nonconforming views should be encouraged but not at any expense.[76]

Perhaps the single most important new information provided by this book is its examination of disparate effects in different issue areas. Past research has considered different case types, but not with the precision of *Are Judges Political?* The authors identified areas of the law where the votes showed little ideological influence. Some of these were surprising, such as the lack of any ideological component to federalism.[77] They also found is-

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[69] *Id.* Some ideologically charged case types, such as capital punishment and abortion, also showed little panel effect. *Id.* These are areas where ideology may be especially paramount, so that individual judge-votes could not be influenced by the ideology of panel members.

[70] *Id.* at 3.

[71] *Id.*

[72] *Id.* at 60. An alternative explanation, though, could simply be that these are not areas of material ideological interest.

[73] *Id.* at 65.

[74] While Sunstein has written extensively on this topic, his views are cumulated in CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003). He concludes that well-functioning societies should discourage conformity and promote dissent. *Id.* at 213. He applies this broad perspective to judicial decisionmaking by noting that a panel minority can prevent the preferences of a majority from disregarding the law. *Id.* at 176–78.

[75] *See id.* at 12.

[76] *Id.* at 90.

[77] The authors suggest that these may be areas where the law is "clear and binding, and hence ideological disagreements cannot materialize." SUNSTEIN ET AL., *supra* note 2, at 60. Alternatively, it is possible that federalism is not itself an ideological driver and judges instead are ideologically influenced by the direction of the action challenged on federalism grounds. *See, e.g.*, Frank B. Cross & Emerson H.

sue areas where voting was highly ideological but uninfluenced by other members of the deciding panel, such as in decisions involving abortion, capital punishment, and perhaps gay and lesbian rights.[78] These issues were apparently so ideologically charged that judges were not amenable to intrapanel influence. For most issue areas studied, however, the authors found evidence of ideological effects on individual votes that were amplified on unified political panels and moderated on mixed political panels.[79] In this respect, the book demonstrates that the type of case can influence ideological factors in determining judicial outcomes.

The authors did not directly examine collegiality or dissent, but their findings are central to those questions, too. The presence of panel effects in many cases arguably silences some dissent.[80] Therefore, the presence or absence of panel effects is likely a good proxy for intrapanel collegiality. While *Are Judges Political?* is directly concerned with political judicial decisionmaking, its analysis of panel effects greatly informs the study of collegial decisionmaking as well.

Are Judges Political? makes an important contribution to our understanding of circuit court decisionmaking. It builds on existing research in showing the impact of both individual judicial ideology and panel effects on decisions. Most significantly, the book dramatically demonstrates that these effects are not uniform but vary tremendously, depending on the case type under judicial consideration. Still, despite these significant contributions to the study of judicial collegiality, the book does not directly address the components of collegiality.[81] These components are examined in *Judging on a Collegial Court*.

III. JUDGING ON A COLLEGIAL COURT

Judging on a Collegial Court focuses on whether circuit court judges dissented from or separately concurred with a majority decision of their deciding panel, an act the authors call "horizontal dissensus." The authors' data include over 17,000 judge-votes from 1960 to 1996. They apply empirical methods to analyze determinants of dissent among the cases studied.

This study does not simply rely on the party of the appointing President to assess the role of ideology, which has been criticized elsewhere,[82]

Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 763–67 (2000) (reporting this effect in Supreme Court decisionmaking).

[78] SUNSTEIN ET AL., *supra* note 2, at 55.

[79] *Id.* at 26–27.

[80] *See supra* note 55 and accompanying text.

[81] The authors did hypothesize that collegiality was an important factor in their findings. SUNSTEIN ET AL., *supra* note 2, at 64–67. They ascribed judicial votes to the influence of the "collegial concurrence," in which judges agree to an outcome out of concern for ongoing relations with their circuit colleagues. *Id.*

[82] *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 87–89 (2002).

but instead uses a quantitative scale that considers both the relative ideological position of the appointing President and that of the judge's home-state Senator.[83] Thus, the study captures degrees of conservatism or liberalism among appointees of a given party. The authors also consider a variety of other factors that can influence dissent rates, including dissensus as a proxy for collegiality. Indeed, they treat a separate concurrence as comparable to a dissent in their measure of dissensus.[84]

The authors of *Judging on a Collegial Court* examine what factors influence the likelihood of dissent. Initially, they note the importance of ideological considerations in dissent, observing that "the bottom line is that ideological divergence among judges is an extremely influential determinant of separate opinions."[85] However, ideology does not explain all judicial decisions, and something about the decisionmaking process qualifies the role of judicial ideology. The authors believe that collegiality also influences dissensus but recognize that collegiality is very difficult to quantitatively capture. They suggest that the decision to dissent may be affected by a variety of other factors, including measures of collegiality, and examine fifteen other potential determinants of dissent.[86] The book's empirical findings confirm the significance of some of these factors.

Before considering particular factors, the authors contemplate the differences among circuits. It has been noted that the various circuits have independently "develop[ed] cultures that manifest themselves in various ways."[87] There are "[e]xtreme disparities" in the practices of the different circuit courts.[88] The authors find that in some circuits "an individual judge is nearly two and a half times as likely to publish a concurrence or dissent as compared to the baseline."[89] Earlier research also found a considerable variation in dissent rates among circuits.[90] This suggests that certain "cir-

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[83] These scores are described in Micheal W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 631 (2001).

[84] Although I will hereafter use the term "dissent" as shorthand, this term as used includes both dissents and separate concurrences.

[85] HETTINGER ET AL., *supra* note 2, at 37.

[86] *Id.* at 63.

[87] Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1352 (2005). Such varying cultural norms may be more important than any formal legal requirements. *See* Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421, 1440 (arguing the importance of such norms on the U.S. Supreme Court).

[88] Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, 61 LAW & CONTEMP. PROBS. 157, 197 (1998).

[89] HETTINGER ET AL., *supra* note 2, at 67. The highest rate in the period analyzed occurred on the D.C. Circuit in 1966, which saw separate opinions in almost 41% of the cases. *Id.*

[90] *See* Justin J. Green, *Parameters of Dissensus on Shifting Small Groups*, *in* JUDICIAL CONFLICT AND CONSENSUS, *supra* note 3, at 139, 145. These effects were not static, however. Some circuits with lower dissent rates in the 1966–1970 period had much higher dissent rates in 1980, and vice versa. *Id.*

cuit norms" play a major role in the individual judge's decision to write separately, which may be a proxy for intracircuit collegiality.[91]

The authors then use regression analysis to examine circuit norms and other hypothesized dissent determinants; this analysis yields several determinants with high levels of statistical significance. As expected, judicial ideology and circuit norms are highly significant determinants of dissent. They also find that judges are less likely to write a separate opinion if they are the circuit's chief judge, a district court judge sitting by designation, or have a high ABA rating.[92] Conversely, judges are more likely to write separately if the case saw amicus participation, involved a civil rights/civil liberties claim, or resulted in the reversal of a decision below.[93]

Judging on a Collegial Court also considers an alternative explanation of dissent: the strategic institutional theory. In this theory, judges choose to write a dissenting opinion to highlight the decision for possible reversal, either en banc or by the Supreme Court.[94] The theory posits that dissent is an indicator to reviewing entities that the majority ruling may be erroneous. There is some evidence that the presence of a dissenting opinion heightens the probability of subsequent review.[95]

The authors' then develop and test a strategic model of dissenting on the federal circuit courts of appeals. The model is based on the hypothesis that when a majority opinion does not conform to the outcome preferences of the Supreme Court or the full circuit, the decision is more likely to be reversed and a minority judge is more likely to use dissent as a signal.[96] The empirical analysis includes independent variables associated with the outcome preferences of the full circuit and the Supreme Court to see if they influence dissent rates. These measures had no statistical significance.[97] Hence, it appears that dissent represents a sincere disagreement with the majority's decision, not a product of hierarchical institutional strategy.

Despite the failure of its strategic institutional model, *Judging on a Collegial Court* provides important information on the dissenting behavior of circuit court judges. As with *Are Judges Political?*, it demonstrates the

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[91] Lindquist has subsequently examined some of the administrative factors behind these circuit norms. *See* Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659 (2007) (these factors included court size as a proxy for collegiality, ideological diversity, oral argument rate, and workload).

[92] HETTINGER ET AL., *supra* note 2, at 71 tbl.3.

[93] *Id.* The authors also conduct a study of what factors influence the circuit court's decision to reverse a lower court holding, which they call "vertical dissensus." *Id.* at 89–107. Again, they find significance for both ideology and institutional circuit factors. *Id.* While this is a very important research topic, the focus of this review is limited to intrapanel dissensus via dissents.

[94] *Id.* at 74.

[95] *See id.* at 76–77 (reporting empirical evidence that a dissenting opinion increases the probability of both en banc review and Supreme Court review of a circuit court decision).

[96] *Id.* at 78–80.

[97] *Id.* at 86.

significant link between ideological diversity and dissenting behavior. In addition, it shows that dissents are substantially affected by circuit norms that arguably reflect a relative level of collegiality, but are not affected by strategic hierarchical considerations.

IV. THE INTERACTION OF COLLEGIALITY AND IDEOLOGY

Having reviewed the body of research of collegial judicial decision making, including the important recent contributions of *Are Judges Political?* and *Judging on a Collegial Court*, it is now appropriate to synthesize this information into a judicial decisionmaking model. Before generating this model, however, it is important to address a few normative questions. Should we encourage or discourage dissent on the circuit courts? Are higher levels of dissent detrimental or beneficial? Section IV.A attempts to answer these questions. The remainder of Part IV addresses the costs associated with dissent and then synthesizes our knowledge of dissent into a model of judicial decisionmaking that incorporates both individual preferences and the cost of dissensus.

A. The Systemic Effects of Dissensus

Conventional wisdom favors judicial consensus and discourages dissent. Judges themselves engage in "a continual quest to reduce conflict through holding conferences, circulating draft opinions and memorandums, and conducting private meetings between individual judges or groups of judges" to reach a consensus outcome.[98] Several reasons have been suggested for the value of consensus on judicial panels.

First, public dissensus may subtly undermine the legitimacy of judicial power. "When judges speak with one voice, it suggests that they have reached the 'right' decision," influenced only by appropriate legal evaluation of the issues.[99] When ideological opposites—liberals and conservatives—join together in a mutual decision, it offers assurances that judges are probably not driven by personal ideology but instead have dispassionately evaluated the relevant legal determinants to resolve the case. Conversely, when judges publicly disagree, especially when that disagreement appears grounded in ideological preferences, the legal legitimacy of that decision might be questioned.[100]

Judge Learned Hand wrote that a dissenting opinion "cancels the impact of monolithic solidarity on which the authority of a bench of judges so

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[98] Goldman & Lamb, *Prologue* to JUDICIAL CONFLICT AND CONSENSUS, *supra* note 3, at 1.

[99] *Id*. ("A unanimous decision can usually expect a friendlier reception from other courts, politicians, lawyers, the media, and even the general public than a divided one.").

[100] *See* Brennan, *supra* note 31, at 429 (noting that some suggest that a dissent serves as "a 'cloud' on the majority decision that detracts from the legitimacy that the law requires and from the prestige of the institution that issues the law").

largely depends."[101] Other circuits are less likely to adopt a ruling accompanied by dissent.[102] A dissent may also make the opinion more vulnerable to reversal; Justice Scalia reported that a "dissent is also a warning flag to the Supreme Court: the losing party who seeks review can point to the dissent as evidence that the legal issue is a difficult one worthy of the Court's attention."[103]

Second, such dissensus may undermine the authority of a decision.[104] The greatest power of a judicial ruling comes not from resolution of the particular dispute between parties but from its precedential impact on subsequent cases. Judge Lipez suggests that dissents by their nature "seek to erode the authority of the majority opinion."[105] Thus, dissenting opinions may destabilize the law, making litigation more likely and creating uncertainty about the governing rules.[106]

Finally, dissensus may adversely affect the collegiality that is believed to benefit courts. Because "[d]issent causes tension on collegial courts,"[107] a consensual decision can "avoid or minimize conflict among judges with different values and attitudes."[108] Furthermore, "judges may . . . develop overt or covert ill will toward the colleagues with whom they disagree."[109] Refusal to agree to a majority's opinion may undermine interpersonal relationships on a court, especially when a dissenting opinion is strongly worded.

In contrast to this conventional wisdom, however, dissent may be viewed as beneficial. A dissenter may serve as something of a "devil's advocate" or "whistleblower," and provide the majority with a challenging contrary opinion that they must confront. Chief Justice Charles Evans Hughes argued that unanimity was valuable when "obtained without sacrifice of conviction," but that when merely formal and insincere it was "not desirable in a court of last resort."[110] Justice Brennan saw dissent as an "ob-

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[101] LEARNED HAND, THE BILL OF RIGHTS 72 (1958); *see also* Stricko-Neubauer, *supra* note 34, at 2 (observing that a non-unanimous decision "undermines the façade of straightforward legal interpretation," while unanimity "can be important in ensuring compliance with a ruling and serving as a strong precedent to guide future cases").

[102] Lipez, *supra* note 30, at 323–24 (noting that such a decision "will receive critical scrutiny and perhaps eventual repudiation in another circuit"); *see also* HETTINGER ET AL., *supra* note 2, at 76–77 (discussing empirical support for dissenting opinions leading to review).

[103] Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 37. Justice Ginsburg similarly commented on the fact that a circuit court dissent may signal to the Supreme Court "that the case is troubling and perhaps worthy of a place on its calendar." Ginsburg, *supra* note 31, at 144.

[104] Some commentators further argue that dissent "weakens the court's authority." Peterson, *supra* note 23, at 429.

[105] Lipez, *supra* note 30, at 323.

[106] *See* Peterson, *supra* note 23, at 425–27.

[107] *Id.* at 428.

[108] Goldman & Lamb, *Prologue* to JUDICIAL CONFLICT AND CONSENSUS, *supra* note 3, at 1.

[109] *Id.* at 2.

[110] CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 67 (1928).

ligation" to protect "the integrity of the process."[111] In this way, dissents can improve decisions and the overall state of the law by holding majority opinions up to close scrutiny.

Dissent may also facilitate the beneficial evolution of the law. Studies of cultural evolution have demonstrated that variation helps cultures develop in a beneficial manner.[112] Cultures as a whole tend to be imitative, following the practices of a family or community.[113] However, individuals engage in some "comparison shopping," in which they evaluate the utility of cultural variants.[114] Over time, variants are created, evaluated, and adopted, yielding a process of slow cultural evolution through the spread of successful variations.[115] Indeed, there is a societal "need for the law to change," and variation via dissents may aid that change.[116] "Perfect harmony [can be] an undesirable obstacle to legal growth,"[117] and studies have found that "groups with diverse memberships are more creative at solving problems and do a better job than homogenous groups."[118] Dissenting behavior may thus be a useful tool in promoting the beneficial evolution of the law. As Justice Ginsburg wrote, separate opinions can "contribute to the improvement or progress of the law."[119]

One might distinguish at this point between internal and external dissents. An internal dissent involves an argument between members of a circuit court panel over the result of a case before a decision is rendered. An external dissent is a published dissent from a majority opinion. It appears that internal dissensus is valuable because it promotes discussion and critical evaluation of a judge's initial opinions about a case. By contrast, external dissensus through published dissents is problematic because it may undermine collegiality and respect for law. Still, external dissents are not universally bad, as they may highlight questionable decisions. Moreover, without the option of external dissents, internal dissensus might carry little influence. Ideally, internal dissensus and debate should be widespread,

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[111] Brennan, *supra* note 31, at 435.

[112] *See, e.g.*, Robert Boyd & Peter J. Richerson, *Why Does Culture Increase Human Adaptability?*, 16 ETHOLOGY AND SOCIOBIOLOGY 125 (1995); Joseph Henrich & Richard McElreath, *The Evolution of Cultural Evolution*, 12 EVOLUTIONARY ANTHROPOLOGY 123, 123 (2003) (describing this as the "behavioral adaptations that explain the immense success of our species").

[113] *See* PETER J. RICHERSON & ROBERT BOYD, NOT BY GENES ALONE 67 (2005).

[114] *Id.* at 69.

[115] *Id.* at 69–70.

[116] Stephen L. Wasby, *Of Judges, Hobgoblins, and Small Minds: Dimensions of Disagreement in the Ninth Circuit*, *in* JUDICIAL CONFLICT AND CONSENSUS, *supra* note 3, at 155.

[117] *Id.* at 155.

[118] Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 251 (1999).

[119] Ginsburg, *supra* note 31, at 143. Judge Coffin likewise argued that collegiality enhances quality in judicial decisions. COFFIN, *supra* note 23, at 213; *see also* Lindquist, *supra* note 91, at 698 (suggesting that dissent can "play an important role in the development of legal doctrine").

with external dissensus through published dissents reserved for extreme cases.

B. The Direct Cost of Dissent to Judges

There are a variety of costs associated with issuing a dissenting opinion, foremost of which may be the effort required to draft and issue such an additional opinion.[120] The relative infrequency of circuit court dissent has also been attributed to "theories of cognitive dissonance, in which judges seek to reduce the psychic discomforts of standing alone."[121] Courts also have "[n]orms of reciprocity," such that a judge's dissent from an opinion may cost him votes in his future opinions.[122] For these reasons, appellate judges "dislike" dissenting and "would much prefer to join the majority."[123]

Of course, dissent is not a purely costly activity. A variety of judges have expressed the joy they find in writing separately.[124] Nevertheless, this joy must be titrated by judges. Given the hundreds of cases on the individual circuit court judge's docket, the burden of frequent dissent would seem considerable. This effect is evident from the relatively low rate of dissenting opinions on circuit courts.

There are also dissent costs for the panel members in the majority. "A dissenting opinion weakens the legitimacy of the panel's ruling, and frequent dissents can diminish the authority of the court."[125] Justice Brandeis reportedly withheld some dissenting opinions out of a fear of weakening the Court.[126] Judge Posner has similarly urged that judges hesitate to publish dissents in the interest of collegiality and clarity.[127] The courts' use of per curiam decisions to underscore their unanimity in particularly sensitive

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[120] A review of the Supreme Court found that "[n]ot infrequently the preparation of a dissenting opinion was forgone because the demands of other items of work prevented an adequate treatment . . . ." PAUL FREUND, ON UNDERSTANDING THE SUPREME COURT 71 (1950). The marginal cost is surely much higher for circuit court judges, with their much heavier caseload.

[121] HOWARD, *supra* note 13, at 193.

[122] Peterson, *supra* note 23, at 417; *see also* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 324 (1996) ("Over time, colleagues might accumulate debts of deference on key issues, and subtle, unarticulated vote trading could occur.").

[123] Flanders, *supra* note 55, at 401.

[124] Justice Scalia described the opportunity to write alone in dissent as an "unparalleled pleasure." Scalia, *supra* note 103, at 42. Judge Patricia Wald declared that a dissent was "liberating." Patricia Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1413 (1995). Justice William O. Douglas declared that the "right to dissent is the only thing that makes life tolerable for a judge of an appellate court." WILLIAM O. DOUGLAS, AMERICA CHALLENGED 4 (1960).

[125] Joshua B. Fischman, *Decision-Making Under a Norm of Consensus: A Structural Analysis of Three-Judge Panels* 4, *presented at* the First Annual Conference on Empirical Legal Studies (Oct. 2006).

[126] *See* Peterson, *supra* note 23, at 416.

[127] RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 232–37 (1985).

cases well illustrates a dissent's power to diminish the strength of an opinion.[128]

If dissents are costly to both the minority and majority, judges on a panel will be more likely to make compromises to avert them. Such compromises could involve changes to the language of the opinion or even vote-switching. Presumably, the latter effect would generally involve the minority making the majority's opinion unanimous, but it might involve both majority judges switching to what initially was the minority outcome. The costs of a dissenting opinion are not infinite, however, so this compromise is likely to be bounded by the judges' loss of utility from switching their votes or modifying their opinion language.

This explanation of dissent assumes a certain degree of negotiation among panel members. Ample anecdotal evidence confirms the presence of such negotiations. Woodford Howard's interviews with circuit court judges found an overwhelming majority reporting a "give and take" among panel members.[129] He found that "[c]hanges [in opinion] may result from threats to dissent . . . ."[130] One judge declared that "the judicial process is like legislation," in that "[a]ll decisions are compromises."[131] A study of Justice Brandeis found that he frequently drafted and circulated dissenting opinions, which sometimes changed the votes of his colleagues or altered majority opinions.[132] When his efforts failed, however, he often suppressed his dissent and joined the majority opinion.[133]

The process of internal dissensus may enhance the quality of circuit court opinions. Many judges have testified to the value of internal dissensus or whistleblowing. Judge Lipez wrote that "a dissent usually forces the majority to rethink the reasoning and assumptions that underlie its opinion."[134] This puts the majority position to the test, and Justice Scalia urged that the "most important internal effect of a system permitting dissents and concurrences is to improve the majority opinion."[135] Justice Brennan argued that the dissent provides a valuable "damage control" mechanism for erroneous majority opinions.[136] Indeed, the "prospect of a dissent" serves to

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[128] *See* Ginsburg, *supra* note 31, at 139–140. Circuit courts also engage in this practice. *Id.* at 140 n.37.

[129] HOWARD, *supra* note 13, at 208 tbl.7.6. Of the judges interviewed, twenty-five reported "give and take," three reported "some" give and take, and zero reported no give and take. *Id.* Only about ten percent of judges thought the amount of intracourt deliberation was "insufficient." *Id.* at 211 tbl.7.7.

[130] *Id.* at 209.

[131] *Id.*

[132] ALEXANDER BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (1957).

[133] *Id.* at 28.

[134] Lipez, *supra* note 30, at 322.

[135] Scalia, *supra* note 103, at 41.

[136] Brennan, *supra* note 31, at 430.

heighten "the opinion writer's incentive to 'get it right.'"[137] This situation conforms to Judge Edwards's description of a collegial court as one where "judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect."[138] In fact, collegiality may actually enhance the level of internal dissensus,[139] but collegiality is also "associated with rule of law principles such as following precedent . . . ."[140] Collegiality, especially when accompanied by internal dissensus, may therefore improve the quality of judicial decisions.

C. *Modeling Dissensus*

This section presents a model of dissensus that goes beyond the simple presence of dissenting opinions and incorporates internal dissensus. An identifiable dissent captures only the case outcome, not the nature of the opinion. Consequently, examining dissents addresses only a small aspect of dissensus and collegiality on the courts of appeals. Judges may engage in considerable internal dissent or discussion over the language of an opinion. While this negotiation is neither observable nor measurable, it is nevertheless an important component of dissent's value as a proxy for collegiality.

Are Judges Political? and *Judging on a Collegial Court* showed us that collegiality affects judicial decisionmaking. One way in which collegiality manifests itself is through dissent. While a certain amount of dissent is normatively beneficial, this dissent does not come without cost. With this in mind, it is possible to create a model of judicial decisionmaking that incorporates both a judge's individual outcome preference and the cost of dissenting from a decision contrary to that preference.

In constructing this model for judicial decisionmaking, it is useful to begin with William Riker's median voter theory.[141] The median voter theorem states that outcomes and opinions are dictated exclusively by the ideo-

[137] Ginsburg, *supra* note 31, at 139. She noted that when separate opinions are circulated, they can "provoke clarifications, refinements, modifications in the court's opinion" and assure that the review has not been "perfunctory." *Id.* at 143*; see also* COFFIN, *supra* note 23, at 221 (stressing that "on a significant number of occasions," the circulation of a dissenting position presents important new information, such that "a writing judge has gracefully changed course"); Flanders, *supra* note 55, at 408–09 (emphasizing the value of internally circulated dissents in modifying and improving the majority's initial position); Michael R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 456 (2000) (stating that the opinions of a collegial court are "better in substance, style, and tone").

[138] Edwards, *The Effects of Collegiality*, *supra* note 14, at 1645. This is echoed by Judge Coffin, who described collegiality as striving for "as much excellence in the court's decision as the combined talents, experience, insight, and energy of the judges permit." COFFIN, *supra* note 23, at 215.

[139] *See* Edwards, *The Effects of Collegiality*, *supra* note 14, at 1647 (citing social science research suggesting that relative unfamiliarity in a group tends to produce conformity, while greater familiarity facilitates the expression of differing views in a group).

[140] *Id.* at 1682.

[141] *See* WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962); *see also* Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 44–49 (2008).

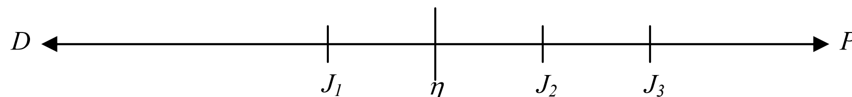
logically median member of the panel. The median voter is the individual necessary to accumulate an ideological majority. He or she provides the key vote and therefore controls the outcome.

In practice, minimum winning coalitions are not common,[142] and they are especially uncommon on federal circuit courts, where nearly all decisions are unanimous. Consensus on these courts, however, can be theoretically explained by the existence of the non-unanimity costs already discussed. Thus, the median voter theory combined with a measure of the cost of dissent should generate a useful model of judicial decisionmaking.

The model begins by placing three judges on a single-dimension spectrum, with the most pro-defendant position at the extreme left and the most pro-plaintiff position at the extreme right.[143] Although many models express this positioning as an ideological preference, this need not be the case; it could easily be a legal preference or a combined ideo-legal preference. Regardless of the reason for the preference, the model simply identifies the point in the spectrum that the judge most prefers for an individual case. This point is sometimes called the "bliss point" for the individual judge.[144] Each judge prefers a decision as close as possible to her bliss point.

The model then uses ή to depict the case facts of a particular claim. Any judge with a bliss point to the right of ή prefers a decision for the plaintiff, while any judge with a bliss point to the left prefers a decision for the defendant. If all the judges have bliss points to the right or to the left of ή, one would naturally expect unanimity in the outcome. Figure 1 presents a hypothetical arrangement of a three-judge circuit court panel for a given case when such preference consensus does not exist.

Figure 1



If judicial decisions were driven exclusively by preferences, one would expect the outcome in this case to be 2–1 for the plaintiff.

A better model of collegial decisionmaking, however, must also consider the costs of dissensus. Figure 2 incorporates these costs through the bars and dotted lines surrounding each judge's bliss point.

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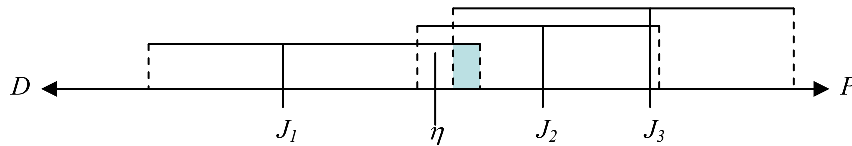
[142] *See* Brace & Hall, *supra* note 33, at 55.

[143] My model builds on the model presented by Joshua B. Fischman, *Decision Making Under a Norm of Consensus: An Analysis of Three-Judge Panels*, *presented at* the First Annual Conference on Empirical Legal Studies (Oct. 2006).

[144] Giacomo A.M. Ponzetto & Patricia A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 385 (2008).

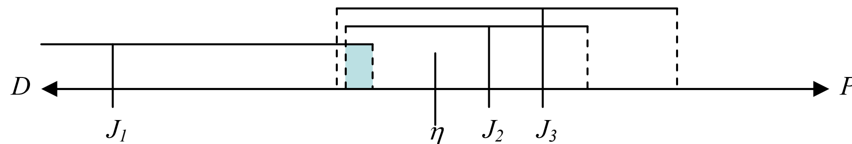
Figure 2



The range between the dotted lines represents the range of decisions in which the cost of dissent outweighs the judge's outcome preference. Thus, a judge prefers to join a decision within this range rather than dissent. If any point lies within the dotted lines of all three judges, a unanimous decision is possible. This "consensus area" is depicted by the shaded area. According to the scenario depicted in Figure 2, the judges should produce a unanimous opinion because there is a region (the shaded area) in which all judges prefer unanimity to a split decision at their particular bliss points. The model thus explains how even judges who prefer divergent outcomes for a particular case will reach unanimity.

Changing the preferences of the judges, however, produces a different outcome. Figure 3 involves a pro-defendant judge with an extreme preference, and two pro-plaintiff judges with less extreme preferences.

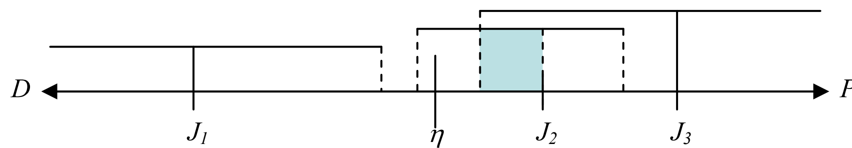
Figure 3



The shaded area is to the left of ή, so this scenario will result in a decision for the defendant despite two judges with pro-plaintiff preferences. The cost of dissensus is high enough that the majority will compromise their preferred outcome in the case in order to avoid a dissent from J_1. Therefore, Figure 3 depicts how internal panel dissensus and the threat of a dissent can alter the outcome in a given case.

Although one could hypothesize different arrangements of judicial preference, the model explains the outcome and resulting opinion for each arrangement. Figure 4 depicts how a dissent can result, despite the costs of dissent and the value of collegial consensus.

Figure 4



The bars expressing the costs of dissensus do not overlap for J_1 with J_2 and J_3; there is no shaded area within all three bars. This means that the cost of J_1 dissenting is not high enough to force J_1, J_2, or J_3 to compromise their preferred outcome, so the decision that maximizes the preferences of the judges will produce a dissent by J_1.

This model spatially demonstrates the interaction of individual preferences, including ideological preferences and panel collegiality. A key factor in this model is the relative extremity of the judicial preferences. A more extreme minority preference judge increases the likelihood of dissent (as displayed in Figure 4) and may even change the outcome in the case (as displayed in Figure 3). By contrast, a less extreme minority preference is more likely to result in compromise to the majority preference (as displayed in Figure 2).

This model does not completely capture the collegiality effect on circuit court panels. For example, it does not address a persuasion effect, in which a judge convinces other panel members that their bliss points should be changed. While purely ideological preferences are generally considered immutable,[145] a legal preference might be altered by a persuasive legal argument. The model nevertheless captures the costs of dissent and illustrates how these costs influence judicial decisions.

The model is built upon the findings of the two books. *Are Judges Political?* demonstrates that judges tend to seek common, consensual ground in most categories of cases. *Judging on a Collegial Court* proves that ideological remoteness of judges produces dissensus, as the model predicts.

V. JUDICIAL POLICY EVALUATION

Are Judges Political? contains a brief conclusion assessing the normative implications of its findings. The book suggests that a decision "is more likely to be right . . . if it is supported by judges with different predilections."[146] The authors suggest refinement of the judicial selection process, in which Presidents employ a bipartisan commission for the selection of

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[145] Joanna Shepard, *The Influence of Retention Politics on Judges' Voting* 4–5 (Emory Law & Economics Research Paper No. 07-21, 2007).

[146] SUNSTEIN ET AL., *supra* note 2, at 136.

nominees, who would reflect a diversity of viewpoints. Such an action is remote from today's political agenda, however.

The policy question, then, is how we can realistically gain the appropriate level of dissensus and consensus at the circuit court level. If judges all shared the same background and ideology, dissent would be much less frequent, but we would lose the benefits of dissent. Ideally, we should want significant internal dissent within circuit panels to improve opinion quality, but only limited external dissensus to avoid undermining judicial authority or collegiality. The ensuing discussion addresses approaches that might help achieve this ideal.

One means of lowering dissent rates might be to increase the caseload burden of the circuit courts.[147] The greater the workload of an individual judge, the higher the relative cost of taking on the additional work of writing a dissent. At some level, the caseload could become so great as to eliminate the time necessary to draft dissenting opinions. This caseload factor would seem to sacrifice some of the benefits of internal dissent, though. Moreover, empirical research suggests that relative caseload is not a major factor influencing dissent rates.[148]

Another factor influencing dissensus may be circuit size, as with the hypotheses about the Ninth Circuit discussed above. There is evidence of a statistically significant relationship between the number of circuit court judges and the overall circuit dissent rate.[149] Dividing the Ninth Circuit might prove beneficial, though it does not have an unusually high dissent rate.[150] Another important determinant of dissensus is judicial diversity. Judges of different backgrounds, ideological or otherwise, are more likely to have contrasting views about the proper resolution of cases, as is evident from the data in both books showing that ideology is a determinant of published dissent. Reducing diversity would reduce the dissent rate but at considerable cost. Lack of diversity undermines the internal dissent that is so useful in improving the judicial product. Judge Edwards found this to be

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[147] *See* HOWARD, *supra* note 13, at 193 (suggesting that increasing workloads were "powerful suppressants of dissent").

[148] *See* Songer, *supra* note 28, at 125–26 (reporting no statistically significant difference in dissent rates over time and relative to intercircuit caseload burdens).

[149] *See* Goldman, *supra* note 5, at 493.

[150] JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS 101 (2002). The overall effects of circuit size are unclear, however. For example, a generalized reduction in circuit size throughout the nation would create significant costs by balkanizing American law into dozens of separate circuits. But other practices might have some benefit in contributing to the appropriate level of collegiality and dissensus. *See*, *e.g.*, Edwards, *The Effects of Collegiality*, *supra* note 14, at 1664–65 (reporting that reducing the number of visiting judges on panels and facilitating the distribution of contrary opinions helped to enhance this effect).

the case in his D.C. Circuit experience, as judges of similar political preference too often sided with one another out of "partisan loyalty."[151]

Diversity value is shown from the evidence of internal dissensus, demonstrated by the panel effects. Diversity on panels, for example, helped ensure that judges applied the *Chevron* deference standard to agency rules, rather than relying on the judicial ideologies.[152] This should be beneficial, as a "decision is more likely to be right, and less likely to be political in a bad sense, if it is supported by judges with different predilections."[153] Judge Edwards argued that panel diversity provides "better and more nuanced opinions—opinions which, while remaining true to the rule of law, over time allow for a fuller and richer evolution of law."[154] *Are Judges Political?* likewise counsels for the value of diversity in the judiciary.[155]

I have previously argued that this effect counsels for mandating "split panels" on circuit courts, ensuring that each panel contains at least one judge appointed by a Republican and Democratic President.[156] Such split panels should reduce ideological decisionmaking by the circuit courts and consequently enhance decisions based on law.[157] This proposal has not gained much traction, though, and it has been criticized for potentially undermining collegiality on the circuit.[158]

An alternative, more politically realistic proposal is to use the filibuster in judicial confirmations. While filibusters technically only delay action, the ability to conduct a perpetual filibuster means that the device can essentially bar Senate action, such as a judicial confirmation. Recently, the use of senatorial filibusters in judicial confirmations for circuit court appointees has become quite controversial. After Democrats threatened to filibuster a group of George W. Bush's circuit court appointees, Republicans argued that such filibusters "were unprecedented in the history of our nation and of the Senate."[159] They claimed that nominees were entitled to an "up or down" majority vote, rather than a filibuster that could be broken only with at least a sixty to forty vote. President Bush argued that the filibuster vio-

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[151] Edwards, *The Effects of Collegiality*, *supra* note 14, at 1648; *see also id.* at 1666–70 (discussing the benefits of diversity on circuit courts).

[152] *See* Cross & Tiller, *supra* note 46, at 2172.

[153] SUNSTEIN ET AL., *supra* note 2, at 136.

[154] Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329 (2002).

[155] SUNSTEIN ET AL., *supra* note 2, at 139.

[156] *See generally* Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215 (1999).

[157] *Id.* at 228–30.

[158] *See* Wald, *supra* note 118, at 255 (suggesting that mandating split panels would alter judicial perception of the role of judges); *see also* Edwards, *The Effects of Collegiality, supra* note 14, at 1678 (suggesting that a focus on ideology "can be detrimental to collegiality").

[159] John Cornyn, *Obstruction and Destruction Plague Judicial Nominees*, L.A. TIMES, Nov. 12, 2003, at B11.

lated the Senate's "constitutional responsibility."[160] Even Chief Justice Rehnquist weighed in with an argument against the use of the senatorial filibuster for court nominees.[161]

Republicans took steps to eliminate the Senate filibuster for judicial nominees (called the "nuclear option"), but a compromise was brokered by a "Gang of Fourteen" moderate Senators that provided a vote for six contested nominees in return for the withdrawal of three others.[162] The compromise also contained a promise that future judicial filibusters would be reserved for "extraordinary circumstances."[163]

This same rationale applies to circuit court nominees. The case for judicial filibusters of Supreme Court nominees has been made through a positive political theory model.[164] The need for more votes to confirm means that a nominee must be politically closer to the median. In most circumstances, it requires nominees to receive votes from the opposing party. Professor Michael Gerhardt has argued that the elimination of the filibuster would result in the selection of "less-qualified people or more-divisive people."[165]

Although judicial filibusters are unlikely to regularly produce the "split panels" for which I argued, they can serve to moderate the ideological fervor of nominees. If a Republican President, for example, is denied the appointment of a conservative judge, he is unlikely to replace that nominee with a liberal Democrat nominee. But a filibuster would likely produce a more moderate conservative. Thus, after Bork's nomination to the Supreme Court was denied by a vote of the Senate, President Reagan put up the more moderate Justice Kennedy as his alternative nominee.[166]

In the spatial model outlined above, greater moderation yields fewer dissents. By moving judicial preferences toward the median preference, judges will be more willing to compromise in collegial deliberation.

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[160] George W. Bush, Statement on the Senate Filibuster to Block a Vote on the Nomination of Michael Estrada, 39 WEEKLY COMP. PRES. DOC. 320 (March 13, 2003).

[161] *See* Chief Justice William H. Rehnquist, 1997 Year-End Report on the Federal Judiciary, THIRD BRANCH, Jan. 1998, http://www.uscourts.gov/ttb/jan98ttb/january.htm.

[162] *See* David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 59–60 (2006) (discussing this aspect of the compromise).

[163] The text of this promise is set out in *id.* at 62 n.332.

[164] *See* John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator, and the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257.

[165] *See* Jeffrey Rosen, *The Nation: Fight Club; The Senate Nears the Point of No Return*, N.Y. TIMES, May 22, 2005, at 41.

[166] The renowned liberal constitutional law professor, Lawrence Tribe, vigorously opposed the nomination of Bork but favored the nomination of Kennedy, who he viewed as a more moderate conservative voice. *See, e.g.*, Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 565 (1988). The same was true for the liberal Ronald Dworkin. *See, e.g.*, Robert F. Nagel, *Meeting the Enemy*, 57 U. CHI. L. REV. 633, 649 (1990) (discussing the two nominations and ideological moderation as key to confirmation).

Greater ideological extremity, as depicted in Figure 4 above, produces more dissents.

Ideological diversity is not the only type of diversity that produces benefits when increased.[167] Studies have found that the presence of a woman on a circuit court panel significantly influences the decisions of fellow male judges on the panel, at least in certain civil rights cases.[168] The findings suggest an internal deliberative process of collegiality. Insofar as diverse perspectives contribute to effective internal dissensus and collegiality, diversity on panels should be encouraged. While the filibuster does not directly promote such diversity, it might contribute to this effect out of simple democratic needs to attend to constituencies.

The judicial filibuster carries some risks. A highly polarized nominating process may ideologically "radicalize" future federal judges.[169] Recognition of the filibuster should not necessarily produce greater ideological polarization, however. Presidents, aware of the possibility of a filibuster, would anticipatorily react by selecting appointees more likely to survive the process.[170] Thus, the threat of a filibuster should yield less ideologically polarizing appointees in the first place.[171]

CONCLUSION

Are Judges Political? and *Judging on a Collegial Court* provide valuable new information on the intersection of ideology and collegiality in circuit court decisionmaking. While confirming the now well-documented effect of judicial ideology, they demonstrate that ideology is but a partial determinant of an individual judge's decisions. Measures that partially capture collegiality are also quite important. Along with other research, these books demonstrate that such collegiality issues should be essential components of future studies.

I build on this research by formulating a more formal model that explains collegiality and dissent. This model demonstrates how the costs of nonconsensual panel decisionmaking contribute to intrapanel collegiality and affect the outcome of judicial decisions. It also explains how consen-

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[167] *See* Edwards, *The Effects of Collegiality*, *supra* note 14, at 1669 (noting the benefits of demographic diversity).

[168] *See*, Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 324 (2004) (finding that "male judges vote more liberally when one woman serves on a panel with them as compared to all-male panels"); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1787 (2005) (finding that males sharing panel with female judges were significantly more likely to favor plaintiffs).

[169] *See* Edwards, *The Effects of Collegiality*, *supra* note 14, at 1678.

[170] This effect is addressed in Law & Solum, *supra* note 162, at 101–03.

[171] The use of the filibuster might have an effect on the collegiality of the Senate. This is beyond the scope of my research on the courts but would be another factor potentially relevant to any assessment of the value of filibustering judicial nominees.

suality is not a uniform equilibrium for circuit court decisions, and predicts the level of dissents.

I also discuss mechanisms that may enhance the collegiality effect. Some more ministerial actions may contribute to collegiality, although they inevitably have a limited impact. A broader political measure—increased use of the filibuster for judicial nominees—may also enhance collegiality. In addition to producing ideologically moderate appointees, my model suggests that the filibuster can contribute to future circuit court collegiality. A model, though, is a necessary simplification of reality, which requires quantitative testing for its validation. While the books reviewed in this Review Essay provide some of that empirical validation, additional research is necessary to understand circuit court collegiality and also the effects of the legislative filibuster. Researchers should examine the relative consensuality and ideological decisionmaking of circuit court judges appointed under different political regimes, such as divided versus unified national governments.