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Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals

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As the decisions of the United States Courts of Appeals become an increasingly important part of American legal discourse, the debate concerning adjudication theories of the circuit courts gain particular relevance. Whereas, to date, the issue has received mostly normative treatment, this Article proceeds systematically and confronts the positive inquiry: how do courts of appeals judges actually decide cases? The Article proposes theoretically, tests empirically, and considers the implications of, a combined attitudinal and strategic model of en banc court of appeals decisionmaking. The results challenge the classicist judges, legal scholars, and practitioners' normative frameworks, and suggest positive theory's central function in the growing debate.

I. INTRODUCTION

The United States Courts of Appeals sit at the juncture between local trial courts and a national appellate tribunal. They are the "'vital center of the [federal] judicial system.'"[1] Since at least the midpoint of this century, they have acted as the final arbiter in nearly all appeals from district courts and federal agencies.[2] Of greater moment, these courts have increasingly defined

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[1] J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 8 (1981) (quoting J. Edward Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29, 29 (1968)).

[2] The Judiciary Act of 1925 gave the Supreme Court discretionary control over its caseload. Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (codified as amended at 28 U.S.C. § 1254 (1994)). Immediately after passage of the 1925 Act, the Supreme Court granted review to only 20% of the petitions for certiorari, excluding *in forma pauperis*

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and developed principles of law and policy directly governing their respective regions and indirectly affecting the rest of the nation. Accordingly, although the United States Supreme Court is technically the final word on federal law and cases, the circuit courts have become the courts of last resort for most litigants and the sources of doctrinal development for most legal issues.

Recognizing the increasing relevance of and pressure on federal courts of appeals, legal scholars have started to refocus the debate regarding adjudication theories (that is, the proper role of judges and the appropriate bases for judging), judicial appointment, court procedure, and court structure from the Supreme Court to the lower appellate courts.[3] The scholarly exchanges have

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petitions. The percentage has steadily dropped since 1926: to 11% in 1960 and to 4% in 1995. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 80–81, 83 (2d ed. 1996). The Supreme Court's broader discretion, combined with dramatic increases in caseload and the expansion of federal law, limit the Court's ability to supervise and guide the development of national law and principle, because the Court must usually defer to conclusions reached by lower courts.

In fact, the actual rate of Supreme Court review of lower court rulings is lower than its rate of granting certiorari because petitions seeking certiorari are filed from only a minority of circuit court decisions. Donald Songer and Sue Davis have estimated, from a study of three circuits, that the rate of Supreme Court review of circuit court holdings is less than 1%. *See* Sue Davis & Donald R. Songer, *The Changing Role of the United States Courts of Appeals: The Flow of Litigation Revisited*, 13 JUST. SYS. J. 323 (1988–89) [hereinafter Davis & Songer, *The Flow of Litigation Revisited*]; *see also* Donald R. Songer, *The Circuit Courts of Appeals*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT (John B. Gates & Charles A. Johnson eds., 1991) [hereinafter Songer, *The Circuit Courts*] (discussing the methodology and implications of his work with Davis).

Songer and Davis's study was modeled after an earlier study by J. Woodford Howard. Howard conducted an intensive quantitative review of the flow of litigation from federal district courts to three federal courts of appeals (District of Columbia, Second, and Fifth Circuits) and from those three circuits to the Supreme Court. The study covered all cases decided by the three circuits during the 1965, 1966, and 1967 terms, a total of 4,945 cases. Howard concluded that the "most striking pattern" in the data was the Supreme Court's very limited review of the three circuit courts, granting certiorari to only 92, or 9.2%, of the 1,004 cases appealed (20.3% of all cases decided by the three circuits during that period). The Court affirmed 25% of the circuit court decisions it reviewed. Thus "the three tribunals became courts of last resort in 98.1% of the cases and made decisions that formally prevailed in 98.6%." *See* J. Woodford Howard, Jr., *Litigation Flow in Three United States Courts of Appeals*, 8 LAW & SOC'Y REV. 33 (1973).

[3] *See, e.g.*, Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989) (examining whether the Ninth Circuit has succeeded in maintaining consistency in the law of the circuit as it has grown); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986); *see also, e.g.*, PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL (1976); SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS (1986).

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covered a broad range of issues, from theories of constitutional interpretation[4] to questions of the judicial system's structure.[5] Scholars have considered the appropriate functions of intermediate appellate courts as well as the relative lawmaking and policymaking roles that these courts fill in a system governed by a single supreme tribunal.[6]

Although diverse in their focal points, these debates share a common characteristic: they are largely normative. To the very limited extent that legal scholars have considered positive theory at all, they have not tested their theories in any systematic way.[7] This Article assumes that before we can

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A similar discussion has been occurring as well with respect to intermediate appellate courts in state systems. *See, e.g.*, James P. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOK. L. REV. 459 (1975); Edmund B. Spaeth, Jr., *Achieving a Just Legal System: The Role of State Intermediate Appellate Courts*, 462 ANNALS AM. ACAD. POL. & SOC. SCI. 48 (1982).

[4] *See, e.g.*, Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843 (1993) (criticizing an article by Professor Frederick Schauer on legal positivism for failing to consider courts below the U.S. Supreme Court and, in turn, offering a consideration of positivist constitutional interpretation in the context of lower courts).

[5] *See, e.g.*, THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994) (describing a crisis of volume in the circuit courts and proposing intramural and extramural reforms); RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS (Arthur D. Hellman ed., 1990); Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11 (recommending a dramatic and innovative restructuring of the federal judicial system in order to accommodate growing caseloads and citing numerous studies on restructuring the judicial system).

[6] *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedent*, 46 STAN. L. REV. 817 (1994) (critically examining the historical justifications for the doctrine of hierarchical precedent and defending the doctrine on alternate grounds); Michael W. Combs, *The Policy-Making Role of the Courts of Appeals in Northern School Desegregation: Ambiguity and Judicial Policy-Making*, 35 W. POL. Q. 359 (1982) (examining how courts of appeals have responded to the uncertainty and ambiguity found in policy pronouncements of the Supreme Court); Benjamin Kaplan, *Do Intermediate Appellate Courts Have a Lawmaking Function?*, 70 MASS. L. REV. 10 (1985).

[7] Legal scholars relying on positive political theory and public choice/rational choice theory have developed non-normative, formal models of Supreme Court behavior, particularly the interaction between the U.S. Supreme Court and the legislative and executive branches. However, very few legal scholars have tested empirically their formal theories, and almost none have considered lower courts. *See, e.g.*, Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605 (1995) (setting forth a theory as to how judges working in a multi-tiered system make decisions by utilizing a "team" model of adjudication, as opposed to an agency model, but without testing the theory empirically).

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thoughtfully propose modifications in the judicial system, we must first understand how it works. We should consider theoretically and test empirically the positive inquiry (i.e., how do court of appeals judges decide cases) as a preliminary matter in seeking to evaluate and, if necessary, to improve the workings of these engines of the federal judicial system. Stated another way, we should first examine how circuit court judges actually make decisions before we propose that they should (or should not) make them differently.

Professor William Eskridge is an obvious and noteworthy exception to this general trend, as his work includes empirical testing of positive hypotheses; however, he focuses his studies on the Supreme Court. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Overriding*]; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) [hereinafter Eskridge, *Reneging on History*].

In addition, political scientists have started to empirically analyze public choice/rational choice and positive political theories of court decisionmaking (called "strategic models"). But political scientists, like legal scholars, have focused primarily on the U.S. Supreme Court. *But see* Jeffrey A. Segal et al., *Decisionmaking on the U.S. Courts of Appeal*, *in* CONTEMPLATING COURTS 227 (Lee Epstein ed. 1995) [hereinafter Segal et al., *Decisionmaking*]; Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Theory of Supreme Court-Circuit Court Interaction*, 38 AM. J. POL. SCI. 673 (1994); Steven R. Van Winkle, *Dissent as a Signal: Evidence from the U.S. Courts of Appeals* (August 29, 1997) (unpublished paper, presented at the 1997 annual meeting of the American Political Science Association, Washington, D.C.) (on file with author). Most have examined, theoretically and empirically, the interaction between the Supreme Court and the legislative and executive branches (such studies are known as "separation-of-power games"). *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 138–81 (1998) [hereinafter EPSTEIN & KNIGHT, CHOICES]; Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263 (1990); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87 (1996) [hereinafter Knight & Epstein, *Struggle*]; McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995) (three political scientists—Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast—publishing under a hybrid moniker). A number of political science scholars have examined dynamics internal to the Court, such as opinion assignment and the decision to review a case. *See, e.g.*, EPSTEIN & KNIGHT, CHOICES, *supra*, at 112–37; Robert L. Boucher, Jr., & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995) (testing the role of strategy in the justices' decisions to grant certiorari); Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581 (1996) (examining the possible reasons a justice would change her vote between the original conference on the merits and the Court's announcement of a final decision, which is termed "voting fluidity").

For a further discussion of formal modeling of judicial behavior and rational choice/public choice theory, see *infra* notes 74–104 and accompanying text.

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Studies of the sources of judicial behavior and the effects of internal and external pressures on the judicial process have significant implications for perennial debates over majority rule, judicial accountability, and other values.[8] For example, empirical evidence revealing that judges vote to maximize their personal policy preferences by voting strictly according to their attitudes would call for a different prescription than evidence demonstrating that judges vote to be part of the majority rather than to maximize personal preferences. The former conclusion would suggest that an appointing President should focus on a judicial candidate's stated policy preferences, while the latter would suggest that he should examine his prospective appointee's prior voting record, if available, in "close" cases. Consider another example: social science evidence disclosing that circuit court decisions are in line with the apparent ideological preferences of the Supreme Court would allay fears that the growing size of the circuit court caseload will result in a breakdown in the Court's power to govern the federal system.

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[8] The social-scientific study of judicial decisionmaking by exposition of a positive theory of judicial behavior and the application of quantitative techniques to empirical evidence to test that theory adds a critical dimension to the consideration of normative questions. *See* Harry Kalven, Jr., *Toward a Science of Impartial Judicial Behavior*, 42 U. CINN. L. REV. 591, 594–95 (1973). Professor Kalven stated:

> The fundamental premise in the idea of impartial judges and rules of law is that certain kinds of decision-making, for example, by judges, can by institutional arrangements and role discipline be made to show less variance and less correlation to personal factors than other kinds of decision-making, for example, voting and consumer preferences. . . . Empirical study of judicial behavior must stimulate and sharpen theory about the aspiration to have a human being who as a judge is tolerably impartial and tolerably independent.

Id.; *see also* Segal et al., *Decisionmaking*, *supra* note 7, at 229. Here, Professors Segal, Donald Songer, and Charles Cameron explained that:

> The value of this method of understanding courts has long been appreciated. For example, Oliver Wendell Holmes, in his famous essay "The Path of the Law," advanced a "prediction theory" of the law. Holmes noted that lawyers must be able to predict what judges will do in order to advise their clients appropriately. In fact, Holmes put such stress on prediction that he *defined* the law itself as nothing more than predictions about the behavior of judges. Predictions require models. Hence, models of judicial behavior can be seen as closely connected with the concept of law itself.

Id.; *see also* Symposium, *Social Science Approaches to the Judicial Process*, 79 HARV. L. REV. 1551 (1966); Symposium, *Empirical Approaches to Judicial Behavior*, 42 U. CINN. L. REV. 589 (1973).

To answer the question of how judges make decisions, political scientists have developed two competing "models"[9] of judicial decisionmaking: attitudinal and strategic. The attitudinal model is based on an atomistic understanding of judicial behavior—the judge is viewed as an individual actor making decisions independently—and posits that the judge seeks to maximize her sincere policy preferences, termed "attitudes." The strategic model, in contrast, considers the judge as dependent upon and responsive to the decisions of her colleagues on the bench and the relative policy positions of other political institutions. These positive theories of judicial behavior have been almost entirely developed by hypothesizing about and examining only one judicial institution, the U.S. Supreme Court.

I propose, test, and consider the implications of a combined attitudinal and strategic theory of en banc court of appeals decisionmaking. Under this theory, we can predict circuit court judicial behavior in en banc cases based on the judges' policy preferences (as measured by the political party of their appointing President) and/or their compulsion to win (as measured by their willingness to join a majority opinion even though it conflicts with their policy preferences). I have examined en banc decisions of one "average" circuit, the U.S. Court of Appeals for the Fourth Circuit, and found that they support the

[9] The term model, as used here and throughout the paper, is intended to connote explanatory models: those that seek not only to describe phenomena but also to *explain* them. Stated another way, an explanatory model is a systematic, empirically verified understanding of why a phenomenon occurs as it does. A descriptive model of lung cancer would list the ailments marking the disease (shortness of breath, lesions growing in the lining of the lung, and so on) whereas an explanatory model of lung cancer would inform us, based on empirical evidence, as to its causes (smoking, environmental toxins, and so on). Likewise, a description of appellate decisionmaking would set forth an essentially superficial account of the process: filing of briefs, presentation of oral arguments, discussion in conference, casting of votes, and release of an opinion. An explanation would go deeper and actually informs us about how the final decision was reached and what drove the result announced by the court. A good social science model will *explain* a sizeable percentage, though not all, of the observed behavior and thereby serve as a valuable aid to our understanding of that behavior. *See generally* Lee Epstein, *Studying Law and Courts*, *in* CONTEMPLATING COURTS 1, 7–8 (Lee Epstein ed., 1995). Here, Professor Epstein underscores the distinction:

> [M]odels in social science are not meant to constitute reality. To the contrary, they are purposefully designed to ignore certain aspects of the real world and focus instead on a crucial set of explanatory factors. . . . When we try to make generalizations about a phenomenon—say, judicial decision making—we lose specifics that are part of reality . . . . Yet, the simplifications inherent in models provide social scientists with useful handles for understanding the real world and for reaching general conclusions about the way the world works.

Id. at 8.

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hypothesis that circuit court judges in en banc cases behave according to both the attitudinal model and the strategic model.

I begin by delineating the two leading models of Supreme Court behavior. Part II sets out the development of the attitudinal model of judicial behavior. Part III examines the more recently developed strategic model of judicial decisionmaking, which has two variations: one focusing on the internal dynamics at play in the Court and the other considering the external forces pressuring the Court and its members.

In Part IV, I extrapolate from the two competing Supreme Court models a theory about the behavior of en banc courts of appeals on a micro-level (the vote of the individual judge) as well as on a macro-level (the court's decision). The theory has four components or elements. The first two elements address the micro-level inquiry and suggest that circuit judges in en banc cases will seek to maximize either their personal policy preferences or their influence on the court. Hence, judges will either vote consistently with the ideological direction ("liberal" or "conservative")[10] of the party of their appointing President or vote strategically ("swing judges").[11] The second two elements address the macro-level inquiry and suggest that the en banc court will not vote consistently with the ideological direction of the majority coalition because of the strategic voting behavior of swing judges, but will vote relatively consistently with the ideological direction of the Supreme Court. In addition to delineating the reasoning supporting these arguments, I subject each to empirical testing and find strong empirical support for the micro-level and macro-level components

[10] The terms "liberal" and "conservative" are used in this paper in a way consistent with the meanings traditionally assigned by social commentators and court scholars as well as most interested observers of the legal system. Most Supreme Court watchers, for example, believe they can predict with a fair amount of accuracy the vote of the Supreme Court's right wing—Chief Justice Rehnquist and Justices Scalia and Thomas—in many cases. We believe we can predict their decisions because we share a common sense perception about how liberal and conservative judges vote. For example, in the areas of civil rights and liberties, liberal judges generally seek to extend freedoms, whereas conservatives seek to limit them. In the realm of economic regulation, liberal jurists favor an enhanced governmental role in the economy and tend to uphold legislation that benefits working people or the economic underdog, while conservatives oppose an increase in government intervention and tend to favor business. In criminal cases, liberal judges generally are more sympathetic to criminal defendants, while conservatives tend to favor prosecution and law enforcement. The categorizations are admittedly broad and cannot account for the complexity of relative ideological positions. Nevertheless, the terms retain meaning and significance in the course of trying to understand political phenomena. For a more thorough discussion, see *infra* notes 22, 129 and accompanying text.

[11] I define "swing judge" as a judge who is either loss-averse or status-seeking and as a consequence votes to join majorities for strategic reasons rather than policy preference reasons.

of the theory. I conclude by considering the implications of my results for efforts to prescribe improvements in the federal judicial system at the intermediate level.

II. THE EVOLUTION OF AN ATTITUDINAL THEORY OF SUPREME COURT BEHAVIOR

The social scientific study of courts arose out of an interest in explaining the actions of the Supreme Court or, more particularly, those of certain justices.[12] As a result, scholars have traditionally focused their court studies on the behavior of individual justices and, as a consequence, have considered those justices to be independent, or atomistic, actors. Because of such early and continued attention, micro-level analysis is the most fully developed, articulated, and tested positive theory of judicial behavior. A half-century of study has produced an understanding of the actions of the atomistic judge. A review of the development of micro-level theory will illuminate the rationale behind and ideas driving the dominant paradigm of judicial behavior, the attitudinal model.

A. *Formal Legal Theory*

Positive theory and normative theory about judicial decisionmaking were identical in the early part of this century: formalism.[13] Common law formalism—or what came to be known as Classical Legal Theory—posited that judicial decisions were based on logical reasoning or reasoning by example.[14] Under this familiar view of judicial decisionmaking, the judge reviews the case before her and draws inevitable conclusions based on its commonalities with earlier cases.[15] This conception of the judiciary can be traced to Montesquieu

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[12] *See, e.g.*, WALTER F. MURPHY & JOSEPH TANENHAUS, THE STUDY OF PUBLIC LAW 12 (1972) ("[S]ocial scientists have many, varied, and legitimate interests in studying and explaining public law and judicial behavior."); *Social Science Approaches to the Judicial Process*, *supra* note 8, at 1551 ("Political scientists have recently begun to investigate new dimensions of the judicial process."). *See generally* Van Winkle, *supra* note 7.

[13] *See, e.g.*, Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983) (discussing the rise of Harvard Law School's first dean, Christopher Columbus Langdell, and the genesis of Langdell's scientific theory of law known as classical legal orthodoxy).

[14] *See, e.g.*, Thomas C. Grey, Book Review, *Modern American Legal Thought*, 106 YALE L.J. 493, 495-97 (1996). Under Langdellian legal theory, "law should be *formal*, producing outcomes by the application of rules to facts without any intervening exercise of discretion." *Id.* at 495.

[15] *See generally* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948). Some scholars label this "mechanical jurisprudence" because the process by which judges

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and Blackstone who believed that judicial power must be kept distinct from executive and legislative powers and should be characterized by a lack of decisionmaking discretion.[16]

Like the Langdellian judge, both legal scholars and social scientists approached the study of law and courts through the same ostensibly objective mechanism. Scholars seeking to understand how the Supreme Court reached decisions examined recent developments in a particular area of law and postulated about the scope and implications of the developing doctrine.[17]

The strong attachment of both legal scholars and social scientists to a formalist understanding of court behavior may be seen in part as an attempt to rationalize judicial policymaking in a democracy, specifically by presenting the judge as a neutral and reasoned decisionmaker and by emphasizing the primacy of rules. As Felix Frankfurter explained the position: "[o]ur judicial system is absolutely dependent upon a popular belief that it is as untainted in its workings as the finite limitations of disciplined human minds and feelings make possible."[18] From the Classical Legal perspective, neutral decisionmaking

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reach decisions is highly structured and repetitive. *See* STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 263–69 (3d ed. 1988).

[16] *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 405–07, 426–27 (1996) (citing BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Franz Neumann ed. & Thomas Nugent trans., 1949) (1748); 1 WILLIAM BLACKSTONE, COMMENTARIES) [hereinafter Pushaw, *Justiciability*]; *see also* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 476–77 (1994) (discussing Blackstones's adherence to "the axiom that a judge's role was merely to 'expound'—not 'make'—the law").

[17] The *American Political Science Review* regularly published individual as well as serial articles reviewing and cataloging judicial decisions in constitutional law and in public law. Eugene Wambaugh began the annual survey of the Supreme Court's constitutional law rulings, *see Constitutional Law in 1909–1910*, 4 AM. POL. SCI. REV. 483 (1910); *Constitutional Law in 1910–1911*, 6 AM. POL. SCI. REV. 513 (1912), which was continued by Thomas Reed Powell, *see Decisions of the Supreme Court of the United States on Constitutional Questions, 1914–1917*, 12 AM. POL. SCI. REV. 17 (pt. I), 427 (pt. II), 640 (pt. III) (1917); *The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1917*, 13 AM. POL. SCI. REV. 229 (1918), and by Edwin Corwin, *Constitutional Law in 1919–1920, Part I*, 14 AM. POL. SCI. REV. 635 (1920); *Constitutional Law in 1919–1920, Part II*, 15 AM. POL. SCI. REV. 52 (1921); *Constitutional Law in 1920–1921*, 16 AM. POL. SCI. REV. 22 (1922). Similarly, Robert E. Cushman published an annual article or articles on case developments in public law. These studies were centered on the notion that previously announced legal doctrine provided the single best predictor and explainer of Court decisions.

[18] Felix Frankfurter, *The* Berger *Decision*, NEW REPUBLIC, Feb. 23, 1921, *reprinted in* FELIX FRANKFURTER ON THE SUPREME COURT 78 (Philip Kurland ed., 1970). Interestingly though, Frankfurter himself often created doctrines (most notably justiciability) by either

through logical reasoning *was* adjudication and vice versa; any other act by a judge would no longer be judging.[19]

The Classical Legal model of judicial decisionmaking ignores the obvious fact that judges have a good deal of discretion in deciding cases. Charles Haines observed that:

> At the same time that the mechanical theory was dominant there were always justices and magistrates who frankly recognized that under the veil of the mysterious and divine sources of legal principles, it was necessary for judges to exercise discretion and to make choices as to the legal rules to be applied.[20]

And in exercising that discretion, judges will be guided, at least in part, by their personal conceptions of public policy and rights; and thus, their decisions cannot be explained solely by consideration of existing precedent.[21] For example, conservatives and liberals have different perceptions about American society (e.g., do blacks still suffer from discrimination?) that produce different decisions.[22] Even when conservatives and liberals share a certain perception

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ignoring or distorting prior law to serve his own policy preferences. *See* Pushaw, *Justiciability*, *supra* note 16, at 458–63.

[19] Legal Process theorists also adopted this perspective. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958). First available in 1958, though only officially published and commercially available in 1994, this tome was aimed at making law as coherent and rational as possible through procedural justifications consistent with political pluralism as espoused by Robert Dahl.

[20] Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 98 (1922). Even Blackstone recognized that some discretion was necessary. *See* Pushaw, *Justiciability*, *supra* note 16.

[21] *See generally* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960). In this discursive, Toynbeean text on testing the "method" of American Legal Realism, Llewellyn delineated and captured the primary themes of Realism and provided descriptive accounts of different appellate courts to support the behavioral implications of these themes.

[22] Consider the comments of a D.C. Circuit judge in an interview with a political scientist:

> The liberals will line up on the side of the injured; in government regulation cases involving business, for the public; and in union cases, on the side of the union. Conservatives will take the side of insurance companies in personal injury cases, and will support management in disputes with organized labor. These are, of course, generalizations.

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(e.g., freedom of speech is a cherished right), they will likely disagree on its value relative to competing concerns (e.g., should the speech rights of dissidents outweigh the state's interest in maintaining order?). Even accepting the Classical premise that recitation of law is relevant to a judge's decision, the judge cannot decide cases without considering the context and consequence of her decision, nor without the influence of her own thoughts and experiences.

B. *Legal Realism*

Legal pragmatists adopted as a normative paradigm the observation that judges cannot make decisions without being influenced by their personal perceptions. They contended that judges *should not* try to reach decisions without considering context and other factors beyond "law on the books." They argued that case outcomes are the product of a host of internal, attitudinal factors and that legal rules and doctrines are at best boundaries within which judges act or, at worst, smoke screens behind which they hide their true motivations.[23] Realists such as Karl Llewellyn expected empirical study to uncover the various factors that cannot be directly observed but that produce judicial decisions.[24]

In 1948, University of Chicago political scientist C. Herman Pritchett offered a *positive* theoretical interpretation of the *normative* tenets of legal realism in his social scientific study of the Supreme Court, *The Roosevelt Court*.[25] Pritchett used simple statistics to evaluate systematically micro-level voting behavior on the Court between 1937 and 1947. For example, he identified distinct liberal and conservative voting blocs through agreement scores (which reflect the percentage rate at which a given justice votes with another justice) and revealed ideological preferences by counting votes on particular issues.[26] Pritchett did not present an explanatory model of Supreme

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Sheldon Goldman, *Conflict on the U.S. Courts of Appeals, 1965–71: A Quantitative Analysis*, 42 U. CINN. L. REV. 635, 635 (1973). Another judge, from the Second Circuit, concurred: "If you study the votes over a two or three year period, you will find the pattern." *Id.*

[23] *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND (1930) (applying psychological model to the study of the modern legal mind); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). Llewellyn claims to have introduced the "realist" label into legal scholarship in this *Columbia Law Review* article. *See* LLEWELLYN, *supra* note 21, at 512; Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

[24] *See* LLEWELLYN, *supra* note 21. Llewellyn contended that the purposes of judicial opinions do not include "report[ing] the process of deciding." *Id.* at 56.

[25] *See* C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947 (1948).

[26] *See id.* at 240–63.

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Court decisionmaking, but he did provide the basis for the development of the behavioral study of the Supreme Court.

Pritchett's work revolutionized the way scholars thought about judicial decisionmaking. As Glendon Schubert, one of the country's most influential court scholars, explained in 1965:

> Pritchett's [*The Roosevelt Court*] is the most important and influential book to be published in the past two decades in the general field of constitutional law and politics, and . . . a whole generation of political scientists—of whom I am one—was compelled to modify, some more radically and others less so, their basic orientation toward the study of the Supreme Court, as a consequence of having read [it].[27]

C. *Attitudinal Model*

Building on insights of the Legal Realists—who posited that individual judges make decisions based on their own values and policy positions—social scientists have developed "attitudinal" models of judicial decisionmaking that focus on the justice as an atomistic maximizer of policy preferences.

1. *Schubert*

Glendon Schubert was the first to attempt to develop and test a model of micro-level judicial decisionmaking;[28] he proposed to build a model based on "attitudes" to discover the forces hidden behind and producing Supreme Court opinions.[29] Looking to existing scientific studies of human behavior, specifically the work of social psychologists Louis Thurstone, Clyde Coombs, and Louis Guttman, he attempted to pierce the veil of judicial decision.[30] Drawing an analogy between the facts in these studies and those presented in the legal process, he characterized relevant case facts as "stimuli."[31] Schubert sought to scale these stimuli according to their relative ideological values. He then scaled in the same graph, or "multi-dimensional ideological space," the relative ideological position of a justice—a key assumption underlying his

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[27] *See* GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946–1963, at 6 (1965).

[28] *See id.*

[29] *See id.* at 4 (likening his effort to Alice's step through the Looking Glass).

[30] *See id.* at 22–37.

[31] *See id.*

model being that justices and cases could be ideologically scaled relative to one another.[32]

To understand Schubert's theory, consider a simple model on a horizontal line, or a "one-dimensional ideological space." We can locate case stimuli at relative points, which Schubert called "j-points," along an ideological line.[33] We also place justices based upon their relative attitudes along the same ideological line at points Schubert called "ideal points" or "i-points."[34]

The following hypothetical illustrates Schubert's theory.[35] An appellate court is presented with First Amendment challenges in two cases—case *A* and case *B*—involving injunctions curtailing political demonstrations. In case *A*, the district judge found past instances of violence and the potential for future violence and ordered that demonstrators stand at least five feet away from entrances and exits at the targeted facility. The district judge in case *B* found evidence of prior acts of violence and ordered that the demonstrators stand out of earshot of (at least 30 feet away from) any person approaching, entering, or leaving the facility. Under Schubert's theory, we can position these case stimuli in ideological space. The injunction in case *B* is more restrictive of speech, so we place it to the ideological right of case *A*, as set forth in Figure 1.

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[32] *See id.* Schubert developed a multi-dimensional version of his model with scale axes. He then used empirical evidence in an attempt to map the location of each justice's i-point in the "orthogonal," or multi-dimensional, ideological space relative to the various case j-points. (The meaning of i-points and j-points is discussed textually *infra.*) I do not discuss fully the multi-dimensional model here because it is more complicated and would consume more space than is necessary to understand the contribution made by Schubert's work. *See id.*

[33] *See id.* at 37–38.

[34] *See id.* Professors Segal and Spaeth observe that i-points are more aptly called indifference points because a judge would be indifferent as between alternative outcomes when a case stimulus, or j-point, corresponds with her i-point. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 68 (1993). Ideal points, in contrast, would refer to the judge's preferred outcome. The judge's preferred outcome is not represented by her place on the ideological spectrum relative to case stimuli but rather by the decision she would make as to each case.

[35] The hypothetical is modeled after a hypothetical drawn by Segal and Spaeth. *See id.* at 67–68. Segal and Spaeth's book, as well as their respective book chapters in Lee Epstein's *Contemplating Courts*, were invaluable sources of information and insight on the theoretical development and construction of the attitudinal model. *See id.*; Segal et al., *Decisionmaking*, *supra* note 7, at 227; Harold J. Spaeth, *The Attitudinal Model*, *in* CONTEMPLATING COURTS 296 (Lee Epstein ed., 1995) [hereinafter Spaeth, *Attitudinal Model*].

Figure 1. Hypothetical case stimuli (j-points) in one-dimensional ideological space

We would be able to place any demonstration injunction along this line depending on its characteristics, or stimuli. The more restrictive the injunction and the less evidence of harm to support it, the farther to the right the corresponding j-point will be. And the j-point will be farther to the left the less restrictive the injunction and the more evidence to support it.

Next we imagine three appellate judges with different attitudes on the question of demonstration injunctions. Judge 1 believes that any injunction is an unconstitutional prior restraint. Judge 3 believes that trial judges should actively exercise their power to limit demonstrations to maintain order and would uphold most injunctions. Judge 2 desires to provide some right to communicate while protecting persons at risk from demonstrations; she is not as deferential to trial judges as Judge 3 and not as opposed to injunctions as Judge 1.

We can place these three judges at i-points along the same ideological line containing our hypothetical case stimuli, as set forth in Figure 2.

Figure 2. Hypothetical judicial attitudes (i-points) in one-dimensional ideological space

In this one-dimensional model, the judge upholds injunctions to the left of her position and strikes those to the right.[36] A three-judge panel consisting of Judges 1, 2, and 3 would affirm the injunction in case *A* by a two-judge vote of

[36] The Schubert model, as represented in one-dimensional space, does not account for the nature of the protest. Consequently, union protestors' free speech claims would produce the same case stimuli as the same claims by anti-abortion protestors. An empirical test of such a model would likely reveal that the nature of the protest does affect the judge's response. A multi-dimensional representation would take account of such a variation.

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Judges 2 and 3 but would vacate the injunction in case *B* by a two-judge majority of Judges 1 and 2.

2. *Rohde-Spaeth*

A decade later, David Rohde and Harold Spaeth agreed with Schubert's evaluation of the nature of the judicial process, but they proposed a different attitudinal model based on the categorization of "attitude objects" and "attitude situations."[37] The Rohde-Spaeth model hypothesizes that individual preference is the primary determinant of judicial behavior. Preferences, in turn, are composed primarily of "attitudes."[38] Borrowing psychologist Milton Rokeach's definition, Professors Rohde and Spaeth submitted that:

> An attitude is a (1) relatively enduring, (2) organization of interrelated beliefs that describe, evaluate, and advocate action with respect to an object or situation, (3) with each belief having cognitive, affective, and behavioral components. (4) Each one of these beliefs is a predisposition that, when suitably activated, results in some preferential response for the attitude object or situation, or toward the maintenance or preservation of the attitude itself. (5) Since an attitude object must always be encountered within some situation about which we also have an attitude, *a minimum condition for social behavior is the activation of at least two interacting attitudes, one concerning the attitude object and the other concerning the attitude situation.*[39]

In fact, Rohde and Spaeth observed that goals, rules, and situations influence decisions and outcomes generally.[40] The primary goals of justices are "policy goals: . . . [e]ach member of the [Supreme] Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences."[41] The ability of justices to obtain their goals is aided by life tenure, which gives the justices job security and removes ambition for higher office, and by supremacy in the judicial system, which accords finality to their decisions.[42]

As Professor Spaeth would explain more specifically nearly twenty years

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[37] *See* DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976).

[38] *See id.* at 75.

[39] *Id.* (quoting Milton Rokeach, *The Nature of Attitudes*, *in* 1 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 449-57 (1968)) (emphasis added).

[40] *See id.* at 71–72.

[41] *Id.* at 72.

[42] *See id.* at 72–74.

later, "[c]entral to the Rohde-Spaeth formulation is the construct of attitudes, which [we] define as a set of interrelated beliefs about at least one attitude object [AO] and the situation in which it is encountered [attitude situation, or AS]."[43] In the context of judicial decisions, the attitude objects (AOs) are conceptualized as the "legal or human persons involved in the legal process," and the attitude situations (ASs) are the "dominant legal issues" presented.[44] In a case involving a corporation suing a federal agency over a wage and hour law, for example, a justice's vote will turn on the interaction between the justice's attitudes toward business and government (AOs) and her attitudes toward economic regulation and employee protection (ASs).[45]

3. *Operationalizing "Attitude": Party of Appointing President*

Other social scientists have taken the extant theoretical premise of the Schubert and Rohde-Spaeth models—that justices decide cases based on attitudes—and continued their work of developing a model. The first task faced by these social scientists was to operationalize judicial attitudes. Because few judges have publicly stated their ideological preferences on every issue, social scientists have been forced to use some sort of proxy for judicial attitude.[46] They have sought to estimate unobservable personal values or ideology by relying on observable attributes which have been linked with individual preferences and beliefs, such as age, gender, race, party identification, and religious, regional, and ethnic background.[47] But these studies have had limited success.[48]

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[43] Spaeth, *Attitudinal Model*, *supra* note 35, at 307.

[44] ROHDE & SPAETH, *supra* note 37, at 77.

[45] *See id.* at 77–78, 161-67 (including a table containing the actual cases and their corresponding AO and AS values).

[46] For a discussion of the challenges to formulating measures of individual preference, see Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261, 261-62 (1996) ("Perhaps the most fundamental challenge is to locate sources of data that are independent of the behavior of the political actors under scrutiny.").

[47] For example, Beverly Blair Cook sought to explain the severity of sentences given to draft offenders by federal district judges. She considered the effects of various characteristics of a judge on the judge's decision, including: age (whether the judge was over the age of 65), military service (none, low, or high), having a son (or sons) of draftable age, membership in local versus national versus altruistic groups, association with civil liberties groups, and party identification. She was able to explain only 5% of the variation in the sample of 1852 draft cases. *See* Beverly Blair Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 U. CINN. L. REV. 597, 620-30 (1973) (and articles and books cited therein).

For another example, see Sue Davis et al., *Voting Behavior and Gender on the U.S.*

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As it turns out, social scientists have discovered that the political party of the appointing President is a good proxy for a justice's attitudes.[49] This is hardly surprising, because the appointment process is highly political: Presidents, recognizing the policymaking role of justices, seek to appoint justices whose politics most closely resemble their own.[50] Various justices have

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Courts of Appeals, 77 JUDICATURE 276 (1995). When they controlled for political identification, Professors Davis, Susan Haire, and Donald Songer found that Democratic women sided with employees in employment discrimination cases more often than Democratic men, but that Republicans did not behave differently based on gender. In search and seizure cases as well as obscenity cases, there were no statistically significant differences in the votes of male and female judges once a control for the appointing President's party was added. *See id.*; *see also* Epstein & Mershon, *supra* note 46.

In addition, Professors Jeffrey Segal and Albert Cover postulated that the attitudes of justices could be determined from newspaper editorials published about the justice after the justice's nomination by the President and before the justice's confirmation by the Senate. They analyzed the content of editorials published regarding the nomination of all justices from Earl Warren to Anthony Kennedy. If the editorial attributed conservative qualities to the justice, they counted that as evidence of conservatism, and so forth. They found a high correlation between the political ideology assigned to statements regarding the justices as candidates and the ideology of the decisions of those justices once on the Court. They observed, however, that this measure of attitude might be difficult to replicate. *See* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); *see also* C. Neal Tate, *Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355 (1981).

For criticism of attempts to use social background characteristics as a stand-in for attitudes, see Sheldon Goldman & Austin Sarat, *Backgrounds and Decisions*, *in* AMERICAN COURT SYSTEMS 374 (Sheldon Goldman & Austin Sarat eds., 1978); S. Sidney Ulmer, *Are Social Background Models Time-Bound?*, 80 AM. POL. SCI. REV. 957, 964–66 (1986).

[48] *But see* Epstein & Mershon, *supra* note 46; Segal & Cover, *supra* note 47.

[49] *See, e.g.*, STUART S. NAGEL, THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE 188-91 (1969); JOHN SPRAGUE, VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM 1889-1959 (1968) (examining voting blocs using algorithm and pairing justices who vote together); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 326, 328 (1992); Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 845 (1961).

[50] *See* HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 42–149 (1988) (providing a brief historical account of judicial selection from 1793 through 1980, and a more detailed consideration of Ronald Reagan's successful and failed nominations to the bench, and noting that Reagan was certainly not unique in his effort to alter the constitutional landscape through judicial appointments); SEGAL & SPAETH, *supra* note 34, at 127 ("Given the Supreme Court's role as a national policy maker, it would boggle the mind if Presidents did not pay careful attention to the ideology and partisanship of potential nominees."); Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 295–97, 306 (1991) (discussing how Presidents

reported being questioned at length by administration officials, and in some instances by the President himself, about their positions on various policy issues.[51] Judicial selection thus is inherently political and not strictly merit-based: "Merit competes with other political considerations like personal and ideological compatibility, with the forces of support or opposition in Congress and the White House, and with demands for representative appointments on the basis of geography, religion, race, gender, and ethnicity."[52] In turn, the appointment process results in the appointment of justices whose decisions tend to be in line with the ideology of the President who selects them.[53] The exceptions are memorable for their unusualness and do not undermine the postulate that, on average, judges reflect the ideological positions of the President who appoints them.[54] We know further that the President's party identification reflects overarching, general principles such that a Democratic President is more liberal than a Republican President.[55]

The conclusion that judicial behavior can be explained by policy preferences and predicted by using the party of the appointing President as a measure of preference should not be misconstrued to imply that justices lack respect for the rule of law or vote the party line in the way elected officials do.

Reagan and Bush sought to appoint judges to carry out their social agenda, namely, "institutionalizing judicial restraint in matters of governmental civil liberties and civil rights policymaking," just as Presidents Roosevelt and Truman aimed to appoint judges to "constitutionaliz[e] the New Deal").

[51] *See, e.g.*, LAWRENCE BAUM, THE SUPREME COURT 42 (4th ed. 1992) (describing how Justices Harry Blackmun and Sandra Day O'Connor were questioned at length as to their positions on various policy issues by presidential aides prior to nomination, and how Justice O'Connor noted that President Reagan personally asked her position on abortion).

[52] DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 63 (2d ed. 1990).

[53] *See, e.g., id.*; BAUM, *supra* note 51, at 41-43; *see also* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 846 (1991) (observing the conflation of law and politics in the selection of judges); Mark Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777, 780 (1987) ("One can imagine that people could have views on the merits of political issues . . . that contradict their views of the constitutional aspects of the same question. But the people who position themselves to be nominated for federal judgeships are not part of that imagined group.").

[54] *See* McNollgast, *supra* note 7, at 1637–38.

[55] *See* PETER WOLL, CONSTITUTIONAL DEMOCRACY: POLICIES AND POLITICS 153-67 (1982) (discussing from a historical perspective the relationship between political parties and the identification of and position taken on public policy issues as well as the role of the President as an embodiment of his party's policy positions).

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Yet justices remain policymakers,[56] and the same factors that lead a justice to identify with a particular political party and lead a President to select a justice also lead to more or less liberal decisions by the justice because of his attitudes.[57]

Yet the lingering sense that justices, while seeking to maximize their policy preferences, are different from other political actors has prompted attempts to consider more directly the influence of "the law." Lee Epstein and I built on the attitudinal model by creating a macro-level model that considered both extralegal factors, such as the composition of the Court (measured by the number of Republican appointees), and legal factors, such as the legally relevant facts presented to the Court in a particular case.[58] We tested our theory through an empirical consideration of death penalty cases decided by the Supreme Court between 1972 and 1991. We found that an integrated model accounted for the Court's rulings better than a strictly attitudinal model. We concluded that doctrine acted as a constraint on the impact of non-legal forces on Supreme Court decisionmaking and that "the most complete explanation of judicial outcomes should incorporate legal and extralegal factors."[59] However, the inherent impediments to the creation of a functional model of this form across doctrinal areas have limited other efforts to similarly map judicial outcomes.[60]

The attitudinal model endures because empirical studies have demonstrated that it has substantial explanatory power.[61] As Epstein and Jack Knight have

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[56] *See, e.g.*, WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 1 (1964) ("As long as law remains one of the most common means of formalizing public policy, the judicial office in the United States will involve political, i.e., policy-making, power . . . and [judges use that power], as J. W. Peltason has said, 'not as a matter of choice, but of function.'") (citation omitted); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279–95 (1957).

[57] *See, e.g.*, GLENDON SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 129–42 (1959); Goldman, *supra* note 50; *see also supra* text accompanying notes 50–51.

[58] *See* George & Epstein, *supra* note 49.

[59] *Id.* at 333–34.

[60] Few scholars have presented research demonstrating success with the legal model, and only a small number of subject areas have been tested. *See* SEGAL & SPAETH, *supra* note 34, at 221 n.61 (citing attempts to test an integrated model in other issue areas).

[61] *See* James Gibson, *Decision Making in Appellate Courts*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 255, 255–56, 258–60 (John B. Gates & Charles A. Johnson eds., 1991). Professor Gibson notes:

> Political scientists have been systematically studying decision making within the United States Supreme Court and other appellate courts since the publication of C. Herman Pritchett's *The Roosevelt Court* in 1948. Indeed the central problem in the study of

observed, "judicial specialists generally agree that justices, first and foremost, wish to see their policy preferences etched into law. They are, in the opinion of many, 'single-minded seekers of legal policy.'"[62] Most adherents of the model will concede that it does not account for all factors in judicial decisionmaking[63] and acknowledge that legal rules and doctrines have been demonstrated to restrain and, in some instances, guide decisionmaking.[64] But they point out that the attitudinal model of judicial decisionmaking is a valuable tool for explaining and predicting judicial behavior.[65]

> judicial behavior and process over the course of the last fifty years has been to understand the processes through which decisions are made by the judges sitting on appellate benches . . . . Despite the difficulties of collecting data, great strides have been made in developing theories and models of the decision-making process within appellate courts. Even with the cloak of secrecy, analysts have been able to penetrate these courts, largely through statistical methods. This has produced a series of strong hunches about how decisions get made.

Id. at 258-60; *see also* George & Epstein, *supra* note 49, at 325-26. *See generally* SEGAL & SPAETH, *supra* note 34, and sources cited therein.

[62] EPSTEIN & KNIGHT, CHOICES, *supra* note 7, at 9-10 (quoting George & Epstein, *supra* note 49, at 325).

[63] In fact, models are inherently incomplete:

> A model is a simplified representation of reality; it does not constitute reality itself. Models purposefully ignore certain aspects of reality and focus instead on a selected set of crucial factors. Such simplifications give us a useful handle for understanding the real world that we could not obtain from more exhaustive and descriptive strategies.

Segal et al., *Decisionmaking*, *supra* note 7, at 229; *see also supra* note 8.

[64] *See, e.g.*, George & Epstein, *supra* note 49, at 328.

[65] Despite widespread agreement among social scientists that the attitudinal model has a tremendous amount of explanatory power, most contemporary legal scholars have failed to acknowledge this work or, when acknowledging it, to give it credence. *See, e.g.*, Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 44-46 (1988) (noting that social scientists have studied the influence of non-legal factors on legal decisionmaking, but reaching the astonishing conclusion that it is overemphasized by legal realists). Although some legal scholars (such as legal realists) have acknowledged the contribution of political science's insights to the judicial process, *see, e.g.*, LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 18 (1986); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995) (describing movement to infuse study of law with understanding of social sciences); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983), most have ignored what political theorists of their time were saying about judicial institutions; *see, e.g.*, HART & SACHS, *supra* note 19.

A recent and noteworthy exception to this trend is Tulane Law Professor Stephen Griffin. *See* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS (1996). He attempts to integrate law and political science in the consideration of

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Although the attitudinal model is a good predictor of individual judicial behavior, public choice scholars now argue that the model can be improved without unnecessarily complicating it or detracting from its predictive ability. As discussed in the next section, a small but growing number of judicial theorists are proposing that a model of judicial behavior must account for the fact that Supreme Court justices make decisions as members of a multi-judge court and as a part of a political system.

III. THE INTRODUCTION OF A STRATEGIC THEORY OF JUDICIAL BEHAVIOR

Attitudinal theorists contend that a Supreme Court justice's decisions on the merits of a case are the product of legal policy preferences and case facts. A Republican appointee will tend to take a more conservative position than a Democratic appointee; she will do so regardless of the positions taken by her colleagues on the bench or by other institutions. But the attitudinal model is incomplete. It does not account for a fundamental characteristic of the Supreme Court: the decisions of individual justices are subject to the agreement of other justices on the Court as well as the acquiescence of institutions higher up in the decisionmaking hierarchy. Recently, judicial scholars have proposed theories that recognize the interdependence of judicial decisionmaking. These "strategic" theories of judicial behavior, which I discuss below, acknowledge that justices seek to satisfy policy goals but emphasize the influence, or effects, of strategic factors, such as interactions with colleagues on the Court (internal dynamics)[66] and reactions to the positions of other institutional actors (external

constitutional theory. *Id.* at 131–39. He observes that although political scientists who work in the field often consider legal scholarship, "legal scholars do not often return the favor" and that "[c]onstitutional theories offered by legal scholars rarely . . . discuss behaviorist research on judicial decisionmaking." *Id.* at ix–x.

[66] Scholars, such as Lewis Kornhauser and Lawrence Sager, David Post and Steven Salop, and Maxwell Stearns, have utilized strategic and/or rational choice modeling to evaluate *normative* adjudication theories in light of internal dynamics presumed to exist in multi-judge appellate courts, specifically the Supreme Court. *See, e.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 4–5 (1993) (discussed *infra* note 70); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 770–74 (1992) (arguing that multi-judge courts should adopt a system of "issue voting" as opposed to the present "outcome voting" approach); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1257–87 (1994). For a thoughtful consideration and critique of this scholarship, see John M. Rogers, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 VAND. L. REV. 997, 997–1040 (1996). Professor Stearns and Professors Post and Salop are given an opportunity to reply in this *Vanderbilt Law Review* symposium. *See* David G. Post & Steven C. Salop, *Issues and*

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forces), and of institutional structure on the justices' final decisions.[67]

To illustrate the general distinction between the attitudinal model and a strategic model which considers the effects of external forces on judicial decisionmaking, imagine a hypothetical justice—Justice X—faced with three possible outcomes in a particular case—1, 2, or 3. Imagine further that Justice X prefers outcome 1 to outcome 2 and outcome 2 to outcome 3.[68] If the Court reaches outcome 1, Congress will pass legislation to overrule the Court's decision and enact outcome 3. In contrast, Congress will not pass legislation in response to outcome 2, even though it prefers outcome 3. While the attitudinal model predicts that Justice X will vote for his most preferred outcome, outcome 1, the strategic model assumes that Justice X recognizes that his ability to obtain his policy goals is dependent upon the actions of other political institutions. Accordingly, the strategic model predicts that Justice X will vote for outcome 2 because he prefers it to outcome 3 (the final result, after congressional action, if he chooses outcome 1).[69]

We can alter the example to illustrate the distinction between the attitudinal model and a strategic model which considers internal dynamics, that is, the influence of other Court actors on Justice X's decision. Assume that a majority of justices, including Justice X, will vote for outcome 2, but that the failure of majority support for outcome 2 (which occurs when Justice X votes for outcome 1) results in a shift in support such that a majority of justices votes for outcome 3. (Perhaps Justice Y is indifferent between outcomes 2 and 3, and

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Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others, 49 VAND. L. REV. 1069 (1996); Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1045 (1996).

[67] *See* EPSTEIN & KNIGHT, CHOICES, *supra* note 7, at 10–18.

[68] This example is modeled after a hypothetical drawn by Professor Epstein:

> In rational choice models of judicial decisions, thus, it is not enough to say, as the attitudinal model does, that Justice X chose action 1 over 2 because she preferred 1 to 2. Rather the strategic assumption suggests the following proposition: Justice X chose 1 because X believed the other relevant actors—perhaps Justice Y or Senator Z—would choose 2, 3, or another action, and given these choices, action 1 led to a better outcome for Justice X than did other alternative actions.

Epstein, *supra* note 9, at 13 n.4 (citing PETER C. ORDESHOOK, A POLITICAL THEORY PRIMER 8 (1992)).

[69] The strategic model can be just as rigid in its prediction as the attitudinal model. It predicts that Justice X will usually not vote for her most preferred outcome while the attitudinal model insists she will. *Cf.* EPSTEIN & KNIGHT, CHOICES, *supra* note 7, at 5 (describing circumstance in which "strategic calculations will lead justices to vote their sincere preferences or sign opinions that reflect them").

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prefers both to outcome 1.) Justice X will vote for outcome 2 to prevent a majority from forming in support of outcome 3.

In this section, I discuss the theories that have developed to consider and explain the phenomena set forth in these two examples; that is, the behavior of goal-oriented justices who are dependent upon other justices and other institutions for the realization of their policy goals. First, I delineate and explain the studies of internal dynamics on the Court, which tell us that justices within a group may forego their sincere policy preferences in favor of other goals, such as influence on the content of the majority opinion, participation on the winning side, or position as a pivotal voter. Second, I consider separation of powers studies of external forces on the Court.

A. *Internal Dynamics*

Federal appellate courts are collegial and decide cases collectively.[70] A justice must consider and respond to the preferences and expected actions of her colleagues to attain the outcome closest to her own initial preference. The necessary process of bargaining, compromise, and accommodation makes it unlikely that a justice will be able to reach a decision that exactly reflects her ideal outcome in every case, or even in most cases.[71]

Political scientist Walter Murphy was one of the first social scientists to consider the fact that Supreme Court justices act collectively rather than individually.[72] In his landmark book, *The Elements of Judicial Strategy*, Murphy built on small group sociology theory to develop a theory of justices as

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[70] *See* Kornhauser & Sager, *supra* note 3 (noting that appellate adjudication in the United States is exclusively a group process, and arguing that the group nature must be taken into account when developing theories of adjudication); Kornhauser & Sager, *supra* note 66, at 4 (explaining that "appellate adjudication is a collective endeavor that can only be fully understood once its collective features are considered," and that in "[c]ollegial collective enterprises . . . each participant must consider and respond to her colleagues as she performs her tasks [because] collaboration and deliberation are the trademarks of collegial enterprise"). In these two articles addressing the doctrinal paradox posed by multi-judge courts, the authors consider a normative query not addressed by my empirical evaluation: namely, whether models of adjudication satisfy the goals of adjudication given the current structure of the appellate process (specifically that it involves multiple decisionmakers).

[71] Justice Frankfurter explained the experience: "When you have to have at least five people to agree on something, they can't have that comprehensive completeness of candor which is open to a single man, giving his own reasons untrammeled by what anybody else may do or not do if he put that out." FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 294–301 (Harlan B. Phillips ed., 1960).

[72] *See* MURPHY, *supra* note 56. Sociologist Eloise Snyder published an earlier evaluation of the implications of small group theory for Supreme Court decisionmaking. *See also* Eloise Snyder, *The Supreme Court as Small Group*, 36 SOC. FORCES 232 (1958).

strategic actors within a collective body.[73] He described how a justice could act to maximize influence on public policy development through a process of bargaining. His approach was largely descriptive, providing historical evidence to support the theory that justices brought together to decide cases act like other persons forced to interact to reach a group decision, that is, their positions are influenced by the presence of others. This influence will produce different strategic behavior in different actors, but its effect undermines the argument that justices will vote solely based on their attitudes (as proffered by the attitudinal model).

Scholars have built on Murphy's work by utilizing rational choice, or public choice, theory to develop a model of strategic interaction within the Court.[74] "Unlike the attitudinal model, the strategic model suggests that

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[73] For examples of small group sociology studies of the time, see MURPHY, *supra* note 56, at 216 n.1, and sources cited therein.

[74] The most noteworthy scholarly contribution following Murphy's approach and utilizing public choice theory is a book published this year by Epstein and Knight entitled *The Choices Justices Make. See* EPSTEIN & KNIGHT, CHOICES, *supra* note 7. Some scholars refer to the application of the methods of economics to the study of politics as "rational choice theory." *See, e.g.*, Peter C. Ordeshook, *The Development of Contemporary Political Theory*, *in* POLITICAL ECONOMY: INSTITUTIONS, COMPETITION, AND REPRESENTATION 73 (William A. Barnett et al., eds., 1993); William H. Riker, *Political Science and Rational Choice*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 163 (James E. Alt & Kenneth A. Shepsle eds., 1990). Others, however, refer to it as "public choice theory." *See, e.g.*, DENNIS C. MUELLER, PUBLIC CHOICE (1979). Regardless of label, rational/public choice theory is a variant of game theory.

Game theory is a mathematical theory of rational competitive and cooperative behavior which has its origins in Jon von Neumann and Oskar Morgenstern's classic 1944 text *Theory of Games and Economic Behavior*. JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944). The political and economic theories derived from game theory have been some of the most intriguing, and hotly debated, theories developed in the social scientific and legal literature.

Judicial scholars have been slow to examine the implications of game theoretic models—arguably the most significant development in political theory in recent years—for theories of judicial behavior. *See* John B. Gates, *Theory, Methods, and the New Institutionalism in Judicial Research*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 469, 473 (John B. Gates & Charles A. Johnson eds., 1991) (arguing that notwithstanding a few noteworthy studies considering rational/public choice theory in the context of law and courts, "researchers in judicial politics seem much less attentive to the potential strengths and weaknesses of these perspectives"). Epstein and Knight have explicitly attempted to build on the work of Murphy with their new book *The Choices Justices Make. See* EPSTEIN & KNIGHT, CHOICES, *supra* note 7.

Not all social scientists believe that variants of game theory, such as rational or public choice, offer great insight to political and economic phenomena. Some critics complain that rational choice models lack sufficient empirical support to justify their burgeoning use. *See,*

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Supreme Court justices are constrained by the behavior of their brethren or actors external to the Court."[75] The strategic model is also dynamic where the attitudinal model is static; the former seeks to explain not merely a justice's final vote on the merits of a case, but also her participation in a deliberative process within which justices cast initial votes in conference, circulate draft opinions, propose or demand changes in drafts, change votes, circulate revised drafts, and conclude by authoring or signing onto a majority, concurring, or dissenting opinion.

Strategy theorists such as political scientists Epstein and Knight have argued persuasively that "[w]e can best explain the choices of justices as strategic behavior, and not merely as responses to ideological values."[76] Recent research on the interaction between Supreme Court justices suggests and documents various forms of strategic behavior during the deliberative process, including the exchange of a vote for changes in opinion content and the move from the minority position in a case to the majority in order to retain authority (or perhaps simply to avoid loss of status).

1. *Opinion Writing and Signing Negotiations*

Murphy revealed, based on an examination of the papers of Justices Murphy, Stone, and Taft, the intra-Court bargaining wherein a justice offers to trade his vote and concurrence in an opinion for changes in the content of the opinion.[77] Recently, political scientists Maltzman and Wahlbeck, after an extensive examination of intra-Court correspondence and conference records contained in Justice Brennan's personal papers, discovered many modern incidents of justices voting against their ideal policy positions in order to

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e.g., DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY (1994).

It is beyond the scope of the present article to parse the various arguments regarding rational choice theory or even to provide a full exposition of what rational choice theory is. Accordingly, I seek to discuss in a fairly simple manner the elements and characteristics of game theory relevant to my proposed model of en banc circuit court decisionmaking.

[75] James F. Spriggs, II et al., *The Process of Bargaining and Accommodation on the U.S. Supreme Court* (Apr. 10–12, 1997) (unpublished paper, presented at the 1997 annual meeting of the Midwest Political Science Association, Chicago) (on file with author).

[76] *See* Lee Epstein & Jack Knight, *The New Institutionalism, Part II*, LAW & COURTS, Spring 1997, at 4. (setting forth a synopsis of their work which is more fully developed in their recently published book, *The Choices Justices Make*).

[77] *See* MURPHY, *supra* note 56, at 56–68 (recounting several exchanges between justices supporting his hypothesis that justices trade votes for language in the majority opinion).

influence the content of a majority opinion.[78] Consider Maltzman and Wahlbeck's recounting of a post-conference yet pre-decision exchange regarding *Wardius v. Oregon*,[79] a case in which the Supreme Court ultimately reversed the lower court and recognized a criminal defendant's right to reciprocal discovery:

> Justice Brennan's docket books reveal that Justice Rehnquist initially voted with the minority. Nevertheless, on March 14, 1973, he circulated an explanatory note: "I voted to affirm in this case at Conference, but before writing a dissent to Thurgood's proposed opinion I think I will wait to see if anything narrower . . . is written." On June 4, Justice Marshall circulated a new draft with a cover letter stating that "since the Court appears hopelessly splintered on the disposition of petitioner's [Wardius] contentions concerning the state's exclusionary rule, I have decided that it may be best to leave this question for another day." On June 6, Marshall's decision to limit the breadth of his opinion was rewarded when Rehnquist joined his opinion to reverse.[80]

After discovering such historical evidence of opinion writing and signing negotiations,[81] Maltzman and Wahlbeck sought to test systematically Murphy's

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[78] *See* Maltzman & Wahlbeck, *supra* note 7. For an interesting account of the justices' thoughts about and some historical instances of opinion writing and signing negotiations, see Spriggs et al., *supra* note 75 (quoting from the personal papers of justices).

Recent studies have been made possible by the availability of the personal papers of various justices, most notably Justices Brennan and Marshall. Justice Brennan's papers include records of conference votes and changes in votes over the course of opinion circulation and revision. For a discussion of these documents, see Forrest Maltzman & Paul J. Wahlbeck, *Inside the U.S. Supreme Court: The Reliability of the Justices' Conference Records*, 58 J. POL. 528, 528–39 (1996).

[79] 412 U.S. 470 (1973).

[80] Maltzman & Wahlbeck, *supra* note 7, at 583 (quoting Memorandum from William Rehnquist to Warren Burger (Mar. 14, 1973) and Memorandum from Thurgood Marshall to the Conference (June 4, 1973) (available in William J. Brennan's Papers, Box 303, Library of Congress)).

[81] One example of a more direct request by a justice to trade his vote for a change in opinion content is Justice Potter Stewart's communication to Justice Hugo Black in which Stewart threatened to join Justice John Harlan's dissent instead of signing onto Black's majority opinion:

> "At the risk of seeming unreasonably stubborn, I am still unwilling to join your opinion so long as it contains the view expressed in the phrase 'over a long period of time' in the 6th line on page 12. Perhaps I had better wait to see John Harlan's separate opinion."

Maltzman & Wahlbeck, *supra* note 7, at 581 (quoting Memorandum from Potter Stewart to Hugo Black (Dec. 2, 1969) (available in William J. Brennan's Papers, Box 205, Library of

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hypothesis that "the key resource that policy-minded justices have at their disposal is their vote and opinion—and these can be used as bargaining chips to affect the content of the Court's opinion."[82] They looked at changes in votes between the original conference on the merits and the Court's announcement of the final decision (known as "voting fluidity") reflected in Justice Brennan's conference notes and proposed a strategic model of voting fluidity to explain all discovered vote shifts.[83] Using a statistical tool called logistic regression[84] to examine votes on the Burger Court, they demonstrated that justices' decisions to change their votes stemmed primarily from strategic considerations rather than a change in their underlying policy positions.[85] More specifically, justices change their votes not because they are persuaded by the other side but rather to retain what influence they can given a losing position.

2. *Swing Justices: Loss Aversion and Status Seeking*

The social psychology literature provides some illumination upon the reasons why a justice joins a majority which takes a position inconsistent with her sincere policy preferences. Justices may cast a vote contrary to their ideological position because they like to win (or to be perceived as "winners"), or perhaps because they are loss averse.[86] They simply may prefer to be in the

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Congress)) (explaining that "[u]ltimately, Black altered the draft opinion, and Stewart switched from the position he first expressed at conference and joined Black's opinion").

[82] *See* Maltzman & Wahlbeck, *supra* note 7, at 581.

[83] *Id.*

[84] Logistic regression, unlike linear regression, assumes a dependent variable (the event to be explained) that is dichotomous (has two possible values), and therefore is better suited than traditional linear regression for analyzing judicial decisions which, like many political variables, are dichotomous. *See generally* ALAN AGRESTI & BARBARA FINLAY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 482–92 (2d ed. 1986) (describing logistic and logit models); JOHN H. ALDRICH & FORREST D. NELSON, LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS 48–66 (1984). For a more detailed discussion of logistic regression and logit, see *infra* notes 147–51 and accompanying text.

[85] *See* Maltzman & Wahlbeck, *supra* note 7, at 587–90.

[86] The phenomenon of loss aversion in the instance of a riskless choice (i.e., a choice without uncertainty) is well documented in the psychological literature, though it has not been examined in the specific setting of judicial decisionmaking. *See, e.g.*, Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 200 (1991) (explaining that "a given difference between two options will have greater impact if it is viewed as a difference between two disadvantages than if it is viewed as a difference between two advantages"); Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039, 1047 (1991) ("The basic intuition concerning loss aversion is that losses (outcomes below the reference state) loom larger than corresponding gains (outcomes above the reference state). Because a shift of

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majority: "Justices on the court, like individuals in all institutions, may feel uncomfortable remaining outside the dominant group. As a result, justices may change their votes from the minority to the majority because of small-group influences that are independent of policy preferences."[87] Justice George Sutherland, who served on the Court from 1922 to 1938, acceded on a number of occasions to a majority opinion with which he did not agree rather than dissent alone. He wrote to Chief Justice Harlan Fiske Stone in 1930 that "'I was inclined the other way [in *Broad River Power Co. v. South Carolina*[88]], but I think no one agreed with me. I, therefore, yield my not very positive views to those of the majority.'"[89] Similarly, Sutherland told Stone regarding *Lamb v. Schmitt*,[90] "'I voted the other way, but I have acquiesced in other outrages and probably shall in this. Shall let you know Saturday, though I should like more time to forget.'"[91] He did acquiesce. Finally, in *Alaska Packers Association v. Industrial Accident Commission*,[92] Sutherland wrote on the back of Stone's slip opinion in the case: "'Probably bad—but only a small baby. Let it go.'"[93]

Justices may also act as swing justices because they seek status by establishing themselves as the pivotal vote on the court, shifting between

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reference can turn gains into losses and vice versa, it can give rise to reversals of preference."). I thank Chris Guthrie for suggesting loss aversion as a possible explanation for the phenomena of judges giving up the opportunity to write a dissent and voting in the majority even when they continue to disagree with the majority position.

[87] *See* Maltzman & Wahlbeck, *supra* note 7, at 583; *see also* MURPHY, *supra* note 56, at 62 ("Most people experience anxiety when they find themselves in sharp disagreement with a group with whom they are intimately associated. Supreme Court Justices tend to be highly independent and individualistic men, but they may not be completely immune to this distaste for isolation.").

[88] 281 U.S. 537 (1930).

[89] Harlan Fiske Stone Papers, Library of Congress, *quoted in* MURPHY, *supra* note 56, at 52.

[90] 285 U.S. 222 (1932).

[91] Harlan Fiske Stone Papers, Library of Congress, *quoted in* MURPHY, *supra* note 56, at 52.

[92] 294 U.S. 532 (1935).

[93] Harlan Fiske Stone Papers, Library of Congress, *quoted in* MURPHY, *supra* note 56, at 52–53 (Sutherland's comment about the case's significance also suggests another strategic motivation: preserving personal capital for when it matters.). Sutherland was not the only justice on the Court at that time who signed onto an opinion with which he disagreed. Murphy described a handwritten note by Justice Pierce Butler written on the back of a Stone slip opinion and filed in Stone's personal papers: "'I voted to reverse. While this sustains your conclusion to affirm, I still think reversal would be better. But I shall in silence acquiesce. Dissents seldom aid in the right development or statement of the law. They often do harm. For myself I say: 'Lead us not into temptation.'" *Id.* at 52.

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majority coalitions.[94] These justices may cast the decisive vote in close cases (e.g., where there is a five-to-four vote split) and thereby appear to have greater policymaking power.[95] In a range of issue areas, Justice Anthony Kennedy appears to shift between voting blocs in an effort to earn the role of deciding vote.[96] Justice Sandra Day O'Connor has also been considered a pivotal justice, although within certain, limited issue areas like affirmative action, abortion rights, and First Amendment Establishment Clause jurisprudence.[97] Scholars have identified several justices as filling this key position: Hugo Black,[98] Tom Clark,[99] Charles Evans Hughes,[100] Lewis Powell,[101] Stanley Reed,[102] Owen Roberts,[103] and Potter Stewart.[104]

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[94] *See, e.g.*, SCHUBERT, *supra* note 57, at 192–210 (applying game theory hypothesis that certain justices will seek to be swing judges to the voting behavior of Chief Justice Hughes and Justice Roberts); Tracey E. George, *Identifying Swing Justices on the U.S. Supreme Court: The Case of Justice Powell and the Death Penalty* (1990) (unpublished manuscript, on file with author).

[95] But it is unclear whether the justice is determining the direction of the law or simply moving between coalitions. George, *supra* note 94, at 1–2.

[96] *See, e.g.*, Marcia Coyle, *An Emboldened Majority Breaks Ground*, NAT'L L.J., July 31, 1995, at C2–C4 (describing Justices O'Connor and Kennedy as swing justices); Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 82 (After considering significant Court decisions during Kennedy's tenure, the author concludes that "a pattern has emerged. Where Justice Kennedy goes, so goes the Supreme Court: for the past three terms, in 5-4 cases, he has voted with the majority more often than any other Justice, and so has been the pivotal figure in case after case .... His leadership, it should be said, is passive rather than active: other Justices must persuade him of *their* views, rather than the other way around.").

[97] *See, e.g.*, Coyle, *supra* note 96, at C2–C4; George, *supra* note 94, at 1; Stephen Wermeil, *Swing Vote: Sandra Day O'Connor Emerges as Key Player in High Court Rulings*, WALL ST. J., June 11, 1990, at 1.

[98] *See* J. Woodford Howard, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968). Justice Black served on the Court from 1937 through 1971.

[99] *See* SCHUBERT, *supra* note 57. Justice Clark served on the Court from 1949 through 1962.

[100] *See id*; SPRAGUE, *supra* note 49. Justice Hughes served on the Court as an associate justice from 1910 through 1916 and as chief justice from 1930–1941.

[101] *See* George, *supra* note 94. Justice Powell served on the Court from 1972–1987.

[102] *See* Note, *Mr. Justice Reed: Swing Man or Not?*, 1 STAN. L. REV. 714 (1949). Justice Reed served on the Court from 1938–1957.

[103] *See* SCHUBERT, *supra* note 57; SPRAGUE, *supra* note 49. Justice Roberts served on the Court from 1930–1945.

[104] *See* William B. Schultz & Philip K. Howard, *The Myth of Swing Voting: An Analysis of Voting Patterns on the Supreme Court*, 50 N.Y.U. L. REV. 798 (1975). Justice Stewart served on the Court from 1958 through 1991.

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B. *External Forces*

A strategic, policy-oriented justice considers not only the positions of her colleagues but also of other actors who can influence policy outcomes. The Supreme Court's statutory rulings can be and have been overruled by Congress and the President. Although extremely unlikely, its constitutional rulings can be overturned by the amendment process.[105] It would be surprising if these external forces did not influence Supreme Court decisionmaking. A justice truly seeking to maximize her sincerely-held preferences would want to consider whether her decision would be overturned by an actor above her in the hierarchy.

Historically, scholars did not incorporate environmental variables such as the interrelatedness of the judicial and political subsystems into research design.[106] In recent years, scholars, again relying on game theoretic designs, have developed formal models of the strategic interplay between the Supreme Court, Congress, and the President;[107] these so-called "separation-of-powers games," like the internal dynamics strategic model, presume that justices seek to maximize their personal policy preferences.[108] But, as Segal explains, the separation-of-powers games, again like the internal strategic model, emphasize the role of strategy:

> The positive political theorists argue that in order to come as close as possible to achieving that goal the Court must frequently defer to the preferences of Congress, especially in statutory interpretation cases. Attitudinalists, alternatively, argue that the rules and structures of the U.S. political system

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[105] *See* EPSTEIN ET AL., *supra* note 2, at 608 (setting forth in tabular form the four amendments overturning Supreme Court decisions).

[106] *See* Cook, *supra* note 47.

[107] *See, e.g.*, Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, *in* CONTEMPLATING COURTS 315 (Lee Epstein ed., 1995); Eskridge, *Overriding*, *supra* note 7; Eskridge, *Reneging on History*, *supra* note 7; Knight & Epstein, *Struggle*, *supra* note 7; Brian Marks, *A Model of Judicial Influence on Congressional Policymaking:* Grove City College v. Bell (1989) (unpublished working paper in political science P-88-7, Hoover Institution, Stanford University, on file with author); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997). Brian Marks has been given credit for publishing the most influential work on this topic, *see* Eskridge, *Reneging on History*, *supra* note 7, at 643 n.195, and for being the "first scholar to have included courts in the American politics separation-of-powers games," Segal, *supra*, at 29, with his unpublished paper made available as a working paper at Stanford's Hoover Institution in 1988 and as a completed Ph.D. dissertation at Washington University, St. Louis, in 1989.

[108] *See* Epstein & Walker, *supra* note 107, at 322.

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allow the justices to vote sincerely, that is, without constraints from Congress and/or the president.[109]

Empirical studies of Court/Congress/President interactions have found that the Court is responsive to the preferences of the other branches of government, particularly Congress. For example, in the statutory interpretation area, the Court is influenced by the current legislators' preferences, as opposed to the preferences of those who wrote the law.[110] These studies share the feature of delineating serial interaction between the branches based on individual responses within a range of preferred outcomes.

IV. APPLYING THEORIES OF SUPREME COURT BEHAVIOR TO U.S. COURTS OF APPEALS

The attitudinal and strategic theories of judicial behavior described above have been developed almost entirely through a consideration of the behavior of U.S. Supreme Court justices. What do studies of the Supreme Court tell us about behavior on lower courts, in particular, federal courts of appeals? Are circuit judges as able to follow their personal preferences in deciding cases? Do they behave in the same strategic fashion as justices? Students of the lower courts have expressed concern that the models developed in analyzing the Supreme Court may not be well-suited for other courts.[111]

In this section, I first discuss the relevant institutional distinctions between circuit courts and the Supreme Court which have hindered the study of lower

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[109] Segal, *supra* note 107, at 28 (citations omitted).

[110] *See* Eskridge, *Overriding*, *supra* note 7, at 390. Segal challenges this finding with his own research indicating that justices in statutory cases between 1947 and 1992 largely sought to attain their personal preferences with only minimal evidence of responsive behavior. *See* Segal, *supra* note 107, at 35–43. *But see* Andrew D. Martin, *Designing Statistical Tests of Formal Theories: The Separation of Powers and the Supreme Court* (1997) (unpublished paper presented at the 1997 annual meeting of the Law and Society Association, St. Louis, Mo.) (challenging Segal's conclusion).

[111] *See* Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 964 (1992). Professors Songer and Haire explain:

> Numerous studies exist that provide insight into behavior on the Supreme Court. However, models that explain behavior on the Supreme Court may not be appropriate for understanding judicial behavior in other appellate courts . . . . As a result of the scholarly focus on the Supreme Court and the inability accurately to extend models of Supreme Court behavior, much less is known about the bases of voting on lower courts.

Id.

appellate courts, and argue that we can overcome traditional limitations to the study of courts of appeals by focusing on en banc decisions, arguably the most significant and revealing rulings of circuit courts. For the current study, I consider all en banc rulings of one court of appeals, the Fourth Circuit. In Subsection B, I explain how I collected the relevant information from the 274 en banc cases (my "data") and present basic descriptive statistics regarding the data. I end Part IV by proposing and testing a four-part theory of en banc circuit court behavior extrapolated from existing Supreme Court scholarship.

A. *Overcoming Limitations to the Study of Circuit Courts*

Legal scholars and political scientists are fascinated with the Supreme Court in part, of course, because of the Court's preeminence. However, many other, more pragmatic reasons related to the difficulty of studying circuit courts account for the relative lack of court of appeals studies. First, courts of appeals operate primarily in rotating divisions of three judges. These three-judge panels are composed not only of active circuit judges but also of retired members from the circuit[112] as well as temporarily-designated members from other federal courts.[113] Thus, the deliberative body deciding circuit court cases does not have the coherency and consistency of membership that marks the high court.

Second, circuit courts of appeals do not share the Supreme Court's prerogative to select cases for review. Thus, most appeals court decisions involve routine examinations of lower court outcomes, primarily using highly deferential standards of review, such as abuse of discretion or plain error. Courts of appeals reverse only about 20% of the cases they review,[114] compared to a reversal rate of 60% to 65% for the Supreme Court.[115] Routine affirmations do not offer a means for considering normative or positive theories of adjudication because these theories are relevant only where a judge believes she has some decisionmaking discretion. Normative theories have been developed to address "hard" cases, those where there is a real dispute as to the

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[112] Federal circuit judges who have retired from regular active service may ask to serve on cases within their circuit. *See* 28 U.S.C. § 294(c) (1994).

[113] The Judicial Code provides that the chief judge of a circuit may assign senior and active district judges from within the circuit, to sit and decide cases brought before the circuit. *See* 28 U.S.C. § 292(a) (1994). The code also provides that the chief justice, at the request of the chief judge or circuit justice of a circuit, may assign retired Supreme Court justices with their consent, *see* 28 U.S.C. § 294(d) (1994), as well as circuit judges from other circuits, *see* 28 U.S.C. § 291(a) (1994), to sit temporarily on the circuit. These designated judges have the same authority as circuit judges in the cases in which they participate.

[114] *See* Davis & Songer, *The Flow of Litigation Revisited*, *supra* note 2, at 964.

[115] *See* EPSTEIN ET AL., *supra* note 2, at 212.

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proper resolution of the question before the court. "Where law and precedent provide weak guidelines rather than mandates," the judge's decision is more likely to be the product of attitudes and environment.[116]

One subset of circuit court decisions, en banc cases, may nevertheless overcome limitations otherwise inherent in the study of circuit courts. As the name implies, en banc cases are heard by the entire circuit bench:[117] all active circuit judges, as well as any senior circuit judge of that circuit who sat on the panel, if one was convened.[118] Such decisions allow us to view circuit court behavior when acting in concert. Hence, en banc cases provide us with a more coherent body of jurists from which to extrapolate regarding the politics of deciding appeals at the circuit court level. In addition, en banc hearing procedures, like the certiorari process, limit the cases reviewed by the entire court to those selected by a majority of the court's members (a greater percentage than the Supreme Court's required four out of nine).[119] This

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[116] Cook, *supra* note 47, at 597.

[117] Mini en banc hearings were approved by statute in 1978 for circuits of more than 15 active judges. *See* Pub. L. No. 95-486, § 5(a)(b), 92 Stat. 1633 (codified as amended at 28 U.S.C. § 46(c) (1994)). Only the Ninth Circuit has exercised this option. Under its rules, if a majority of active, non-recused judges votes for en banc review:

> [T]he en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the court.... Notwithstanding the provision herein for random drawing of names by lot, if a judge is not drawn on any of three successive en banc courts, that judge's name shall be placed automatically on the next en banc court. In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.

9TH CIR. R. 35-3.

[118] Of course, the rules requiring recusal by a judge who has a conflict of interest apply to en banc cases as it does to all cases; consequently, an active judge may not participate in all en banc decisions. Interestingly, only recently did the courts conclude that a recused circuit judge could not vote on the decision to grant an en banc hearing or rehearing. The issue sparked much debate prior to its resolution. *See, e.g.*, Janet L. McDavid & Henry T. Reath, *Report to the House of Delegates on Procedures for Rehearing En Banc*, 55 ANTITRUST L.J. 665 (1987).

[119] The Supreme Court, in 1941, ruled that judges of the courts of appeals had the power to convene all of the active circuit judges to try cases. *See* Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326 (1941). Congress followed the Court's lead in the next major act governing the judicial branch—the Judicial Code of 1948—and explicitly recognized the practice: "Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service." 28 U.S.C. § 46(c) (1994).

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procedure creates the presumption that the cases are likely to involve difficult, complex, highly political, or at least significant questions.[120] Thus, en banc

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But Congress did not resolve the one question left unanswered by the Supreme Court's *Textile Mills* decision, namely, the standard by which the courts were to determine whether to rehear or hear initially an appeal en banc.

Four years later, the Supreme Court held that en banc review of a panel decision was not a matter of right, as the first appeal from a district court decision typically is, but within the discretion of the appellate court. *See* Western Pac. R.R. v. Western Pac. R.R., 345 U.S. 247 (1953). The Court, though, deferred as a matter of deliberate policy to the lower courts' discretion in weighing what factors supported the grant of full court review. Yet Justice Frankfurter in a concurring opinion sought to distinguish the function as primarily one for resolving intra-circuit conflict and cautioned against its use in other cases unless they are "extraordinary in scale—either because of the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit." *Id.* at 270–71 (Frankfurter, J., concurring).

A Federal Rule of Appellate Procedure implementing the existing judicial and statutory grants of power, adopted in 1967, expresses a view of the procedure similar to that expressed by Frankfurter in his *Western Pacific* concurrence. *See* FED. R. APP. P. 35. The rule warns that en banc review is "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." *Id.* The language appears to be drawn from both Frankfurter's concurrence and the Court's opinion in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685 (1960). The Court in *American-Steamship* observed that "*[e]n banc* courts are the exception, not the rule" and should be "convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *Id.* at 689. But, if the intention of the drafters was to limit the use of en banc review, the very wording of the rule frustrates that purpose. As Fourth Circuit Judge J. Dickson Phillips observed: "There is enough flexibility built into the very text of this rule—in the word 'ordinarily' and in the open-ended expression of 'exceptional importance'—that it could not be claimed that the rule itself either compels or excludes rehearing en banc in *any* case." Arnold v. Eastern Airlines, 712 F.2d 899, 914 (4th Cir. 1983) (Phillips, J., dissenting).

[120] Congress has directed circuit courts to consider certain questions initially en banc. *See, e.g.*, Federal Election Campaign Act of 1971, 2 U.S.C. § 437h(a) (1983). This statute provides:

> The [Federal Election] Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Id. These questions—typically concerning the constitutionality of a statute—are significant. *See* Note, *All the President's Men?: A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 787 (1987) (footnote omitted from title) (noting that en banc

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decisions, as opposed to the majority of routine appeals taken by right from lower federal courts or agencies, should test theories we have developed about judicial decisionmaking.[121]

En banc decisions, in addition to being the most important circuit court rulings, also may be the most revelatory. They provide insight to theories about the construction, purpose, and philosophy of intermediate appellate courts in the legal process.[122] Judges on a circuit court cannot make decisions individually, so they must rely on coalition building while still seeking to maximize their individual policy preferences. By considering the actions these institutions undertake as a group, we can examine systematically and test analytically internal dynamics such as ideology and interdependence as well as external dynamics such as institutional interaction.

B. *Empirical Evidence: The En Banc Decisions of the Fourth Circuit*

I sought to test my theory against all en banc decisions of one of the twelve circuits. I rejected the First Circuit because it is atypically small, the Ninth Circuit because it is unusually large, and the D.C. Circuit because of its largely administrative law caseload and lack of geographic diversity. I also rejected the Fifth and Eleventh Circuits because these courts are the offspring of the old Fifth Circuit that was divided into two circuits in 1981 and was atypically large prior to that time. Of the remaining seven circuits, I selected the Fourth Circuit for a number of reasons. It has an average number of judges, an average size caseload, and a typical distribution of cases by issue area.

The Fourth Circuit was one of the smaller circuit courts initially, with only two judges permanently assigned under the Judicial Code of 1911. Fifty years passed before the court had more than three members. Seven judges served on the Fourth Circuit in 1974, making it one of the three smallest circuits. Twenty

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constitutional cases arguably raise the most significant issues and have the greatest precedential effects).

[121] Christopher Smith reasons further that en banc cases provide an effective means of examining intermediate courts because (1) the cases frequently emanate from the existence of conflict among a circuits' judges, and (2) the expanded size of the deliberative body increases the likelihood of dissent. *See* Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133 (1990) (Smith uses en banc cases decided between 1983 and 1988 to examine the theory that Reagan appointees to the courts of appeals are more conservative and polemic than other judges. The study documents the existence of Reagan-appointed voting blocs in appellate cases, but these polarized decisions have been concentrated in two circuits (D.C. and Eighth Circuits) and are mirrored by a similar number of Carter-appointed voting blocs.).

[122] *See, e.g.*, Christopher P. Banks, *The Politics of En Banc Review in the "Mini-Supreme Court"*, 13 J. L. & POL. 377 (1997).

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years later, the court had grown to fifteen and ranked fourth out of twelve in size. Its caseload, however, has remained the same relative to other circuits. The Fourth Circuit was fourth out of eleven circuits for total appeals filed in 1974. For 1994, the Fourth Circuit ranked fifth among all twelve circuits in the number of total appeals filed, as well as the number of criminal and administrative appeals filed. It had the third highest number of prisoner appeals.[123]

I also was searching for a circuit that included a mix of country and city, agriculture and industry, and north and south. The Fourth Circuit, which includes Maryland, North Carolina, South Carolina, Virginia, and West Virginia, covers a geographic region that reflects some of the diversity present in the country: industrial North and antebellum South; Baltimore's harbor, West Virginia's coal mines, and North Carolina's tobacco fields; the capitol of the confederacy and the affluent and highly-educated suburbs of the nation's capital; and Charlestons north and south. The business sector includes national bank headquarters; the Research Triangle; major state, private, and religious colleges and universities; several significant military bases and federal agencies; and professional sports teams. The party politics of the region are also mixed, with leading Republican Senators—Thurmond, Helms, Warner—and leading Democratic Senators—Byrd, Mikulski, Sarbanes—claiming input on the appointment of judges for the circuit. Given the problems with other courts and what the Fourth Circuit offers, I concluded that it was a reasonable choice for study and would allow for inferences to be drawn about courts of appeals generally.

To identify the en banc cases decided by the Fourth Circuit in the court's modern era—1962 through 1996, from the year the court's membership first exceeded three judges—I conducted WESTLAW and LEXIS searches and found 274 en banc cases. Figure 3 shows the trend in number of en banc cases per year during that period. In two years (1966 and 1996), the court decided a high of sixteen cases en banc; and in both 1969 and 1992, the court decided a low of three cases. The court decided an average of 7.8 cases en banc per term.

[123] *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS FOR UNITED STATES COURTS (1996, 1976) (fact sheets obtained from the Administrative Office outlining information for 1994 and 1974, respectively).

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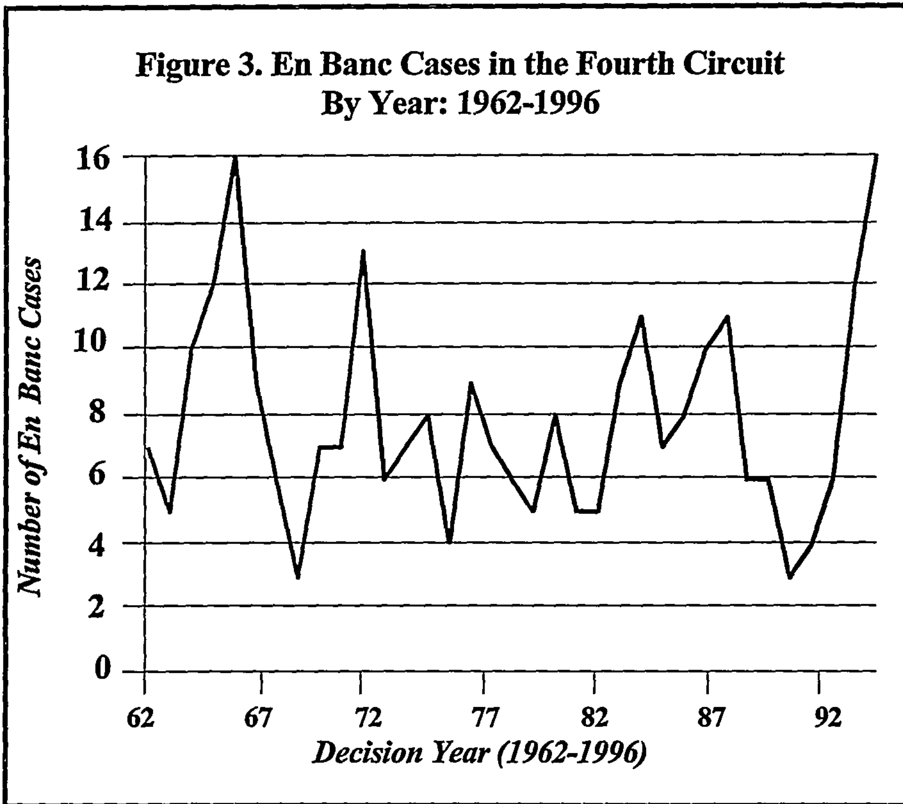

I examined the cases and recorded several features of each case (in research parlance, I "coded" the cases on many dimensions).[124] Eight coding categories are relevant here:

(1) citation;
(2) oral argument date (if the court heard argument);
(3) decision date;
(4) issue type;
(5) ideological direction of court's decision;
(6) disposition of case;
(7) each judge's participation, appointing President, and home state; and
(8) subsequent Supreme Court action, if any.

I explain below each category and describe the frequencies and relative frequencies of observations within each category:

(1)-(3) The citation was simply the federal reporter cite for the case (e.g., 350 F.2d 1375). The argument and decision dates were the dates listed in the

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124 For a discussion of the process of coding content, see JOHN B. WILLIAMSON ET AL., THE RESEARCH CRAFT: AN INTRODUCTION TO SOCIAL SCIENCE METHODS 303-06 (1977).

reported case for the respective events. I made note if the en banc court did not hear oral argument (which it did not in a small number of cases).

(4) I categorized each case as one of eight broad issue types derived from categories used in two databases of federal court decisions: the Supreme Court Database[125] and the U.S. Court of Appeals Database.[126] I deferred to the categories developed by the authors of those databases for several reasons: first, to allow comparisons between my results and the results in studies using those databases; second, to provide for easier replication of my study; and third, and perhaps most importantly, to defer to formulations crafted over time and through debate among court scholars. The issue areas are: criminal, civil rights, first amendment, due process (non-criminal), privacy, labor relations, economic regulation and activity, and miscellaneous. One group of cases, school desegregation suits, was identified separately on the basis of the uniqueness of its treatment. Between 1962 and 1977, the Fourth Circuit, as a matter of policy, heard all school desegregation appeals en banc without awaiting panel review. The court may have been following the Supreme Court's practice in the *Brown v. Board of Education*[127] cases of presenting a united front in the face of strong public opposition.[128] Table 1 reflects the number of en banc cases of each issue

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[125] *See* HAROLD J. SPAETH, UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953-1993 TERMS: DOCUMENTATION (6th ICPSR version 1995). This multi-user database, funded by the National Science Foundation and available as a computer file through the Inter-university Consortium for Political and Social Research [ICPSR], encompasses all aspects of United States Supreme Court decisionmaking during the 1953 through 1993 terms and is constantly updated. The data file includes a documentation file explaining the coding methodology.

[126] *See* DONALD R. SONGER, UNITED STATES COURT OF APPEALS DATABASE: DOCUMENTATION (Rough Draft Sept. 26, 1996). The U.S. Court of Appeals Database, modeled after the Supreme Court Database and also funded by the National Science Foundation, will contain two sets of data. The first is a random sample of cases from each circuit for each year for the period 1925-1988. The total size for this sample is 15,315 cases. The second part will include all the appeals court cases whose decisions were reviewed by the Supreme Court in a decision reported in a full opinion in United States Reports for the period covered by the Supreme Court Data Base, Phase I. This phase was expected to result in the coding of approximately 4000 additional cases. The Database is not yet available through the ICPSR.

[127] *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown I); Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II). Both were unanimous decisions.

[128] *See* J.W. PELTASON, 58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961) (documenting the influence and power of the ten circuit judges, as well as the forty-eight district judges, charged with realizing the Supreme Court's decision in *Brown v. Board of Education*).

The *Brown* Court held that separate schools for black and white students were inherently unequal and thus unconstitutional but failed to explicate what was constitutionally required.

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type ("frequency") and the percentage of all cases each issue type constituted ("relative frequency").

Table 1. Issues Heard En Banc by the Fourth Circuit, 1962–1996		
Issue Types	Frequency	Relative Frequency
Criminal	79	28.8%
Civil Rights	42	15.3%
School Desegregation	52	19.0%
First Amendment	12	4.4%
Due Process	11	4.0%
Privacy	0	0.0%
Labor Relations	28	10.2%
Economic Regulation & Activity	28	10.2%
Miscellaneous	22	8.0%
Total	274	100.0%

(5) I coded each decision as liberal or conservative, the ideological direction variable, again using the Supreme Court and U.S. Court of Appeals Databases as guides.[129] The ideological variable is two-dimensional ("discrete" or "dichotomous") because it takes on only two possible values (liberal or conservative), and it reflects whether the court supports or opposes the issue to

Peltason explored and exposed the decisionmaking processes at the lower court levels as the judges struggled to interpret the broad and ambiguous *Brown* guidelines in the face of powerful political, social, and personal forces battling over the issue of school desegregation. *See id.* at 24.

[129] Obviously, we could debate at length the meaning and application of the worn-out ideological labels "liberal" and "conservative," but the definitions provided by the authors of the databases defer to their common meaning during this period and, more importantly, are explicit about their content. Thus, the variable is a valid and reliable measure because it is explicitly and specifically defined even if the conservative and liberal labels lack specificity of meaning. Although I dislike relying on these labels, they remain the "most generally used to distinguish between opposed complexes of preferences in matters of public policy." SCHUBERT, *supra* note 27, at 28. The present study, by relying on consistent categorizations, can be compared to and used with other studies.

For additional discussion of the meaning of liberal and conservative in the context used here, see *supra* notes 10, 22 and accompanying text.

which the case pertains. In criminal, civil rights, first amendment, due process (non-criminal), privacy, and school desegregation cases, I coded a decision as "liberal" if it was one of the following:

- pro-criminal defendant,
- pro-civil liberties or civil rights claimant,
- pro-indigent,
- pro-Indian,
- pro-affirmative action,
- pro-female in abortion,
- pro-underdog,
- anti-government in non-takings due process, or
- pro-disclosure (except employment or student records).

I coded a decision as "conservative" if it was the reverse.

For cases involving labor relations or economic regulation and activity, I coded a decision as liberal if it was:

- pro-union (except union anti-trust),
- pro-competition,
- anti-business,
- anti-employer,
- pro-liability,
- pro-injured person,
- pro-indigent,
- pro-small business,
- pro-debtor,
- pro-bankrupt,
- pro-Indian,
- pro-environmental protection,
- pro-consumer,
- pro-accountability, or
- pro-trial in arbitration.

I coded economic regulation and activity and labor relations decisions as conservative if they were decided the opposite way.

I did not code the twenty-two miscellaneous cases by ideological direction because they did not lend themselves to a reliable (or "replicable") categorization.

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Table 2 shows the frequency with which each type of case was decided in a liberal or conservative direction.[130]

Table 2. Ideological Direction by Case Issue				
Issue Areas	Liberal		Conservative	
	Frequency	Relative Freq.	Frequency	Relative Freq.
Criminal	32	40.5%	47	59.4%
Civil Rights	11	26.2%	31	73.8%
School Desegregation	32	61.5%	20	38.5%
First Amendment	7	58.3%	5	41.7%
Due Process	4	36.4%	7	63.6%
Labor Relations	15	53.6%	13	46.4%
Economic Regulation & Activity	11	39.3%	17	60.7%
Totals	112	44.4%	140	55.6%

(6) I coded each case according to its disposition. The disposition variable reflects the treatment the en banc court accorded the court or agency whose decision it reviewed and is one of eight types: affirmed, reversed, reversed and remanded, vacated and remanded, affirmed in part and reversed/vacated in part, affirmed in part and reversed/vacated in part and remanded, vacated, and dismissed. These eight types are generally of three broader types: affirmed, reversed, and mixed. As reflected in Figure 4, the reversal rate for en banc Fourth Circuit cases is substantially higher than that estimated for all circuit court cases, consistent with the hypothesis that en banc cases are more significant than average cases.[131]

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130 The relationship between issue and ideological direction was not statistically significant.

131 *See supra* notes 117–21 and accompanying text.

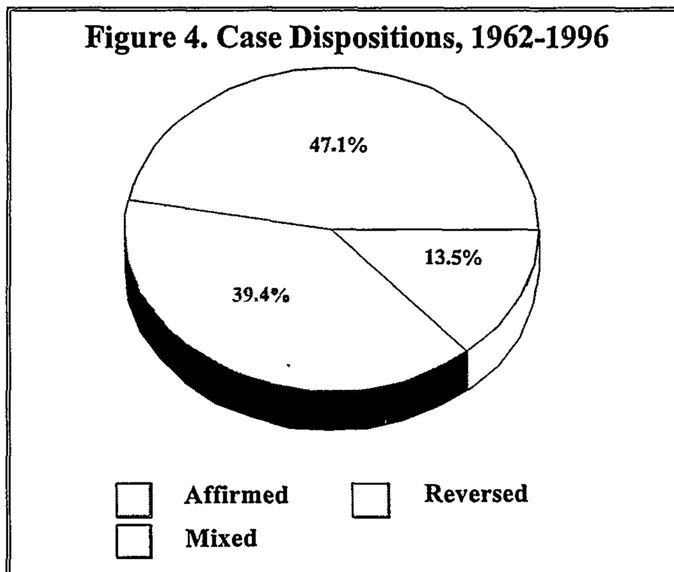

Figure 4. Case Dispositions, 1962-1996

(7) I coded each judge's participation according to her vote and the nature of her participation: writing the majority opinion, joining the majority opinion, concurring, or dissenting. If a judge indicated that she was concurring in part *and* dissenting in part, I examined her opinion (or the opinion she joined) to determine whether it agreed with the ideological direction coded for the majority opinion. If a judge agreed with some preliminary holding of the majority, but disagreed with its ultimate conclusion and ideological direction, I coded her participation as dissenting. If, however, she essentially agreed with the court's primary holding and ideological direction, but disagreed about means or implications described in dicta, then I coded the judge as concurring.

I further identified judges according to the name and party of the President who appointed them and the state in which they maintained their office. In the relevant time period (1962–1996), twenty-six judges have served on the Fourth Circuit: fourteen Republican appointees (three appointed by Eisenhower, three by Nixon, four by Reagan, and four by Bush) and twelve Democratic appointees (two appointed by Kennedy, three by Johnson, five by Carter, and two by Clinton). Ten judges have come from the northern states of Maryland and West Virginia, and sixteen from the Carolinas and Virginia. Five judges served the Fourth Circuit in 1962 and thirteen currently serve.[132]

(8) Finally, I coded the Supreme Court's treatment of en banc cases. For each case, I recorded whether a certiorari petition had been filed and, if so,

[132] Congress has authorized 15 judgeships, but there are two vacancies which President Clinton has been unable to fill during his tenure.

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how the Supreme Court responded to the petition. Table 3 shows the frequencies and relative frequencies of the filing of petitions from en banc cases as well as the success of those petitions by decade. The reversal rate for decisions reviewed by the high court was slightly higher than the Court's average of about 60% to 65%. But the most striking finding is the number of cases reviewed by the Court. It granted certiorari to forty-three petitions from the en banc Fourth Circuit, or 31% of the cases in which petitions were filed (not including the two pending petitions), as compared to an average certiorari grant rate of 7.3% of all cases from all circuits during the same period.[133]

Table 3. Supreme Court Review of En Banc Decisions by Decade, 1962–1996

Years	No Appeal/ Petition		Appeal Dismissed/ Cert. Denied		Affirmed		Reversed/ Vacated		Pending		Total
	Freq.	Rel. Freq.	Freq.	Rel. Freq.	Freq.	Rel. Freq.	Freq.	Rel. Freq.	Freq.	Rel. Freq.	
62–69	40	58.8%	17	25.0%	4	5.9%	7	10.3%	0	0.0%	68
70–79	37	50.0%	23	31.1%	3	4.1%	11	14.9%	0	0.0%	74
80–89	35	44.3%	29	36.7%	5	6.3%	10	12.7%	0	0.0%	79
90–96	17	32.1%	29	54.7%	0	0.0%	1	1.9%	4*	7.5%	53
Total	129	47.1%	100	36.5%	12	4.4%	29	10.6%	4	1.5%	274
Relative Frequency as percentage of cases with petitions filed			69.0%		8.3%		20.0%		2.8%		
Relative Frequency as percentage of cases granted *cert.*					27.9%		67.4%		4.7%		

*Note: Two *certiorari* petitions have been granted, but the cases have not been decided. Two other *certiorari* petitions remain pending.

C. *A Positive Theory*

I have considered theories of judicial behavior that have been developed by studying the Supreme Court. The dominant approach, the attitudinal model, postulates that policy preferences, or attitudes, produce judicial behavior: attitudinal studies have proven that attitudes, as measured by the party of the appointing President, are a strong predictor of the behavior of justices on the Supreme Court. The newer, and not yet as widely-studied or as widely-

[133] *See* EPSTEIN ET AL., *supra* note 2, at 81–83 (73,095 certiorari petitions, excluding *in forma pauperis*, were filed between 1962 and 1995, and the Supreme Court granted review to 5323).

accepted, approach, the strategic account, largely accepts the argument that judges seek to attain policy goals but emphasizes the effects of internal and external influences, which strategists argue dramatically constrain the ability of a justice to vote his personal policy preferences. Where the attitudinal model postulates that justices will vote consistently with the ideological direction of their appointing President's party, the strategic model stipulates that justices will respond to the positions of others and thus are unlikely to vote consistently in a strict ideological fashion.

I believe that both theories have merit in the context of the en banc courts of appeals, but that neither alone can account for most decisions made by judges or by courts. I propose a positive theory of en banc circuit court behavior that is a hybrid of the two Supreme Court theories. To develop this positive theory of en banc court of appeals behavior, I use the two Supreme Court theories to generate expectations about the bases of circuit court judicial behavior and to make predictions regarding that behavior. These expectations, or "hypotheses," predict a certain relationship between variables.[134]

The hybrid theory predicts en banc court behavior on a micro- and macro-level as set forth in four components or "hypotheses." The first two hypotheses address micro-level behavior while the second two address macro-level behavior. First, I postulate that most appeals court judges are like Supreme Court justices, "single-minded seekers of legal policy"[135] who follow their own sincere preferences as to how a case should be resolved and consequently behave consistently with the predictions of the attitudinal model. But, second, I further expect that a small percentage of judges in a given en banc case will act strategically and, instead of simply following their own preferences, will respond to the relative positions of their colleagues and the Supreme Court. Third, I hypothesize the attitudinal model will fail to predict the en banc court's decision. Finally, I proffer that the Supreme Court's attitudes will influence en banc behavior. The conclusion is that the attitudinal model will largely explain micro-level behavior but not macro-level behavior.

In this section, I set forth each of the four hypotheses extrapolated from Supreme Court theories and test each in turn.

1. *Most Judges Vote Consistently with the Party of Their Appointing President*

As discussed above, the attitudinal theory predicts that justices decide cases based on sincere policy preferences, with the most consistently accurate

[134] *See* Epstein, *supra* note 9, at 8–9 (defining variables as "'observable characteristics' of some phenomenon that, as the name suggests, vary").

[135] George & Epstein, *supra* note 49, at 325.

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measure of policy preferences, or ideology, being the party of the appointing President, an unsurprising prediction given judicial selection methods.[136] However, the President does not have the same degree of unfettered discretion in his selection of circuit judges as he has for Supreme Court justices because of the tradition of senatorial courtesy with respect to senators from the circuit.[137] Therefore, we might expect the party of the appointing President to be a weaker predictor of judicial behavior at the circuit court level than it has been found to be at the Supreme Court level.

Some evidence supports the conclusion, however, that the use of the President as a proxy for attitude in modern attitudinal models retains predictive strength in the circuit court context, at least for the latter half of this century. A study of appointments during the 1961 to 1964 period found that the court of appeals "appointment process can be characterized as a highly complex negotiations process consisting of several components. Those selected for appointment have tended to be political activists reflecting (to some extent) the values and outlook of the appointing administration."[138] We would expect this finding to be even more true since the time of that study because, as the circuit courts have risen in prominence, Presidents have increased the attention given to the naming of circuit judges:[139] taking a leading role in their selection, investigating the political philosophy of prospective nominees, and seeking to appoint like-minded jurists to the circuit bench. The Carter administration, for example, actively sought to name judges who were liberal, particularly on civil rights issues, to the courts of appeals.[140] Carter's Republican successors,

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[136] *See supra* notes 49–57 and accompanying text.

[137] *See* WASBY, *supra* note 15, at 97 ("In the first half of the twentieth century, patronage considerations dominated in appellate court nominations in administrations not concerned about the court's policy-making possibilities, but a mix of patronage and concerns about professionalism occurred where government's role was limited but judges' role in policy-making was recognized," such as during the FDR administration.); HENRY J. ABRAHAM, THE JUDICIAL PROCESS 23–25 (6th ed. 1993).

[138] Sheldon Goldman, *Judicial Appointments to the United States Courts of Appeals*, 1967 WIS. L. REV. 186. The object of Goldman's article was to analyze the various components of the selection process, and in particular the role of politics and ideology in the process and, in turn, the kind of people appointed. He gathered the data from a systematic study of Justice Department files produced for the nomination process for each of the 84 judges in active service on the appeals courts during part or all of the period between 1961 and 1964.

[139] Richard Nixon may have been the first President to recognize the prospect for influencing national policy by systematically controlling the appointment of judges to lower federal courts. *See* Goldman, *supra* note 50, at 294–95 (quoting communications between Nixon and White House aid Tom Charles Huston found in White House Central Files).

[140] *See* LAWRENCE BAUM, THE SUPREME COURT 40 (3d ed. 1989).

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Ronald Reagan and George Bush, worked with equal effort to appoint judges who supported school prayer, opposed abortion, and favored harsh criminal penalties.[141] Studies of the circuit judge appointment process support the hypothesis that circuit judges, particularly during the period of the present study (1962–1996), will vote in line with the ideological direction of the party of the appointing President.[142]

In testing the attitudinal model as a predictor of micro-level judicial behavior, I am seeking to explain the vote of the individual judge. This is the dependent variable.[143] The independent variable (or explanatory variable) is the factor believed to cause variation in the dependent variable. My independent

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[141] *See id. See generally* Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298 (1993); Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318 (1989); Goldman, *supra* note 50.

[142] Some legal observers doubt that Clinton's appointments to the lower courts will prove as liberal as the appointments of his Democratic predecessors, most notably Carter. *See* Jeffrey Toobin, *Clinton's Left-Hand Man*, NEW YORKER, July 21, 1997, at 28, 29-30. Mr. Toobin states:

> [T]he Clinton judges are an ideologically bland group. "The Clinton appointments are philosophically moderate," says Nan Aron, the president of the liberal Alliance for Justice, which monitors judicial appointments. "Studies show that they have the same ideological underpinnings as Gerald Ford's appointments. They're less liberal than Jimmy Carter's." [Deputy Attorney General] Jamie Gorelick says, "On choices of judicial candidates, the President has often been more comfortable with the more middle-of-the-road, less doctrinaire candidates."

Id. The first systematic study of circuit court decisions by Clinton appointees found that Clinton appointees were not as liberal overall as Carter appointees (36% versus 43%) but were significantly more liberal than Nixon (30%), Ford (29%), Reagan (32%), or Bush (30%) appointees. Ronald Stidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16, 17, 20 (1996). The numbers in parentheses reflect the percentage of liberal decisions reached by appointees of each President in the sample of circuit court cases from 1994–1995. The overall statistics hide an important distinction between Clinton's and Carter's circuit judges: Carter's were much more liberal than Clinton's in criminal justice cases (40% versus 31%) though Clinton circuit judges were still more liberal than Nixon (26%), Ford (20%), Reagan (26%), or Bush (22%) judges in the criminal justice issue area. *See id.* at 20. But Carter and Clinton judges were comparably liberal in civil rights and liberties cases (42% versus 41%), an issue area in which the most liberal Republican appointees in these cases, Ford appointees, took a liberal position 35% of the time and the most conservative, Nixon appointees, took a liberal position 29% of the time. *See id.*

[143] The dependent variable is the phenomenon to be explained and which is believed to be influenced, affected, or caused by some other phenomenon known as an independent variable.

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variable is the direction of the court's decision.[144] I am seeking to test whether there is a relationship between the dependent variable and the independent variable and, if so, to estimate the strength of that relationship. My bivariate model (one with only one independent variable) hypothesizes that the ideological direction of the en banc court's decision (the independent variable I_i) causes variation in the voting position of the judge (the dependent variable J_i)—joining the majority or dissenting—in the following manner: if the court's decision is liberal, a Democratic appointee will vote to join the court's decision while a Republican appointee will dissent; and if the court's decision is conservative, a Democratic appointee will dissent and a Republican appointee will join the majority.

When utilizing statistical techniques (like linear regression or logit), we use null and alternative hypotheses. Our statistical test will seek to disprove the null hypothesis and thereby accept the alternative hypothesis.[145] My null hypothesis (H_0) is that there is no interaction between the direction of a judge's decision and the party of the President who appointed her. My alternative hypothesis (H_a) is that judicial behavior is influenced by attitudes as measured by the party of the appointing President. The Hypothesis 1 model can be expressed as set forth below in Figure 5:

Figure 5. Hypothesis 1 Model:[146]

$$\pi(J_i=0) = \beta_0 + \beta_1 I_i$$

[144] We also can use more than one, or multiple, independent variables, creating a multivariate model.

[145] We cannot prove H_0. We simply seek to disprove it. H_a is accepted if the test results in rejection of the null. A good example of null and alternative hypotheses are those we use in our system of criminal justice. Our null hypothesis is that the defendant is innocent (H_0=innocent). Our alternative hypothesis is that the defendant is guilty (H_a=guilty). Our test statistic is a jury of peers. The p-statistic is the likelihood of guilt. The criminal justice system does not require proof that the defendant is innocent; rather, the prosecutor simply seeks to disprove it. Given our standard of reasonable doubt, the likelihood of innocence calculated by the jury must be less than or equal to .01 ($p<.01$) for the system to reject the null and accept the alternative, thus finding the defendant guilty. If the jury finds that the likelihood of innocence is greater than .01, we fail to reject the null—that is, we find the defendant not guilty (but we do not find the defendant to be innocent).

[146] The dependent variable J_i is the voting position of the judge which is a binary variable equal to 0 if the judge votes with the majority and equal to 1 if she dissents. $\pi(J_i=0)$ is the probability of a given judge's vote being the same direction as the majority's decision. β_0 is the constant. The independent variable I_i is the ideological direction of the court's majority decision. The parameter of I_i is β_1.

I evaluate the Hypothesis 1 model using the parameter estimation strategy of logit:[147]

> A great many political variables are *discrete*: an event either happens or it doesn't; we either observe a characteristic or we don't. *Probit* and *logit* models are common statistical tools for analyzing such discrete (or dichotomous) dependent variables—outcomes that can take on only one of two possible values . . . . It is easiest to understand and interpret the probit and logit models by focusing on the *probabilities* of observing these discrete dependent variables. That is, what are the chances of observing one outcome rather than the other? Suppose that the probability, which may be represented as π_i, of observing the characteristic in question is somewhere between zero and one for case *i*.[148]

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[147] *See supra* note 84. Logistic procedure fits a logistic regression model for binary response data by the method of maximum likelihood. A multiple logistic regression model takes the form:

$$\text{logit}(\pi) = (\log(\pi/1-\pi)) = \alpha + \beta_1 X_1 + \ldots + \beta_k X_k.$$

See AGRESTI & FINLAY, *supra* note 84, at 486–92 (discussing logit models for categorical independent variables); *id.* at 488–92 (discussing a study of the effects of racial characteristics of the defendant and of the victim on the decision to impose the death penalty after the defendant was convicted of homicide); SEGAL & SPAETH, *supra* note 34, at 370–72 (discussing the logit model).

I use logit instead of the more traditional linear regression probability model because underlying assumptions of that model are not satisfied. As an initial matter, linear regression assumes a linear relationship exists between an increase in the independent variable and an increase in the dependent variable and such is not the case where we are talking about the probability of an event occurring (i.e., the likelihood of a judge joining the majority). Also, linear models predict values of the dependent variable in the whole range of numbers ($-\infty$ to ∞) instead of the restricted range for dichotomous variables of 0 or 1. Logit solves these problems by using an S-shaped (as opposed to a linear) probability function. It is called "logit" because it is formulated in terms of the log of the odds ratio. *See* AGRESTI & FINLAY, *supra* note 84, at 489; SEGAL & SPAETH, *supra* note 34, at 368–69 (discussing why linear regression poses mathematical problems when used to estimate relationships where the dependent variable is dichotomous—has only two values).

Logit poses its own interpretive problems as the coefficients cannot be as readily interpreted as in a linear model because they refer to the log scale. *See* SEGAL & SPAETH, *supra* note 34, at 370. In addition, the problem of serial correlation has proven to be "'untractable'" in logit. George & Epstein, *supra* note 49, at 335 n.21 (quoting ALDRICH & NELSON, *supra* note 84).

[148] David C. Nixon, *Appendix B: Probit and Logit*, *in* CONTEMPLATING COURTS 430, 430 (Lee Epstein ed., 1995).

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In my model, the probability of interest is the likelihood of a particular judge voting with the majority ($\pi(J_i)$). I use the ideological direction of the majority's decision (I_i) to predict the likelihood of a particular judge joining the majority. This "*explanatory variable[ ]* (also called [an] *independent variable[ ]*) [is] used to test whether the conditions [it] indicate[s] increase or decrease the probability of observing the dependent variable to a statistically significant degree."[149] Here, then, the expectation is that if the ideological direction of the court's decision (the independent variable) is liberal, the probability of a Democratic appointee (the dependent variable) joining the majority is higher and the probability of a Republican appointee (the dependent variable) joining the majority is lower.

As Professor David Nixon explains:

> Independent variables are significant to varying degrees in predicting the dependent variable. [A] logit . . . model[ ] employ[s] a numerical technique, *maximum likelihood*, to derive estimates of *coefficients* for each of the explanatory variables. These coefficients, which may be represented as β, indicate the direction and strength of the relationship between the independent and dependent variables. If a coefficient is positive, then larger values of the independent variable are associated with a higher probability of observing a 1 for the dependent variable.[150]

So, a positive coefficient ($\beta_1 > 0$) for a given judge indicates that she was more likely to join a conservative majority and less likely to join a liberal one.

The significance level is the weight of evidence supporting the null hypothesis. Thus, the smaller the number representing the significance level the greater the degree of confidence with which we reject the null hypothesis. Statistical significance is a technical term not to be confused with importance or validity. To say that a finding is statistically significant at the .001 level means that the finding would not have occurred by chance more than one time in a thousand. By convention, a finding which has a random probability of less than .05 is described as statistically significant.[151]

As reflected in Table 4, the direction of the court's decision is a statistically significant explanation for the votes of 18 out of 25 judges: 16 at the .001 level, 1 at the .01 level, and 1 at the .05 level. (Judge Sneeden is not included in this analysis as he only participated in three en banc cases.) Moreover, the estimates for the parameters (as reflected in the MLE column) are large enough (particularly in light of the SE estimates) that we may legitimately conclude that

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149 *Id.* at 430–31.

150 *Id.* at 431.

151 *See, e.g.*, AGRESTI & FINLAY, *supra* note 84.

the independent variable is a significant aid in predicting the dependent variable. Thus, the attitudinal model explains with a tremendous degree of confidence the voting behavior of most judges participating in en banc cases. We can say that the majority of circuit judges participating in en banc cases vote their sincere policy preferences, or ideology, without constraint from their colleagues or the Supreme Court.

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Table 4. Logistic Regression and Correlation Matrix of Hypothesis 1 Model

Judge (Party of App. Pres.)	MLE (S.E.)	Ct=Liberal		Ct=Conservative	
		Majority	*Dissent*	Majority	*Dissent*
Sobeloff (R)	-3.8917*** (0.7019)	47	0	12	16
Haynsworth (R)	1.018 (0.5552)	62	13	66	5
Boreman (R)	2.0302 (1.0803)	39	9	33	1
Bryan (D)	1.6368* (0.6744)	36	15	37	3
Bell (D)	-3.7997*** (0.9104)	29	0	8	9
Winter (D)	-3.5264*** (0.6348)	60	3	30	51
Craven (D)	-2.0600 (1.1111)	34	1	26	6
Butzner (D)	-2.3709*** (0.5859)	46	4	29	27
Russell (R)	2.7445*** (0.4920)	32	29	103	6
Field (R)	1.6227 (1.1702)	15	4	19	1
Widener (R)	3.0090*** (0.4984)	25	32	95	6
Hall (D)	0.6369 (0.4026)	27	16	67	21
Phillips (D)	-1.6768*** (0.5002)	24	7	25	39
Murnaghan (D)	-2.4441*** (0.5424)	30	5	25	48
Sprouse (D)	-2.1547*** (0.6749)	23	3	24	27
Ervin (D)	-3.4784*** (0.7742)	31	2	22	46
Chapman (R)	3.8837*** (0.8233)	9	11	43	0
Wilkinson (R)	4.1225*** (0.8508)	7	16	54	2
Sneeden (R)	n.a.	—	—	3	0
Wilkins (R)	-4.6961*** (1.4256)	14	6	53	0
Niemeyer (R)	4.1787*** (0.9459)	5	10	26	0
Hamilton (R)	0.0606 (0.8269)	8	3	17	6
Luttig (R)	4.4410*** (1.1157)	3	8	23	0
Williams (R)	4.4262 (2.4846)	8	2	22	0
Michael (D)	-6.1129*** (1.4367)	8	0	1	19
Motz (D)	-4.1497** (1.3865)	6	0	4	11

Note: The model is testing the probability of each judge (the dependent variable) joining the majority based on the direction of the majority's ruling (the independent variable). MLE=maximum likelihood estimate for the parameter. S.E.=standard error.*significant at .05; **significant at .01; ***significant at .001.

In all but two instances, the judge's ideological bias is consistent with the hypothesized effect of the party of the President who appointed the judge. The

first exception is Eisenhower appointee Simon Sobeloff, who voted with an indisputable liberal bias.[152] Interestingly, several southern senators opposed President Eisenhower's nomination of Sobeloff, a former Chief Judge of the Maryland Supreme Court and Solicitor General of the United States, who had been active in Republican party affairs. These senators predicted, correctly, that Sobeloff would prove to be a liberal judge:

> [Sobeloff's] liberal racial attitudes had sparked strong opposition from southern senators during his confirmation hearings. At one point Senator Eastland [from Mississippi] had exclaimed, "The kindest thing that can be said about the nominee is that he is on the borderline of Red philosophy"... Eastland showed his great displeasure with the Sobeloff nomination by bottling up confirmation inside the Judiciary Committee for one year before a vote was taken.[153]

The other judge, Albert Bryan, a Democrat from Virginia appointed by Kennedy, may have behaved in a way more reflective of a Southern Democrat although the other democratic appointments from the southern states within the Fourth Circuit do not exhibit the same regional distinction.

2. *A Few Judges Do Not Vote Consistently with the Party of Their Appointing President but Instead Vote Strategically*

Circuit courts of appeals, like the Supreme Court, are collegial institutions that decide cases collectively, and when sitting en banc, they decide cases as an entire group.[154] Thus, appeals court judges, again like Supreme Court justices, must rely on negotiation strategies to influence how cases are decided.[155]

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[152] Sobeloff was not the only Eisenhower appointee to vote more like a Democratic appointee. Eisenhower Supreme Court appointees Chief Justice Warren and Justice Brennan also behaved contrary to the predicted ideological direction. "Indeed, according to a widely circulated but apparently apocryphal story, Eisenhower was asked if he had made any mistakes as President and replied, 'Yes, two, and they are both sitting on the Supreme Court.'" BAUM, *supra* note 51, at 42 (quoting Alyssa Sepinwall, *The Making of a Presidential Myth*, WALL ST. J., Sept. 4, 1990, at A11 (letter)).

[153] *See* DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 81 (1988) (citing 102 CONG. REC. 12855 (1956); PELTASON, *supra* note 128, at 24).

[154] *See supra* note 70–71 and accompanying text.

[155] First Circuit Senior Judge Frank Coffin has described appellate judicial collegiality as:

> The deliberately cultivated attitude among judges of equal status and sometimes widely differing views working in intimate, continuing, open, and noncompetitive relationship

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Murphy did not examine whether his hypotheses would also apply to courts of appeals, but he expected that the bargaining process he documented on the Supreme Court would occur on any collegial court which follows similar formal rules to reach a group decision.[156]

The procedures governing en banc circuit court decisionmaking are like those governing Supreme Court decisionmaking in meaningful ways. First, the majority rules. Second, individual judges have the discretion to vote as they wish—they determine how they shall vote and which opinion to join. Third, the judges meet in conference after oral argument to take an initial vote, but the vote is not binding. Fourth, after conference, the judges are in regular communication regarding the decision, and draft opinions are circulated. Fifth, judges may change their votes and make comments on draft opinions during this stage. Sixth, the position of each judge is known by the other judges during this process of deciding. Finally, the judge does not have to adopt her ultimate position until immediately before the decision is announced.

In light of the similarities in Supreme Court and circuit court decisionmaking processes, I hypothesize that the same internal strategic dynamics observed in studies of the Supreme Court will also play out in the courts of appeals with respect to a minority of judges. Small group theory and the strategic account inform our expectations by telling us that judges within a group may forego their policy preferences in favor of other goals, such as influence on the content of the majority opinion, participation on the winning side, or position as a pivotal voter. The internal strategic phenomena observed on the Supreme Court (e.g., opinion writing and signing negotiations and swing justices) support the hypothesis that judges will vote against their policy

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> with each other, which manifests respect for the strengths of the others, restrains one's pride of authorship, while respecting one's own deepest convictions, values patience in understanding and compromise in nonessentials, and seeks as much excellence in the court's decision as the combined talents, experience, insight, and energy of the judges permit.

FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING AND JUDGING 215 (1994).

Judge Coffin asserts, based on personal experience, that the growth in the number of judges in a court results in a corresponding decrease in collegiality because each judge sits less frequently with any other judge. This certainly makes sense: if you anticipate the need to persuade someone in the future—if you have a long term relationship with successive interactions—you will be more cooperative. Second Circuit Senior Judge James Oakes concurs: "nine times out of ten proximity makes the heart grow fonder, or, perhaps it should be put, makes the minds more compatible." James L. Oakes, *On Appeal: Courts, Lawyering, and Judging*, 104 YALE L.J. 2369, 2376 (1995) (book review).

[156] *See* Walter F. Murphy, *Courts as Small Groups*, 79 HARV. L. REV. 1565, 1569 (1966).

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preferences (or inconsistently with the predictions of the attitudinal model) for strategic reasons but only to join the majority, not to dissent.[157]

An empirical test of the micro-level attitudinal model on the Fourth Circuit's en banc decisions (Hypothesis 1 model) reveals that seven Fourth Circuit judges did not vote strictly according to their policy preferences as measured by the party of the appointing President: Judges Haynsworth, Boreman, Craven, Field, Hall, Hamilton, and Williams.[158] A close examination of the voting behavior of these judges reveals a common thread connecting them: they voted consistently with the majority.

Table 5. Swing Judges on the Fourth Circuit, 1962-1966

Judge	Signed onto Majority		Dissented	
	Freq.	Rel. Freq.	Freq.	Rel. Freq.
Haynsworth (R)	128	87.7%	18	12.3%
Boreman (R)	72	87.8%	10	12.2%
Craven (D)	60	89.6%	7	10.4%
Field (R)	34	87.2%	5	12.8%
Hall (D)	94	71.8%	37	28.2%
Hamilton (R)	25	73.5%	9	26.5%
Williams (R)	30	93.8%	2	6.3%

Judges Haynsworth, Boreman, Craven, Field, and Williams all voted with the majority at a rate more than one standard deviation above the court's average, while Judges Hall and Hamilton joined the majority slightly more often than average. In the instance of Haynsworth, Boreman, Craven, and Field, each judge joined liberal majorities roughly as often as conservative majorities. Judge Williams was not able to join as many liberal majorities

[157] *See supra* notes 70–104 and accompanying text.

[158] We can conclude that the attitudinal model does not account for the voting behavior of these judges for two reasons: (1) the independent variable is not statistically significant for six of the judges, and (2) the parameter estimates (maximum likelihood estimates of β) for each judge is small relative to the standard deviation estimate (SE). If β is less than two standard deviations greater than (or less than) zero, we cannot conclude that the independent variable (here the ideological direction of the court's decision) is related to the dependent variable (here the vote of the judge).

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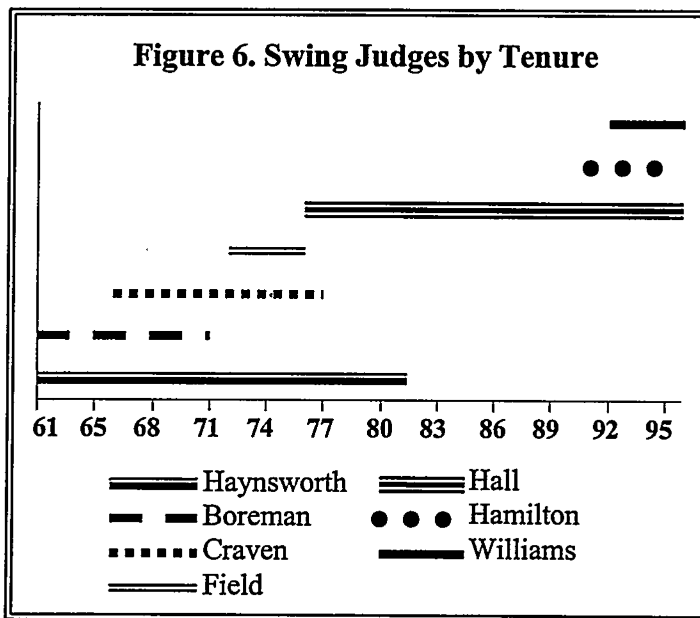
because the en banc court recently has not turned that direction as often; but she had roughly the same low rate of dissent from liberal majorities as from conservative ones and has the highest majority participation rate in en banc cases of any Fourth Circuit judge during the period of this study, 1962–1996.

Since these judges voted more frequently with the majority than the average judge, we can conclude that they were swing judges. We may not be able to determine from this test why they vote with the majority (e.g., to influence majority opinion content, to achieve status, or to avoid loss). But, we can conclude that they are behaving strategically as evidenced by their willingness to join majority opinions and give up the opportunity to file dissenting opinions even though the majority decision conflicts with our proxy for their policy preferences.

Figure 6. Swing Judges by Tenure



We can also discern that the Fourth Circuit has had at least one swing judge, if not more, during the period of this study. Figure 6 graphically represents the tenure time line of each swing judge and discloses that the swing judges' terms cover the period of interest. Thus, a strategic judge was participating in most en banc decisions of the court.

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3. *The Presence of Swing Judges Will Result in an En Banc Court That Does Not Vote Consistently with the Party of the Appointing President of the Majority Coalition*

Since the internal dynamics strategic model proves correct for at least some of the judges in the en banc circuit court context, then the attitudinal model will fail to predict the entire court's decision—that is, it will fail as a macro-level model. If the court has several swing judges (as reflected in a test of Hypothesis 2), then we will not be able to explain the en banc court's decisions by looking primarily to its composition because the swing judges will vote against their party cohort to join majorities. That is, we would not expect the entire court to vote consistently in line with the majority coalition's party due to the strategic behavior of swing judges.

To test this expectation, we look at the relationship between the court's composition by party of the appointing President and the ideological direction of the decision of the court (or a majority of the court); such an examination is a macro-level analysis. The ideological direction of a given decision is our dependent variable (C_i). Our independent variable is the relative number of Republican appointees participating in the decision. We seek to test here, as we did in Hypothesis 1, whether there is a relationship between the dependent and independent variables and, if there is, the strength of the relationship. My null hypothesis (H_0) is that there is no interaction between the ideological direction of the court's decision and the party of the appointing President of its members. My alternative hypothesis (H_a) is the opposite. The Hypothesis 3 model can be expressed as in Figure 7:

Figure 7. Hypothesis 3 Model:[159]

$$\pi(C_i=0) = \beta_0 + \beta_1 R_i$$

I evaluate the Hypothesis 3 model, as I did the Hypothesis 1 model, using logit.[160] In the Hypothesis 3 model, the probability of interest is the likelihood

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[159] The dependent variable C_i is the direction of the court's decision which is a binary variable equal to 0 if the Court rules in a liberal direction, 1 otherwise. $\pi(C_i=0)$ is the probability of a given court decision being liberal. β_0 is the constant. The independent variables R_i is a dummy ratio variable reflecting the court's party composition. The value of R_i increases as the number of Republican appointees increases relative to the number of Democratic appointees. The parameter of R_i is β_1. (I also tested a second model with an independent variable that was continuous and represented the percentage of Republican appointees who participated in the court's decision. The models produced comparable results.)

[160] *See supra* notes 84, 147–51 and accompanying text.

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of the court voting in a particular ideological direction ($\pi(C_i)$). I use the composition of the court by the party of the appointing President (R_i) to predict the likelihood of the court voting in a particular ideological direction.

Hypothesis 3 predicts that the ideological direction of the court's decision—the dependent variable—is unrelated to the party of the appointing President of the judges (the independent variable—R_i). So we will find support for Hypothesis 3 if we fail to reject the null hypothesis.

The results of the logistic regression of the Hypothesis 3 model are set forth in Table 6. We fail to reject the null hypothesis and cannot conclude that there is a relationship between composition of court by party of the appointing President (the independent variable) and the ideological direction of the court's decision (the dependent variable).

Table 6. Logistic Regression of Hypothesis 3 Model

Independent Variables	MLE	S.E.	Sig (p<x)
Republican Appointee (R_i)	-.0044	.0661	N.S.
Constant	.2453	—	—
-2 Log Likelihood	.004		N.S.

Note: The dependent variable is the direction of the court's decision (i.e., liberal or conservative) in all cases categorized for direction; *N*=252. The model is calculating the probability of a given decision being liberal. Of the 252 cases, the direction was liberal in 112 or 44.4%. MLE=maximum likelihood estimate for the parameter; S.E.=standard error; Sig=significance levels. N.S. = not significant.

Another way to think about the relative success or failure of a model is to ask whether the model predicts better than an uninformed observer. If you were simply to guess that the en banc Fourth Circuit decided a case conservatively, you would be right 55.6% of the time. We want a model to improve on guessing, reducing the amount of error. The Hypothesis 3 model (a macro-level attitudinal model) correctly categorizes 55.6% of the cases and thus produces no reduction in error.[161]

The attitudinal model, though successful in predicting the behavior of most Fourth Circuit judges, misses the decision reached by the court, arguably a more important concern as the court's decision is ultimately the one that

[161] Reduction in error $= 100 \times \frac{\text{\% correctly classified} - \text{\% in the modal category}}{100\% - \text{\% in the modal category}}$

See George & Epstein, *supra* note 49, at 335 n.20.

matters. The failure of the model could be attributable to the strategic influences on the judges the attitudinal model failed to explain.

4. *En Banc Courts of Appeals Will Vote Relatively Consistently with the Ideological Composition of the Supreme Court*

Judicial decisions in the federal system can be overruled by other actors: the Supreme Court can be overruled in certain instances by the Congress and the President. Likewise, courts of appeals are subject to review and possible reversal by the Supreme Court. Appeals court judges, like Supreme Court justices, are aware of this constraint on their ability to attain their policy goals. Based on strategic theory considering the effects of external forces, we would expect policy-oriented appeals court judges to consider the relative ideological position of the Supreme Court when making their decisions and to modify their behavior if necessary to prevent reversal.[162]

But not all circuit court decisions are reviewed by the high court, as not all losing litigants seek Supreme Court review[163] and the Court has discretionary control over those cases that are appealed.[164] The Supreme Court's oversight power is further narrowed by its limited capacity to review lower court decisions due to its scarce resources (one body deciding all cases collectively) coupled with the burgeoning size of the federal caseload.[165] We might suppose then that courts of appeals would not feel constrained by the Supreme Court's authority. But the specter of reversal and its associated reputational and policymaking costs may, despite the low risk of reversal, influence lower court decisions.[166] We would expect that courts of appeals decisions may be

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[162] *See* Segal et al., *Decisionmaking*, *supra* note 7 (testing a hierarchical model, which views circuit judges as policy seekers restrained by the presence of a superior—the Supreme Court—in the judicial hierarchy, by examining search and seizure cases); Songer et al., *supra* note 7, at 277 (examining "Supreme Court-circuit court interaction from a principal-agent perspective, employing a fact pattern analysis to determine the extent to which circuit courts follow their own policy preferences versus the extent that they follow the policy dictates of the Supreme Court").

[163] *See* Davis & Songer, *The Flow of Litigation Revisited*, *supra* note 2 (estimating that the rate of Supreme Court review of circuit court holdings is less than 1% after accounting for the rate of certiorari filings and the rate of grants).

[164] *See* EPSTEIN ET AL., *supra* note 2, at 81–83 (stating that the Supreme Court granted review to 11% of petitions in 1960 and to 4% in 1995).

[165] *See* FEDERAL COURT MANAGEMENT STATISTICS FOR UNITED STATES COURTS, *supra* note 123; Dragich, *supra* note 5.

[166] Second Circuit Judge Frank opined that the courts of appeals are "merely a reflector, serving as a judicial moon" to the Supreme Court's sun. Choate v. Commissioner, 129 F.2d 684, 686 (2d Cir. 1942).

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explained in part by looking to the ideological composition of the Supreme Court, but that the Court's ideological stance would not account for most variance in lower court outcomes (that is, it would be a statistically significant though relatively weak explanation for rulings).

In evaluating Hypothesis 4, we are interested in considering the relationship between the composition of the Supreme Court and the ideological direction of a decision of the en banc Fourth Circuit (or a majority of the en banc circuit court). Hypothesis 4 predicts that the ideological direction of the Fourth Circuit's en banc decision—the dependent variable (C_i)—is related to the ideological composition of the Supreme Court (the independent variable—SC_i—measured in the relative number of Republican appointees on the Court). SC_i is an ordinal variable that increases as the number of Republican Supreme Court appointees increases, and that decreases as the number decreases, with the initial value set at the 1962 term.[167] My null hypothesis (H_0) is that there is no relationship between the ideological direction of the court's decision and the party of the appointing President of the justices of the Supreme Court. My alternative hypothesis (H_a) is that court outcomes are influenced by Supreme Court composition. The Hypothesis 4 model is set forth in Figure 8 and is tested using logit:

Figure 8. Hypothesis 4 Model:[168]

$$\pi(C_i=0) = \beta_0 + \beta_1 SC_i$$

[167] I ran a separate statistical test to determine whether the relative political composition of the Supreme Court was substantially the same as the composition of the Fourth Circuit, and thus not amenable to segregating in this fashion. That is, if both variables are varying at the same rate and in the same direction, the Supreme Court variable may simply measure the same thing as the Fourth Circuit composition variable. I found a positive but very weak relationship between the variables and thus conclude that the test of the Hypothesis 4 model is not measuring the same thing as the test of Hypothesis 3.

[168] The dependent variable C_i is the direction of the court's decision which is a binary variable equal to 0 if the Court rules in a liberal direction, 1 otherwise. $\pi(C_i=0)$ is the probability of a given court decision being liberal. β_0 is the constant. The independent variable SC_i is a dummy ordinal variable reflecting the number of Republican appointees on the Supreme Court. The parameter of SC_i is β_1.

The results are set forth in Table 7:

Table 7. Logistic Regression of Hierarchical Model of All En Banc Cases Categorized by Direction, 1962-1996

Independent Variable	MLE	S.E.	Sig (p<x)
Supreme Court (SC_i)	0.2828	(0.0755)	0.0002
Constant	-0.5597	—	—
-2 Log Likelihood	14.655		0.0001

Note: The dependent variable is the direction of the court's decision (i.e., liberal or conservative) in all cases categorized for direction; $N=252$. Of these cases, the direction was conservative in 140 or 55.6%.
MLE=maximum likelihood estimate for the parameter; S.E.=standard error; Sig=significance levels.

The results of the statistical test of Hypothesis 4 demonstrate that the Supreme Court's composition by party of the justice's appointing President is a statistically significant factor explaining the decisionmaking of the en banc Fourth Circuit. But the Supreme Court's ideological composition is a weak factor as shown in the small maximum likelihood estimate for the parameter, β.[169] These findings support the conclusion that the Supreme Court, by its mere presence, acts as a constraining force on the decisions of the Fourth Circuit; but, the high court does not completely govern the lower court's rulings. The Supreme Court, then, continues to be a check on the behavior of the lower court.

V. CONCLUSION

Based on the theories and empirical evidence presented here, we can explain and predict micro-level judicial behavior on the en banc courts of

[169] Smaller values of β, as reflected in the MLE column, are associated with flatter curves and a weaker reaction of the dependent variable to variation in the independent variable. The closer β is to 0, the less the independent variable explains about the probability of observing a 1 for the dependent variable. *See* Nixon, *supra* note 148, at 431. How do we decide when an independent variable's explanatory value is so weak as to be practically irrelevant? If β is more than two standard deviations (SE) greater or less than 0, "we are 95% confident that the independent variable is related to the dependent variable ([i.e.,] is nonzero)." *Id.* at 433. Here, our maximum likelihood estimate of the parameter β (.2828) is more than two standard deviations (SE = .0755) greater than 0, so we are 95% confident that the composition of the Supreme Court does help to predict the ideological direction of an en banc decision of the Fourth Circuit.

appeals in light of the party of the President who appointed the judges. Most courts of appeals judges vote their attitudes. But the influence of individual attitudes on judicial decisionmaking appears to be vitiated for a minority of judges by the presence of other judges and the Supreme Court. These judges vote strategically. These two findings taken together mean that courts—the macro-level unit of analysis—are balanced. Thus, the institutional structure of the federal courts (collegiality and hierarchy) is successful at achieving the goal of limiting or moderating the behavior of judges at the intermediate appellate level. The use of multi-judge decisionmaking bodies combined with the presence of actors who can limit or reverse their decisions has the net effect of curbing preference maximization. That these internal and external constraints prevent unfettered discretion is probably by design, though the means by which the goal is achieved may be other than expected. The result is equilibrium on a given court between those judges acting to pursue policy and those seeking to achieve strategic ends.

Most judges believe they are classicists and go to great lengths to explain their decisions by reference to existing law. Rare is the judge who will go on record saying she is a raw instrumentalist. And despite legal realism, critical legal theory, and their permutations, most scholars and practitioners also perceive themselves largely as classicists. Consequently, many judges, scholars, and practitioners espousing normative theory may challenge the relevance of my positive theory to their work. But, for normative theory to be coherent, it must respond to what is actually going on, not merely what judges *perceive* themselves to be doing, or the prescription can only be persuasive to those judges already receptive to the idea. Normative theory uninformed by positive theory is built upon a foundation that is inherently flawed because it relies on the premise that judges *are* following classical legal theory.

Taken as a whole, then, what are the implications of my findings for the development of normative theories? On some level, the answer is obvious: the most fully articulated and grounded normative theories should incorporate, consider, and respond to the realities of how judges make decisions. The question of the implications of my findings for specific prescriptive theories is best left for those scholars developing such theories.

I would suggest, however, that scholars concerned about the growing caseload and size of the federal circuit courts because they fear that the larger circuit courts will be too divided and that the Supreme Court will lose its ability to retain control over the development of national law should reconsider the degree of their fear. My findings for the Fourth Circuit indicate that an internal equilibrium is achieved within an appellate court and remains even as the court grows—a balance achieved by strategic judges restraining the power of ideology-driven judges. Similarly, the Supreme Court maintained some

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authority over the decisions of the Fourth Circuit, acting as a check on its decisionmaking, despite the geometric increases in caseload.

And for those who remain more interested in the behavior of the Supreme Court than the circuit courts, remember that six of the nine sitting justices once served on circuit courts.[170] Were they, like most of the judges in my study, single-minded seekers of policy during their appeals court tenure? Or, did they play a strategic role? Did they change their approach to judging after ascension to the high court? Perhaps an appeals court swing judge becomes an ideologue after appointment to the Supreme Court because she has now satisfied her ambition and no longer has to check her political views at the courthouse door.

I suggest only a few possible questions prompted by the results of my theory. Future analyses will hopefully address these questions and, in addition, continue where I have left off by exploring other circuit courts with an eye to discerning whether the theory I have developed here is unique to the Fourth Circuit or sufficiently universal to inform our expectations about all appeals court judges.

[170] Justice John Paul Stevens served on the U.S. Court of Appeals for the Seventh Circuit from 1970 until his appointment to the Supreme Court by President Gerald Ford in 1975. President Reagan's first appointment to the Supreme Court was then-D.C. Circuit Judge Antonin Scalia, who served on the court of appeals from 1982 until 1986. Justice Anthony Kennedy, appointed by President Ronald Reagan to succeed Justice Lewis Powell in 1988, sat on the Ninth Circuit for 13 years. Bush appointee Justice Clarence Thomas served for one year on the D.C. Circuit, from 1990 until 1991. Both of President Bill Clinton's appointments to the Court have been elevated from circuit courts: Justice Ruth Bader Ginsburg served on the D.C. Circuit from 1980 until 1993 and Justice Stephen Breyer served on the First Circuit from 1980 until 1994. *See* EPSTEIN ET AL., *supra* note 2, at 222–26, 296–303; THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 482–83, 756, 836, 870–71 (Kermit L. Hall ed., 1992).

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