

**ESSAY****IDEOLOGICAL VOTING ON FEDERAL COURTS OF APPEALS: A PRELIMINARY INVESTIGATION***Cass R. Sunstein,\* David Schkade,\*\* & Lisa Michelle Ellman\*\*\**

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#### INTRODUCTION

OVER many decades, the United States has been conducting an extraordinary natural experiment with respect to the performance of federal judges. The experiment involves the relationship between political ideology<sup>1</sup> and judicial decisions. Many people believe that political ideology should not and generally does not affect legal judgments,<sup>2</sup> and this belief contains some truth.<sup>3</sup> Frequently the law is clear, and judges should and will simply implement it, whatever their political commitments. But what happens when the law is unclear? What role does ideology play then? We can easily imagine two quite different positions. It might be predicted that even when the law is unclear, ideology does not matter; the legal culture imposes a discipline on judges, so that judges vote as judges, rather than as ideologues. Or it might be predicted that in hard cases, the judges' "attitudes" end up predicting their

<sup>1</sup> In using this term, we do not intend to venture anything especially controversial about the actual or appropriate grounds of judicial decisions. As will be clear, we measure "ideology" by the political affiliation of the appointing president.

<sup>2</sup> See, e.g., Jeffrey Rosen, *Obstruction of Judges*, N.Y. Times, Aug. 11, 2002, § 6 (Magazine), at 38 (emphasizing that appellate court judges are required to apply United States Supreme Court precedents through reasoned argument).

<sup>3</sup> See Frank B. Cross, *Decisionmaking in the U.S. Courts of Appeals*, 91 Cal. L. Rev. 1457, 1514 (2003) (reporting empirical finding that law strongly disciplines judicial judgments).

votes, so that liberal judges show systematically different votes from those of conservative judges.<sup>4</sup>

It is extremely difficult to investigate these questions directly. It is possible, however, to identify a proxy for political ideology: the political affiliation of the appointing president. Presidents are frequently interested in ensuring that judicial appointees are of a certain stripe. A Democratic president is unlikely to want to appoint judges who will seek to overrule *Roe v. Wade*<sup>5</sup> and strike down affirmative action programs. A Republican president is unlikely to want to appoint judges who will interpret the Constitution to require states to recognize same-sex marriages. It is reasonable to hypothesize that as a statistical regularity, judges appointed by Republican presidents (hereinafter described, for ease of exposition, as Republican appointees) will be more conservative than judges appointed by Democratic presidents (Democratic appointees, as we shall henceforth call them). But is this hypothesis true? When is it true, and to what degree is it true?

More subtly, we might speculate that federal judges are subject to “panel effects”—that on a three-judge panel, a judge’s likely vote is influenced by the other two judges assigned to the same panel. In particular, does a judge vote differently depending on whether she is sitting with zero, one, or two judges appointed by a president of the same political party? On one view, a Republican appointee, sitting with two Democratic appointees, should be more likely to vote as Democratic appointees typically do, whereas a Democratic appointee, sitting with two Republican appointees, should be more likely to vote as Republican appointees typically do. But is this in fact the usual pattern? Is it an invariable one? Since judges in a given circuit are assigned to panels (and, therefore, to cases) randomly, the existence of a large data set allows these issues to be investigated empirically.<sup>6</sup>

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<sup>4</sup> See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002). For an important study of politics and lower courts, see Nancy Scherer, *Scoring Points: Politicians, Political Activists and the Lower Federal Court Appointment Process* (forthcoming 2004) (on file with the Virginia Law Review Association).

<sup>5</sup> 410 U.S. 113 (1973).

<sup>6</sup> For accounts of aggregate data, see Cross, *supra* note 3, at 1504–09 (showing significant effect of ideology, varying across administrations).

In this Essay, we will examine a subset of possible case types, focusing on a number of controversial issues that seem especially likely to reveal divisions between Republican and Democratic appointees. In brief, we will explore cases involving abortion, affirmative action, campaign finance, capital punishment, Commerce Clause challenges to congressional enactments, the Contracts Clause, criminal appeals, disability discrimination, industry challenges to environmental regulation, piercing the corporate veil, race discrimination, sex discrimination, and claimed takings of private property without just compensation. We will offer a more detailed description of our subjects and methods below.

The central purpose of this Essay is to examine three hypotheses:

1. *Ideological voting.* In ideologically contested cases, a judge's ideological tendency can be predicted by the party of the appointing president; Republican appointees vote very differently from Democratic appointees. Ideologically contested cases involve many of the issues just mentioned, such as affirmative action, campaign finance, federalism, the rights of criminal defendants, sex discrimination, piercing the corporate veil, racial discrimination, property rights, capital punishment, disability discrimination, sexual harassment, and abortion.

2. *Ideological dampening.* A judge's ideological tendency, in such cases, is likely to be dampened if she is sitting with two judges of a different political party. For example, a Democratic appointee should be less likely to vote in a stereotypically liberal fashion if accompanied by two Republican appointees, and a Republican appointee should be less likely to vote in a stereotypically conservative fashion<sup>7</sup> if accompanied by two Democratic appointees.

3. *Ideological amplification.* A judge's ideological tendency, in such cases, is likely to be amplified if she is sitting with two judges from the same political party. A Democratic appointee

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<sup>7</sup>We use the phrases "stereotypically liberal" and "stereotypically conservative" throughout for the purpose of simplicity. Of course it would be foolish to predict that Republican appointees will *always* vote against sex discrimination plaintiffs or in favor of challenges to affirmative action programs.

should show an increased tendency to vote in a stereotypically liberal fashion if accompanied by two Democratic appointees, and a Republican appointee should be more likely to vote in a stereotypically conservative fashion if accompanied by two Republican appointees.

We find that in numerous areas of the law, all three hypotheses are strongly confirmed.<sup>8</sup> Each finds support in federal cases involving campaign finance, affirmative action, sex discrimination, sexual harassment, piercing the corporate veil, racial discrimination, disability discrimination, Contracts Clause violations, and review of environmental regulations. In such cases, our aggregate data strongly confirm all three hypotheses. Indeed, we find many extreme cases of ideological dampening, which we might call “leveling effects,” in which party differences are wiped out by the influence of panel composition. With leveling effects, Democratic appointees, when sitting with two Republican appointees, are as likely to vote in the stereotypically conservative fashion as are Republican appointees when sitting with two Democratic appointees. We also find strong amplification effects, such that if the data set in the relevant cases is taken as a whole, Democratic appointees, sitting with two Democratic appointees, are about *twice* as likely to vote in the stereotypically liberal fashion as are Republican appointees, sitting with two Republican appointees—a far larger disparity than the disparity between Democratic and Republican votes when either is sitting with one Democratic appointee and one Republican appointee.

In most of the areas investigated here, the political party of the appointing president is a fairly good predictor of how individual judges will vote. But in those same areas, the political party of the president who appointed the other two judges on the panel is at least as good a predictor of how individual judges will vote. All in

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<sup>8</sup> See also Cross, *supra* note 3, at 1504–05 (describing similar findings based on aggregate data). For a valuable study of peer influences within the judiciary in affirmative action cases, see Charles M. Cameron & Craig P. Cummings, *Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeals, 1971-1999* (2003) (unpublished manuscript), available at [www.yale.edu/coic/CameronCummings.pdf](http://www.yale.edu/coic/CameronCummings.pdf).

all, Democratic appointees show somewhat greater susceptibility to panel effects than do Republican appointees.

But there are noteworthy counterexamples to our general findings. In three important areas, ideology does not predict judicial votes, and hence all three hypotheses are refuted. This is the pattern in criminal appeals, takings claims, and Commerce Clause challenges to congressional enactments. In two other areas, the first hypothesis is supported, but the second and third hypotheses are refuted. These two areas are abortion and capital punishment. In each of these areas, judges apparently vote their convictions and are not affected by panel composition.

We offer a number of other findings. We show that variations in panel composition lead to dramatically different outcomes, in a way that creates serious problems for the rule of law. In the cases we analyze, a panel composed of three Democratic appointees issues a liberal ruling 61% of the time, whereas a panel composed of three Republican appointees issues a liberal ruling only 34% of the time. A panel composed of two Republican appointees and one Democrat issues a liberal ruling 39% of the time; a panel composed of two Democratic appointees and one Republican does so 50% of the time. These differences certainly do not show that the likely result is foreordained by the composition of the panel; there is a substantial overlap between the votes of Republican appointees and those of Democratic appointees. Ideology is hardly everything. But the litigant's chances, in the cases we examine, are significantly affected by the luck of the draw.

To understand the importance of group dynamics on judicial panels, it is important to emphasize that a Democratic majority, or a Republican majority, has enough votes to do what it wishes. Apparently a large disciplining effect comes from the presence of a single panelist from another party. Hence all-Republican panels show far more conservative patterns than majority Republican panels, and all-Democratic panels show far more liberal patterns than majority Democratic panels.

Our tale is largely one of effects from ideology on individual voting and panel outcomes. But it is important not to overstate those effects. The pool of cases studied here is limited to domains where ideology would be expected to play a large role. Outside of such domains, Republican and Democratic appointees are far less likely

to differ. The absence of party effects in important and contested areas (criminal law, takings, and federalism) testifies to the possibility of commonalities across partisan lines, even when differences might be expected. And even where party differences are statistically significant, they are not huge. In the entire sample, Democratic appointees issue a liberal vote 51% of the time, whereas Republicans do so 38% of the time. The full story emphasizes the significant effects of ideology and also the limited nature of those effects. We shall spend considerable time on the complexities here.

Disaggregating our data, we provide evidence of how ideology varies by circuit, showing that the Ninth, Third, and Second Circuits are the most liberal, while the Fifth and Seventh are the most conservative. We also find striking similarities across circuits. In all circuits, Democratic appointees are more likely than Republican appointees to vote in a stereotypically liberal direction. At the same time, however, a judge's vote is no better predicted by his or her own party than it is by the party of the other two judges on the panel.

Our main goal in this Essay is simply to present and analyze the data—to show the extent to which the three hypotheses find vindication.<sup>9</sup> But we also aim to give some explanation for our findings and to relate them to some continuing debates about the role of ideology on federal panels. Our data do not reveal whether ideological dampening is a product of persuasion or a form of collegiality. If Republican appointees show a liberal pattern of votes when accompanied by two Democratic appointees, it might be because they are convinced by their colleagues. Alternatively, they might suppress their private doubts and accept the majority's view. It is also possible that they are able to affect the reasoning in the majority opinion, trading their vote for a more moderate statement of the law. In any case, it is reasonable to say that the data show the pervasiveness of the “collegial concurrence”: a concurrence by a judge who signs the panel's opinion either because he is persuaded by the shared opinion of the two other judges on the panel or because it is not worthwhile, all things considered, to dissent. The collegial concurrence can be taken as an example, in the unlikely set-

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<sup>9</sup> Some of the findings here are previewed, without statistical analysis, in Cass R. Sunstein, *Why Societies Need Dissent*, at ch. 8 (2003).

ting of judicial panels, of responsiveness to conformity pressures.<sup>10</sup> These pressures make it more likely that people will end up silencing themselves, or even publicly agreeing with a majority position, simply because they would otherwise be isolated in their disagreement. We will discuss these issues at greater length after presenting the data.

We also find evidence within the federal judiciary of “group polarization,” by which like-minded people move toward a more extreme position in the same direction as their predeliberation views.<sup>11</sup> If all-Republican panels are overwhelmingly likely to strike down campaign finance regulation, and if all-Democratic panels are overwhelmingly likely to uphold affirmative action programs, group polarization is likely to be a reason. Finally, we offer indirect evidence of a “whistleblower effect”: A single judge of another party, while likely to be affected by the fact that he is isolated, might also influence other judges on the panel, at least where the panel would otherwise fail to follow existing law.<sup>12</sup>

We believe that our findings are of considerable interest in themselves. They also reveal much about human behavior in many contexts. A great deal of social science evidence shows conformity effects: When people are confronted with the views of unanimous others, they tend to yield.<sup>13</sup> Sometimes they yield because they believe that unanimous others cannot be wrong; sometimes they yield because it is not worthwhile to dissent in public.<sup>14</sup> In addition, a great deal of social science evidence shows that like-minded people

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<sup>10</sup> For an overview of conformity pressures, see Solomon E. Asch, *Opinions and Social Pressure*, in *Readings About the Social Animal* 13 (Elliot Aronson ed., 1984).

<sup>11</sup> See Roger Brown, *Social Psychology: The Second Edition* (1985); Sunstein, *supra* note 9, at 112–13; David Schkade, Cass R. Sunstein, & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 *Colum. L. Rev.* 1139, 1140 (2000); see also Cameron & Cummings, *supra* note 8, at 19–21 (discussing a similar finding in affirmative action cases, to the effect that liberal judges become far less inclined to uphold affirmative action programs when surrounded by conservatives, and that conservative judges become far more approving when surrounded by liberals).

<sup>12</sup> See 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 (1998).

<sup>13</sup> See Asch, *supra* note 10.

<sup>14</sup> See Robert Baron et al., *Group Process, Group Decision, Group Action* 66 (1992).

tend to go to extremes.<sup>15</sup> In the real world, this hypothesis is extremely hard to test in light of the range of confounding variables. But our data provide strong evidence that like-minded judges also go to extremes: The probability that a judge will vote in one or another direction is increased by the presence of judges appointed by the president of the same political party. In short, we claim to show both strong conformity effects and group polarization within federal courts of appeals. If these effects can be shown there, then they are also likely to be found in many other diverse contexts.

In fact, the presence of such effects raises doubts about what is probably the most influential method for explaining judicial voting: the “attitudinal model.”<sup>16</sup> According to the attitudinal model, judges have certain “attitudes” toward areas of the law, and these attitudes are good predictors of judicial votes in difficult cases.<sup>17</sup> Insofar as party effects are present, our findings are broadly supportive of this idea. But the attitudinal model does not come to terms with panel effects, which can both dampen and amplify the tendencies to which judicial “attitudes” give rise. Since panel effects are generally as large as party effects, and sometimes even larger, the attitudinal model misses a crucial factor behind judicial votes.

A disclaimer: We have collected a great deal of data, but our subtitle—a preliminary investigation—should be taken very seriously. The federal reporters offer an astonishingly large data set for judicial votes, including over two hundred years of votes ranging over countless substantive areas. Our own investigation is limited to several areas that, by general agreement, are ideologically contested, enough to produce possible disagreements in the cases that find their way to the courts of appeals.<sup>18</sup> Of course it would be extremely interesting to

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<sup>15</sup> Brown, *supra* note 11, at 203–26.

<sup>16</sup> See Segal & Spaeth, *supra* note 4.

<sup>17</sup> See *id.* at 86. We oversimplify a complex account.

<sup>18</sup> Note that the disciplining effect of existing law will be most constraining in disputes that never find their way to litigation; in many such cases, everyone agrees what the law is, and it is not worthwhile to test that question. In disputes that are not litigated, it is safe to say that Republican appointees and Democratic appointees would agree almost all of the time. The doctrine should be expected to impose less discipline in cases that go to trial. In addition, the decision to appeal suggests a degree of indeterminacy in the law. Hence we are considering cases that are not only contested ideologically, but that also involve a sufficient lack of clarity in the law as to make it worthwhile to challenge a lower court ruling. Of course, the highest degree of indeterminacy can be found in cases that are litigated to the Supreme Court. In the areas

know much more.<sup>19</sup> Might ideological voting and panel effects be found in apparently nonideological cases involving, for example, bankruptcy, torts, and civil procedure? What about the important areas of antitrust and labor law? How do the three hypotheses fare in the early part of the twentieth century, when federal courts were confronting the regulatory state for the first time? In cases involving minimum wage and maximum hour laws, did Republican appointees differ from Democratic appointees, and were panel effects also significant? Do the hypotheses hold in the segregation cases of the 1960s and 1970s? In the future, it should be possible to use the techniques discussed here to test a wide range of hypotheses about judicial voting patterns. One of our central goals is to provide a method for future analysis, a method that can be used in countless contexts.

This Essay will be organized as follows. Part I will offer the basic data, testing the three hypotheses in a number of areas. Part II will disaggregate the data by exploring circuit results. Part III will speculate about the reasons for the various findings, with special attention to collegial concurrences, group polarization, and whistleblower effects. Part IV will investigate some normative issues.

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in which we find no effects from ideology—criminal appeals, takings, and federalism—such effects may nonetheless be found at the Supreme Court level.

<sup>19</sup>For a valuable discussion, see Cross, *supra* note 3, which involves aggregate data and does not explore particularly controversial areas, and thus provides a useful supplement to ours. We are now embarking on a more extensive study, with data and analysis available at Chicago Judges Project, at <http://www.law.uchicago.edu/policy/judges> (2004). The effect of judicial ideology is usefully investigated in Linda R. Cohen & Matthew L. Spitzer, Solving the *Chevron* Puzzle, 57 *Law & Contemp. Probs.* 65 (Spring 1994) (special issue) (finding that justices are far more likely to defer to an agency's statutory construction when the agency is controlled by a president of the same political party as the justice). There is an informative but sparse literature on panel effects. See 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 (1973); Burton M. Atkins & Justin J. Green, Consensus on the United States Courts of Appeals: Illusion or Reality?, 20 *Am. J. Pol. Sci.* 735 (1976); Sheldon Goldman, Conflict and Consensus in the United States Courts of Appeals, 1968 *Wis. L. Rev.* 461; Donald R. Songer, Consensus and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals, 26 *Am. J. Pol. Sci.* 225 (1982). We have found especially valuable Cross & Tiller, *supra* note 12, and Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 *Va. L. Rev.* 1717 (1997). On partisan voting, see David E. Klein, Making Law in the United States Courts of Appeals (2002); Donald R. Songer et al., Continuity and Change on the United States Courts of Appeals (2000); Revesz, *supra*. A helpful overview of party effects is Daniel R. Pinello, Linking Party to Judicial Ideology in American Courts: A Meta-analysis, 20 *Just. Sys. J.* 219 (1999).

## I. THE THREE HYPOTHESES

*A. Aggregate Data*

We examined a total of 4958 published majority three-judge panel decisions, and the 14,874 associated individual judge's votes,<sup>20</sup> in areas involving abortion,<sup>21</sup> capital punishment,<sup>22</sup> the Americans with Disabilities Act,<sup>23</sup> criminal appeals,<sup>24</sup> takings,<sup>25</sup> the Contracts

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<sup>20</sup> With regard to search criteria, we tried to choose the method that would achieve the highest number of results. Once we performed the searches as listed, we further filtered the body of cases so as to include only those that were relevant. For example, in the capital punishment context, when we searched for "capital punishment" on Lexis, we found relevant cases as well as irrelevant ones. Irrelevant cases would include, for instance, a non-capital punishment case citing a capital punishment case. See, e.g., *Hines v. United States*, 282 F.3d 1002, 1004 (8th Cir. 2002) (citing a capital punishment case and including the words "capital punishment" in citation even though *Hines* was a non-capital punishment case). In the affirmative action context, some irrelevant cases noted that "Congress has not taken an affirmative action." Since these cases did not bear on what we were studying, they were not included in the final search results.

<sup>21</sup> We assembled the sample of abortion cases by searching Lexis for "core-terms (abortion) and date aft 1982 and constitutional" and "abortion and constitution!". These cases generally presented challenges to statutes and policies that might infringe on a woman's right to choose, or challenges to the constitutionality of antiprotesting injunctions. (We included the latter set of cases both because they are plausibly seen as "abortion cases" and because their inclusion increases the size of a fairly small sample. It would be possible to object that these cases are properly treated as "free speech cases" rather than "abortion cases," but we hypothesized that the abortion issue would inevitably be salient, a hypothesis that is supported by our findings about judicial voting patterns.) Because plaintiffs differed between the cases, outcomes were coded as pro-life or pro-choice; if a judge voted at all to support the pro-life position then the vote was counted as a pro-life vote. The sample includes cases from 01/01/82–12/31/02. We identified a total of 101 cases.

<sup>22</sup> We assembled this sample of capital punishment cases by searching Lexis for "capital punishment." If a judge voted to grant the defendant any relief, then the vote was coded as a pro-defendant vote. The sample includes cases from 01/01/95–12/31/02. We identified a total of 181 cases.

<sup>23</sup> 42 U.S.C. §§ 12101–12213 (1994). We assembled this sample of disability cases by searching Lexis for "Americans with Disabilities Act." If a judge voted to grant the plaintiff any relief, then the vote was coded as a pro-plaintiff vote. The sample includes cases from 01/01/98–12/31/02. We identified a total of 682 cases.

<sup>24</sup> We assembled the sample of criminal cases from the D.C. Circuit, the Third Circuit, and the Fourth Circuit by searching <http://www.ll.georgetown.edu/federal/judicial/cadc.cfm>, <http://vls.law.vill.edu/Locator/3/>, and <http://www.law.emory.edu/4circuit/2nd-idx.html> for cases with "United States" in the title. Government appeals and civil disputes were disregarded. If a judge voted to grant the defendant any relief, then the vote was coded as a pro-defendant vote. The sample includes cases from 01/01/95–12/31/02. We identified a total of 1176 cases.

<sup>25</sup> We assembled the sample of takings cases by Shepardizing on Lexis *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal*

Clause,<sup>26</sup> affirmative action,<sup>27</sup> Title VII race discrimination cases brought by African-American plaintiffs,<sup>28</sup> sex discrimination,<sup>29</sup> campaign finance,<sup>30</sup> sexual harassment,<sup>31</sup> cases in which plaintiffs sought to pierce the corporate veil,<sup>32</sup> industry challenges to envi-

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*Commission*, 483 U.S. 825 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). If a judge voted to grant the party alleging a violation of the Takings Clause any relief, then the vote was coded as a pro-plaintiff vote. The sample includes cases from 06/26/78–12/31/02. We identified a total of 215 cases. We did not include decisions of the U.S. Court of Claims, as discussed *infra* note 63 and accompanying text.

<sup>26</sup> We assembled the sample of Contracts Clause cases by Shepardizing on Lexis *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), and *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977). If a judge voted to grant the party alleging a violation of the Contracts Clause any relief, then the vote was coded as a pro-plaintiff vote. The sample includes cases from 04/27/77–12/31/02. We identified a total of seventy-six cases.

<sup>27</sup> We assembled the sample of affirmative action cases by searching Lexis for “affirmative action and constitution or constitutional.” The sample also includes cases found through a Westlaw Key Cite of *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). If a judge voted to hold any part of an affirmative action plan unconstitutional, then the vote was considered a vote for the party challenging the plan. The sample includes cases from 06/28/78–12/31/02. We identified a total of 155 cases.

<sup>28</sup> We assembled the sample of Title VII cases by searching Lexis for “Title VII and African-American or black.” We included cases that presented a challenge by an African-American plaintiff. If a judge voted to grant the plaintiff any relief, then the vote was coded as a pro-plaintiff vote. The sample includes cases from 01/01/85–12/31/02. We identified a total of 320 cases.

<sup>29</sup> We assembled the sample of sex discrimination cases by searching Lexis for “sex! discrimination or sex! harassment.” If the plaintiff was afforded any relief, then the vote was coded as a pro-plaintiff vote. The sample includes cases from 01/01/95–12/31/02. We identified a total of 1007 cases.

<sup>30</sup> We assembled the sample of campaign finance cases by Shepardizing on Lexis *Buckley v. Valeo*, 424 U.S. 1 (1976). If a judge voted to afford the party challenging the campaign finance provision any relief, then the vote was coded as a pro-plaintiff vote. The sample includes cases from 01/30/76–12/31/02. We identified a total of fifty-five cases.

<sup>31</sup> We assembled the sample of sexual harassment cases (a subset of sex discrimination cases) by searching Lexis for “sex! harassment.” If a judge voted to afford the plaintiff any relief, then the vote was coded as a pro-plaintiff vote. The sample includes cases from 01/01/95–12/31/02. We identified a total of 470 cases.

<sup>32</sup> We assembled the sample of piercing the corporate veil cases by searching Lexis for “pierc! and corporate veil.” If a judge voted to afford the plaintiff trying to pierce the veil any relief, then the vote was coded as a pro-plaintiff vote. The sample includes cases from 01/01/95–12/31/02. We identified a total of 106 cases.

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ronmental regulations,<sup>33</sup> and federalism challenges to congressional enactments under the Commerce Clause.<sup>34</sup> Our methods for finding and assessing these cases, described in the footnotes, leave room for errors and for a degree of discretion. We are confident, however, that the basic pattern of our results is sound. To keep the inquiry manageable, our investigation is limited to recent time periods (sometimes from 1995 to the present, though sometimes longer, certainly when necessary to produce a sufficient number of cases in a particular category<sup>35</sup>). We believe that limited though the evidence is, our results are sufficient to show the range of likely patterns and also to establish the claim that the three principal hypotheses are often vindicated.

Our sample is limited to published opinions. This limitation obviously simplifies research, but it also follows from our basic goal, which is to test the role of ideology in difficult cases rather than easy ones. As a general rule, unpublished opinions are widely agreed to be simple and straightforward and to involve no difficult or complex issues of law. To be sure, publication practices are not uniform across circuits, and hence the decision to focus on published cases complicates cross-circuit comparisons. But that decision enables us to test our hypotheses in the cases that most interest us (and the public), while also producing at least considerable information about the role of party and panel effects across circuits.<sup>36</sup>

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<sup>33</sup> We assembled the sample of EPA cases by searching <http://www.ll.georgetown.edu/federal/judicial/cadc.cfm> for cases with “EPA” or the EPA administrator’s name in the case title. We crosschecked this set of cases with results from a Lexis search of “EPA” and “Environmental Protection Agency.” If a judge voted to afford the industry challenger any relief, then the vote was coded as a pro-industry vote. The sample includes cases from 09/19/94–12/31/02. For cases before 1994, we relied on Revesz, *supra* note 19, at 1721–27. We identified a total of 142 cases.

<sup>34</sup> We assembled the sample of Commerce Clause cases by Shepardizing on Lexis *United States v. Lopez*, 514 U.S. 549 (1995). If a judge voted to afford the plaintiff any relief, then the vote was coded as a pro-plaintiff vote. The sample includes cases from 04/26/95–12/31/02. We identified a total of 272 cases.

<sup>35</sup> Thus we extended the viewscreen to earlier cases when the post-1995 sample was small. In deciding how far back to look, we typically relied on starting dates marked by important Supreme Court decisions that would predictably be cited in relevant cases.

<sup>36</sup> Because unpublished opinions generally involve easy cases, we would not expect to see significant party or panel effects in them, and a full sample of court of appeals opinions, including unpublished ones, would of course show reduced effects of both

**Table 1. Summary of Votes by Individual Judges and Majority Decisions of Three-Judge Panels**  
(proportion voting for the liberal position on the given issue)

Case Type	Individual Judges' Votes							Panel Majority Decisions				
	Party			Panel Colleagues				Panel Composition				
	R	D	D - R	RR	RD	DD	DD - RR	RRR	RRD	RDD	DDD	DDD - RRR
Campaign finance (vote to uphold)	.28	.46	.18	.29	.34	.53	.24	.23	.30	.35	.80	.57
Affirmative action (vote for)	.48	.74	.26	.47	.62	.73	.26	.37	.50	.83	.85	.48
EPA (vote against industry)	.46	.64	.18	.48	.54	.66	.19	.27	.55	.62	.72	.45
Sex discrimination (vote for Plaintiff)	.35	.51	.16	.36	.41	.57	.21	.31	.38	.49	.75	.44
Contracts (reject const challenge)	.24	.30	.06	.19	.26	.45	.26	.16	.26	.32	.50	.34
Pierce corp veil (vote to pierce)	.27	.41	.14	.25	.31	.51	.26	.23	.29	.37	.56	.33
ADA (vote for Plaintiff)	.26	.43	.17	.24	.35	.45	.21	.18	.27	.47	.50	.32
Abortion (vote pro-choice)	.49	.70	.21	.58	.55	.65	.07	.53	.51	.62	.78	.25
Capital punishment (vote against)	.20	.42	.22	.29	.29	.30	.01	.18	.22	.38	.33	.15
Title VII cases (vote for Plaintiff)	.35	.41	.06	.39	.35	.42	.04	.43	.31	.45	.56	.13
Federalism (vote to uphold)	.95	.99	.04	.96	.97	.97	.01	.97	1.00	.98	1.00	.03
Criminal (vote for Defendant)	.33	.36	.03	.33	.33	.33	.00	.31	.31	.40	.34	.02
Takings clause (find no taking)	.23	.20	-.03	.23	.20	.23	.00	.26	.17	.24	.25	-.01
<b>Average across all case types</b>	.38	.51	.13	.39	.43	.52	.14	.34	.39	.50	.61	.27
<b>Case types with a panel difference</b>	.34	.50	.16	.35	.40	.53	.17	.29	.36	.49	.64	.35

Table 1 shows the percentage of stereotypically liberal votes<sup>37</sup> in a variety of areas. It reveals both individual votes and majority decisions of three-judge panels. Note first that in a number of areas, there is strong evidence of ideological voting in the sense that Democratic appointees are more likely to vote in the stereotypically liberal direction than are Republican appointees. We measure ideological voting by subtracting the percentage of liberal Republican votes from the percentage of liberal Democratic votes; the lar-

party and ideology. We emphasize that our goal is to see those effects in the hard cases, not the easy ones, and hence their absence from easy cases is essentially uninteresting.

<sup>37</sup> For simplicity of analysis and clarity of presentation, we coded votes for all case types in the same ideological direction. Identical results would come using conservative votes but with the sign reversed.

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ger the number, the larger the party effect. The overall difference is 13%—not huge, but substantial. The extent of this effect, and even its existence, is variable across areas. We shall discuss these variations shortly.

We can also see that the votes of judges are influenced by the party affiliation of the other two judges on the same panel.<sup>38</sup> As a first approximation, we measure this influence by subtracting the overall percentage of liberal votes by a judge of either party when sitting with two Democratic appointees from the percentage when he or she sits with two Republican appointees. Surprisingly, this overall difference, 14%, is as large as the basic difference between parties. This is our simple measure of panel effects, though it is part of a more complex story. As we shall see, there are multiple ways to assess the influence of the other judges on the panel.

Finally, it is clear that these two influences result in actual decisions that are very much affected by the composition of the panel. The clearest point is a sharp spread between the average outcome in an all-Republican panel and that in an all-Democratic panel. Indeed, the likelihood of a liberal outcome is roughly twice as high with the latter as with the former. For litigants in highly controversial areas, a great deal depends on the luck of the draw—the outcome of a random assignment of judges.

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<sup>38</sup> In the same vein, see Cross, *supra* note 3, at 1504–05.

**Figure 1. Party and Panel Influences on Votes of Individual Judges**  
(on average for ideological case types)

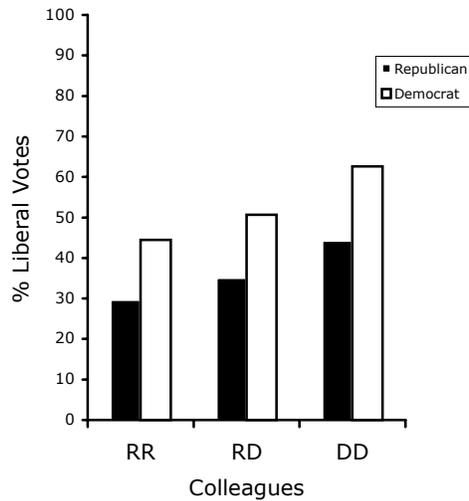


Figure 1 captures the aggregate party and panel effects across those areas in which there is ideological voting.<sup>39</sup> The most striking lessons of this figure are our principal themes here.<sup>40</sup> For both De-

<sup>39</sup> We exempt cases in which there is little or no ideological voting (criminal cases, takings cases, and federalism cases). If those cases were included, then we would see the same overall patterns, but in diminished form. If we exempt cases of ideological voting without panel effects (abortion, capital punishment), the aggregate panel effects would of course be more pronounced.

<sup>40</sup> The data were analyzed using a logistic regression model with the *vote* (liberal/conservative) of an individual judge in a given case as the dependent variable. The independent variables were the judge's *party* (Democratic/Republican appointee), the number of Democratic appointees among the other two judges on the *panel*, and dummy variables for *case category* and *circuit*. Results for this overall model appear in the Appendix. For analyses of individual case categories, the model is the same but with *case category* dummies dropped; for analyses of circuits, the *circuit* dummies are dropped. In the aggregate analysis of Figure 1 the coefficients for *party* ( $p < .001$ ) and *panel* ( $p < .001$ ) are both highly significant. There is also a slight

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mocratic appointees and Republican appointees, the likelihood of a liberal vote jumps when the two other panel members are Democratic appointees, and it drops when the two other panel members are Republican appointees. For purposes of discussion, we might take, as the baseline, cases in which a judge is sitting with one Democrat and one Republican, and compare how voting patterns shift when a judge is sitting instead with two Democratic appointees or two Republican appointees. We can readily see that a Democrat, in the baseline condition, casts a liberal vote 51% of the time, whereas a Republican does so 35% of the time. Sitting with two Democratic appointees, Democratic appointees cast liberal votes 63% of the time, whereas Republican appointees do so 44% of the time. Sitting with two Republican appointees, Democratic appointees cast liberal votes 45% of the time, whereas Republican appointees do so only 30% of the time. Thus, Republican appointees sitting with two Democratic appointees show the same basic pattern of votes as do Democratic appointees sitting with two Republican appointees.

The aggregate figures conceal some significant differences across case categories. We begin with cases in which all three hypotheses are supported and then turn to cases in which they are not.

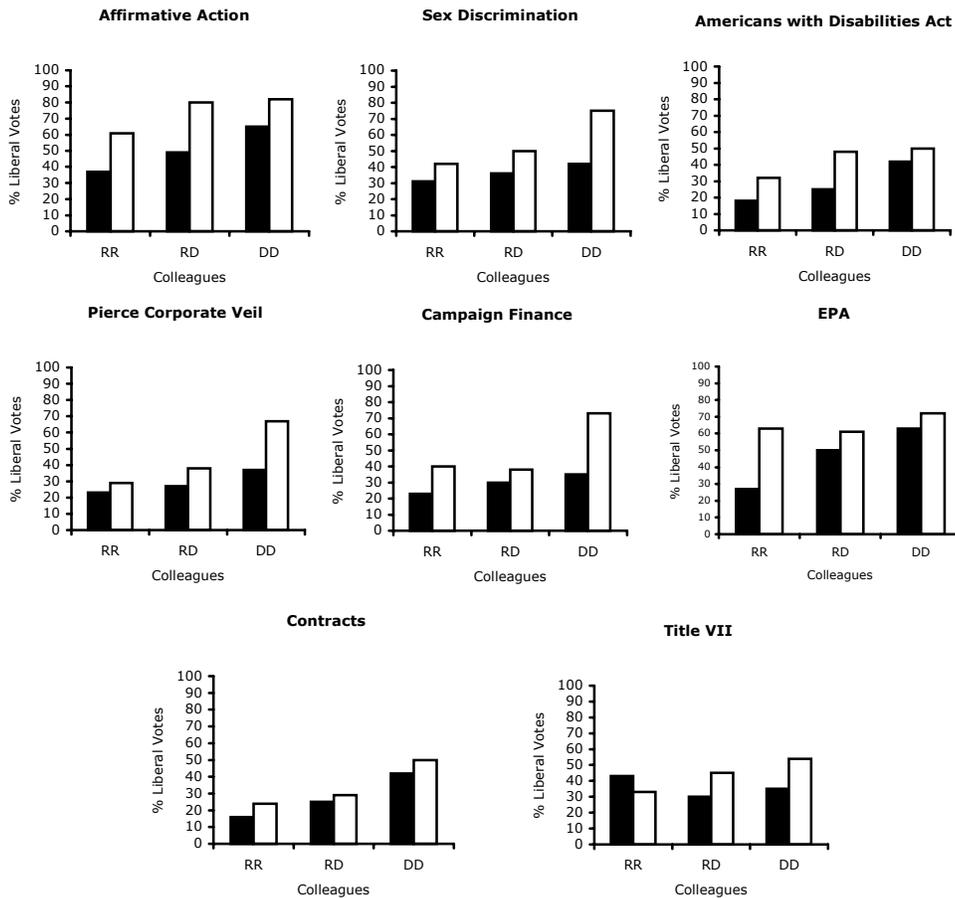
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tendency for Democratic appointees to show larger panel effects than Republican appointees (the interaction term is marginally significant,  $p < .07$ ).

*B. All Hypotheses Supported*

**Figure 2. Voting Patterns for Case Types with Both Party and Panel Effects**

(■ (black) = Republican appointees, □ (white) = Democratic appointees)



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*1. Affirmative Action*

Let us start with affirmative action, which shows the basic pattern of results as in the aggregate data (Figure 2).<sup>41</sup> From 1978 through 2002, Republican appointees cast 267 total votes, with 127, or 48%, in favor of upholding an affirmative action policy. By contrast, Democratic appointees cast 198 votes, with 147, or 74%, in favor of upholding an affirmative action policy. Here we find striking evidence of ideological voting. We also find significant evidence of panel effects. An isolated Democrat sitting with two Republican appointees votes for affirmative action only 61% of the time—halfway between the aggregate numbers for Democratic appointees and Republican appointees. More remarkably, isolated Democratic appointees are actually slightly less likely to vote for affirmative action programs than are isolated Republican appointees, who vote in favor 65% of the time. Thus, we see strong evidence of ideological dampening.

The third hypothesis is also confirmed. On all-Republican panels, individual Republican appointees vote for affirmative action programs only 37% of the time—but 49% of the time when Republican appointees hold a two-to-one majority. On all-Democratic panels, individual Democratic appointees vote in favor of the plan 82% of the time, compared to 80% with a two-judge Democratic majority. An institution defending an affirmative action program has about a one-in-three chance of success before an all-Republican panel—but more than a four-in-five chance before an all-Democratic panel! In a pattern that pervades many of the doctrinal areas, the rate of pro-affirmative action votes on all-Democratic panels is almost triple the corresponding rate of Republican votes on all-Republican panels.

*2. Sex Discrimination*

In sex discrimination cases from 1995 to the present, Republican appointees voted in favor of plaintiffs 35% of the time, whereas Democratic appointees voted for plaintiffs 51% of the time. Hence we find strong evidence of ideological voting, though not as strong

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<sup>41</sup> The coefficients for *party* ( $p < .001$ ) and *panel* ( $p < .001$ ) are both significant. For related findings about overlapping data, with more refined coding, see Cameron & Cummings, *supra* note 8.

as in the affirmative action context.<sup>42</sup> When in the minority, Republican appointees vote in favor of sex discrimination plaintiffs 42% of the time, identical to the 42% rate of Democratic appointees when they are in the minority. The most striking number here is the percentage of pro-plaintiff votes when three Democratic appointees are sitting together. Here 75% of Democratic votes favor plaintiffs, far higher than the rates of 50% or less when Democratic appointees sit with one or more Republican appointees. On all-Republican panels, Republican appointees vote at a strongly anti-plaintiff rate, with only 31% favoring plaintiffs; this rate increases steadily with each Democrat on a panel.

### 3. *Sexual Harassment*

Sexual harassment cases are a subset of sex discrimination cases; for that reason, they have not been included as a separate entry in our aggregate figures. But because the area is of considerable independent interest, we have conducted a separate analysis of sexual harassment cases.<sup>43</sup> Republican appointees vote in favor of plaintiffs at a rate of 37%, whereas Democratic appointees vote for plaintiffs at a rate of 52%. Sitting with two Democratic appointees, Republican appointees are more likely to vote for plaintiffs than Democratic appointees sitting with two Republican appointees by a margin of 44% to 41%. On all-Democratic panels, Democratic appointees vote for plaintiffs at a 76% rate, more than double the 32% rate of Republican appointees on all-Republican panels. It might be expected that gender would be relevant to rulings in sexual harassment cases, and for this reason we did a separate analysis of whether gender predicts likely votes. The answer is that gender does not matter. Female judges are not more likely than male judges to vote in favor of plaintiffs in our sample of these cases, and judges who sit with one or more female judges are not more likely to vote for plaintiffs than those who sit only with male judges. The party of the appointing president, not gender, is the important variable.

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<sup>42</sup> The coefficients for *party* ( $p < .001$ ) and *panel* ( $p < .001$ ) are both significant.

<sup>43</sup> The coefficients for *party* ( $p < .001$ ) and *panel* ( $p < .001$ ) are both significant.

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*4. Disability*

Under the Americans with Disabilities Act, judges of both parties are influenced by the colleagues with whom they sit on a panel.<sup>44</sup> In data collected for the period from 1998 to 2002,<sup>45</sup> Republican appointees vote 26% of the time in favor of plaintiffs; sitting with one Republican and one Democrat, the rate is 25%, about the same as the aggregate figure. When sitting with two Republican appointees, however, the rate drops to 18%, and when sitting with two Democratic appointees, it jumps to 42%. Democratic percentages move in the same directions, though with a slightly different pattern. The overall pro-plaintiff vote is 43%, but it is 32% when a Democratic appointee sits with two Republican appointees (significantly lower than the 42% rate for Republican appointees sitting with two Democratic appointees), and it rises to 48% with one other Democrat and to 50% on all-Democratic panels.

*5. Piercing the Corporate Veil*

Cases in which plaintiffs attempt to pierce the corporate veil follow a very similar pattern to sex discrimination cases, with all three hypotheses confirmed.<sup>46</sup> Republican appointees accept such claims at a significantly lower rate than Democratic appointees: 27% as opposed to 41%. But here as elsewhere, Republicans sitting with two Democratic appointees, voting 37% in favor of veil-piercing, are more liberal than Democrats sitting with two Republican appointees, voting in favor of piercing only 29% of the time. The most extreme figures in the data involve unified panels. Here, too, the pro-plaintiff voting percentage of Democratic appointees on all-Democratic panels is almost triple the corresponding number for Republican appointees on all-Republican panels: 67% as opposed to 23%.

*6. Campaign Finance*

In cases since 1976, Republican appointees cast only 28% of their votes in favor of upholding campaign finance laws, substan-

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<sup>44</sup> The coefficients for *party* ( $p < .001$ ) and *panel* ( $p < .001$ ) are both significant.

<sup>45</sup> The sample is very large here, so we thought it unnecessary to collect earlier data to test our three hypotheses.

<sup>46</sup> The coefficients for *party* ( $p < .01$ ) and *panel* ( $p < .001$ ) are both significant.

tially lower than the 46% rate for Democratic appointees. Hence the first hypothesis—ideological voting—is tentatively supported.<sup>47</sup> With respect to the second hypothesis, involving ideological dampening, the results are suggestive as well. When sitting with two Democratic appointees, Republican appointees vote to uphold campaign finance laws 35% of the time. When sitting with two Republican appointees, Democratic appointees vote for such programs 40% of the time.

Now we turn to the third hypothesis, involving ideological amplification. On all-Republican panels, Republican appointees vote to uphold 23% of the time, while on all-Democratic panels, Democratic appointees vote to uphold 73% of the time. The corresponding numbers on two-judge majority panels are 30% and 38% respectively. Thus, there is evidence of a substantial difference between the behavior of all-Democratic panels and Democratic majority panels—but Republican judges tend to vote the same regardless of whether they are on unified panels or Republican majority panels.

### 7. *Environmental Regulation*

A large data set, much of it compiled and explored in an important and illuminating essay by Dean Richard Revesz,<sup>48</sup> comes from industry challenges to EPA regulations. We have added a great deal to Revesz's data set here,<sup>49</sup> though, like Revesz, we limit our investigation to the D.C. Circuit, which hears the vast majority of environmental cases.<sup>50</sup> From 1970 through 2002, Democratic appointees voted against agency challenges 64% of the time, whereas Republican appointees did so 46% of the time.<sup>51</sup> There are also sig-

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<sup>47</sup> Here we are hampered by the small number of campaign finance cases available. The coefficient for *party* almost achieves significance ( $p = .13$ ), and the *panel* coefficient is positive but not significantly different from zero ( $p = .35$ ). We include campaign finance cases in this group of case categories because it has a similar pattern that would be highly significant given a larger number of cases.

<sup>48</sup> See Revesz, *supra* note 19.

<sup>49</sup> See *id.* at 1721–27.

<sup>50</sup> The coefficients for *party* ( $p < .001$ ) and *panel* ( $p < .001$ ) are both significant.

<sup>51</sup> Using a smaller data set than that used here, Dean Revesz finds that when industry challenges an environmental regulation, there is an extraordinary difference between the behavior of a Republican majority and that of a Democratic majority. Republican majorities reverse agencies over 50% of the time; Democratic majorities do

nificant findings of group influence.<sup>52</sup> Republican appointees show ideological amplification. On all-Republican panels, Republican appointees vote against industry challenges just 27% of the time, but for members of two-Republican majorities this figure rises rapidly to 50%, and finally to 63% for a single minority Republican.

Interestingly, Democratic appointees do not show ideological amplification in this domain. A single Democratic appointee accompanied by two Republican appointees votes against industry challenges 63% of the time, but when joined by two Democratic appointees, the rate rises only to 72%. Their invalidation votes are largely impervious to panel effects. As Dean Revesz has shown, however, ideological amplification can be found among Democratic appointees when an environmental group is challenging agency action. A panel of three Democratic appointees is more likely to accept the challenge than a panel of two Democratic appointees and one Republican.<sup>53</sup> The likelihood that a Democrat will vote in favor of an environmentalist challenge is highest when three Democratic appointees are on the panel—and lowest when the panel has two Republican appointees.<sup>54</sup>

#### 8. *Contracts Clause Violations*

We examined Contracts Clause cases with the thought that Republican appointees would be more sympathetic than Democratic appointees to Contracts Clause claims. Our speculation to this effect was rooted in the fact that conservative academics have argued for stronger judicial protection of contractual rights through constitutional rulings.<sup>55</sup> But our speculation turned out to be wrong. There is mild evidence of ideological voting with respect to the

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so less than 15% of the time. Revesz, *supra* note 19, at 1763; Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 Va. L. Rev. 805, 808 (1999). Ideology also emerges as an important factor in Cohen & Spitzer, *supra* note 19 (finding that justices are far more likely to defer to an agency's statutory construction when the agency is controlled by a president of the same political party as the justice).

<sup>52</sup> See Revesz, *supra* note 19, at 1751–56; Revesz, *supra* note 51, at 808.

<sup>53</sup> Revesz, *supra* note 19, at 1753.

<sup>54</sup> *Id.* Revesz notes, however, that these differences are not statistically significant, an unsurprising fact in light of the small sample. *Id.*

<sup>55</sup> See Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 704–05 (1984).

Contracts Clause, but it runs in the opposite direction from what we predicted, apparently because those who make Contracts Clause objections are more sympathetic to Democratic than to Republican appointees.<sup>56</sup>

In cases from 1977 to the present, Republican appointees vote on behalf of plaintiffs 24% of the time, whereas Democratic appointees do so 30% of the time. More striking in this context are the panel effects, which are large for both parties. On all-Democratic panels, Democratic appointees vote in favor of plaintiffs 50% of the time; on all-Republican panels, Republican appointees vote in favor of plaintiffs only 16% of the time. Moreover, the dampening effects are large and in the predicted direction. Sitting with two Democratic appointees, Republican appointees vote in favor of plaintiffs in 42% of the cases, whereas a Democrat sitting with two Republican appointees does so just 24% of the time.

### 9. Title VII

In cases brought under Title VII by African-American plaintiffs, we find small but nearly statistically significant evidence of ideological voting: Democratic appointees vote for plaintiffs 41% of the time, whereas Republican appointees do so 35% of the time. The small size of the difference is noteworthy, and we are not entirely sure how to explain it.<sup>57</sup> Democratic appointees show ideological dampening, with a 33% pro-plaintiff vote when sitting with two Republican appointees, and ideological amplification, with a 54% pro-plaintiff vote when sitting with two Democratic appointees. The pattern for Republican appointees is a puzzle. When sitting with two Republican appointees, Republican appointees actually vote for plaintiffs at a higher rate—43%—than when sitting with one or more Democratic appointees. When sitting with two Democratic appointees, Republican appointees vote for plaintiffs at a 35% rate, slightly higher than the 30% rate shown when sitting

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<sup>56</sup> The coefficient for *party* is not significantly different from zero ( $p > .30$ ), but the *panel* coefficient is significant ( $p < .01$ ).

<sup>57</sup> Neither the coefficient for *party* ( $p = .18$ ) nor that for *panel* ( $p > .30$ ) is significantly different from zero. We include Title VII cases here because, except for the anomalous pattern for all-Republican (“RRR”) panels, the remainder of the pattern looks similar to the rest of the groups of case categories. Indeed, if we drop the RRR group, both *party* and *panel* effects are significant.

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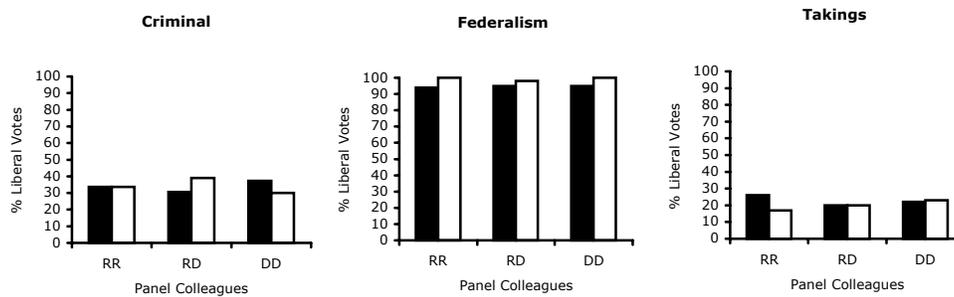
with one Democrat and one Republican. Overall, this pattern is similar to others with both party and colleague effects, except for the apparently anomalous voting of all-Republican panels, for which we have no good explanation.

*C. All Hypotheses Rebutted*

In three areas, all of our hypotheses were rebutted (Figure 3). The simple reason is that in these areas there is no significant difference between the votes of Republican appointees and those of Democratic appointees. Contrary to expectations, the political affiliation of the appointing president does not matter in the contexts of criminal appeals, federalism, and takings.

**Figure 3. Voting Patterns for Case Types with Neither Party nor Panel Effects**

(■ (black) = Republican appointees, □ (white) = Democratic appointees)

*1. Criminal Appeals*

It might be anticipated that Democratic appointees would be especially sympathetic to criminal defendants and that Republican appointees would be relatively unsympathetic. At least this is a popular platitude about judicial behavior. Hence the three hypotheses might be anticipated to receive strong support. But all of them are rejected, at least in three courts of appeals from 1995 to

the present.<sup>58</sup> We selected the courts of appeals for the D.C. Circuit and for the Third and Fourth Circuits on the theory that we would be highly likely to find ideological voting in criminal cases in those circuits. (We follow widespread but informal lore here, which suggests that ideological splits are especially severe on these circuits.) But we found no such effects. The overall rate of votes for defendants is between 30% and 39%, with no significant differences between Republican appointees and Democratic appointees and without significant panel effects. We conclude that Republican appointees and Democratic appointees do not much differ in this domain; we attempt to explain this finding below.

## 2. Federalism and the Commerce Clause

Since 1995, the overwhelming majority of federal judicial votes have been in favor of the constitutionality of programs challenged under the Commerce Clause. Indeed, Democratic appointees vote to validate the challenged program over 99% of the time! The numbers are not materially different for Republican appointees, for whom the overall validation rate is 95%. No panel effects are observed.<sup>59</sup> A possible reason for the agreement is that for many decades, the United States Supreme Court gave a clear signal that courts should be reluctant to invalidate congressional enactments under the Commerce Clause.<sup>60</sup> To be sure, the Court has provided important recent signs of willingness to invoke that clause against Congress.<sup>61</sup> But neither Republican nor Democratic appointees seem to believe that those signals should be taken very seriously. Perhaps things will change in this regard as the lower courts internalize the Court's messages. One qualification about our findings should be noted here: The difference between Republican and Democratic appointees is statistically significant. But this apparent difference is only of technical interest, since both groups of judges vote to uphold nearly 100% of the time, and panels vote to uphold

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<sup>58</sup> Neither the coefficient for *party* nor that for *panel* is significantly different from zero.

<sup>59</sup> The coefficient for *party* is significant ( $p < .05$ ), but the coefficient for *panel* is not.

<sup>60</sup> See Geoffrey R. Stone et al., *Constitutional Law* (4th ed. 2001).

<sup>61</sup> See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

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at least 97% of the time regardless of which combination of judges sits on a panel (see Table 1).

### 3. Takings

When plaintiffs challenge a governmental decision as violative of property rights, Democratic appointees and Republican appointees again show no significant differences in voting.<sup>62</sup> Only 23% of Republican votes are in favor of such challenges. It might be expected that Democratic appointees would show a substantially lower level of invalidation rates, but the percentage of Democratic votes to invalidate is nearly identical: 20%. No panel effects can be found. Note in this connection that our investigation did not include the Court of Claims, where, according to informal lore, ideological divisions are common.<sup>63</sup> It would be valuable to know whether a study of that court would uncover party and panel effects.

#### *D. Ideological Voting Without Amplification or Dampening: The Unique Cases of Abortion and Capital Punishment*

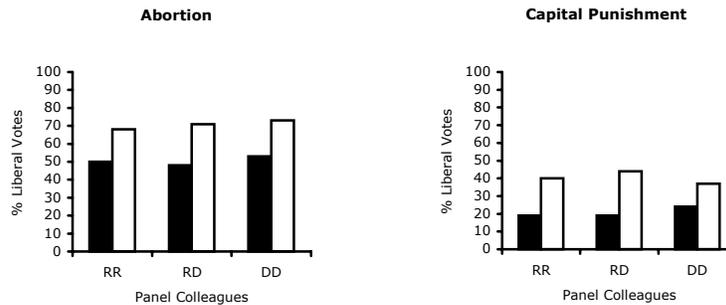
It is possible to imagine areas dominated by ideological voting. In such areas, judges would be expected to vote in a way that reflects the political affiliation of the appointing president—but panel effects would be minimal. This is the pattern of outcomes in only two areas that we investigated: abortion and capital punishment (Figure 4).

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<sup>62</sup> Neither the coefficient for *party* nor that for *panel* is significantly different from zero.

<sup>63</sup> The informal lore receives support from Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. Envtl. Aff. L. Rev. 509 (1998).

**Figure 4. Voting Patterns for Case Types with Only a Party Effect**  
 (■ (black) = Republican appointees, □ (white) = Democratic appointees)



Democratic appointees cast pro-choice votes 70% of the time, compared to 49% for Republican appointees. Here again we find evidence of ideological voting. But panel effects are absent. Sitting with two Democratic appointees, Republican appointees vote in favor of invalidation 53% of the time, not appreciably different from the 48% rate when sitting with one or more Republican appointees and the 50% invalidation rate in all-Republican panels. Similarly, sitting with two Republican appointees, Democratic appointees vote in favor of abortion rights 68% of the time, not much less than the 71% and 73% rates when sitting with one or two other Democratic appointees, respectively. The failure of the third hypothesis is even more striking. A Republican vote on an all-Republican panel is essentially the same as on a panel of two Republican appointees and one Democrat. A Democratic vote on an all-Democratic panel is essentially the same as on a panel of two Democratic appointees and one Republican.

Capital punishment shows a similar pattern: a large party difference but no other significant effects. Republican appointees vote for defendants 19% of the time on all-Republican panels, 19% of the time on majority Republican panels, and 24% of the time on majority Democratic panels. Democratic appointees vote for defendants 37% of the time on all-Democratic panels, 44% of the time on majority Democratic panels, and 40% of the time on majority Republican panels.

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*E. Panel Decisions*

Thus far we have focused on the votes of individual judges. For litigants and the law, of course, it is not the votes of individual judges, but the decisions of three-judge panels, that are of real interest. Let us now turn to panel outcomes.

In terms of the political affiliation of the appointing president, there are four possible combinations of judges on a three-judge panel: RRR, RRD, RDD, and DDD. Variations in panel composition can have two important effects, which should now be distinguished. The first involves the sheer number of people leaning in a certain direction. Suppose, for example, that Republican appointees are likely to rule in favor of a particular type of program only 40% of the time, whereas Democratic appointees are likely to rule in favor of such programs 70% of the time. As a simple statistical matter, and putting to one side the possibility that judges are influenced by one another, it follows that the likely majority outcome of a panel will be affected by its composition. Under the stated assumption, a panel of all-Democratic appointees is far more likely (78%) to uphold the program than a panel of two Democratic appointees and one Republican (66%), while an all-Republican panel would be much less likely to do so (35%).<sup>64</sup>

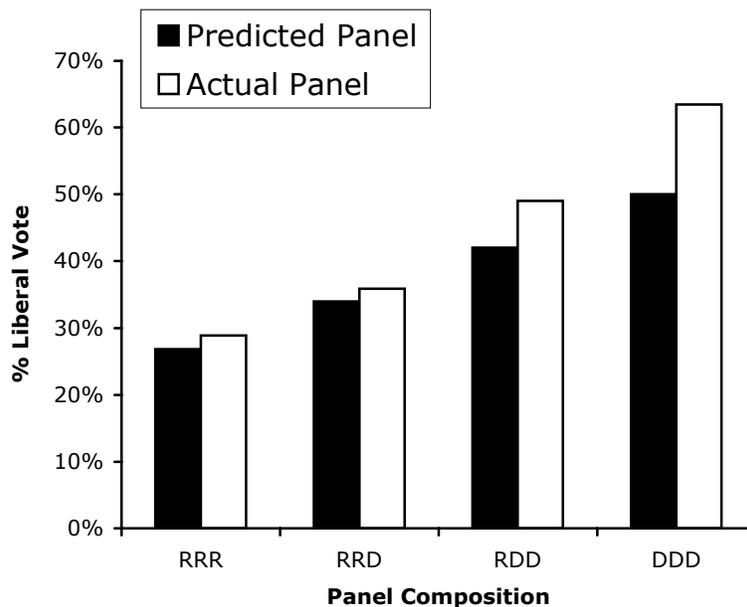
This is an important and substantial difference. As noted, however, this statistical effect assumes that judicial votes are not influenced by judicial colleagues. Suppose that an individual judge's likely vote is in fact influenced by the composition of the panel. If so, then the mere majority force of predispositions, just described, will not tell the full story of the difference between all-Republican panels and all-Democratic panels. In fact, the statistical account will understate the difference, possibly substantially. To illustrate with our own data, let us assume for the moment that the average

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<sup>64</sup> These figures come from the multinomial probabilities of getting at least two votes to uphold (a *yes* vote, "Y"), given the panel composition. For a three-judge panel, there are four ways to uphold a decision—votes of YYY, YYN, YNY, and NYY, from judges 1, 2, and 3, respectively. For example, for an all-Democratic appointed panel ("DDD"), the probability of a judgment to uphold the program is  $P(YYY) + P(YYN) + P(YNY) + P(NYY) = .7 \cdot .7 \cdot .7 + .7 \cdot .7 \cdot (1-.7) + .7 \cdot (1-.7) \cdot .7 + (1-.7) \cdot .7 \cdot .7 = .343 + .147 + .147 + .147 = .784$ , which rounds to 78%; for one Republican and two Democrats ("RDD"), the calculation is  $.4 \cdot .7 \cdot .7 + .4 \cdot .7 \cdot (1-.7) + .4 \cdot (1-.7) \cdot .7 + (1-.4) \cdot .7 \cdot .7 = .196 + .084 + .084 + .294 = .658$ ; and so forth.

percentages reported in the bottom row of Table 1 do accurately represent individual voting tendencies for case types that show differences in panel decisions. Figure 5 compares the predicted percentages, based on 34% for Republican appointees and 50% for Democratic appointees and using the calculation above, to the observed averages from the same row of the Table. The predicted panel effect (DDD% - RRR%) is 23%, but the observed effect is 35%. It is clear that to explain these results, something must be at work other than majority voting with different ideological predictions.<sup>65</sup>

**Figure 5. Predicted vs. Actual Panel Decisions**  
(for case types with a panel difference)

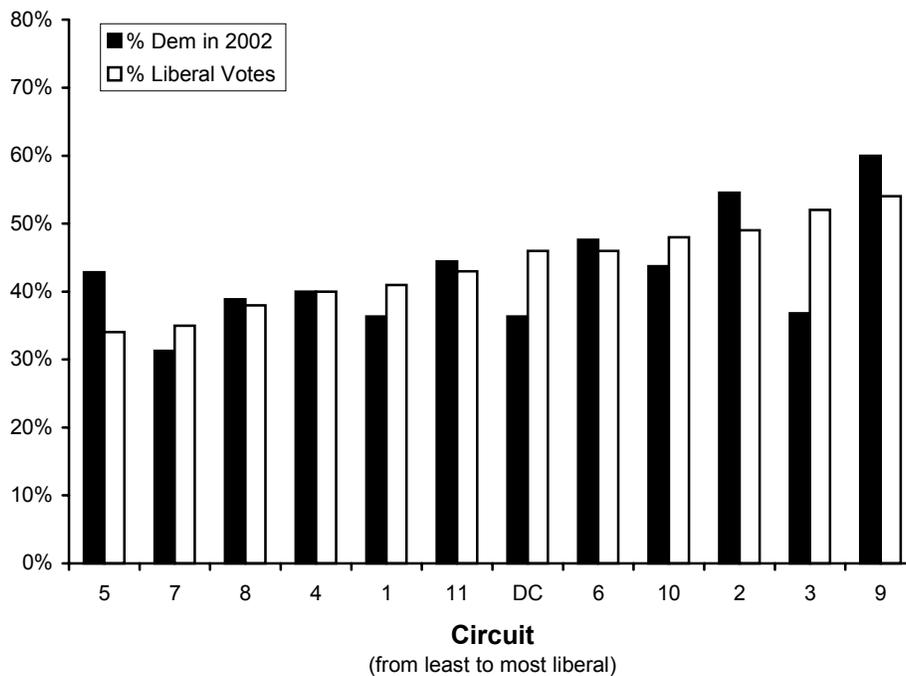


<sup>65</sup> If the shape of the graph were to hold up, it would suggest that the largest disparities occur when Democratic appointees are in the majority. This conclusion is tentative, of course, because of the lack of a clean or simple measure of the “true” party difference since judges only vote on panels with other judges, and never alone.

## II. DISAGGREGATING BY CIRCUIT

There are twelve federal courts of appeals, and it is therefore possible to disaggregate the cases by circuit to see whether the effects observed in the aggregate data hold across the board. In some contexts, the sample is too small to allow for reliable generalizations. To obtain a sense of what is happening across circuits, we aggregated the various cases within circuits.<sup>66</sup> The simplest finding has to do with ideological variations across circuits.

**Figure 6. Circuit Composition and Individual Voting Patterns**  
(sorted by percentage of liberal votes)



<sup>66</sup> To provide a common basis for comparing the circuits, we analyzed those case types with party differences, as in Figures 1–4, but also excluded environmental cases, which were brought only in the D.C. Circuit.

Consider Figure 6. In accordance with standard lore, the Ninth and Second Circuits are two of the most liberal, and the Fifth and Seventh Circuits are two of the most conservative. The rankings, in terms of ideology, correlate strongly but not perfectly with the percentage of Democratic appointees on the relevant court in 2002 ( $r = .59$ ).<sup>67</sup> Note that the figure, while suggestive, is a bit crude. In many contexts, litigants have some discretion about the circuit in which to bring suit, and hence civil rights plaintiffs would prefer to bring suit in the Ninth Circuit rather than in the Fifth. But broadly speaking, the figure probably captures ideological differences across circuits.

Now turn to another question: whether the effects of party and panel differ across circuits. As before, to obtain a measure of party effects, we subtract the percentage of liberal votes by Republican appointees from the percentage of liberal votes by Democratic appointees; this is a good test for whether party predicts likely votes. To create our measure of panel effects, we subtract the percentage of liberal votes by judges (whether Republican or Democrat) sitting with two Republican appointees from the percentage of such votes of judges sitting with two Democratic appointees. Figure 7 presents the results. There are party differences in all circuits, although they do differ in magnitude. The Third, Fifth, and Seventh Circuits show small party differences (less than 8%), followed by a group of eight circuits with party differences in the 12%–17% range, followed by the Ninth Circuit, which shows by far the largest party difference (27%).

There is also a modest tendency for party differences to be larger as the ideology of the circuit becomes more liberal (a correlation across circuits of .43 between the percentage of liberal votes and the size of the party difference). Larger party differences tend to be accompanied by larger panel differences as well. There is a correlation of .70 between the sizes of party and panel effects (the Sixth Circuit, which has a large party effect but no panel effect, is the main exception to this pattern). In the great majority of circuits, therefore, a judge's vote is predicted as well or better by the

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<sup>67</sup> Of course, since our cases occurred over many years, an analysis that more carefully matched the year of the case with the then-current composition of the relevant circuit could show a stronger relationship.

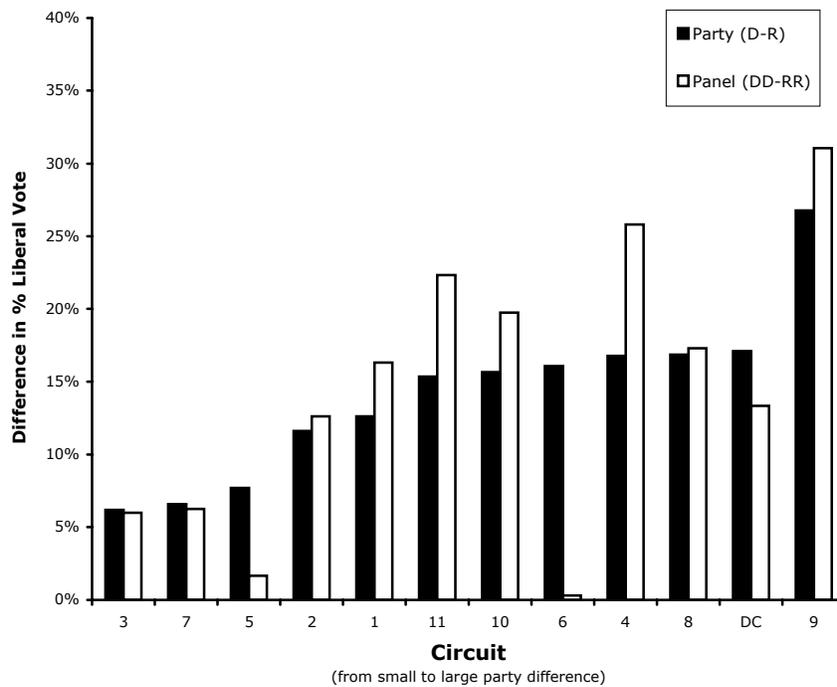
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political affiliation of the president who appointed the two other panel members as by the political affiliation of the president who appointed the judge in question.

**Figure 7. Party and Panel Effects on Individual Judge's Votes, by Circuit**  
(from smallest to largest party difference)



### III. EXPLANATIONS

What explains this pattern of outcomes? We sort them into three categories: those in which all three hypotheses are rejected; those in which party effects are clear but unaccompanied by panel effects; and those in which all three hypotheses are confirmed.

*A. No Party Effects, No Panel Effects*

Consider first the contexts in which all three of our hypotheses are rejected. In those contexts, Republican and Democratic appointees do not much disagree, and hence the political party of the appointing judge will not affect outcomes. In many areas, ideology is undoubtedly irrelevant to judicial votes. For example, we would not expect to see significant party effects in diversity cases that present routine issues of state law. Our investigation finds that party is irrelevant in several areas where such effects might be anticipated, and indeed in which we anticipated them. By informal lore, Republican appointees and Democratic appointees do disagree in criminal appeals, takings, and federalism cases. But informal lore is wrong. There are two possible explanations.

The first explanation is that the law (as elaborated by the Supreme Court or by previous appellate decisions) is clear and binding, and hence ideological disagreements cannot materialize. It is plausible to think that in all three areas, the precedents dampen any differences between Republican and Democratic appointees. At the court of appeals level, there might well be a sufficient consensus about the doctrine to overcome the potential effects of party. Perhaps the disagreements can manifest themselves only in the “frontier” cases—the highly unusual situations that find their way to the Supreme Court itself. This hypothesis finds some support in the Commerce Clause area, where the small (but statistically significant) difference between Democratic and Republican appointees seems to come in these “frontier” cases, despite an overall high level of agreement.<sup>68</sup>

The second possibility is that even if the doctrine does allow courts room to maneuver, appointees of different parties do not much disagree about the appropriate principles. Other empirical work suggests that in criminal cases, President Clinton’s appointees do not differ from Republican appointees.<sup>69</sup> A near-consensus appears to exist in this area. Perhaps the same is true in the contexts of takings and federalism. For criminal appeals, there is a further point. Unlike in the civil context, criminal defendants will appeal

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<sup>68</sup> See *supra* notes 59–61 and accompanying text.

<sup>69</sup> See Nancy Scherer, Are Clinton’s Judges “Old” Democrats or “New” Democrats?, 84 *Judicature* 150, 154 (2000).

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even when there is no indeterminacy, because (with very rare exceptions) they are not paying for the appeal. As a result, most criminal appeals lack merit under the prevailing doctrine.<sup>70</sup> Our data do not allow us to decide between the “binding precedent” and “ideological agreement” accounts, but they do show that in some domains where Democratic appointees and Republican appointees might be expected to differ, there is essential agreement. In these contexts, we find a tribute to conventional aspirations for the rule of law.<sup>71</sup>

*B. Party Effects Without Panel Effects*

What about the contexts of abortion and capital punishment? Here we find that party affiliation is what matters, and hence that people will vote their convictions regardless of the composition of the panel. In these cases, antecedent convictions must be extremely strong—strong enough to undo the group influences that occur in other types of cases. It seems clear that judges have strong beliefs about abortion and capital punishment, issues about which beliefs are often fiercely held. In cases of this kind, it is natural to assume that votes will be relatively impervious to panel effects.<sup>72</sup>

The disaggregated data show that for some judges, other areas have similar characteristics. On the D.C. Circuit, Democratic appointees respond to industry challenges to environmental regulations in the same way that judges as a whole respond to abortion and capital punishment cases: They are impervious to the different influences that come from different panel compositions. For Democratic appointees, party matters, but panel does not. (Interestingly, Republican appointees on the D.C. Circuit show both party and panel influences.) In general, Sixth Circuit judges show the same pattern as Democrats on the D.C. Circuit in cases challenging environmental regulations. How can we explain such patterns? One possibility is that the relevant judges have strong convictions across a range of cases, convictions that are sufficient to make

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<sup>70</sup> Recall that many of the easiest cases are unpublished, but a large number of easy cases in the criminal domain still find their way into publication.

<sup>71</sup> Along the same lines, see Cross, *supra* note 3.

<sup>72</sup> See the discussion of how group influences are weakest in easy cases and when people have strong convictions, in Sunstein, *supra* note 9, at 24–26.

panel irrelevant. Perhaps this is true for Democratic appointees assessing environmental cases on the D.C. Circuit. Another possibility is that judges of the opposing party are particularly unconvincing. To understand this possibility, it is necessary to explore the reasons for panel effects.

### *C. Why Aren't the Effects Larger?*

We have been emphasizing the existence of strong party and panel effects. But this is only part of the story. It would be possible to see our data as suggesting that most of the time, the law is what matters, not ideology. Note here that even when party effects are significant, they are not overwhelmingly large. Recall that Republican appointees cast stereotypically liberal votes 38% of the time, whereas Democratic appointees do so 51% of the time. Half of the votes of Democratic appointees are stereotypically conservative, and over one-third of the votes of Republican appointees are stereotypically liberal. More often than not, Republican and Democratic appointees agree with one another, even in the most controversial cases. Why is this?

We think that the answer has three parts. The first consists of panel effects. Republican appointees often sit with one or more Democratic appointees, and the same is true for Democratic appointees. If judges are influenced by one another, the random assignment of judges will inevitably produce some dampening of differences. The second factor involves the disciplining effect of precedent and law—a factor that might be labeled “professionalism.” In the context of Commerce Clause challenges to legislation, we have explained judicial agreement across party lines partly on the ground that precedent is seen to dispose of most current disputes. Sometimes precedent will allow some, but not a great deal of, space for ideological differences to emerge. Undoubtedly the large measure of agreement is partly a product of the constraints of law itself. In some areas, those constraints will ensure that Republican and Democratic appointees do not disagree. In other areas, they will permit disagreement, but they will discipline its magnitude.

The third factor involves legal and political culture. For all of their differences, Democratic and Republican judicial appointees are almost never ideologues or extremists. If a sex discrimination

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plaintiff presents a strong claim, Republican appointees will agree with her, even if the law allows judges to exercise discretion; if industry shows that an environmental regulation is plainly arbitrary, Democratic appointees will strike it down as arbitrary, even if the law would allow them to uphold it. The process of legal training imposes strong limits on what judges seek to do. In any case, the political culture constrains presidential appointments, ensuring a kind of filtering that will, for the most part, prevent presidents from nominating (and the Senate from confirming) people whose views are perceived as extreme. The high levels of agreement between Republican and Democratic appointees are undoubtedly affected by this fact. The most general point is that insofar as our evidence shows less in the way of party effects than some people might expect, professional discipline and legal consensus help explain the level of agreement.

*D. Why Panel Effects?*

In our data, the usual pattern involves not simply party effects but also panel effects. Indeed, the latter are as large as the former and sometimes larger. We observe substantial panel effects in the areas of campaign finance, affirmative action, disability discrimination, piercing the corporate veil, race discrimination, sexual harassment, sex discrimination, and judicial review of environmental regulations at the behest of industry plaintiffs. We suggest that three factors are probably at work.

*1. The Collegial Concurrence*

In the context of judicial review of environmental regulations, Dean Revesz's empirical analysis finds that "while individual ideology and panel composition both have important effects on a judge's vote, the ideology of one's colleagues is a better predictor of one's vote than one's own ideology."<sup>73</sup> We have moderated this finding and extended it, as moderated, to many domains. But why is "the ideology of one's colleagues" so influential? Let us begin by focusing on the difference between how a judge will vote on a three-judge panel if she sits with no colleagues from the same

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<sup>73</sup> Revesz, *supra* note 19, at 1764.

party, and how a judge will vote if she sits with one or more colleagues from the same party. The simplest explanation is that much of the time, judges are willing to offer a “collegial concurrence.”

Two factors are likely to contribute to the collegial concurrence. First, the votes of one’s colleagues carry some information about what is right. If two colleagues believe that an affirmative action program is unconstitutional, and no other judge is available to argue on its behalf, then the exchange of arguments in the room will suggest that the program is genuinely unconstitutional. Second, dissenting opinions on a three-judge panel are likely to be both futile and burdensome to produce—a difficult combination. Most of the time, such dissents will not persuade either of the majority’s judges to switch his vote. To be sure, such a dissent might, in extreme cases, attract the attention of the Supreme Court or lead to a rehearing en banc; and when judges dissent, it is partly in the hope that such an outcome will occur. Supreme Court review is rare, however, and courts of appeals do not regularly rehear cases en banc. In any case, it is time-consuming to write a dissent. If the ultimate decision is not going to be affected, why do the extra work?

There are further points. Our data capture votes rather than opinions. Perhaps Democratic appointees show a conservative voting pattern when sitting with two Republicans; but perhaps they are able to affect the opinion, moving it in the direction of greater moderation. If so, the effect of the isolated judge is understated by our data; that effect can be measured only by examining opinions for moderation or extremism (a possibility to which we shall return). In any case, dissenting opinions might also cause a degree of tension among judges, a particular problem in light of the fact that the same judges often work together for many years. According to informal lore, a kind of implicit bargain is struck within many courts of appeals, in the form of, “I won’t dissent from your opinions if you won’t dissent from mine, at least not unless the disagreement is very great.”

All of these points help account for the great power of “the ideology of one’s colleagues” in producing judicial votes. It would be interesting in this regard to learn whether judges are less likely to dissent when they are newly appointed or when they have been on the bench for an extended period—and also whether judges are less likely to dissent when their chambers are physically close to

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other chambers and hence when judges see each other on a regular basis.

We can better understand these points if we notice the clear connection between the collegial concurrence and the behavior of individuals in experimental settings when faced with a unanimous group opinion. A great deal of social science research has demonstrated that if people are confronted with the unanimous views of others, they tend to yield.<sup>74</sup> This finding has been made in the context of both political and legal issues,<sup>75</sup> and it extends to simple issues of fact.<sup>76</sup> Sometimes people yield even with respect to the unambiguous evidence of their own senses. The yielding, a form of collegial concurrence, 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. The evidence here suggests that judges are vulnerable to similar influences.

Note that an understanding of collegial concurrences may help explain the failure of the second and third hypotheses in the contexts of abortion and capital punishment. In those contexts, judgments are firmly held, and the firmness of those judgments is sufficient to outweigh the informational and reputational pressure imposed by the contrary judgments of panel members. It may also be the case that for certain highly charged issues, a given judge's convictions are well known to be deeply held by the other judges on that panel, and thus those judges are less likely to perceive a dissent as a failure of collegiality.

In fact, an understanding of the relevant processes helps to explain and refine the leveling effects that we have emphasized. Suppose that a Democratic appointee is sitting with two Republican appointees, and everyone on the panel knows that the Democratic appointee might reject an extreme ruling. A dissent or a separate opinion may be unlikely; but the mere possibility might lead the two Republicans to moderate their ruling so as to ensure unanimity. The collegial concurrence need not signify that the isolated

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<sup>74</sup> See, for example, the overview in Asch, *supra* note 10.

<sup>75</sup> See Richard S. Crutchfield, *Conformity and Character*, 10 *Am. Psychologist* 191 (1955).

<sup>76</sup> See Asch, *supra* note 10.

Democrat, or the isolated Republican, is simply going along with her peers. The very presence of a potential dissenter can lead to a mutually agreeable opinion; both sides might have done some yielding. We have emphasized that our data, focused on outcomes, do not enable us to test this hypothesis rigorously. But the sharp difference between divided and unified panels, in terms of expected votes, is at least suggestive of the possibly important effect of the isolated Democrat or Republican. It is to that difference that we now turn.

## 2. *Group Polarization*

Why do all-Republican panels and all-Democratic panels behave so distinctively? Why are they different from majority Republican panels and majority Democratic panels? A clue comes from one of the most striking findings in modern social science: Groups of like-minded people tend to go to extremes.<sup>77</sup> More particularly, such groups end up adopting a more extreme version of their predeliberation tendencies. Consider a few examples outside of the legal context:

A group of moderately profeminist women become more strongly profeminist after discussion.<sup>78</sup>

After discussion, citizens of France become more critical of the United States and its intentions with respect to economic aid.<sup>79</sup>

After discussion, whites predisposed to show racial prejudice offer more negative responses to the question whether white racism is responsible for conditions faced by African-Americans in American cities.<sup>80</sup>

After discussion, whites predisposed not to show racial prejudice offer more positive responses to the same question.<sup>81</sup>

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<sup>77</sup> See Brown, *supra* note 11, at 203–26.

<sup>78</sup> See David G. Myers, *Discussion-Induced Attitude Polarization*, 28 *Hum. Rel.* 699, 707–12 (1975).

<sup>79</sup> See Brown, *supra* note 11, at 224.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

After discussion, juries inclined to award punitive damages typically produce awards that are significantly higher than the awards specified, before discussion, by median member.<sup>82</sup>

An understanding of group polarization strongly suggests that in an important sense, our findings about party and panel effects are understated. We have focused on votes—on who wins and who loses. We have not focused on opinions, which can be written narrowly or broadly. Investigation of the substance of the opinions would obviously be burdensome and involve considerable discretion on the part of the investigator. But it is plausible to speculate that a unified panel is less likely to be moderate than a divided one—and hence that an investigation that looks only at likely votes understates the extremism of all-Republican and all-Democratic panels. Much room remains for further analysis.

There have been three main explanations for group polarization, all of which have been extensively investigated.<sup>83</sup>

*a. Persuasive Arguments*

The first explanation, emphasizing the role of persuasive arguments, is based on a common sense intuition: Any individual's position on an issue is partly a function of which arguments presented within the group are convincing. People's judgments therefore move in the direction of the most persuasive position defended by the group, taken as a collectivity. Because a group whose members are already inclined to vote in a certain direction will have a disproportionate number of arguments supporting that direction, the result of discussion will be to move people further in the direction of their initial inclinations. The key is the existence of a limited argument pool, one that is skewed in a particular direction.<sup>84</sup> In the context of appellate judging, we think that this is the most compelling explanation of our finding of the relative extremism of all-Democratic and all-Republican tribunals. Judges are busy people, and they do not always have the time or inclination to produce a

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<sup>82</sup> See Schkade, Sunstein, & Kahneman, *supra* note 11, at 1140–41.

<sup>83</sup> See Brown, *supra* note 11, at 212–22; Sunstein, *supra* note 9, at 120–24; Robert S. Baron et al., Social Corroboration and Opinion Extremity, 32 *J. Experimental Soc. Psychol.* 537 (1996).

<sup>84</sup> See Brown, *supra* note 11, at 219–20.

counterargument on their own. The natural human tendency toward confirmation bias—finding most compelling those arguments that confirm one's antecedent inclinations<sup>85</sup>—reinforces this process. Hence it should be no surprise that like-minded judges go to extremes.

*b. Social Comparison*

The second explanation, involving social comparison, begins with the claim that people want to be perceived favorably by other group members and that they want also to perceive themselves favorably. Once they hear what others believe, they adjust their positions in the direction of the dominant position. The result is to press the group's position toward one or another extreme and also to induce shifts in individual members.<sup>86</sup> People may wish, for example, not to seem too enthusiastic or too restrained in their enthusiasm for affirmative action, feminism, or an increase in national defense; hence their views may shift when they see what other group members think. The result will be group polarization.

*c. The Role of Corroboration*

The third explanation begins by noting that people with extreme views tend to have more confidence that they are right, and that as people gain confidence they become more extreme in their beliefs.<sup>87</sup> The basic idea is simple: Those who lack confidence and who are unsure what they think tend to moderate their views. It is for this reason that cautious people, not knowing what to do, are likely to choose the midpoint between relevant extremes.<sup>88</sup> If other people seem to share your view, however, you are likely to become more confident that you are correct—and hence to move in a more extreme direction. In a wide variety of experimental contexts, people's opinions have been shown to become more extreme simply because their view has been corroborated, and because they have

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<sup>85</sup> See David Myers, *Intuition: Its Powers and Perils* 116–19 (2002).

<sup>86</sup> See Brown, *supra* note 11, at 215–16; Sunstein, *supra* note 9, at 122–23.

<sup>87</sup> See Baron et al., *supra* note 83, at 537–38.

<sup>88</sup> See Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 *J. Legal Stud.* 287, 287–88 (1996).

become more confident after learning of the shared views of others.<sup>89</sup>

It seems reasonable to speculate that one of our key results—ideological amplification on all-Republican and all-Democratic panels—reflects group polarization. When a court consists of a panel of judges with the same basic orientation, the median view before deliberation begins will be significantly different from what it would be in a panel of diverse judges. The argument pool will be very different as well. For example, a panel of three Republican appointees, tentatively inclined to invalidate the action of the Environmental Protection Agency (“EPA”), will offer a range of arguments in support of invalidation and relatively few in the other direction—even if the law, properly interpreted, favors validation. If the panel contains a judge who is inclined to uphold the EPA, the arguments that favor validation are far more likely to emerge and to be pressed. Indeed, the very fact that the judge is a Democrat increases the likelihood that such counterarguments will emerge, since that judge might not think of himself as being part of the same “group” as the other panel members. Because corroboration of opinion leads to greater confidence, and hence extremity, it is not surprising that deliberation by a panel of three like-minded judges would lead to unusual and extreme results.

In this context, the difference in voting patterns on unified and divided panels is fortified by the possibility that the minority judge, finding himself outnumbered, might produce a dissenting opinion in public. To be sure, Supreme Court review is rare, and, in the general run of cases, the prospect of such review probably does not have much of a deterrent effect on courts of appeals. But judges who write majority opinions are usually not enthusiastic about having to see and respond to dissenting opinions. If the law actually favors the dissenting view, two judges, even if they would like to reverse the EPA, might be influenced to adopt the easier course of validation.

At this point a skeptic might note that lawyers make adversarial presentations before judges. Such a skeptic might insist that the size of the “argument pool” is determined by those presentations, not only—and not even mostly—by what members of the panel are

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<sup>89</sup> See Baron et al., *supra* note 83, at 559.

inclined to say and do. And undoubtedly the inclinations of judges are shaped, some of the time, by the contributions of advocates. But adversarial presentations are made before all possible panel compositions, and hence they cannot explain panel effects that we have observed. What matters for purposes of the outcomes is the inclinations of judges. It is because of these inclinations that the existence of a unified rather than divided panel can make all the difference. Notice in this regard that for the polarization hypothesis to hold, it is not necessary to know whether judges spend a great deal of time offering reasons to one another. Mere exposure to a conclusion is enough.<sup>90</sup> A system of simple votes unaccompanied by reasons should incline judges to polarize. Of course reasons, if they are good ones, are likely to make those votes especially persuasive.

### *3. The Whistleblower Effect*

Imagine that existing law is not entirely clear, but that fairly applied, it requires one or another outcome. It is easily imaginable that like-minded judges, unaccompanied by a potential dissenter, will fail to apply the law fairly. This is not because they are essentially lawless. It is because when the law is unclear, fallible human beings might well be inclined to understand the law in a way that fits with their predilections.

These points provide a possible explanation for some of the differences between panels with two-to-one majorities and panels in which all judges were appointed by a president of the same political party. Consider affirmative action cases. In some of these cases, three Democratic appointees might well be inclined to vote in favor of validation even if existing doctrine argues the other way. If no Republican appointee is on the panel, there is a risk that the panel will unanimously support validation despite existing law. The effect of the Republican is to call the panel's attention to the tension between its inclination and the decided cases. Of course, her effort may fail. Her co-panelists might persist in their views, perhaps with the claim that those cases can be distinguished. But when existing law does create serious problems for the panel, the presence of a judge with a different inclination will have a large effect. We speculate that in the areas in which there is a large difference

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<sup>90</sup> See Baron et al., *supra* note 14, at 74.

between two-to-one majorities and three judges from the same party, this effect—the whistleblower effect—is playing a role.<sup>91</sup>

Our data do not allow this speculation to be tested directly, but a separate study shows the importance of a potential dissenter, or whistleblower, in ensuring that courts follow the law.<sup>92</sup> More particularly, a Democratic appointee on a majority Republican court of appeals panel turns out to be extremely important in ensuring that such a panel does what the law asks it to do. The basic point is that diversity of view can help to correct errors—not that judges of one or another party are more likely to be correct.

To understand this study, some background is in order. Under the Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*, courts should uphold agency interpretations of law so long as the interpretations do not clearly violate congressional instructions and are "reasonable."<sup>93</sup> But when do courts actually uphold such interpretations? Existing law allows judges considerable room to maneuver, so that courts inclined to invalidate agency interpretations usually can find a plausible basis for doing so. The real question is when they will claim to have found that plausible basis. The relevant study, extending well beyond environmental protection to regulation in general, confirms the idea that party affiliation has an exceedingly large influence on outcomes within the D.C. Circuit. If observers were to code cases very crudely by taking account of whether industry or a public interest group is bringing the challenge, they would find that a panel with a majority of Republican appointees reaches a conservative judgment 54% of the time, whereas a panel with a majority of Democratic appointees reaches such a judgment merely 32% of the time.<sup>94</sup>

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<sup>91</sup> Insofar as the governing precedent was produced by another court of appeals, it might be a product of an all-Republican or an all-Democratic panel, producing a form of path dependency. Many complications are created by the possibility that an isolated judge would blow the whistle by asking a panel to conform to the beliefs of an earlier panel with a different and distinctive ideological composition. We are emphasizing here cases in which the precedent was produced by the Supreme Court, not a lower court.

<sup>92</sup> Cross & Tiller, *supra* note 12, at 2156.

<sup>93</sup> 467 U.S. 837, 844 (1984).

<sup>94</sup> Cross & Tiller, *supra* note 12, at 2169.

For present purposes, the most important finding is the dramatic difference between politically diverse panels, with judges appointed by presidents of more than one party, and politically unified panels, with judges appointed by presidents of only one party. On *divided* panels in which a Republican majority of the court might be expected to be hostile to the agency, the court nonetheless upholds the agency's interpretation 62% of the time. But on *unified* all-Republican panels, which might be expected to be hostile to the agency, the court upholds the agency's interpretation only 33% of the time. Note that this was the only unusual finding in the data. When Democratic majority courts are expected to uphold the agency's decision on political grounds, they do so over 70% of the time, whether unified (71% of the time) or divided (84% of the time). Consider the results in tabular form:<sup>95</sup>

	RRR panel	RRD panel	RDD panel	DDD panel
Invalidate agency action	67%	38%	16%	29%

It is reasonable to speculate that the only seemingly bizarre result—a 67% invalidation rate when Republican appointees are unified!—reflects group influences and, in particular, group polarization. A group of all-Republican appointees might well take the relatively unusual step of rejecting an agency's interpretation. By contrast, a divided panel, with a built-in check on any tendency toward the unusual or extreme outcome, is more likely to take the conventional route of simply upholding the agency's action. An important reason is that the single Democratic appointee acts as a “whistleblower,” discouraging the other judges from making a decision that is inconsistent with the Supreme Court's command that courts of appeals should uphold agency interpretations of ambiguous statutes.<sup>96</sup>

<sup>95</sup> Constructed on the basis of data in Cross & Tiller, *supra* note 12, at 2171–73.

<sup>96</sup> See *id.* at 2174–76.

*E. A Preliminary Investigation—and Future Directions*

We have emphasized that this is a preliminary investigation. It should be possible before terribly long to do what we have done here for multiple domains of the law, extending over time.<sup>97</sup> The data are readily available, and most of the work involves mere counting. As we have suggested, it would be exceedingly interesting to know whether the three hypotheses hold in the pre-New Deal era of tensions between courts and the regulatory state, and also in the struggle over school segregation. So, too, it would be valuable to know whether similar patterns can be found in the legal disputes over slavery, in judicial review of decisions by the National Labor Relations Board and the Federal Communications Commission, in cases brought under the Federal Tort Claims Act, and in cases involving foreign affairs and war.

We could easily imagine that ideological disagreements between judges appointed by presidents of different parties would be greater or weaker in certain historical periods.<sup>98</sup> It might be hypothesized, for example, that such disagreements were weakened in the 1940s, when the nation seemed to form a consensus against an aggressive role for the federal judiciary. It might also be hypothesized that such disagreements would be especially strong since 1980, with powerful partisan divisions about the appropriate role of the federal judiciary.<sup>99</sup> Are these hypotheses correct? Ultimately, it would be desirable to compile an extensive data set about votes on federal courts of appeals, showing the diverse patterns into which those votes fall.

## IV. WHAT SHOULD BE DONE?

It remains to investigate the normative issues. Is it troubling to find a large effect from party or panel composition? Should we be concerned if like-minded judges go to extremes? Is there reason to attempt to ensure diversity on the federal courts, or to promote a

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<sup>97</sup> We are attempting many extensions of this preliminary analysis in the Chicago Judges Project, at <http://www.law.uchicago.edu/policy/judges/> (2004).

<sup>98</sup> For supportive evidence, see Cross, *supra* note 3, at 1506–08 (finding that Reagan-Bush judges are the most ideological since the late 1940s and that Carter judges are the least ideological).

<sup>99</sup> See *id.* for strong support.

degree of diversity on panels? There is a widespread view that judges appointed by presidents of different political parties are not fundamentally different and that, once on the bench, judges frequently surprise those who nominated them. The view is not entirely baseless, but it is misleading. Some appointees do disappoint the presidents who nominated them, but those examples are not typical. Judges appointed by Republican presidents are quite different from judges appointed by Democratic presidents. To take evidence from just one area, “[p]artisanship clearly affects how appellate courts review agency discretion.”<sup>100</sup> We have acknowledged that the effects that we find are large but not massive. Because of the disciplining effect of precedent, and because judges do not radically disagree with one another, there is significant commonality across political parties. But in the most difficult areas, the ones where the law is unclear or in flux, both party and panel effects are large enough to be a source of serious concern.

It is difficult to evaluate the underlying issues without taking a stand on the merits—without knowing what we want judges to do. Suppose that three Republican appointees are especially likely to strike down affirmative action programs and that three Democratic appointees are especially likely to uphold those programs. At first glance, one or the other inclination is troubling only if we know whether we disapprove of one or another set of results. And if a view about what judges should do is the only possible basis for evaluation, we might conclude that those who prefer judges of a particular party should seek judges of that party and that group influences are essentially beside the point.

But this conclusion is too strong. In some cases, the law, properly interpreted, does point toward one or another view. The existence of diversity on a panel is likely to bring that fact to light and perhaps to move the panel’s decision in the direction of what the law requires. The existence of politically diverse judges and a potential dissent increases the probability that the law will be followed. The *Chevron* study, referred to above, strongly supports this point.<sup>101</sup> The presence of a potential dissenter—in the form of a judge appointed by a president from another political party—creates a pos-

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<sup>100</sup> Cross & Tiller, *supra* note 12, at 2175.

<sup>101</sup> See *id.* at 2175–76.

sible whistleblower who can reduce the likelihood of an incorrect or lawless decision.<sup>102</sup> Through an appreciation of the nature of group influences, we can see the wisdom in an old idea: A decision is more likely to be right, and less likely to be political in a pejorative sense, if it is supported by judges with different predilections.

There is a further point. Suppose that in many areas it is not clear in advance whether the appointees of Democratic or Republican presidents are correct. Suppose that we are genuinely uncertain. If so, then there is reason to favor a situation in which the legal system has diverse judges, simply on the ground that through that route, more reasonable opinions are likely to be heard. If we are genuinely uncertain, then there is reason to favor a mix of views merely by virtue of its moderating effect. In the face of uncertainty, many people choose between the poles.<sup>103</sup>

Consider an analogy. Independent regulatory commissions, such as the Federal Trade Commission, the Securities and Exchange Commission, the National Labor Relations Board, and the Federal Communications Commission, often make modern law and policy. Much of the time, such agencies act through adjudication. They function in the same fashion as federal courts. Under federal statutes, Congress has attempted to ensure that these agencies are not monopolized by either Democratic appointees or Republican appointees. The law requires that no more than a bare majority of agency members may be from a single party.<sup>104</sup>

An understanding of group influences helps to justify this requirement. An independent agency that is all-Democratic or all-Republican might move toward an extreme position—indeed, toward a position that is more extreme than that of the median Democrat or Republican, and possibly more extreme than that of any agency official standing alone. A requirement of bipartisan membership can operate as a check against movements of this kind. Congress was apparently aware of this general point. Closely attuned to the policymaking functions of the relevant institutions,

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<sup>102</sup> This is the explanation in Cross & Tiller, *supra* note 12, at 2173.

<sup>103</sup> See Mark Kelman et al., Context-Dependence in Legal Decision Making, *in* Behavioral Law and Economics 61, 61 (Cass R. Sunstein ed., 2000).

<sup>104</sup> See, e.g., 15 U.S.C. § 78d(a) (2000) (stating that the SEC shall be composed of five commissioners appointed by the president, not more than three of whom shall be members of the same political party).

Congress was careful to provide a safeguard against extreme movements.

Why do we fail to create similar safeguards for courts? Part of the answer must lie in a belief that, unlike heads of independent regulatory commissions, judges are not policymakers. Their duty is to follow the law, not to make policy. An attempt to ensure bipartisan composition would seem inconsistent with a commitment to this belief. But the evidence we have discussed shows that judges are policymakers of an important kind and that, in some contexts, their political commitments very much influence their votes. In principle, there is good reason to attempt to ensure a mix of perspectives within courts of appeals.

Of course the idea of diversity, or of a mix of perspectives, is hardly self-defining. It would not be appropriate to say that the federal judiciary should include people who refuse to obey the Constitution, or who refuse to exercise the power of judicial review, or who think that the Constitution allows suppression of political dissent and does not forbid racial segregation. Here, as elsewhere, the domain of appropriate diversity is limited. What is necessary is reasonable diversity, or diversity of reasonable views, and not diversity as such. People can certainly disagree about what reasonable diversity entails in this context. We are suggesting here that there is such a thing as reasonable diversity and that it is important to ensure that judges, no less than anyone else, are exposed to it, and not merely through the arguments of advocates.

A competing argument would stress a possible purpose of the lower federal courts: to produce a wide range of positions, so that Supreme Court review will ultimately follow an exploration of a number of possible interpretations. For those who emphasize the value of diverse decisions, what we have treated as a vice might instead be a virtue. On this view, it is desirable to have unified panels of ideologically similar judges, simply in order to produce a wide band of arguments for the Supreme Court to assess. We do not believe that this is an irrelevant concern; it weighs in the balance. More (reasonable) positions are better than fewer. We would respond only that Supreme Court review is exceedingly rare and that most of the time, court of appeals decisions are effectively final. In these circumstances, it is not clear that the gain in the range of

ideas outweighs the competing considerations to which we have pointed.

These points cast fresh light on a much disputed issue: the legitimate role of the Senate in giving “advice and consent” to presidential appointments to the federal judiciary. Above all, an understanding of social influences supports the view that the Senate has a responsibility to exercise its constitutional authority in order to ensure a reasonable diversity of views. The history of the Constitution strongly suggests an independent role for the Senate in consenting to the appointment of federal judges.<sup>105</sup> That independent role certainly authorizes the Senate to consider the general approach and the likely pattern of votes of potential judges. There can be no doubt that the president considers the general approach of his nominees; the Senate is entitled to do the same. Under good conditions, these simultaneous powers would bring about a healthy form of checks and balances, permitting each branch to counter the other. Indeed, that system is part and parcel of social deliberation about the direction of the federal judiciary.

Why might this view be rejected? It could be urged that there is only one legitimate approach to constitutional or statutory interpretation—that, for example, some version of originalism or textualism is the only such approach, and that anyone who rejects that view is unreasonable. For true believers, it is pointless to argue for diverse views.<sup>106</sup> Diversity is not necessary or even valuable if we already know what should be done and if competing views would simply cloud the issue. In a scientific dispute, it is not helpful to include those who believe that the earth is flat. Alternatively, it might be urged that a deferential role for the Senate, combined with natural political competition and cycles, will produce a sensible mix over time. We do not deny this possibility. Nor have we dismissed the suggestion that unified panels have some real advantages. Our only suggestions are that a high degree of diversity on

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<sup>105</sup> David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *Yale L.J.* 1491, 1494 (1992).

<sup>106</sup> Note, however, that even if it would be appropriate for all judges to share a certain approach, it is also desirable to have diversity with respect to the application of that approach. Textualists do not all agree with one another; there is internal diversity in the world of originalism. Diversity is appropriate here to ensure an airing of reasonable views.

the federal judiciary is desirable, that the Senate is entitled to pursue diversity, and that without such diversity, judicial panels will inevitably go in unjustified directions.

#### CONCLUSION

No reasonable person seriously doubts that ideology, understood as normative commitments of various sorts, helps to explain judicial votes. Presidents are entirely aware of this point, and their appointment decisions are undertaken with full appreciation of it.<sup>107</sup> We have found striking evidence of a relationship between the political party of the appointing president and judicial voting patterns. We have also found that much of the time, judicial votes are affected by panel composition. In many domains, the voting patterns of isolated Democratic appointees are close to what would be expected from the median Republican appointee, just as the voting patterns of an isolated Republican appointee are akin to what would be expected from the median Democratic appointee. In many domains, a Democratic appointee is significantly more likely to vote in the stereotypical liberal fashion if surrounded by two Democratic appointees than if surrounded by one Republican and one Democrat. Similarly, the voting patterns of Republican appointees are very much influenced by having two, rather than one, co-panelists appointed by a president of the same political party.

Taken as a whole, the data suggest the pervasiveness of three phenomena. The first is the collegial concurrence: votes to join two colleagues and to refuse to dissent publicly, notwithstanding an initial disposition to vote the other way and possibly a continuing belief that the decision is incorrect. The second is group polarization: the tendency of a group of like-minded people to move to relative extremes. The third is a whistleblower effect, by which a single judge of a different party from the majority can have a moderating effect on a judicial panel.

It might be surprising to find that in some controversial areas, the political affiliation of the appointing president is not correlated with judicial votes, and hence that in those areas, none of these effects can be observed. This is the basic finding for criminal appeals, takings, and federalism. But it should not be terribly shocking to

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<sup>107</sup> On practices over time, see Scherer, *supra* note 4.

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see that in the areas of abortion and capital punishment, judges vote their convictions. Here the political affiliation of the appointing president is crucial, but panel composition is irrelevant. What is perhaps most striking is that in our data set, abortion and capital punishment are the only areas in which ideology matters but panel composition does not.

These findings do not have clear implications for the composition of panels or for the judiciary as a whole. But if divided panels increase the likelihood of effective whistleblowing, and if unified panels tend to go to extremes, there is fresh reason to attempt to ensure a high degree of intellectual diversity within the federal courts and even within judicial panels. Of course this claim would not hold if the appointees of one or another party had a monopoly on legal wisdom. In most areas, however, we think that there is no such monopoly, and that better results are likely to come from a mix of views and inclinations. However the normative issues are resolved, the empirical findings are clear. In many domains, Republican appointees vote very differently from Democratic appointees, and the effects of ideology are both dampened and amplified by the composition of the panel.

## APPENDIX: OVERALL LOGISTIC REGRESSION RESULTS

DV = Liberal vote (0,1)

Predictor	Coefficient	Std. Error	z	P> z
Party (1 = Democratic appointee)	.576	.074	7.81	.000
Other Two (# Democrat appointees)	.285	.046	6.19	.000
Party * Other Two	.126	.068	1.86	.063
ADA	-1.144	.110	-10.41	.000
Abortion	-.028	.155	-.18	.859
Campaign Finance	-.997	.194	-5.13	.000
Capital Punishment	-1.226	.139	-8.82	.000
Contracts	-1.517	.184	-8.24	.000
Pierce Corp Veil	-1.176	.159	-7.40	.000
Environmental protection	-.065	.198	-.33	.743
Sex Discrimination	-.656	.106	-6.21	.000
Title VII	-.799	.120	-6.66	.000
1st Circuit	-.347	.121	-2.87	.004
2nd Circuit	-.321	.112	-2.87	.004
3rd Circuit	.262	.132	1.98	.047
4th Circuit	-.638	.126	-5.06	.000
5th Circuit	-.928	.113	-8.21	.000
6th Circuit	-.584	.111	-5.28	.000
7th Circuit	-.695	.101	-6.89	.000
8th Circuit	-.567	.099	-5.74	.000
10th Circuit	-.472	.118	-4.01	.000
11th Circuit	-.590	.117	-5.06	.000
12th Circuit	-.636	.167	-3.80	.000
Constant	.331	.131	2.53	.011

Base case (constant) = 9th circuit, affirmative action cases, Republican

Number of obs = 8475

LR chi2(23) = 747.63

Prob &gt; chi2 = 0.0000

Pseudo R2 = 0.0657

Log likelihood = -5318.8336