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## THE DYNAMICS AND DETERMINANTS OF THE DECISION TO GRANT EN BANC REVIEW

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*Abstract:* The ability of U.S. Courts of Appeals to control the development of law within their respective circuits has been strained by the practice of divisional sittings, the growing caseload at the circuit court level, the increasing number of judges sitting within each circuit, and the decreasing probability of Supreme Court intervention. The primary method of maintaining coherence and consistency in doctrinal development within a federal circuit is en banc review. Yet, many critics contend that en banc rehearing is a time-consuming, inefficient procedure that fails to serve its intended purpose and too often is abused for political ends. This Article attempts to address these normative arguments over the legitimacy of the en banc process by determining the positive causes of the decision. The Article proposes a hybrid model of the decision to grant en banc review, derived from the legal, attitudinal, and hierarchical theories of judicial behavior, and tests it empirically against nearly 1000 cases from three circuits. The model accurately predicts the decision to grant en banc review in nearly ninety percent of the cases. This Article concludes that three factors—reversal of a lower court or agency ruling, filing of a dissent, and a liberal panel ruling—largely account for which panel decisions will be reheard en banc.

The U.S. Courts of Appeals, which effectively have become the courts of last resort for most litigants and the source of doctrinal development for most legal issues,<sup>1</sup> decide the vast majority of cases by way of panels.

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1. In the 1996–1997 term, the U.S. Supreme Court decided 101 cases, compared to the more than 25,000 cases decided by the U.S. Courts of Appeals; fewer than 4% of the parties who sought a definitive ruling from the Court by way of a writ of certiorari were able to obtain it. *The Supreme Court's 1996 Term*, 111 Harv. L. Rev. 51, 435–36 (1997) (reporting Supreme Court figures); 1997 U.S. Jud. Conf. Ann. Rep. Table B-1 (reporting court of appeals figures). As can be seen by comparing these figures, the actual rate of Supreme Court review of lower court rulings is in fact lower than its rate of certiorari grants, as petitions seeking certiorari are filed from only a fraction of circuit court decisions. A study of three circuits estimated that the rate of Supreme Court review of circuit court holdings is only .5%. 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, 335 (1988–

Acceptance of the panel practice is in part a product of the availability of review of selected panel rulings by the court's full membership, termed "en banc" review.<sup>2</sup> At the behest of a judge or a party and with the concurrence of a majority of the circuit's active membership, all active members of the court, as well as any senior judge from the circuit who was a member of the original panel, will sit to decide an appeal en banc.<sup>3</sup> The en banc court's ruling becomes the circuit's decision in the case, and the court vacates any earlier panel decision.<sup>4</sup> Circuit courts rarely invoke the en banc procedure; courts of appeals resolve fewer than one percent of their cases en banc.<sup>5</sup>

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89); see also J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* xvii, 9–10, 23–56 (1981) (examining role of circuit courts of appeals "[a]s courts of last resort in the vast majority of federal cases, and as primary organs of judicial review of federal administrative agencies"); Donald R. Songer, *The Circuit Courts of Appeals*, in *The American Courts: A Critical Assessment* 35 (John B. Gates & Charles A. Johnson eds., 1991) (discussing methodology and implications of Songer's work with Davis).

2. This Article deals solely with en banc rehearings by U.S. Courts of Appeals of general jurisdiction. The Federal Circuit also has en banc power. Fed. R. App. P. 35. Federal district courts have also heard cases en banc, although very rarely. John R. Bartels, *United States District Courts En Banc—Resolving the Ambiguities*, 73 *Judicature* 40, 40 (1989) (identifying en banc hearings in 38 reported decisions and nine unpublished decisions from 1928–1989). State supreme courts that normally sit in divisions also retain the en banc hearing option, as do some state intermediate appellate courts and at least one state trial court. See, e.g., Daniel J. Meador et al., *Appellate Courts: Structures, Functions, Processes, and Personnel* 397–98 (1994) (discussing varying approaches at intermediate level); A. Lamar Alexander, Jr., Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities* (pt. 1), 40 *N.Y.U. L. Rev.* 563, 566–67 (1965) (explaining that state supreme courts that normally sit in divisions continue to review certain matters as entire body); John J. Connolly, Comment, *Maryland's Right of In Banc Review*, 51 *Md. L. Rev.* 434 (1992) (describing Maryland's constitutional right to en banc review at trial court level).

3. 28 U.S.C. § 46(c) (1994); Fed. R. App. P. 35.

4. See, e.g., 1st Cir. R. Int. Op. P. X(D); 4th Cir. R. 35(c); 5th Cir. R. 41.3; 6th Cir. R. 14(a); 10th Cir. R. 35.6; 11th Cir. R. 35-11.

5. The extremely low relative number of en banc decisions has been observed in studies focusing on different periods spanning the life of the intermediate appellate system. See, e.g., Sheldon Goldman & Tom Jahnige, *The Federal Courts as a Political System* 23 (3d ed. 1985) (observing that use of en banc procedure is "rare"); Howard, *supra* note 1, at 42, 193 (reporting that en banc cases comprise fewer than one percent of all cases from 1965–1967); Richard A. Posner, *The Federal Courts: Challenge and Reform* 133–34 (1996) (reporting that only 78 en banc decisions were rendered out of more than 25,000 decisions on merits in 1993); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 *Am. Pol. Sci. Rev.* 491, 493 n.7 (1975) (finding that en banc cases amounted to less than 1% of circuit caseload from 1965–1971); Michael E. Solimine, *Ideology and En Banc Review*, 67 *N.C. L. Rev.* 29, 46 (1988) (reporting for 1980–1987 period that approximately .5% of caseload of courts of appeals were en banc decisions); Alexander, *supra* note 2, at 564, 608 (finding that only 423 cases were decided en banc by all circuits from 1940–1964 and that 1.5% of decisions rendered in 1964 were en banc).

In 1995, the Fourth Circuit decided to rehear en banc eleven panel rulings,<sup>6</sup> including the unremarkable case of *Hardester v. Lincoln National Life Insurance Co.*<sup>7</sup> In *Hardester*, the court resolved a dispute over the meaning of a pre-existing duty clause in a health insurance policy. The *Hardester* decision turned on the proper interpretation of the policy's language, a heavily fact-laden inquiry with limited relevance to other disputes. Yet, in the same year it reheard such a relatively minor case, the Fourth Circuit refused to rehear en banc *O'Connor v. Consolidated Coin Caterers Corp.*,<sup>8</sup> a case in which the panel relied upon an interpretation of the Age Discrimination in Employment Act that contradicted the approach taken by every other circuit save one.<sup>9</sup> The U.S. Supreme Court granted certiorari to *O'Connor* and unanimously reversed the Fourth Circuit.<sup>10</sup>

The Fourth Circuit also refused to grant en banc rehearing to another dispute that eventually was argued before the Supreme Court and was the subject of widespread publicity. In *United States v. Virginia*, the Justice

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6. *Smith v. Virginia Commonwealth Univ.*, 62 F.3d 659 (4th Cir. 1995), *on reh'g en banc*, 84 F.3d 672 (4th Cir. 1996); *Robinson v. Shell Oil*, No. 83-1562, 1995 WL 25831 (4th Cir. Jan. 18, 1995), *on reh'g en banc*, 70 F.3d 325 (4th Cir. 1995), *rev'd*, 519 U.S. 337 (1997); *Gilliam v. Foster*, 61 F.3d 1070 (4th Cir. 1995) (en banc) (recounting votes and decision in unpublished and unavailable panel ruling); *Stiltner v. Beretta U.S.A. Corp.*, No. 94-1323, 1995 WL 25643, (4th Cir. Jan. 8, 1995), *on reh'g en banc*, 74 F.3d 1473 (4th Cir. 1996); *Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005 (4th Cir. 1995) (en banc); *Nasim v. Warden*, 42 F.3d 1472 (4th Cir.), *on reh'g en banc*, 64 F.3d 951 (4th Cir. 1995); *United States v. Hines*, 39 F.3d 74 (4th Cir. 1994), *on reh'g en banc*, 65 F.3d 392 (4th Cir. 1995), *vacated*, 516 U.S. 1156 (1996); *United States v. Langley*, No. 93-5219, 1994 WL 518394 (4th Cir. Sept. 23, 1994), *on reh'g en banc*, 62 F.3d 602 (4th Cir. 1995); *Pinder v. Johnson*, 33 F.3d 368 (4th Cir. 1994), *on reh'g en banc*, 54 F.3d 1169 (4th Cir. 1995); *Hardester v. Lincoln Nat'l Life Ins. Co.*, 33 F.3d 330 (4th Cir. 1994), *on reh'g en banc*, 52 F.3d 70 (4th Cir. 1995); 11126 Baltimore Blvd., Inc. v. Prince George's County, 32 F.3d 109 (4th Cir. 1994), *on reh'g en banc*, 58 F.3d 988 (4th Cir. 1995).

7. 33 F.3d 330.

8. 56 F.3d 542 (4th Cir. 1995) (holding that plaintiff who asserts that he was fired because of his age must have been replaced by worker who is under 40, and thus not within protected class, in order to state prima facie case of age discrimination), *rev'd*, 517 U.S. 308 (1996).

9. *See Rinehart v. City of Independence*, 35 F.3d 1263, 1265-66 (8th Cir. 1994); *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 153-56 (7th Cir. 1994); *Carter v. City of Miami*, 870 F.2d 578, 582-83 (11th Cir. 1989); *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1335 n.2 (1st Cir. 1988); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506 (5th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792-93 (3d Cir. 1985); *Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984); *Cuddy v. Carmen*, 694 F.2d 853, 857 (D.C. Cir. 1982); *Douglas v. Anderson*, 656 F.2d 528, 531-33 (9th Cir. 1981). *But see LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993) (requiring plaintiff to show that replacement was person outside protected age group).

10. *See* 517 U.S. 308.

Department challenged the Virginia Military Institute's (VMI) refusal to admit women.<sup>11</sup> Seventeen interest groups filed amicus curiae briefs in the Fourth Circuit on the side of the federal government urging the panel to reverse the district court's ruling that a single-gender educational system such as that found at VMI does not offend the Equal Protection Clause of the Constitution.<sup>12</sup> The panel refused.<sup>13</sup> The Department of Justice sought full court review, but the Fourth Circuit voted to deny rehearing en banc.<sup>14</sup> In the same year, the Fourth Circuit granted a party's motion for en banc rehearing of an unpublished panel decision reversing the grant of summary judgment in a civil antitrust suit.<sup>15</sup> It may seem counter-intuitive that the Fourth Circuit decided to rehear a minor contract interpretation case such as *Hardester* but not *O'Connor*, a case involving a significant intercircuit conflict, and refused to grant rehearing en banc to the highly publicized VMI case, *United States v. Virginia*, while granting rehearing to a civil suit of no particular note.

Surprisingly little is known about why circuit courts select certain cases for en banc rehearing. While a number of judges, scholars, and other court observers have considered whether courts *should* use the en banc procedure,<sup>16</sup> few have considered why it *is* used.<sup>17</sup> Yet, understanding

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11. 976 F.2d 890, 892 (4th Cir. 1992), *cert. denied*, 508 U.S. 946 (1993), *on remand*, 852 F. Supp. 471 (1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 518 U.S. 515 (1996). The Supreme Court did not grant review to the first Fourth Circuit VMI ruling, but rather to the second. However, the Supreme Court's decision addressed the legal conclusions initially reached by the first Fourth Circuit decision, namely that gender differences justify separate educational programs, which were unchanged by the second circuit decision.

12. *Id.* at 890-91.

13. *Id.* at 899-900. The panel concluded that "(1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex; [and] (2) the introduction of women at VMI will materially alter the very program in which women seek to partake." *Id.* at 899. However, the court concluded that Virginia had not presented arguments to justify the absence of a "VMI-type" education for women. *Id.* Therefore, the panel remanded the case to the district court to require Virginia's creation and implementation of a "parallel" program open to women. *Id.* at 900.

14. *Id.* (reporting vote on suggestion for rehearing en banc on Nov. 19, 1992).

15. *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, No. 90-3100, 1991 WL 211859 (4th Cir. Oct. 22, 1991), *on reh'g en banc*, 981 F.2d 160 (4th Cir. 1992).

16. See, e.g., Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 582-83 (1969) (arguing that en banc process is inefficient and unwise); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 Geo. Wash. L. Rev. 1008 (1991) (examining costs and benefits of en banc procedure and utilizing descriptive data to consider legitimacy of different rationales); Irving R. Kaufman, *Do the Costs of the En Banc Proceeding Outweigh Its Advantages?*, 69 Judicature 7, 7 (1985) (arguing from his experience as Second Circuit judge that "the negative aspects associated with en banc far surpass its purported benefits"); Neil D. McFeeley, *En Banc Proceedings in the United States Courts*

the decision to grant en banc review is important because en banc cases are arguably the most significant cases decided by the courts of appeals.

The en banc case is of greater consequence than the more common panel case for a number of reasons. Most obviously, the en banc hearing procedure limits the cases reviewed by the entire court to those selected by a majority of the court's members. This procedure creates the presumption that the cases are likely to involve difficult, complex, highly political, or at least important legal questions.<sup>18</sup> The en banc case poses

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*of Appeals*, 24 Idaho L. Rev. 255, 255 (1987–88) (proposing procedural reforms to reduce number of “frivolous” suggestions for en banc consideration); Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit, 1989–93*, 60 Brook. L. Rev. 491 (1994); Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit, 1984–1988*, 55 Brook. L. Rev. 355 (1989); Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 Brook. L. Rev. 365 (1984) (explaining, in series of three articles, value of Second Circuit’s relatively few en banc rehearings); Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805, 807 (1993) (arguing for increased use of procedure to achieve greater doctrinal uniformity, reduce dominance of court by minority of its members, and decrease need for Supreme Court intervention); Alexander, *supra* note 2, (pts. 1 & 2) at 563, 726 (presenting exhaustive and highly critical detailing of en banc review); Note, *The Politics of En Banc Review*, 102 Harv. L. Rev. 864 (1989) (criticizing what author judges to be increased ideological use of en banc procedure); Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72 Mich. L. Rev. 1637, 1649 (1974) (examining effectiveness of en banc procedure as tool for ensuring uniformity and authority in circuit court rules).

For a general discussion and review of the critical accounts, see Stein, *supra*, at 806–07, 829–52 (examining arguments that en banc process leads to numerous disadvantages such as “judicial inefficiency, diminished finality of three-judge panel decisions[,] impairment of collegiality within a circuit[,]” and politicization of appellate process).

17. Arthur Hellman considered the relationship between intracircuit conflicts and the decision to grant en banc review. Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. Chi. L. Rev. 541 (1990). Hellman systematically examined the Ninth Circuit papers to determine the role of the en banc procedure in maintaining consistency in the law of the circuit. He reviewed all intra-court memoranda regarding en banc review between 1981 and 1986 and found that “en banc ballots were rarely requested and even more rarely successful. . . . [and] contributed only minimally to preservation of uniformity in the law of the Ninth Circuit.” *Id.* at 548–50.

Michael Solimine examined empirically claims that the en banc procedure has become politicized by Reagan appointees. Solimine, *supra* note 5, at 33. Combining normative and positive perspectives on the en banc procedure, Solimine evaluated a three-term sample of en banc decisions against a set of criteria for appropriate purposes for en banc review. He concluded that the criticisms of Reagan judges for ideological abuse of the en banc mechanism were unfounded. *Id.* at 45–51; see also Ginsburg & Falk, *supra* note 16, at 1027–31 (examining legal issues prompting en banc consideration), 1036–39 (comparing votes and participation in en banc and panel decisions).

18. Deborah J. Barrow & Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* 5 & nn.11–12 (1988) (observing that “[a]n en banc session is considered an extraordinary procedure, generally reserved for particularly important or novel legal questions”); Burton M. Atkins, *Decisionmaking Rules and Judicial Strategy on the United States Courts of Appeals*, 25 W. Pol. Q. 626, 638 (1972) (explaining that “[e]n banc sessions

larger consequences because it expends greater judicial and litigant resources,<sup>19</sup> exposes the parties and circuit to the possibility of a splintered ruling,<sup>20</sup> and removes some of the standard constraints on judicial decisionmaking at the court of appeals level.<sup>21</sup>

By granting rehearing en banc, a court may seek to speak in a single voice; however, the result is not necessarily harmonious. A circuit court's ability to sit en banc may work to protect the integrity of circuit law and to reinforce institutional legitimacy by ensuring consistency and conformity in decisionmaking. Yet, the appearance of the full court regularly reviewing and often reversing decisions by panels may undermine a basic tenet of our intermediate appellate system: three-judge panels representing and acting on behalf of the whole court. In addition to the material costs<sup>22</sup> such as delay, judicial inefficiency, administrative expense, and attorneys' fees, seeking one voice can produce the opposite effect by causing intracourt acrimony, ideological polarization, and lost collegiality.<sup>23</sup>

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are reserved for issues of significance and controversy. . . . Cases heard *en banc* may be considered more analogous to those considered by the Supreme Court in that they raise controversial issues and therefore tap, and more accurately reflect, the basic ideological disagreements within the court."); Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 *Judicature* 133, 134 (1990) (utilizing en banc cases as subject of his study in part because such cases are more significant).

19. See *infra* note 22.

20. See, e.g., Kaufman, *supra* note 16, at 8 (detailing examples of en banc cases that produced "a litany of diverging opinions"); Solimine, *supra* note 5, at 38 (presenting, as part of "functional critique" of en banc process, criticism that it "results in fragmented opinions of dubious precedential value").

21. For example, the en banc court, unlike a panel, can overturn circuit precedent. Cf. Ginsburg & Falk, *supra* note 16, at 1050 (predicting, based on their experiences as D.C. Circuit judge and clerk, respectively, that "[t]he D.C. Circuit's en banc practice will always be controversial within the court and among the Bar. . . . because the stakes are high whenever the court decides to rehear a case en banc").

22. See, e.g., Steven Bennett & Christine Pembroke, "Mini" *In Banc Proceedings: A Survey of Circuit Practices*, 34 *Clev. St. L. Rev.* 531, 543 (1986); Carrington, *supra* note 16, at 582-83 (discussing how process is "time-consuming for the judiciary and burdensome to litigants"); Ginsburg & Falk, *supra* note 16, at 1018-20; Kaufman, *supra* note 16, at 7 (arguing "that the en banc proceeding is the most time consuming and inefficient device in the appellate judiciary's repertoire"); Solimine, *supra* note 5, at 37-44 (surveying "the criticism[s] of the en banc process that its costs far outweigh its benefits"); Peter Michael Madden, Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 *Fordham L. Rev.* 401, 417-18 (1974).

23. See, e.g., Howard, *supra* note 1, at 217 (observing from his interviews with judges of Second, Fifth, and D.C. Circuits that "[t]he [en banc] procedure can intensify conflict and polarize courts"); Bennett & Pembroke, *supra* note 22, at 543-44; Carrington, *supra* note 16, at 583; Ginsburg & Falk, *supra* note 16, at 1021; Kaufman, *supra* note 16, at 8; Douglas O. Linder, *How Judges Judge: A Study of Disagreement on the United States Court of Appeals for the Eighth Circuit*, 38 *Ark. L. Rev.*

This Article proposes, tests, and considers the implications of a hybrid theory of the decision to grant en banc review. The theory is “hybrid” because it is composed of seven separate hypotheses derived from existing positive theories of judicial decisionmaking in the resolution of cases on the merits. The Article tests the theory by comparing all panel decisions reheard<sup>24</sup> en banc by three circuits<sup>25</sup> (305 cases) to a random sample of panel decisions from those circuits that the court did not rehear en banc (610 cases).<sup>26</sup> The model accurately predicts whether the circuit

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479, 487 (1985) (noting from interviews with Eighth Circuit judges that “[t]wo judges suggested that en banc cases more frequently generate ‘bad feelings’ than do panel cases. . . . [which t]hey attributed . . . not to the language contained in en banc dissents, but rather to the dynamics of the decisionmaking process in en banc cases”); Newman, *In Banc Practice in the Second Circuit, 1984–1988*, *supra* note 16, at 369 (arguing from circuit judge’s vantage point that “frequent use of the in banc practice surely poses a threat to [collegiality]”); Solimine, *supra* note 5, at 39 (citing as weakness of en banc process possibility that en banc decisionmaking would lead to “acrimony among concurring and dissenting judges”); Stephen Wermiel, *Reagan and the Courts: Full-Court Review of Panel Rulings Becomes Tool Often Used by Reagan Judges Aiming to Mold Law*, Wall St. J., Mar. 22, 1988, available in 1988 WL-WSJ 475907 (quoting D.C. Circuit Chief Judge Patricia Wald’s contention that en banc review “heighten[s] tensions” among judges). *But see* Albert Branson Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 96–97 (1954) (representing that his Third Circuit colleagues “think that [the en banc] procedure has been very helpful in maintaining the very high esprit de corps which they enjoy”); Solimine, *supra* note 5, at 40 (arguing that “[e]specially when cases are ‘important’, the participation of all the judges may contribute to institutional harmony by permitting the entire court to participate”); Stephen L. Wasby, *Communication in the Ninth Circuit: A Concern for Collegiality*, 11 U. Puget Sound L. Rev. 73, 108 (1987) (concluding, based on interviews with Ninth Circuit judges, that most consider en banc process to be “healthy conflict in an exchange of views”); Mich. L. Rev. Note, *supra* note 16, at 1649, 1651 & n.67 (observing, based on circuit judges’ survey responses, that “[i]nstitutional harmony may be advanced by permitting judges to participate in important cases about which they have strong feelings” but concluding that this alone would not justify en banc rehearing).

24. I do not include in this evaluation cases heard as an initial matter en banc because my analysis involves a comparison of the underlying panel decisions to panel decisions that were not reheard en banc.

25. The three circuits are the Second Circuit, which includes Connecticut, New York, and Vermont; the Fourth Circuit, which covers Maryland, North Carolina, South Carolina, Virginia, and West Virginia; and the Eighth Circuit, which governs Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

26. I do not limit my study to those cases in which a party filed a suggestion for en banc rehearing for several reasons. First, the suggestions are not publicly available. Second, Hellman’s research indicates that litigant request is not the primary mechanism for rehearing en banc, but rather suggestion by a judge more often accounts for the decision. Third, even the fact that no one—litigant or judge—asked for reconsideration is reflective of the very dynamics and determinants that I seek to uncover. Finally, there is some evidence that suggestions for en banc reconsideration, although “disfavored” by the Federal Rules, are made in a substantial portion of cases. *See, e.g.*, Delmar Karlen, *Appellate Courts in the United States and England* 55 (1963) (reporting that petitions for rehearing were filed in about half of Second Circuit’s cases and that petitions often requested en banc rehearing); John C. Godbold, *The Eleventh Circuit Court of Appeals—The First Ten Years*, 43 Mercer L. Rev. 961, 974 (1992) (estimating that suggestions were filed in approximately 5000 cases



court will rehear a panel decision in nearly ninety percent of the cases. Three factors in particular—reversal of a lower court or agency ruling, filing of a dissent by a panelist, and a liberal ruling—largely account for which panel decisions will be reheard en banc. Factors typically assumed to be relevant, such as the composition of the panel and an intercircuit conflict, did not have a measurable impact on the decision.

Part I of this Article begins with a brief consideration of the origin and history of the courts of appeals, the adoption of divisional sittings, and the introduction of the en banc procedure. Part II considers three dominant theories of judicial decisionmaking at the intermediate appellate level—legal, attitudinal, and hierarchical—and delineates hypotheses with respect to each theory about the determinants and dynamics of the decision to grant en banc review. Part III presents an integrated model<sup>27</sup> of judicial decisionmaking in the en banc process and tests this model against a substantial dataset (nearly 1000 cases). Part IV concludes by considering the practical implications of the empirical results for litigants, the normative implications for the judiciary, and the positive implications for judicial process scholars.

## I. THE EVOLUTION OF THE COURTS OF APPEALS AND EN BANC REVIEW

One can better understand the dynamics of the en banc process by first looking at the development of the procedure. The explanation for the creation and use of the en banc procedure begins with an account of the courts of appeals adopting a practice of sitting in divisions rather than as an entire court.<sup>28</sup> The history ends with the debate over whether courts of

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during the 11th Circuit's first decade (1981–1990)); McFeeley, *supra* note 16, at 268–69 (reporting that suggestions were filed in approximately 17% of D.C. Circuit disposed cases in 1985 and in approximately 8% of Ninth Circuit cases from 1981–1985).

27. The term “model,” as used here and throughout this Article, connotes explanatory models: those that seek to describe and *explain* phenomena. A good model will *explain* a sizeable percentage, although 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) (“[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 phenomena—say, judicial decision making—we lose the 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.”).

28. A detailed and complete account of the evolution of the courts of appeals may be found in various sources. *See, e.g.*, Felix Frankfurter & James M. Landis, *The Business of the Supreme Court*

appeals, having adopted the practice of sitting in panels of three judges, had the power to convene as a whole to decide selected cases, and if so, when they could do so.

### A. Three-Judge Panels

Many court of appeals procedures, including hearing cases in three-judge panels, can be traced to the procedures of the courts that preceded them. Congress created the predecessors to the U.S. Courts of Appeals—the old “circuit courts”—along with the Supreme Court and the district courts in the Judiciary Act of 1789.<sup>29</sup> Congress provided that the circuit courts would sit in three-judge panels<sup>30</sup> but did not create judgeships for the circuit courts.<sup>31</sup> Instead, three judges drawn from other federal courts<sup>32</sup> visited each of the courts in one region in a particular sequence, traveling on horseback and “riding circuit.”<sup>33</sup> The Judiciary Act of 1869

(1927); Jeffrey B. Morris, *Federal Justice in the Second Circuit: A History of the United States Courts in New York, Connecticut, & Vermont, 1787–1987* (1987); Roscoe Pound, *Organization of Courts* 103–09, 194–240 (1940); Richard J. Richardson & Kenneth N. Vines, *The Politics of Federal Courts: Lower Courts in the United States* ch. 2 (1970); Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System* (1994).

29. Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. The original circuits were the eastern, middle, and southern. § 4, 1 Stat. at 74; *see also* Pound, *supra* note 28, at 103–05.

30. § 4, 1 Stat. at 74–75 (providing that circuit court “shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum”).

31. Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 28–29 (4th ed. 1996). In 1800, a lame duck Federalist Congress authorized three circuit judgeships for each of five circuits and one for the sixth in the infamous Law of the Midnight Judges, Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, and Federalists were named to all of the new judgeships. Fallon et al., *supra*, at 34; Frankfurter & Landis, *supra* note 28, at 21 & n.56 (listing appointments); 1 Charles Warren, *The Supreme Court in United States History* 193 (rev. ed. 1926) (reporting newly elected President Thomas Jefferson’s view that Federalists created circuit judgeships to ensure that federal courts would serve as Federalist “stronghold” from which to attack the works of Jefferson’s government). The newly elected Jeffersonians, shortly after taking control of Congress, abolished the judgeships. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (repealing judiciary acts of preceding Congress). *See generally* Fallon et al., *supra*, at 34; Frankfurter & Landis, *supra* note 28, at 25–28.

32. Originally, two judges were drawn from the Supreme Court and one from a district court within the circuit’s jurisdiction. Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, 74–75 (prescribing that two Supreme Court Justices and one district judge would comprise circuit bench). Later, one Justice and one or two district judges were drawn. Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333, 333 (providing that only one Justice was required for circuit court sessions).

33. Fallon et al., *supra* note 31, at 28–29; Frankfurter & Landis, *supra* note 28, at 21–23; Morris, *supra* note 28, at 18–19. Historian and legal scholar Wythe Holt has concluded, based on the historical record, that Congress “[s]taff[ed] the circuit courts with Supreme Court justices both [to] save[] money and assure[] the proponents of a strong judiciary that the most important judges would sit in the trial of the cases involving alienage and diversity” that fell within the circuit courts’

created one separate circuit court judgeship for each of the then-existing nine judicial circuits.<sup>34</sup> This circuit judge sat with two judges drawn from district courts in the circuit, and occasionally a justice from the Supreme Court would sit in for either the circuit judge or a district judge.<sup>35</sup> Thus, the old circuit court panels never had a distinct identity because the judges sitting on the panels changed from session to session.<sup>36</sup>

The circuit courts also lacked a distinct realm of judicial authority. They served along with the district courts as trial courts in diversity of citizenship cases and in criminal matters.<sup>37</sup> Although granted limited power to review district court decisions in large civil suits,<sup>38</sup> the old

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jurisdiction. Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 Duke L.J. 1421, 1488–89. Historian Charles Warren has explained that the justices' circuit service also served as a form of public promotion for the new federal judicial branch because the justices met individuals in different parts of the nation during their travels. Warren, *supra* note 31, at 58. But, the justices bitterly complained about the onerous burden of circuit riding and fought to end it. *Congressional Quarterly's Guide to the U.S. Supreme Court* 9, 32 (Elder Witt ed., 1979) (recounting various complaints including physical hardships of long, uncomfortable, and occasionally dangerous travel and unpleasant accommodations and legal questions posed by Supreme Court review of circuit cases involving justices); *see also* 1 Julius Goebel, Jr., *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 554–69 (1971) (detailing Supreme Court's "revolt against circuit riding").

34. Act of Apr. 10, 1869, ch. 22, § 2, 16 Stat. 44, 45 (providing "[t]hat for each of the nine existing judicial circuits there shall be appointed a circuit judge, who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit"); *see also* Fallon et al., *supra* note 31, at 34, 36 (explaining that Reconstruction Congress established circuit judgeships in response to "surge in federal judicial business"); Frankfurter & Landis, *supra* note 28, at 73–76 (detailing legislative compromises producing 1869 Act).

35. § 2, 16 Stat. at 45 (providing that any two of these judges—Supreme Court justice or circuit or district judges—would constitute quorum of circuit court and that judges could sit apart to try cases); *see also, e.g.*, Pound, *supra* note 28, at 197.

36. *Cf. Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 68–69 (3d Cir. 1940) (en banc), *aff'd*, 314 U.S. 326 (1941) (observing that circuit courts of appeals lacked permanent membership and were staffed by judges drawn from other courts).

37. Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–77, 78–79. *See generally* Fallon et al., *supra* note 31, at 29–31 (detailing circuit and district courts' substantive jurisdictional boundaries); Pound, *supra* note 28, at 104–05 (describing authority of district and circuit courts). The circuit courts held exclusive jurisdiction over substantial criminal offenses but shared authority with the district courts over lesser criminal offenses (that is, those offenses for which the punishment did not exceed a whipping of "thirty stripes," a \$100 fine, or a six-month prison term). §§ 9, 11, 1 Stat. at 76–77, 78–79. The circuit courts had concurrent jurisdiction with district courts and state courts over civil cases where the dispute exceeded \$500. § 11, 1 Stat. at 78.

38. §§ 21, 22, 1 Stat. at 83, 84. Parties in admiralty cases involving disputes in excess of \$300 could appeal district court rulings to the circuit court. § 21, 1 Stat. at 83. Losing parties in civil actions where the sum in dispute exceeded \$50 could seek circuit court review of a district court decree if they satisfied certain procedural requirements. § 22, 1 Stat. at 84.

circuit courts rarely exercised their appellate authority, primarily deciding cases within their original jurisdiction.<sup>39</sup> As Felix Frankfurter and James Landis observed, the first Judiciary Act contained “not a trace . . . of a suggestion” of an appellate tribunal interposed between the district courts and the Supreme Court.<sup>40</sup>

The Circuit Court of Appeals Act of 1891, popularly known as the Evarts Act,<sup>41</sup> inaugurated intermediate appellate courts in the federal judicial system. The circuit courts of appeals<sup>42</sup> created by the Evarts Act resembled the old circuit courts in many respects: the new and old courts shared the same geographic boundaries,<sup>43</sup> circuit judges sat on both courts,<sup>44</sup> three-judge panels heard disputes,<sup>45</sup> and visiting judges from district courts and the Supreme Court sat on panels.<sup>46</sup> The courts continued to rely upon visiting judges to decide cases because the circuits either lacked a permanent third judge<sup>47</sup> or carried a heavy

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39. Fallon et al., *supra* note 31, at 29 (explaining that circuit courts had “authority to review on writ of error final decisions of the district courts in civil cases in which the matter in controversy exceeded \$50, and, on appeal, final decrees in admiralty and maritime cases in which the matter in controversy exceeded \$300”); Frankfurter & Landis, *supra* note 28, at 12–13 (proffering, based on available data, that volume of appellate cases in circuit courts was not substantial and that “[t]he district and circuit courts were in practice two *nisi prius* courts”); *Congressional Quarterly*, *supra* note 33, at 31, 264 (explaining that “[f]or the nation’s first century, the Supreme Court was essentially the only body to hear appeals from the decisions of other federal courts”).

40. See Frankfurter & Landis, *supra* note 28, at 13.

41. Ch. 517, §§ 2–3, 26 Stat. 826, 826–27 (1891). The act’s popular name was that of its sponsor, Senator William Evarts of New York. For a history of the events leading up to the adoption of the Evarts Act, see Fallon et al., *supra* note 31, at 33–37, and Frankfurter & Landis, *supra* note 28, at 86–102.

42. Federal intermediate appellate courts were called “circuit courts of appeals” until 1948 when their name was changed to “courts of appeals.” Judicial Code of 1948, § 43(a), 62 Stat. 869, 870. The title of the head circuit judge was also changed from “senior circuit judge” to “chief judge.” § 45(a), 62 Stat. at 871.

43. § 2, 26 Stat. at 826 (creating circuit court of appeals in each existing circuit).

44. § 3, 26 Stat. at 827 (providing that circuit judges within circuit were competent to sit on circuit court of appeals for that circuit).

45. § 2, 26 Stat. at 826 (providing that court would “consist of three judges, of whom two shall constitute a quorum”).

46. § 3, 26 Stat. at 827 (providing that Supreme Court justices assigned to circuit and district judges within circuit were competent to sit on circuit court of appeals for that circuit).

47. The Evarts Act added one more circuit judge to each circuit, increasing the number on each to two, § 1, 26 Stat. at 826, except for the Second Circuit, which had previously received an additional judgeship, Act of Mar. 3, 1887, ch. 347, 24 Stat. 492, and now had three, Fallon et al., *supra* note 31, at 37.

caseload.<sup>48</sup> The significant feature distinguishing the circuit courts of appeals from the circuit courts was that the new courts held only appellate power, hearing appeals from both the district and circuit courts.<sup>49</sup> The circuit courts no longer heard any appeals, because the Evarts Act stripped them of their limited appellate authority.<sup>50</sup>

In 1911, Congress took the last step toward establishing the modern intermediate appellate system when it abolished the old circuit courts and retained the circuit courts of appeals created by the Evarts Act.<sup>51</sup> The circuit judges now became judges of the circuit courts of appeals.<sup>52</sup> The 1911 statute, like the Evarts Act, provided that the circuit courts of appeals would “consist of three judges,”<sup>53</sup> but, in the Second, Seventh, and Eighth Circuits, Congress provided for four permanent judgeships without clarifying whether the “court” in those circuits consisted of all the judges or only three.<sup>54</sup> These three circuits continued to decide cases in three-judge panels and did not sit as four judges for any matters.<sup>55</sup>

Given the history of the alternating composition of the original circuit courts and the new circuit courts of appeals, it now seems inevitable that the courts sat in panels of three with designated judges as necessary.<sup>56</sup> As

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48. The Second Circuit had three circuit judges but still regularly invited district judges to sit on panels, probably because it was the busiest circuit. *Morris*, *supra* note 28, at 91, 94–95.

49. § 6, 26 Stat. at 828. *See generally* Pound, *supra* note 28, at 198–99 (discussing jurisdictional authority of circuit courts of appeals).

50. § 4, 26 Stat. at 827. *See generally* Fallon et al., *supra* note 31, at 37 n.66 (explaining that “[i]n deference to the traditionalists, the [Evarts] Act did not abolish the old circuit courts, although it took away their appellate jurisdiction over the district courts”).

51. Act of Mar. 3, 1911, ch. 231, § 297, 36 Stat. 1087, 1168.

52. To clear up some confusion over the exact status of the circuit judges appointed prior to the Judicial Code of 1911, Congress passed the Act of Jan. 13, 1912, ch. 9, 37 Stat. 52, which expressly provided that “[t]he circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit.” *See also* *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 69–70 (3d Cir. 1940) (en banc) (reviewing legislative history of Act of 1912), *aff’d*, 314 U.S. 326 (1941).

53. Ch. 6, § 117, 36 Stat. at 1131 (“There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established.”).

54. Alexander, *supra* note 2, at 570.

55. *See id.* at 570–71.

56. The possibility that the new courts of appeals would sit in divisions had historical precedent as well. The British Parliament, in the English Judicature Act of 1875, authorized the Court of Appeal of England, ordinarily composed of the Master of the Rolls and five Lords Justices, to hear appeals simultaneously in two divisions of three, thereby doubling the court’s decisionmaking capacity. One division heard appeals primarily from the King’s Bench; the other heard appeals from the Chancery Division of the High Court. Pound, *supra* note 28, at 165. By 1963, the court’s 12 judges were sitting simultaneously in four panels of three each. Karlen, *supra* note 26, at 140 (observing that

the membership of other circuits grew to more than three judges, those courts also assumed the practice of panel hearings without adopting a procedure for the full membership to sit together to hear cases.<sup>57</sup> The increased number of judgeships in the courts of appeals, combined with the practice of simultaneous divisional sittings, expanded each court's decisionmaking capacity and concomitantly its potential impact on the development of the law.

### B. *Increased Authority and Influence*

The Evarts Act, in addition to establishing a three-tiered judicial system, introduced another major innovation: the writ of certiorari.<sup>58</sup> The Supreme Court now held the prerogative to refuse to hear certain appeals.<sup>59</sup> Thus, the Act laid the groundwork for regional dominion in the new circuit courts of appeals by establishing their unique jurisdiction, assigning additional judges to the circuits, and allowing the Supreme Court to defer to their decisions. Initially, however, the courts of appeals were limited largely to the task of error review, as “[t]he institutional

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generally, England's “appellate courts do not use their entire membership for the hearing of each appeal, but sit in divisions”). Panels comprised of a subset of judges were also in place in state court systems; however, the practice was received in some quarters with dissatisfaction. Pound, *supra* note 28, at 201–23 (relating historical development of divisional sittings on state courts of last resort); Alexander, *supra* note 2, at 565–67 (observing that in 1879 California was first state to divide its supreme court into two departments and that 20 of 28 states with large supreme courts had adopted practice by 1930). Dean Roscoe Pound described divisional sittings as the most significant nineteenth-century contribution toward solving organizational problems of courts of review. Pound, *supra* note 28, at 223.

57. See, e.g., Karlen, *supra* note 26, at 141; Pound, *supra* note 28, at 201. Oddly, one court scholar writing in 1929 stated unequivocally that “a single court sitting in divisions is, for practical and geographical reasons, out of the question in the federal system.” Walter F. Dodd, *The Problems of Appellate Courts*, 6 Am. L. Sch. Rev. 681, 689 (1929). This statement was made despite the fact that in February 1929, four circuits had more than three judges and all were sitting in three-judge panels. 29 F.2d v, v–ix (1929) (listing judges in circuit courts of appeals as of February 28, 1929).

The District of Columbia Court of Appeals, predecessor to the D.C. Circuit, did not initially follow the practice of divisional sittings, instead sitting with all five judges when two judges joined the court's original three in 1930. Alexander, *supra* note 2, at 571 n.60. The D.C. Circuit has a unique history that accounts for this behavior. Ginsburg & Falk, *supra* note 16, at 1010 & nn.12–13. The five-judge sittings did not continue for long. By 1938, the court utilized three-judge panels. *Id.*

58. Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891).

59. The Evarts Act provided that the circuit courts of appeals decisions were final in nearly all diversity, patent, revenue, non-capital criminal, and admiralty cases. § 6, 26 Stat. at 828. Parties could only seek Supreme Court review by petitioning for a writ of certiorari, which was within the Court's discretion to grant or deny. § 6, 26 Stat. at 828. Parties continued to have the right to appeal to the Supreme Court in cases involving jurisdictional issues, capital crimes, constitutional questions, the construction of treaty law, or conflict of laws. § 5, 26 Stat. at 827–28.

functions of appellate review—declaring and harmonizing general principles—remained in the domain of the Supreme Court.”<sup>60</sup>

In the Judiciary Act of 1925 (the Judges Bill),<sup>61</sup> Congress expanded the courts of appeals’ power by giving the Supreme Court even greater discretionary control over its caseload.<sup>62</sup> The Judges Bill thereby allowed the courts of appeals to become the final arbiter in an increasing proportion of federal cases.<sup>63</sup> At the same time, the courts of appeals quickly experienced unanticipated growth in their dockets.<sup>64</sup> This unanticipated growth, combined with the Supreme Court’s broader discretion to refuse to hear appeals, increased the relative importance of the courts of appeals.<sup>65</sup>

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60. Hellman, *supra* note 17, at 542; *see also* Paul D. Carrington et al., *Justice on Appeal* 200 (1976).

61. The act was popularly known as the Judges Bill because “the original legislation was drafted by members of the Supreme Court.” *Congressional Quarterly*, *supra* note 33, at 265; *see also* Samuel Estreicher & John Sexton, *Redefining the Supreme Court’s Role: A Theory of Managing the Federal Judicial Process* 12–13 (1986) (describing Justices’ participation in judicial reform efforts culminating in Judges Bill).

62. Judiciary Act of 1925, ch. 229, 43 Stat. 936.

63. *See, e.g.*, Frankfurter & Landis, *supra* note 28, at 280–94, 299 (detailing scope and implications of Act of 1925, which “cut the Supreme Court’s jurisdiction to the bone”); William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 *Yale L.J.* 1, 2–3 (1925). Chief Justice Taft was one of the primary movers behind the Judges Bill, having started the reform efforts when he was still President. *Congressional Quarterly*, *supra* note 33, at 265. Taft believed “that litigants have their rights sufficiently protected by a hearing or trial in the courts of first instance, and by one review in an intermediate appellate Federal court.” Taft, *supra*, at 2.

64. The growth in the courts of appeals dockets can be seen by comparing the number of cases filed after the Evarts Act with the number filed after the Judges Bill. Only 841 cases were filed in the courts of appeals in the first year they existed. Posner, *supra* note 5, at 55. By 1930, the courts decided nearly 3000 cases. Federal Judicial Ctr., *The Federal Appellate Judiciary in the 21st Century* 253 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

While the courts of appeals’ caseload expanded, the Supreme Court’s contracted. Prior to the Evarts Act, the Supreme Court’s docket in 1890 included 1816 cases, 636 of which were new filings. Lee Epstein et al., *The Supreme Court Compendium: Data, Decisions, and Developments* 71 (2d ed. 1996). In 1930, 726 cases were on the Court’s docket, but it granted review to only 159. *Id.* at 80.

65. *See generally* Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, in *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* 3, 13 (Arthur D. Hellman ed., 1990) (elucidating courts’ continued growth “in prestige and authority” after passage of Judges Bill of 1925).

### C. *En Banc Review*

As judicial membership and caseloads rapidly expanded following the Judges Bill, the circuits lost some control over the substantial lawmaking authority they had only recently realized.<sup>66</sup> The growing number of panels and rulings sparked concern about the difficulty of maintaining a reasonable uniformity of legal doctrine.<sup>67</sup> The increased size of the deliberative body also led to a decrease in the power of the individual judge. These forces prompted some judges to call for the right of a majority of a circuit's judges to vote for rehearing of a case by the entire circuit membership.<sup>68</sup>

The Ninth Circuit was the first circuit court to address the issue of whether courts of appeals could sit en banc.<sup>69</sup> In *Bank of America v. Commissioner*,<sup>70</sup> a divided Ninth Circuit panel ruled on a question regarding estate taxes. A year later, three different Ninth Circuit judges in *Lang's Estate v. Commissioner*<sup>71</sup> addressed the exact question answered by the *Bank of America* panel, but disagreed with the earlier decision. As the *Lang's Estate* panel explained its predicament: “[We] were faced with the situation where the decision of two judges made a precedent for the remaining five.”<sup>72</sup> The *Lang's Estate* panel concluded that “no method of hearing or rehearing by a larger number”<sup>73</sup> existed at the circuit level to resolve the conflict between the panels and, rather than overrule the *Bank of America* holding, asked the Supreme Court to

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66. *Cf. id.* at 3–4 (discussing difficulties posed to appellate court function by growing caseloads and observing that “horizontal” expansion on court may allow it to resolve more cases, but is likely to reduce its control).

67. *See, e.g.,* Maris, *supra* note 23, at 96–97. The courts of appeals faced a unique problem in their treatment of circuit precedent as a consequence of panel sittings, namely whether a later panel could overturn an earlier panel. Even if a circuit concluded only the Supreme Court could overturn panel precedent, the potential for intracircuit conflicts remained as a consequence of mistaken or intentional ignorance of relevant precedent.

68. The Judicial Conference of Senior Circuit Judges (now called the Judicial Conference of the United States) in 1938 called upon Congress to amend the Judicial Code to make clear that “the majority of the circuit judges [had the right] to provide for a court of more than three judges when in their opinion unusual circumstances make such action advisable.” 1938 Att’y Gen. Ann. Rep. 23.

69. *Lang's Estate v. Commissioner*, 97 F.2d 867 (9th Cir.), *certifying question to* 304 U.S. 264 (1938).

70. 90 F.2d 981 (9th Cir. 1937).

71. 97 F.2d 867.

72. *Id.* at 869.

73. *Id.*



give a definitive answer to the estate law question.<sup>74</sup> The Supreme Court, while agreeing with the second panel on the substantive question, did not address whether circuits could sit en banc.<sup>75</sup>

Two years later, the Third Circuit became the first circuit court to sit en banc when its five judges heard arguments in *Commissioner v. Textile Mills Securities Corp.*,<sup>76</sup> expressly disagreeing with the Ninth Circuit's dicta in *Lang's Estate* that a circuit could not act as a full court.<sup>77</sup> The Supreme Court granted a writ of certiorari in *Textile Mills* to address the circuit split.<sup>78</sup> A unanimous Court agreed with the Third Circuit that the "court" included all judges, not merely three.<sup>79</sup> Hence, the larger group had the inherent power to sit to decide cases, although a three-judge panel was also permissible. Justice Douglas explained that "the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeals will be promoted."<sup>80</sup> He went on to point out that "[t]hose considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases."<sup>81</sup>

At the time of the Supreme Court's *Textile Mills* decision, a bill authorizing circuits "to sit in banc . . . when in their opinion such action is advisable" had passed in the House of Representatives and was being

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74. *Id.* at 869–70.

75. *Lang's Estate*, 304 U.S. 264 (1938).

76. 117 F.2d 62 (3d Cir. 1940) (en banc), *aff'd sub nom.* *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941).

77. *Id.* at 70–71 ("[W]e cannot agree with [Ninth Circuit] Judge Denman's contrary conclusion in *Lang's Estate* . . . . We conclude that this court has power to provide, as it has done by [Local Circuit] Rule 4(1), for sessions of the court en banc, consisting of all the circuit judges of the circuit in active service.").

78. *Textile Mills*, 314 U.S. at 327 ("We granted the petition for certiorari because of the public importance of [the question of whether a circuit court of appeals of more than three judges can convene all the judges to hear a case] and the contrariety of the views of the court below . . . and judges of the Circuit Court of Appeals for the Ninth Circuit . . . as respects its solution.").

79. *Id.* at 333–35. At the time of the Court's *Textile Mills* ruling, eight circuits had more than three judges: the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. 115 F.2d vii, vii–xiii (1941) (listing judges sitting on each court of appeals as of February 1941). The Court of Appeals for the District of Columbia also had more than three judges, but it was not yet part of the circuit court of appeals system. See Ginsburg & Falk, *supra* note 16, at 1010 n.12 (explaining that D.C. Court of Appeals was slowly integrated into circuit court system beginning in 1942 and was fully integrated by 1948).

80. *Textile Mills*, 314 U.S. at 334–35 (citation omitted).

81. *Id.*

considered by the Senate.<sup>82</sup> Congress dropped the bill after the Supreme Court's ruling in *Textile Mills*.<sup>83</sup> However, in the next major act governing the judicial branch, the Judicial Code of 1948, Congress explicitly recognized the practice:

Cases and controversies shall be heard and determined by a court or division 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 active service. A court in banc shall consist of all [active] circuit judges [of the circuit] . . . .<sup>84</sup>

Although codifying the practice of en banc review, the legislation did not resolve the question left unanswered by the Supreme Court in *Textile Mills*: namely, what standards the courts should follow when determining whether to rehear or hear initially an appeal en banc.

Four years later, the Supreme Court had an opportunity to develop explicit guidelines for the en banc process. In *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*,<sup>85</sup> the losing party challenged the circuit court's refusal to reconsider the case en banc. The Supreme Court concluded that Congress did not intend to create a statutory right to en banc review,<sup>86</sup> but rather to ratify legislatively the *Textile Mills* decision and recognize the power of courts of appeals to sit en banc.<sup>87</sup> The Court

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82. 87 Cong. Rec. 8117 (1941).

83. *Id.*; see also *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 253 (1953) (postulating that proposed amendment "died because this Court's decision in *Textile Mills* intervened").

84. Judicial Code of 1948, § 46(c), 62 Stat. 869, 871 (codified as amended at 28 U.S.C. § 46(c) (1994)). Congress has utilized the "in banc" spelling in statutes, although judges and legal scholars have traditionally used the "en banc" spelling. For a colorful discussion of the relative merits of each spelling, see Newman, *The Virtues of Restraint*, *supra* note 16, at 365 n.1, and Newman, *In Banc Practice in the Second Circuit, 1984–1988*, *supra* note 16, at 355 n.1. Last year, the Supreme Court suggested a stylistic change in the Federal Rules of Appellate Procedure—substituting "en banc" for "in banc." *Overhaul of Federal Appellate Rules, Other Rule Amendments Sent to Congress*, 66 U.S.L.W. 2665 (May 5, 1998). Such a change would bring the Rule into usage consistent with case law and scholarship. The April 24, 1998 proposal became permanent because Congress did not act to the contrary by December 1 that year.

85. 345 U.S. 247.

86. *Id.* at 250 ("In our view, [28 U.S.C.] § 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings en banc. It goes no further.").

87. *Id.* at 250–51 ("The statute, enacted in 1948, is but a legislative ratification of *Textile Mills* . . . a decision which went no further than to sustain the power of a Court of Appeals to order a hearing *en banc*."); *id.* at 254 ("[Congress] was motivated by a dual purpose: to give express recognition to the doctrine of *Textile Mills*, while at the same time securing the tradition of three-judge courts against any further intrusion.").

deferred as a matter of deliberate policy to the lower courts' discretion in weighing what factors supported the grant of full court review: "[T]he court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing."<sup>88</sup> The circuit courts must publish their chosen procedures for requesting an en banc hearing so that "litigants who appear before [a circuit court] understand the practice—whatever it may be—whereby the court convenes itself en banc."<sup>89</sup> But, the Court concluded, a party could not challenge the circuit court's decision to grant or deny a request for en banc hearing.<sup>90</sup>

While the *Western Pacific* majority refused to provide any guidance to the courts of appeals, Justice Frankfurter in concurrence sought to distinguish the en banc function as primarily one for resolving intracircuit conflict.<sup>91</sup> Frankfurter cautioned against using the en banc process in other cases unless they were "extraordinary in scale—either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit."<sup>92</sup> Even at this early stage, a dissenting justice voiced concern over the risk of en banc rehearing creating a "hybrid intermediate court" between the three-judge panel and the Supreme Court resulting in "[d]elay, cost, and uncertainty" for litigants.<sup>93</sup>

Following Frankfurter's lead, Congress ratified a Federal Rule of Appellate Procedure implementing the existing judicial and statutory grants of power.<sup>94</sup> The rule warns that en banc review is "not favored and

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88. See *id.* at 250. An indication of the (nearly) unfettered nature of the courts' discretion to determine whether to sit en banc is reflected in the simple nomenclature used for motions by parties seeking en banc rehearing. While a motion for rehearing by the panel is a "petition," a motion for rehearing by the full court is to be framed as a mere "suggestion." See Fed. R. App. P. 35(b) (allowing party to "suggest the appropriateness of a hearing or rehearing in banc") (emphasis added); cf. Solimine, *supra* note 5, at 35 n.27 (observing that "a strict reading of rule 35 reveals that only 'suggestions' for rehearing en banc properly can be offered by litigants").

89. *Western Pac. R.R.*, 345 U.S. at 260–61.

90. *Id.* at 259.

91. *Id.* at 271 (Frankfurter, J., concurring). The Supreme Court later ruled that it would not accept certification to resolve an intracircuit conflict, reasoning that the circuits had the responsibility and capability to maintain consistency by virtue of the en banc procedure. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

92. *Western Pac. R.R.*, 345 U.S. at 270–71 (Frankfurter, J., concurring). Frankfurter agreed with the majority that the courts of appeals held the power to formulate any rules concerning the exercise of the en banc power. *Id.* at 268 (Frankfurter, J., concurring).

93. *Id.* at 273–74 (Jackson, J., dissenting) ("If I were to predict, I would guess that today's decision will either be ignored or it will be regretted.").

94. Fed. R. App. P. 35.

ordinarily will not be ordered except when (1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) the proceeding involves a question of exceptional importance.”<sup>95</sup>

The most recent evolution in the en banc procedure occurred in 1978 when Congress authorized circuit courts consisting of more than fifteen judges to delegate en banc authority to a subset of the full court—a mini en banc hearing.<sup>96</sup> Congress did not *order* large appellate courts to do so, but again granted them considerable leeway in controlling the en banc process.<sup>97</sup> Three circuits presently have more than fifteen judges,<sup>98</sup> but only the Ninth Circuit, by far the largest circuit with twenty-eight active judges, has exercised the mini en banc option.<sup>99</sup>

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95. Fed. R. App. P. 35(a). The language appears to be drawn from both Frankfurter’s *Western Pacific* concurrence and the Court’s opinion in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685 (1960). The Court in *American-Foreign 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.

96. Pub. L. No. 95-486, § 6, 92 Stat. 1633, 1633 (1978) (codified as amended at 28 U.S.C. § 46(c) (1994)).

97. The original Fifth Circuit refused to adopt this practice, and its division may have been hastened by the unwieldiness of a 24-judge deliberative body. *See Barrow & Walker, supra* note 18, at 230–37 (detailing events precipitating Fifth Circuit’s division and identifying en banc hearings as proverbial last straw); Godbold, *supra* note 26, at 962 (recalling, from his tenure as Fifth Circuit judge, that shortly before circuit’s division “the court sat en banc on fifteen cases with twenty-four active judges participating . . . [which] changed the views of those who had opposed division”); *see also* H.R. Rep. No. 96-1390, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4236, 4238–49. The Fifth Circuit convened en banc to hear arguments in six cases in January 1980. *Barrow & Walker, supra* note 18, at 230 & n.29. Twenty-six judges sat on the Fifth Circuit at that time, but two did not participate in the en banc rulings. *Id.* After the 24-judge en banc sittings, all judges of the Fifth Circuit, previously divided on the question of splitting the court, signed a petition in May 1980 asking Congress to split the court. *Id.* at 152 (reprinting original petition), 236 (describing process by which unanimous petition was adopted by judges and presented to Congress). In October 1980, President Jimmy Carter signed into law the Fifth Circuit Court of Appeals Reorganization Act. Pub. L. No. 96-452, 94 Stat. 1994 (1980).

98. Congress has authorized more than 15 judges for the Fifth (17), Sixth (16), and Ninth (28) Circuits. 28 U.S.C. § 44(a) (1994).

99. The Ninth Circuit has fully implemented this approach. Under its rules, if a majority of active, non-recused judges votes for en banc review:

The 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.

While Congress has ordered the courts of appeals to hear en banc challenges to the constitutionality of certain statutes,<sup>100</sup> Congress and the Supreme Court generally have vested the courts of appeals with almost unfettered discretion to decide how and when to exercise their en banc power.<sup>101</sup> Indeed, the courts of appeals have more discretion over en banc rehearing than any other court procedure or action, rendering the en banc process a particularly fruitful area for the study of judicial decisionmaking.

## II. THREE THEORIES OF COURT OF APPEALS DECISIONMAKING

Judges vested with discretion base their decisions on a number of factors. As political scientist James Gibson explains, "judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do."<sup>102</sup> Social scientists and legal scholars have developed theories explaining the nature and role of these factors in judicial behavior. *Attitudinal theory* strives to explain judicial decisionmaking by what judges would prefer to do; *legal theory* states that judges decide on the basis of what they think the law dictates; and *hierarchical theory* rationalizes that judges make decisions based on what they understand is

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9th Cir. R. 35-3; see also Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in *Restructuring Justice*, *supra* note 65, at 55, 63-73 (discussing circuit's adoption and implementation of limited en banc practice).

100. See Newman, *The Virtues of Restraint*, *supra* note 16, at 372 & n.43. For example, the Federal Election Campaign Act of 1971 provides:

[T]he [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.

2 U.S.C. § 437(h) (1994); see, e.g., *International Ass'n of Machinists & Aerospace Workers v. Federal Election Comm'n*, 678 F.2d 1092 (D.C. Cir. 1982) (en banc) (considering constitutional challenge to Federal Election Campaign Act as required by Act).

101. Circuit courts have even questioned the authority of Congress to require them to hear cases en banc in light of the history of the courts' significant discretionary control over both the procedure of seeking en banc hearing and the decision to grant it. See, e.g., *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (addressing constitutionality of legislative veto provision in FTC Improvements Act, as required by Pub. L. No. 96-252, § 21(f)(1), 94 Stat. 374, 395-96 (1980)).

102. James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 *Pol. Behav.* 7, 9 (1983).

feasible given the limits imposed by superiors.<sup>103</sup> Legal theory and attitudinal theory represent the two entrenched positive theories of judicial behavior, while hierarchical theory reflects newer insights to judicial decisionmaking.

This Article applies these positive theories of judicial behavior to the decision to grant en banc review. Each theory generates expectations about the bases of the decision to grant en banc rehearing. These expectations, or “hypotheses,” predict a certain relationship between the grant of en banc rehearing and different characteristics of the panel decision. The combined hypotheses constitute an integrated model of the en banc decisionmaking process.

### A. *Legal Theory*

The traditional conception of judicial decisionmaking is best captured by formalism, or Classical Legal Theory.<sup>104</sup> Classical Legal Theory distinguishes judicial power from executive and legislative powers by its lack of decisionmaking discretion.<sup>105</sup> Judges are neutral and reasoned decisionmakers who defer to rules to guide their decisions.<sup>106</sup> In fact, most judges believe they *are* classicists and go to great lengths to explain their decisions by reference to existing law.<sup>107</sup> And, while most legal

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103. *Cf. id.* Providing a shorthand overview of the judicial behavior theories dominant at the time, Gibson explained that “attitude theory pertains to what judges prefer to do, role theory to what they think they ought to do, and a host of group-institution theories to what is feasible to do.” *Id.*

104. See Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 Ohio St. L.J. 1635, 1642–43 (1998) (describing sources and development of formalism).

105. See, e.g., Howard, *supra* note 1, at 15 (observing that under classic model of judicial function put forth by Alexander Hamilton and John Marshall, “judges do not make the law but merely declare it; judges exercise neither political power nor personal will but merely judgment, a process bridled by law and the discipline of a professional craft”); Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447, 476–79 (1994) (discussing Blackstone’s discourse on “the axiom that a judge’s role was merely to ‘expound’—not ‘make’—the law”); Thomas C. Grey, *Modern American Legal Thought*, 106 Yale L.J. 493, 495–97 (1996) (book review) (explaining that under classical legal theory, as espoused by Harvard Law School’s first dean, Christopher Columbus Langdell, “law should be *formal*, producing outcomes by the application of rules to facts without any intervening exercise of discretion”).

106. See Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 Am. Pol. Sci. Rev. 323, 324, 326–27 (1992) (explaining classical legal paradigm and proposing decisionmaking model based on its premises).

107. Social scientists have not been immune to the fact that judges construct their rulings by applying legal rules to case facts. They have successfully crafted “legal” or “fact-pattern” models of judicial decisionmaking in several issue areas. See, e.g., *id.* (death penalty); Jeffrey A. Segal, *Predicting Supreme Court Decisions Probabilistically: The Search and Seizure Cases, 1962–1981*,

scholars do not adopt wholesale the classical legal view, they do accept the premise that judges make decisions primarily through consideration of legal principles.<sup>108</sup> As legal scholar Frank Cross explains, “[c]lassic unabashed formalism is no longer widely embraced. Nonetheless, its fundamental claims retain much of their appeal. . . . [L]egal scholars have implicitly accepted the use of precedent at face value.”<sup>109</sup>

The legal model, which presumes that “the reasons presented for decisions . . . perform an authentically disciplining function that constrains judges’ decisionmaking,”<sup>110</sup> would explain the decision to grant en banc review by reference to the reasons offered to justify en banc rehearing and the rules governing the process. Supreme Court decisions and federal statutory law set forth two express, but vague, guidelines for when a court of appeals should grant en banc rehearing: to resolve intracircuit conflict and to consider questions of great importance.<sup>111</sup> The legal model would posit that these factors should account, in large measure, for which panel decisions courts rehear en banc.

### 1. *Resolving Intracircuit Conflict*

In the first national decision (judicial or legislative) on the propriety of en banc review, the Supreme Court ruled that courts of appeals have the power to convene themselves en banc primarily to allow them to resolve conflict within the circuit.<sup>112</sup> Consistent with that view, the Supreme

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78 Am. Pol. Sci. Rev. 891 (1984) (Fourth Amendment searches); Jeffrey A. Segal & Cheryl D. Reedy, *The Supreme Court and Sex Discrimination*, 41 W. Pol. Q. 553 (1988) (sex discrimination); 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 (1992) (obscenity). Cf. generally Gibson, *supra* note 102, at 13–16 (discussing extensions of attitudinal model to incorporate case facts or cues).

108. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw. U. L. Rev. 251, 255–64 (1997) (delineating traditional legal model of judicial decisionmaking and subsequent innovations in legal theory as found in law schools).

109. *Id.* at 260.

110. *Id.* at 262.

111. Fed. R. App. P. 35; *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960); *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 271 (1953) (Frankfurter, J., concurring).

112. *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 355 (1941) (citing as reason for en banc procedure that “[c]onflicts within a circuit will be avoided”). As Justice Frankfurter explained in a later decision, “resolving intracircuit conflicts is the primary function of en banc proceedings.” *Western Pac. R.R.*, 345 U.S. at 270 (Frankfurter, J., concurring) (“Rehearings en banc by these

Court adopted the position in 1957 that it would no longer accept certification of intracircuit conflicts.<sup>113</sup> The Court reasoned that the courts of appeals, now armed with the power of en banc reconsideration, had an institutional responsibility for resolving internal conflicts and for harmonizing circuit law.<sup>114</sup> Subsequently, in 1967 Congress created Federal Rule of Appellate Procedure 35 (Rule 35), which explicitly provides that decisional harmony is one of the two special circumstances justifying en banc rehearing.<sup>115</sup> Thus, classical legal theory produces an expectation that conflict between panel decisions would be one of the few instances in which judges would vote for en banc rehearing.<sup>116</sup>

## 2. *Considering Intercircuit Conflict*

Rule 35 expressly acknowledges one other situation supporting en banc review: namely, “question[s] of exceptional importance,”<sup>117</sup> but the provision does little to clarify which cases present such questions. Moreover, if the drafters intended to limit the use of en banc review, the very wording of the rule frustrates that purpose.<sup>118</sup> In fact, any competent legal advocate can argue that her case involves such a question, so a litigant’s, or even a dissenting judge’s, claim that a case should be

courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern.”).

113. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

114. *Id.* (“It is primarily the task of a Court of Appeals to reconcile its internal conflicts.”).

115. Fed. R. App. P. 35(a).

116. Extending the idea that en banc hearings should be used to harmonize circuit law, the Eighth Circuit has taken the position that in instances where a conflict arises between two contemporaneous *district* court decisions, the court should join the appeals and hear them initially en banc “in order to ensure consistent results and to clarify the law.” *United States v. Lacy*, 586 F.2d 1258, 1260 (8th Cir. 1978) (en banc).

117. Fed. R. App. P. 35(a). As Justice Frankfurter mused: “Hearings *en banc* may be a resort also in cases extraordinary in scale—either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit.” *Western Pac. R.R.*, 345 U.S. at 270–71 (Frankfurter, J., concurring). But, the Second Circuit has taken the position that the court should not rehear en banc a case where it is probable given the case’s “extraordinary consequence that . . . the Supreme Court will take [the] matter under its certiorari jurisdiction.” *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1020 (2d Cir. 1973) (Kaufman, J., concurring in denial of petition for rehearing en banc). Hence, the cases that are deemed the most important may not be appropriate for en banc reconsideration on the Second Circuit.

118. 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 Air Lines, Inc.*, 712 F.2d 899, 914 (4th Cir. 1983) (Phillips, J., dissenting).



reheard en banc because it presents a significant legal issue would not alone be enough to distinguish between panel decisions.<sup>119</sup>

Judges and scholars have posited that cases centering on legal issues that are the subject of express *intercircuit* conflicts can be considered to involve such doctrinal import.<sup>120</sup> Justices have suggested in their opinions that a circuit split may justify an en banc rehearing.<sup>121</sup> Furthermore, the Court recently proposed, on the suggestion of the U.S. Judicial Conference, amending the language of Rule 35 to provide explicitly that an intercircuit dispute warrants en banc reconsideration.<sup>122</sup> The local rules of the Seventh, Ninth, and D.C. Circuits already list intercircuit conflict as one criterion for granting en banc rehearing.<sup>123</sup> Therefore, a classical legal model of en banc review would posit that an entire court would more likely rehear cases involving a point disputed by other circuits.

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119. As D.C. Circuit Judge Douglas Ginsburg observed, “[e]xceptional importance’ is in the eye of the beholder.” Ginsburg & Falk, *supra* note 16, at 1022. Second Circuit Judge Jon Newman has also employed that truism in the same context. Newman, *The Virtues of Restraint*, *supra* note 16, at 371.

120. *See, e.g.*, *Air Line Pilots Ass’n v. Eastern Air Lines*, 863 F.2d 891, 924 (D.C. Cir. 1988) (Edwards, J., dissenting from denial of rehearing en banc) (listing as reason to rehear en banc resolution of potential conflict between D.C. Circuit and at least two other circuits); *Hartman Tobacco Co. v. United States*, 471 F.2d 1327, 1330 (2d Cir. 1973) (en banc) (“[W]e think it best to clear up any confusion on the issue [presented in this case] that there may be in this circuit and to align the Second Circuit with every other circuit which has confronted the question.”); Ginsburg & Falk, *supra* note 16, at 1024; Solimine, *supra* note 5, at 59–60 & n.170; *cf.* Madden, *supra* note 22, at 416–17 (arguing that en banc review may be appropriate where panel decision on “important or divisive issue” is in conflict with decisions of other courts of appeals). *But cf.* Posner, *supra* note 5, at 381–82 (arguing that adoption of principle that circuit should rehear en banc any case producing circuit split would waste resources and grant too much authority to first circuit to address issue).

121. *United States v. Watts*, 519 U.S. 148, 170 (1997) (Kennedy, J., dissenting) (questioning Ninth Circuit’s failure to grant en banc rehearing to panel’s “departure from the rule followed in all other circuits”); *United States v. Shabani*, 513 U.S. 10, 11–12 (1994) (unanimous) (explaining that Supreme Court granted certiorari to resolve conflict between Ninth Circuit and other eleven circuits and questioning why Ninth Circuit did not, as member of panel majority had requested, reconsider circuit precedent en banc); *Groves v. Ring Screw Works*, 498 U.S. 168, 172 n.8 (1990) (unanimous) (“Given the panel’s expressed doubt about the correctness of the Circuit precedent that it was following, together with the fact that there was a square conflict in the Circuits, it might have been appropriate for the panel to request a rehearing en banc.”).

122. *Overhaul of Federal Appellate Rules, Other Rule Amendments Sent to Congress*, 66 U.S.L.W. 2665 (May 5, 1998); *see also* *Judicial Conference Considering Numerous Rule Changes*, 10(9) *Inside Litig.*, Sept. 1996, at 7, 8. The April 24, 1998 proposal became the rule because Congress did not act to the contrary by December 1, 1998. Thomas R. Newman & Steven J. Ahmuty, Jr., *Amendments to the Federal Rules*, N.Y.L.J., Dec. 2, 1998, at 3.

123. 7th Cir. R. 35(b); 9th Cir. R. 35-1; D.C. Cir. R. 35(c).

## B. Attitudinal Theory

While most lawyers, judges, and legal scholars presume that judges make decisions by examining relevant legal doctrine, most social scientists adhere to the precept that judges make decisions based on their ideological preferences. This perspective is best captured by the attitudinal theory of judicial decisionmaking.<sup>124</sup> The attitudinal theory assumes that judges are rational actors who, when making decisions, seek to maximize their sincere policy preferences, termed “attitudes.”<sup>125</sup> Because most judges, in contrast to elected policymakers, have not publicly disclosed their policy preferences, a proxy for attitudes is necessary.<sup>126</sup> Attitudinal studies have demonstrated that the ideological

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124. See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993) (presenting best statement and defense of attitudinal theory). See generally Cross, *supra* note 108, at 265–311 (examining and critiquing attitudinal model); George, *supra* note 104, at 1646–55 (discussing historical development and current articulation of attitudinal model); Gibson, *supra* note 102, at 9–13 (considering in detail evolution of attitudinal model of judicial decisionmaking).

125. Glendon Schubert, drawing on the work of social psychologists, was the first to propose a model of judicial decisionmaking based on justices’ attitudes. See Glendon Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946–1963* (1965). David Rohde and Harold Spaeth expanded on Schubert’s model with a construct of attitudes based on a set of interrelated beliefs and further observed that goals, rules, and situations influence judicial behavior generally. David W. Rohde & Harold J. Spaeth, *Supreme Court Decision Making* (1976). For a discussion of Schubert’s and Rohde and Spaeth’s work, see Segal & Spaeth, *supra* note 124, at 67–69; Jeffrey A. Segal et al., *Decision Making on the U.S. Courts of Appeals*, in *Contemplating Courts*, *supra* note 27, at 227, 231–32; and Harold J. Spaeth, *The Attitudinal Model*, in *Contemplating Courts*, *supra* note 27, at 296, 307.

126. Social scientists have utilized, successfully and unsuccessfully, a number of proxies for appellate judges’ attitudes. See generally George, *supra* note 104, at 1650–51 & nn.46–47 (detailing studies that “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”); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 *Am. Pol. Sci. Rev.* 355, 358–60 (1981) (describing research using various personal attribute variables to attempt to predict Supreme Court justice voting behavior).

Donald Songer, Jeffrey Segal, and Charles Cameron created a multidimensional attitude variable based on a court of appeals judge’s appointing President, region, prior prosecutorial or judicial experience, and religion. Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 *Am. J. Pol. Sci.* 673, 679–80 (1994). While their index of judicial ideology was successful in predicting voting behavior in search and seizure rulings, I do not adopt it for several reasons. First, the significance of prior experience is dependent on the issue area (the authors do not contend that the subject matter of their study—search and seizure cases—is representative of caseloads generally). Second, my own work has found region to be insignificant across issue areas. See George, *supra* note 104, at 1686. Third, aside from their work, the empirical evidence on the effect of prior prosecutorial or judicial experience and religious affiliation on courts of appeals decisions is limited to certain issue areas and the relationship between

direction (“liberal” or “conservative”)<sup>127</sup> of the party of a judge’s appointing President is a strong predictor of the case votes of Supreme Court<sup>128</sup> and Court of Appeals judges.<sup>129</sup>

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these variables and judicial behavior is weak. *See, e.g.*, Goldman, *supra* note 5, at 497–505 (finding that effect of religion, one-time political candidate, prior judicial experience, years on court, and prosecutorial experience on judicial behavior on courts of appeals appeared negligible); Steven R. Van Winkle, *Dissent as a Signal: Evidence from the U.S. Courts of Appeals*, at 13–14 (unpublished paper, presented at 1997 annual meeting of American Political Science Association, Washington, D.C.) (on file with author) (testing Songer, Segal, and Cameron measure of judicial ideology and finding “that most of the characteristics were not significantly related to votes”); *see also* Tate, *supra*, at 362 (finding that “religious affiliation adds little or nothing to the explicability” of percentage of liberal votes cast by Supreme Court justice in civil rights and liberties cases). *But see* Tate, *supra*, at 362–63 (finding relationship between prior experience and Supreme Court justices’ votes in civil liberties and rights and economic cases). Finally, I find the theoretical underpinnings for these attributes to be less coherent and more post hoc than for the appointing President characteristic and thus am disinclined to rely on them.

127. This Article uses the terms “liberal” and “conservative” 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 we 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 the right wing’s 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 those freedoms, conservatives to limit them. In the realm of economic regulation, liberal jurists favor an enhanced governmental role 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 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.

128. *See, e.g.*, Stuart S. Nagel, *The Legal Process from a Behavioral Perspective* 193 (1969); John D. Sprague, *Voting Patterns of the United States Supreme Court: Cases in Federalism, 1889–1959* (1968) (examining voting blocs using algorithm pairing justices who vote together); George & Epstein, *supra* note 106, at 329–30 (finding that “the addition of Republican appointees enhanced the Court’s propensity toward a law-and-order stance”); Stuart S. Nagel, *Political Party Affiliation and Judges’ Decisions*, 55 *Am. Pol. Sci. Rev.* 843 (1961); Tate, *supra* note 126, at 361–63 (demonstrating that ideology of appointing President had strong influence on justices’ decisions in civil liberties and rights and economic cases).

129. *See* George, *supra* note 104, at 1678–86 (demonstrating that majority of Fourth Circuit judges participating in en banc cases between 1962 and 1996 voted their sincere policy preferences as measured by party of appointing President); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961–1964*, 60 *Am. Pol. Sci. Rev.* 374 (1966) (concluding, based on all nonunanimous decisions and unanimous reversals by courts of appeals between 1961 and 1964, that statistically significant relationship exists between party affiliation and voting behavior); Goldman, *supra* note 5, at 494–95 (concluding based on intercorrelations of voting behavior on issues and ideological voting blocs “that attitudes and values defined politically rather than legally may be of prime importance in understanding appeals court voting behavior”); Robert Oliphant, *En Banc Polarization in the Eighth Circuit*, 17 *Wm. Mitchell L. Rev.* 701, 706–07, 713–49 (1991) (finding from “subjective analysis” of all en banc Eighth Circuit decisions issued in 1989 and 1990 terms that

While these appellate court studies have focused primarily on decisions on the merits, some Supreme Court studies suggest that politically defined attitudes and politically motivated strategies account for behavior in other steps in the judicial process, such as the decision to grant certiorari.<sup>130</sup> The certiorari procedure resembles the en banc procedure in several meaningful respects. Both require a significant number of the court members' votes to hear a case.<sup>131</sup> As with the Supreme Court, the full circuit court has sole discretion over the cases it selects to hear en banc. The grant of certiorari places an issue on the Supreme Court's highly selective agenda. Likewise, the grant of en banc review elevates a case to one of the few worthy of full court consideration. In light of these similarities, the decision to grant en banc rehearing may reflect policy preferences in much the same way the decision to grant certiorari does.

Attitudinalists recognize that judges must have some decisionmaking discretion to be able to follow their personal preferences.<sup>132</sup> Hence,

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"[e]ach judge's [appointing President's] political party's perspectives are reflected in [the judge's] en banc decisions").

*Judicature*, a publication of the American Judicature Society focused on the improvement of the judicial system, has regularly published thoughtful and concise empirical evaluations of the relative ideological behavior of judges appointed by the then-sitting President. *See, e.g.*, Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 *Judicature* 298 (1993); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution* 70 *Judicature* 48, 54 (1986) (finding that Reagan appointees to circuit bench were more conservative than Democratic appointees and comparably conservative when compared to Nixon and Ford appointees); Ronald Stidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 *Judicature* 16, 17, 20 (1996) (finding that Clinton appointees were more liberal than Republican appointees but less than Carter appointees).

130. *See, e.g.*, H.W. Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court* (1991); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 *Am. Pol. Sci. Rev.* 1109, 1120–21 (1988); Richard L. Pacelle, Jr., *The Dynamics and Determinants of Agenda Change in the Rehnquist Court*, in *Contemplating Courts*, *supra* note 27, at 251, 251–53 (discussing research demonstrating that "[t]he factors that govern the selection of cases and the construction of an annual agenda are closely tied to the factors that explain the justices' decisions on the merits of cases"); *cf.* Gibson, *supra* note 102, at 28 (arguing, based on consideration of empirical evidence, that "the same factors that determine decisions on the merits determine access decisions," such as grants of certiorari).

131. Certiorari requires only four out of nine judges, as opposed to the majority vote required for en banc. David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 232–36 (2d ed. 1990) (explaining history and development of informal rule of four). The decision to grant en banc review, then, would be more likely to reflect the ideological preferences of the court's majority than the decision to grant certiorari.

132. For this reason, many studies of courts of appeals have considered only nonunanimous decisions on the premise that such cases are more likely to provide some decisionmaking leeway for the judge. *See, e.g.*, Burton M. Atkins & Justin J. Green, *Consensus on the United States Courts of*

attitudinal theory would be applicable to the en banc process only if it were characterized by such discretion. Courts of appeals judges do, in fact, have substantial discretion in the en banc process because the process lacks many of the standard constraints on appellate court decisionmaking.<sup>133</sup> The en banc procedure is a highly discretionary function characterized by an absence of tangible formal rules.<sup>134</sup> Courts of appeals rarely report publicly the judges' votes on en banc requests, and judges need not provide written explanations for their decisions. Further, the Supreme Court will not scrutinize grants or denials.<sup>135</sup> Thus, judges have greater leeway to allow other factors, such as their policy preferences, to influence their decisions on whether to vote for en banc reconsideration.

Political scientists are not the only court watchers who believe that judges make decisions to achieve political ends: a vocal group of commentators has criticized the highly discretionary en banc power on the grounds that judges often use their power to serve ideological goals.<sup>136</sup> When Reagan judicial appointees gained majority control over a

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*Appeals: Illusion or Reality?*, 20 Am. J. Pol. Sci. 735, 735 (1976) (observing that "the nonunanimous decision has, perhaps by default, emerged as the primary measure of conflict on appellate courts"); Goldman, *supra* note 129, at 375 (examining only nonunanimous decisions and unanimous reversals because "[s]uch cases indicate that there are alternative paths to decision"); cf. Donald R. Songer, *Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals*, 26 Am. J. Pol. Sci. 225, 225-27 (1982) (criticizing nearly exclusive reliance on nonunanimous decisions in judicial behavior research). Likewise, studies of the Supreme Court have emphasized that the nearly unfettered discretion of justices allows them to follow their policy preferences. See, e.g., Rohde & Spaeth, *supra* note 125, at 72-74 (observing that ability of Supreme Court justices to obtain their goals is aided by life tenure, which gives justices job security and removes ambition for higher office, and by supremacy in judicial system, which accords finality to their decisions).

133. Cf. Segal et al., *supra* note 125, at 232 (observing that attitudinal model may have limited relevance in context of court of appeals substantive decisions because those decisions are subject to Supreme Court review, courts of appeals are unable to select which cases to decide, and circuit judges may have ambition for higher office, which curtails their decisions in publicly announced rulings).

134. See, e.g., *United States v. Gori*, 282 F.2d 43, 52 (2d Cir. 1960) (explaining that Second Circuit has "kept formal rules to a minimum" in light of desire to allow for discretion in determining whether to grant en banc review).

135. *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250, 259-60, 267-68 (1953) (holding that en banc power is discretionary and that Supreme Court could only review lower court en banc decisions to ensure circuits provide some administrative machinery for applying for en banc rehearing).

136. Solimine, *supra* note 5, at 30-32, 37-38 (recounting claims that en banc procedure is used for political reasons); Stein, *supra* note 16, at 845-46 (reviewing and challenging critics' arguments); Note, *Politics*, *supra* note 16, at 866 (arguing that "the amorphous nature of the exceptional importance standard apparently invites partisan decisionmaking"); Charley Roberts, *In*

number of circuits in the '80s,<sup>137</sup> critics alleged that the concurrent rise in the use of the en banc procedure reflected a “conservative revolution.”<sup>138</sup> Even the late Justice Harry Blackmun publicly expressed concern about the politicization of en banc rehearings at a meeting of the district and circuit judges of the Eighth Circuit:

The other [matter that I am disturbed about] is what I've noticed . . . in some of the other courts of appeals, and there will be some criticism from some of the speakers here on this one, but when I see in *en banc* hearings, all the appointees of the present administration voting one way and all the appointees of prior administrations, Democrat or Republican, voting the other way. I am a little bit concerned. Maybe I am more than a little bit concerned.<sup>139</sup>

Some Reagan judges did in fact call for an increased use of en banc decisionmaking,<sup>140</sup> but none observed that their fellow appointees had

*the Circuits, Use of En Banc Review on Upswing*, Chi. Daily L. Bull., Sept. 23, 1992, at 2 (discussing popular perception that en banc review reflects political maneuvering on bench).

137. By the time he left office, Ronald Reagan had appointed nearly half of the appeals court judges (76 out of 168 active judges). Herman Schwartz, *Packing the Courts: The Conservative Campaign to Rewrite the Constitution* 150 (1988). Reagan majorities governed seven circuits. Note, *Politics*, *supra* note 16, at 865 n.4. Court watchers argued that Reagan majorities were dramatically affecting public policies through rulings on lower courts. See, e.g., Stephen Wermeil, *The New Judiciary: Reagan-Picked Judges Put the Federal Courts on Conservative Path*, Wall St. J., Dec. 18, 1984, at 70 (detailing critics' complaints about political biases of Reagan appeals court appointees and recounting evidence supporting critics' claims).

138. See, e.g., Schwartz, *supra* note 137, at 155 (concluding that “[m]any cases in the District of Columbia Circuit were *en banc*ed because the conservative majority on the circuit led by Judge Bork was unhappy with the decision, and there are indications that this is happening in other circuits as well”); Oliphant, *supra* note 129, at 702–05 (discussing claims that Reagan appointees have changed philosophy governing use of en banc review resulting in political polarization in circuit courts); J. Bret Treier, *Increased En Banc Activity by the Sixth Circuit*, 19 U. Tol. L. Rev. 277, 277, 280–82, 299 (1988) (observing notable rise in en banc review rate in Sixth Circuit and arguing that it was produced by shifting partisanship on court); Note, *Politics*, *supra* note 16, at 867–68 (presenting quantitative evidence of political use of en banc procedure by Reagan judge voting blocs), 868–75 (reviewing D.C. Circuit en banc cases for descriptive support of politicization of en banc process); Wermiel, *supra* note 23, at 70 (observing that “[d]uring the Carter period, en banc review grew more slowly than the number of judges, but during the Reagan years, the en banc increase was faster than the growth in judges”). *But see* Solimine, *supra* note 5, at 62 (arguing based on review of cases that no clear party lines could be drawn in en banc decisions). Solimine's methodology has been criticized, however, for failing to consider cases decided in 1988 and for adopting an underinclusive coding scheme. Note, *Politics*, *supra* note 16, at 866–68.

139. Smith, *supra* note 18, at 133–34 (quoting Address by Justice Harry Blackmun, Eighth Circuit Judicial Conference, St. Louis, Mo. (July 15, 1988)).

140. See, e.g., Susan Rice, *Earl Warren Would Blush*, Am. Law. Newspapers, May/June 1988, at 46, 48 (Special Supp.) (observing that one of Reagan's most conservative appointments, Ninth

agreed to use the procedure to ensure that panel decisions were consistent with the new circuit majorities.<sup>141</sup>

### 1. *Questioning the Ideological Direction of the Case*

The attitudinal theory produces the expectation that a circuit's ideological majority is more likely to review a panel ruling adopting the minority's position (an ideologically opposed outcome) than a ruling adopting the majority's position. The attitudinal theory accounts for judicial behavior by assuming that judges will seek to maximize their personal policy preferences. Judges, then, will be more likely to vote for en banc rehearing of a panel decision that is contrary to their preferred outcome (having no incentive to rehear a case with which they agree). Accordingly, a majority of a circuit's judges will vote to rehear a panel decision when the decision reaches a conclusion that conflicts with the circuit majority's ideology. Assuming that policy preferences follow party lines, a court dominated by Republican appointees will more likely grant rehearing to a liberal panel ruling than a conservative ruling.

The attitudinal theory's prediction can also be drawn from normative claims made in favor of en banc rehearing. Proponents of regular use of en banc review typically argue that the circuit's majority has the right to review decisions that are inconsistent with the majority's views. For example, D.C. Circuit Judge Douglas Ginsburg has taken the position that "the decisions of the panels ideally *should* reflect the views of the court as a whole, or where that is not possible because the court is divided, come as close as possible to that ideal by reflecting the views of

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Circuit Judge Alex Kozinski, "has strongly urged the court to conduct more *en banc* hearings"); Wermiel, *supra* note 23, at 70 (reporting that "court sources say Judge [Frank] Easterbrook[, a Reagan appointee to the Seventh Circuit] . . . has urged a Reagan-appointed majority to make greater use of en banc review" and quoting Easterbrook as arguing that en banc rehearing is "a stabilizing process that makes sure the majority's voice is heard").

141. But, a number of Democratic appointees have observed as much. *See, e.g., Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1242 (D.C. Cir. 1987) (en banc) (Edwards, J., concurring). In *Bartlett*, Judge Harry Edwards, a Carter appointee, concurred with the D.C. Circuit decision to vacate an order granting rehearing en banc in three cases that Reagan judges were abusing en banc procedure by interpreting Rule 35 standard in "self-serving and result-oriented" manner. *See also, e.g., Wermiel, supra* note 23, at 70 (quoting from speech presented by D.C. Circuit Chief Judge Patricia Wald, Carter appointee, in which she proffered that "[t]here is increasing resort to en bancs to overrule venerable, heretofore respected . . . precedents . . . [which] is plainly a symptom of the rapidly changing makeup of the court").

a majority of the court.”<sup>142</sup> Judge Ginsburg does not enunciate the view that court alignments follow party lines, but it is implicit in his claims and the claims of other circuit judges that if conflicting ideological positions cause divisions in a court, then the majority view should prevail.<sup>143</sup> Under this view, then, a panel ruling opposed to the majority’s preferences warrants en banc reconsideration.

## 2. *Examining Decisions of Panels Composed of Minority Party Members*

Judges may be more likely to vote for en banc rehearing of decisions by panels composed entirely or primarily of judges from the opposite ideological perspective. They may do so because of ideological polarization. Judges, despite their self-classification as formalists, may consider their colleagues to be partisan, particularly those with whom they disagree.<sup>144</sup> Consequently, judges may assume that any panel majority comprised of judges with whom they disagree will reach an ideologically motivated outcome with which they will also disagree.<sup>145</sup> Or, judges trying to decide whether to grant en banc review may look to a panel’s composition in order to save time. Judges must invest time in closely reading all decisions in which they did not participate in order to label a panel ruling as liberal or conservative. They may adopt a shorthand method for determining the ideological direction of a panel decision by looking to the panel’s composition.

En banc rehearing requires a majority of the court’s active members to vote in favor of review; hence, a court’s majority controls the en banc process. A majority party judge (“mainstreamer”) would expect that a panel dominated by judges from the minority party (“outliers”) would be

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142. Ginsburg & Falk, *supra* note 16, at 1034–39 (emphasis added) (arguing that “majority should rule” circuit). *But see* *United States v. Meyer*, 810 F.2d 1242 (D.C. Cir.), *vacated & reh’g en banc granted*, 816 F.2d 695 (D.C. Cir.), *opinion reinstated & reh’g en banc order vacated*, 824 F.2d 1240, 1241–43 (D.C. Cir. 1987) (Edwards, J., concurring) (challenging view that “every time a majority of the judges disagree with a panel decision, they should get rid of it by rehearing the case *en banc*”).

143. *See generally supra* note 140.

144. *See, e.g., supra* note 141.

145. The attitudinal model would generally predict that such should be the case, depending on the discretion available. *Cf. Atkins, supra* note 18, at 626–27, 637–40 (observing that minority-controlled panels of D.C. Circuit in 1956–1962 were likely to follow their policy preferences in criminal law cases raising constitutional issues despite inconsistency of these preferences with circuit majority’s policy orientation).



more likely to issue a ruling contrary to her policy preferences.<sup>146</sup> Mainstreamers, then, according to the attitudinal theory, will be more likely to vote for rehearing en banc when outliers dominate a panel.<sup>147</sup> Because mainstreamers control the grant of en banc review, a circuit would more likely review a panel controlled by outliers.

### C. Hierarchical Theory

Within the past decade, judicial process scholars have enriched our understanding of judicial behavior by utilizing organization theory as developed in other fields of political science<sup>148</sup> and economics.<sup>149</sup> While recognizing that judges seek to attain their policy preferences, organization theorists observe that appellate judges do not make their decisions in isolation, but rather act as part of a group and within a hierarchical structure.<sup>150</sup> Organization studies draw primarily on

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146. I adopt the outlier-mainstreamer language used by Steven Van Winkle. See generally Van Winkle, *supra* note 126.

147. Cf. Oliphant, *supra* note 129, at 749–50 (finding in review of Eighth Circuit decisions that conservative circuit majority granted en banc review to overturn liberal panels); Solimine, *supra* note 5, at 30–31. Solimine observes:

Bork, Ginsburg, and other Reagan-appointed appellate jurists were said to be using the en banc procedure to review and reverse panel decisions by other, more liberal judges. Merely because they disagreed with the results reached by panels comprising [sic] of or dominated by more liberal judges, Reagan-appointed judges were said to be voting indiscriminately for en banc consideration of those decisions.

*Id.*

148. For judicial studies utilizing organization theory, see, e.g., James C. Brent, *An Agent and Two Principals: United States Courts of Appeal Responses to Employment Division v. Smith and the Religious Freedom Restoration Act*, 27 Am. Pol. Q. (forthcoming Apr. 1999); Segal et al., *supra* note 125, at 237–44 (testing hierarchical, legal, and attitudinal models by using sample of court of appeals search and seizure cases); and Van Winkle, *supra* note 126. For a thoughtful consideration of the development of organization theory in the field of economics and the theory's possible applications in political science, see Terry M. Moe, *The New Economics of Organization*, 28 Am. J. Pol. Sci. 739, 739 (1984) (describing approach he terms "new economics of organization" as characterized by "a contractual perspective on organizational relationships, a theoretical focus on hierarchical control, and formal analysis via principal-agent models").

149. See generally Paul Milgrom & John Roberts, *Economics, Organization & Management* (1992); Gary J. Miller, *Managerial Dilemmas: The Political Economy of Hierarchy* (1992); Kenneth J. Arrow, *Agency and the Market*, in 3 *Handbook of Mathematical Economics* 1183 (Kenneth J. Arrow & Michael D. Intriligator eds., 1986).

150. See, e.g., Gibson, *supra* note 102, at 27–28 (observing how "the decisions of judges are almost always the product of collaborative efforts and group/institutional constraints"); Van Winkle, *supra* note 126, at 2–5. J. Woodford Howard observed the impact of group dynamics and organization structure on the behavior of appellate judges in his early study of the Second, Fifth, and D.C. Circuits. Howard, *supra* note 1, at 189–221.

principal-agent theory to explain hierarchical relationships within the judicial system.<sup>151</sup>

Organization theory applied to the relationship between the en banc court and the three-judge panels begins with the premise that the court and panels have entered into an implicit but incomplete agency agreement (known as a “relational contract”).<sup>152</sup> The principal-agent construct situates the circuit court as the principal authorizing the panel as agent to act on its behalf. The circuit bench delegates the resolution of some cases to a given panel. The panel has limited discretion to resolve the disputes assigned to it.<sup>153</sup> Although circuit court precedent in the form of published opinions explicitly limits the panel, the panel is also limited implicitly by informal circuit norms.<sup>154</sup> When a circuit learns that a panel has violated any shared expectation about appropriate behavior, the circuit will act to censor the panel.<sup>155</sup> Monitoring the panel’s behavior involves difficulties and costs for the circuit because of information asymmetries; hence, circuit judges will typically rely on “signals,” or warning signs, to alert them when a panel has exceeded its authority.<sup>156</sup>

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151. *See, e.g.*, Segal et al., *supra* note 125, at 233 (examining relationship between circuit courts and Supreme Court by utilizing principal-agent theory—“a theory of strategic decision making within hierarchical settings”). *See generally* Van Winkle, *supra* note 126, at 1. Songer, Segal, and Cameron were the first to apply the insights of principal-agent theory to the judicial hierarchy, modeling the relationship between the Supreme Court as principal and the courts of appeals as agents. Songer et al., *supra* note 126; *see also* Moe, *supra* note 148, at 756 (explaining from exhaustive review of relevant literature that principal-agent model is “the dominant framework for the formal analysis of hierarchy”).

152. Van Winkle, *supra* note 126, at 3–5 (describing creation of “relational contract” between circuit courts and three-judge panels).

153. *Cf.* Milgrom & Roberts, *supra* note 149, at 131–32 (explaining principal’s delegation of authority to agent by way of incomplete contract, which sets forth general, rather than detailed, boundaries on agent’s authority).

154. *See, e.g.*, Howard, *supra* note 1, at 191–92 (discussing development and influence of informal norms and procedures on decisionmaking within circuit courts); *cf.* Peter F. Nardulli, *The Courtroom Elite: An Organizational Perspective on Criminal Justice* 66 (1978) (explaining how collective efforts by courtroom elites—judges and lawyers—produce shared norms); Gibson, *supra* note 102, at 29 (describing norm formation on courts).

155. Van Winkle, *supra* note 126, at 3–4.

156. *See, e.g.*, Songer et al., *supra* note 126, at 674 (describing how “[d]ifficulty in monitoring,” “asymmetric information,” and “transactions costs” provide agents with opportunity to reach decisions contrary to principal’s dictates); Van Winkle, *supra* note 126, at 4; *cf.* Arrow, *supra* note 149, at 1183–84 (explaining problems of “hidden action,” known as “moral hazard,” and “hidden information,” known as “adverse selection,” in principal-agent relationship); Moe, *supra* note 148, at 754–55 (discussing concepts of adverse selection and moral hazard, which are at core of theory of hierarchical relationships).

En banc review of the panel's decision represents the circuit's only formal control mechanism.<sup>157</sup>

From a principal-agent perspective, litigants will accept the rulings of a panel as long as they do not question the panel's authority to act on behalf of the circuit. Obviously, active use of the en banc procedure would cast the panel's authority into doubt. On the other hand, the legal system at large will accept the circuit delegating authority to panels as long as the system remains confident that the circuit will exercise control over the panel. A court's reluctance to instigate en banc review will decrease the legal system's confidence in the circuit's control over panels. The tension between these interests should mean that courts use en banc review only when a panel has clearly exceeded its authority.<sup>158</sup>

### 1. *Reinforcing the Affirmation Norm*

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.<sup>159</sup> Courts of appeals reverse only about twenty percent of the cases they review,<sup>160</sup> compared with a reversal rate of sixty to sixty-five percent for the Supreme Court.<sup>161</sup> Hence, it appears that the courts of appeals share an expectation that their decisions will affirm lower court rulings. Principal-agent theory would hold that such a strong norm acts

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157. Van Winkle, *supra* note 126, at 3 (noting that “[e]n banc review . . . is the only intra-circuit way to enforce the terms of the incomplete contract, ex post, when a violation is suspected”).

158. *Cf. id.* at 7–8 (arguing that en banc rehearing should “be resorted to in only the most egregious departures from circuit preferences or the most salient, controversial, and/or novel issues” because process is so costly).

159. *See, e.g.,* Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *Yale L.J.* 255, 256 n.7 (1961) (reporting that one co-author, U.S. Circuit Judge Clark, “in a subjective test covering 300 appeals on which he has sat during the last two years, found clear one-way cases comprised at least 70%, while around 10% were highly original cases giving scope to the method of social values. In the remaining 20%, the outcome actually proved certain, but counsel might be forgiven for thinking they had a bare chance of success.”); Maurice Rosenberg, *Standards of Review*, in *Restructuring Justice*, *supra* note 65, at 30, 31 (explaining that in many instances “the court of appeals [is] obliged by established standards to affirm unless, for example, crucial fact findings were not merely in error but clearly so . . . [likewise, d]iscretionary rulings [have] to be not merely incorrect, but abusive”).

160. *See* Davis & Songer, *supra* note 1, at 332–33 (reporting that average rate of reversal for all circuits in 1984 was 17.5%).

161. *See* Epstein et al., *supra* note 64, at 212.

as an implicit limitation on the authority of panels; therefore, if a panel reverses a lower court, the panel's decision would violate that limitation. Nonpanelists can detect violations of the affirmation norm relatively easily and thus decide whether to exact the sanction of en banc review on panels that deviate from the norm.

## 2. *Responding to a Dissenting Judge*

Under principal-agent theory, a circuit court will grant en banc rehearing whenever it learns that a panel violated the terms of the relational contract. Monitoring the decisions of individual panels to learn if any of the panels have breached the agreement costs a circuit court time, energy, and resources.<sup>162</sup> The circuit will more likely learn of a breach when one panelist dissents because that judge has access to greater information than the non-panelists and has an incentive to persuade the other non-panelists to grant en banc review. Moreover, the mere fact of a dissent signals to a nonpanelist that she may justifiably expend personal resources to rehear the case or at least investigate it further.<sup>163</sup>

## 3. *Limiting the Influence of Designated and/or Senior Judges*

Three-judge panels are composed of active circuit judges as well as retired members from the circuit<sup>164</sup> and temporarily designated members

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162. See, e.g., Ginsburg & Falk, *supra* note 16, at 1032–33. Judge Ginsburg explains that when it comes to identifying “panel error,” judges not on the original panel are at a significant informational disadvantage as compared to panelists because they are less familiar with the case and did not participate in oral argument. “Nor would it make sense for each nonpanelist to acquire that degree of familiarity in order to vote on the suggestion for rehearing. The burden of doing so every time a suggestion was not facially without merit would be overwhelming.” *Id.* at 1033. As Van Winkle explains in an article examining the role of panel dissents as a signal to other members of a court: “The panel knows what it has done. The other judges of the circuit have to expend scarce resources to learn even the *panel’s version* of what it has done (i.e. the opinion).” Van Winkle, *supra* note 126, at 8; cf. Moe, *supra* note 148, at 756 (explaining that principal’s primary difficulty in monitoring agent’s actions arises from fact that information about those “actions and the inputs on which they are based is not only imperfect but skewed in favor of the agent”).

163. Ginsburg & Falk, *supra* note 16, at 1047 (contending that “if the panel was divided, the nonpanelist not only knows that the losing argument was capable of persuading at least one judge; he or she also has the benefit of that judge’s opinion, which can be read without concern that it is skewed by the zeal of an advocate”); cf. Patricia Wald, *The D.C. Circuit: Here and Now*, 55 *Geo. Wash. L. Rev.* 718, 719 (1987) (revealing that dissents are often described by other judges as signal to Supreme Court that case is worthy of grant of certiorari).

164. Federal circuit judges who have retired from regular active service may ask to serve on cases within their circuit. 28 U.S.C. § 294(b)–(c) (1994).

from other federal courts.<sup>165</sup> As caseloads have grown, so has the circuits' reliance on judges who are not active members of the circuit.<sup>166</sup> For various reasons, the active membership may choose to review decisions by panels comprised of, in part, designated and/or senior judges. Active judges may suspect that non-active judges will not feel the same respect for and deference to circuit precedent or simply not have the same knowledge of it given their itinerant status.<sup>167</sup> Or, they may not approve of non-active judges establishing the law of the circuit.<sup>168</sup> Thus, they would more likely grant en banc rehearing to panels with one or more senior and/or designated judges.

While it is somewhat intuitive that active circuit judges may question the authority of visiting judges, it may appear less obvious that they will question senior circuit judges who were at one time active members of the court. Unlike visiting judges, senior circuit judges do not owe allegiance to another court, nor do they appear to be interlopers. However, active circuit judges have expressed the view that senior judges should not be able to constrain the progression of the law.<sup>169</sup>

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165. The Judicial Code provides that the chief judge of a circuit may assign district judges from within the circuit to sit and decide cases brought before the circuit. 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, 28 U.S.C. § 291(a) (1994), may assign retired Supreme Court justices with their consent, 28 U.S.C. § 294(a) (1994), as well as circuit judges from other circuits, 28 U.S.C. § 291(a), to sit temporarily on the circuit. These designated judges have the same authority as circuit judges in the cases in which they participate.

166. Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. Mich. J.L. Reform 351, 363–66 (1995) (observing that growth in caseload has corresponded with increasing utilization of designated district court judges and considering adverse effects of such reliance).

167. Stephen Wasby found in interviews with Ninth Circuit judges that three of nine judges interviewed reported that the use of designated judges was resulting in inconsistent and incoherent decisions, "causing 'severe problems,'" while the remaining six felt that designated judges "contributed to inconsistency 'idiosyncratically.'" Stephen L. Wasby, "Extra" Judges in a Federal Appellate Court: The Ninth Circuit, 15 L. & Soc'y Rev. 369, 374 (1980–81); see also Saphire & Solimine, *supra* note 166, at 371–75; Wasby, *supra*, at 379 (reporting that Ninth Circuit judges were concerned that visiting district and circuit judges were loyal to another institution); cf. Atkins, *supra* note 18, at 630 (observing that "the regular recruitment of outside judges . . . increases the probability of inconsistent decision-making" in part due to "the likelihood that semi-retired and visiting judges are less aware of precedents indigenous to particular circuits than are active court members").

168. See Madden, *supra* note 22, at 417; cf. Saphire & Solimine, *supra* note 166, at 374.

169. Wasby, *supra* note 167, at 377–78.

#### D. *An Integrated Theory*

I have extended the dominant judicial behavior theories by applying them to the decision to grant en banc review and generated hypotheses to explain the decision. The legal, attitudinal, and hierarchical hypotheses form an integrated model of the decision to grant en banc rehearing as set forth below. Each hypothesis predicts a relationship between a characteristic of the panel decision (e.g., the case involved an issue that was the subject of intracircuit conflict) and the likelihood of en banc rehearing. The direction of the hypothesized effect of each factor is positive (e.g., an intracircuit conflict increases the likelihood that a panel will be reheard en banc).

<b>An Integrated Model of the Decision to Grant En Banc Rehearing</b>		
<b>Theory</b>	<b>Panel Characteristic</b>	<b>Hypothesized Effect</b>
<i>Legal</i>	Intracircuit conflict	Increase likelihood
	Intercircuit conflict	Increase likelihood
<i>Attitudinal</i>	Outlier ideological direction	Increase likelihood
	Outlier majority	Increase likelihood
<i>Hierarchical</i>	Reverse lower court or agency	Increase likelihood
	Dissenting panelist	Increase likelihood
	Designated judge on panel	Increase likelihood
	Non-active judges on panel	Increase likelihood

### III. EMPIRICAL ANALYSIS

The proposed integrated model of the decision to grant en banc rehearing stands on solid theoretical underpinnings. Empirical analysis should establish whether the model accurately predicts when a court will rehear a panel ruling en banc. Moreover, empirical testing will establish whether evidence supports each hypothesis and will measure the relative import of each panel characteristic to the decision to grant en banc rehearing.

### A. *The Data*

I drew my data from three of the twelve general subject-matter jurisdiction circuits: the Second, Fourth, and Eighth.<sup>170</sup> Those three circuits held 305 en banc rehearings between 1956 and 1996.<sup>171</sup> To create a control group of cases from each circuit, a systematic random sample stratified by decision year was collected. Two cases were selected for each en banc rehearing in a given year, creating a random sample of 610 panel decisions that were not reheard en banc.

The cases were examined and several features of each case were recorded. Each case was categorized as one of eight broad issue types<sup>172</sup> derived from categories used in two databases of federal court decisions,

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170. I selected the Fourth and Eighth Circuits largely out of personal interest and familiarity. I had the great honor of clerking for Fourth Circuit Judge Francis D. Murnaghan, Jr., and I currently teach at a public law school in the Eighth Circuit's jurisdiction. After I discovered that both circuits have relatively high rates of en banc review, I sought to include a circuit that was less likely to grant en banc rehearing. I chose the Second.

The Second Circuit historically, and perhaps intentionally, has had the relatively lowest number of en banc cases. *See, e.g.*, Kaufman, *supra* note 16, at 7 (reporting with satisfaction that author's circuit, Second, "has the lowest rate of rehearings en banc of all the circuits"); Solimine, *supra* note 5, at 42 & n.71, 45 (observing that "Second Circuit Judges have long been on record as opposing any extensive use of the en banc procedure"). Congress added a fourth judgeship to the Second Circuit in 1911, a fifth in 1929, and a sixth in 1955, but the court did not hear a case en banc until 1956 primarily because the chief judges until that time were opposed to the en banc procedure. Morris, *supra* note 28, at 135; Marvin Schick, *Learned Hand's Court* 76, 115-20 (1970) (describing Learned Hand's "dogged[] oppos[ition] to full court hearings" and recounting how "during [Hand's] chief judgeship and several years thereafter, only the panel system was employed"). In the 1960s and '70s, the court was divided on the appropriate use of the en banc procedure and as a consequence a majority could rarely be garnered in support of rehearing. Howard, *supra* note 1, at 218; Schick, *supra* note 170, at 120-22. The 1980s and '90s have not seen a significant rise in use as reflected in Second Circuit Judge Newman's trilogy of articles detailing every Second Circuit en banc case decided over a 15-year period. *See, e.g.*, Newman, *The Virtues of Restraint*, *supra* note 16, at 491 (observing that "[t]he salient characteristic of [the United States Court of Appeals for the Second Circuit] during 1989-93 is the continuation of an extremely low rate of rehearings en banc").

171. WESTLAW and LEXIS searches were conducted to identify all en banc cases decided by those circuits following a panel ruling. The Second Circuit decided 90 en banc cases, of which 64 followed panel decisions; the Fourth Circuit decided 284 en banc cases, of which 128 followed panel decisions; and the Eighth Circuit decided 151 en banc cases, of which 113 followed panel decisions. In some instances, the panel circulated an opinion among the rest of the circuit but did not issue the opinion because the court voted to rehear the case en banc prior to the release of the opinion. If the en banc decision described the outcome and votes in the original panel ruling, then the panel decision was included in the database and is considered here. If not, the panel ruling could not be included in the database because of insufficient information about its characteristics.

172. The issue areas are criminal, civil rights, First Amendment, due process (non-criminal), privacy, labor relations, economic regulation and activity, and miscellaneous.

the Supreme Court Database<sup>173</sup> and the U.S. Court of Appeals Database.<sup>174</sup> Each decision is categorized as liberal or conservative to establish the ideological direction variable, again using the Supreme Court and U.S. Court of Appeals databases as guides.<sup>175</sup> The dichotomous ideological variable reflects whether the court supports or opposes the issue to which the case pertains.<sup>176</sup> This Article defers to the categorizations developed by the authors of those databases for three reasons: (1) to allow comparisons between my results and the results in studies using those databases; (2) to provide for easier replication of my study;

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173. See Harold J. Spaeth, *United States Supreme Court Judicial Database, 1953–1993 Terms: Documentation* (6th ICPSR version 1995) (last visited Apr. 24, 1999) <<http://www.icpsr.umich.edu/cgi/subject.prl?path=ICPSR&query=XII>>. This multiuser 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 U.S. Supreme Court decisionmaking during the 1953 through 1993 terms and is constantly updated. The data file includes a documentation file explaining the coding methodology.

174. See Donald R. Songer, *The United States Courts of Appeals Data Base Documentation* (Rough Draft 8/26/96) (on file with author). 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 the cases from each circuit for each year for the period 1925–1988. The total size for this sample will be approximately 20,000 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. Donald R. Songer, *The United States Courts of Appeals Data Base*, L. & Courts, Summer 1996, at 23, 23. This phase was expected to result in the coding of approximately 4000 additional cases. *Id.* The Database is not yet available through the ICPSR.

175. 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 century 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/liberal labels lack specificity of meaning. While these labels have lost some precision in general discourse, they remain the “most generally used to distinguish between opposed complexes of preferences in matters of public policy.” See C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–47*, at 33–34 (1948). The present study, by relying on consistent categorizations, can be compared to and used with other studies.

176. In criminal, civil rights, First Amendment, due process (non-criminal), and privacy, a decision was “liberal” if it was one of the following (and “conservative” if the opposite): pro-criminal defendant, pro-civil liberties or civil rights claimant, pro-indigent, pro-Native American, pro-affirmative action, pro-female in abortion, pro-underdog, anti-government in non-takings due process, or pro-disclosure (except employment or student records).

For cases involving labor relations or economic regulation and activity, a decision was “liberal” if it was one of the following (and “conservative” if the opposite): 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-Native American, pro-environmental protection, pro-consumer, pro-accountability, or anti-arbitration.

Miscellaneous cases were not classified by ideological direction because they did not lend themselves to a reliable categorization.



and (3) perhaps most importantly, to defer to formulations crafted over time and through debate among court scholars.

Each case was coded according to its disposition<sup>177</sup> and whether the appellant could be deemed the “winner.” A decision was treated as a win if the appealing or petitioning party emerged at least partially victorious. This variable allows for the distinction between reversals that reflect a substantive win for the appellant and those that are simply a matter of formality. Under the typology used here, a panel reverses a lower court or agency when the disposition is reversed in whole or in part and the appellant “wins.”

Each judge’s vote and the nature of her participation was recorded. If a judge concurred in part *and* dissented in part, her opinion (or the opinion she joined) was examined 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, she was treated 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 the judge was treated as concurring.

The judges from within the circuit were also categorized according to their status (active or senior) and the party of the President who appointed them (Republican or Democrat). Visiting judges were not identified by the party of the President who appointed them.<sup>178</sup>

A case was identified as involving an intracircuit split if any member of the panel explicitly stated that two panels of the circuit had reached different decisions in analogous circumstances. Similarly, a case was identified as addressing an issue that was the subject of an intercircuit split if a member of the panel stated as much.<sup>179</sup> The conflict had to be express and direct, not merely a matter of general or logical inconsistency.<sup>180</sup>

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177. The disposition variable 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.

178. Visiting judges were classified according to their permanent posts: senior circuit judges from other circuits, senior district judges, active district judges, and retired Supreme Court justices.

179. My identification of intercircuit conflict is not as comprehensive as that utilized by Hellman, who examined all filings in a sample of certiorari petitions for claims of conflict. Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693 (1995). Hellman looked for one of two indications of conflict: “*acknowledgment* by the courts of decision and *recognition* by other participants in the legal system.” *Id.* at 708. I relied solely on the former. Like Hellman, I did not go further and seek to determine whether the acknowledged conflict was “‘genuine’ or ‘direct,’” *id.* at 709, although for a different reason: I am

## B. Descriptive Statistics

To confirm that each variable was in fact related to en banc rehearing, the simple bivariate relationship between each hypothesized factor and the decision to grant en banc review is computed. Two-by-two tables reveal the breakdown of cases by a selected panel characteristic (such as whether the panel was unanimous) and whether the panel was reheard en banc. Statistical tests of relationship (primarily Pearson's chi-square test of independence) provide a more rigorous measure of that relationship (if one exists). The tables and simple statistics disclose that the data strongly support most, but not all, hypotheses.

### 1. Resolving an Intracircuit Conflict

Intracircuit conflict is highly unusual in the Second, Fourth, and Eighth Circuits;<sup>181</sup> yet, the relationship between a cited intracircuit

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trying to understand judicial behavior, and hence, the fact that a judge has claimed there is a conflict represents a judicial perception of conflict.

180. Judges may disagree as to whether a conflict has indeed been created. Solimine, *supra* note 5, at 35–40 & n.53. To try to overcome this difficulty, I adopted the basic standard set forth by Thomas Goldstein, who writes the monthly *Circuit Split Roundup* for the Bureau of National Affairs: a case involves or produces a split if it “acknowledge[s] and describe[s] disagreements.” See, e.g., Thomas Goldstein, *Circuit Split Roundup*, 66 U.S.L.W. 2655 (Apr. 28, 1998) (emphasis added). In seeking to distinguish true intracircuit and intercircuit conflicts from merely superficial inconsistencies, I also relied on the insights of Hellman's Theory of Intracircuit Conflict. Arthur Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 Ariz. St. L.J. 915, 922–41 (1991). Hellman developed a three-step test to determine whether a true conflict exists. He found in a sample of Ninth Circuit decisions from 1983 and 1986 that new cases generally do not directly disagree with earlier precedent but rather “follow, extend, or distinguish existing precedents” consistent with “the common-law process.” *Id.* at 965–66.

181. My findings here are consistent with Howard's study of the Fifth Circuit, Hellman's investigation of Ninth Circuit decisions, and several reviews of en banc D.C. Circuit rulings. See Howard, *supra* note 1, at 215–16 (disclosing that “[o]f sixty-five en bancs held by the 5th circuit in 1968–1972, for instance, only five were called to settle panel conflicts” despite sense that circuit's growing size was leading to interpanel discord); Hellman, *supra* note 180, at 921 (concluding that “the Ninth Circuit has generally succeeded in avoiding conflicts between panel decisions”); Hellman, *supra* note 17, at 548–50 (examining 9th Circuit intracourt memoranda regarding whether to grant en banc review for 1981 to 1986 period and finding that intracircuit inconsistency was cited as concern in only 75 cases, and of those was primary concern in less than 60); see, e.g., Note, *Politics*, *supra* note 16, at 876 n.60 (finding that only one of 13 en banc D.C. Circuit cases decided between 1986 and 1988 involved explicit intracircuit conflict). Bennett and Pembroke found that conflict resolution was involved in only eight of 76, or 10.5%, of cases decided en banc by the D.C. Circuit from 1971 through 1985. See Bennett & Pembroke, *supra* note 22, at 537. The authors found no direct intracircuit conflicts in their random sample of 200 panel rulings drawn from the 1971–1980 period, but did find six instances in which a case was listed by *Shepard's Citations* as subsequently questioned, criticized, or limited. *Id.* at 538 & n.41. The *Shepard's Citations*

conflict and a grant of en banc rehearing is statistically significant<sup>182</sup> as reflected in the Fisher's exact test results.<sup>183</sup> The evidence supports the hypothesis that a majority of circuit judges will vote for en banc review whenever such a clear conflict has been expressed in an opinion by one of the panelists.<sup>184</sup> If courts limited en banc rehearsings to such circumstances, however, these rehearsings would practically vanish.

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information is not particularly illuminating; it is a commercial service aimed at an overinclusive characterization of cases so that practitioners may be certain that relevant case law is still controlling. It also lacks clear operationalizations (resulting in reliability problems) and includes dissents, which would not be the basis for finding any circuit conflict.

The relatively low number of cases with explicit conflicts may simply be the product of the rule adopted by most circuits that all panels are bound by the decisions of earlier panels of the court. *See, e.g.,* Bennett & Pembroke, *supra* note 22, at 536 & n.37 (citing cases holding that their respective circuits had adopted law of circuit rule); Carrington, *supra* note 16, at 580; Hellman, *supra* note 179, at 699 n.20 (explaining that all courts of appeals follow rule that panel rulings bind later panels unless overruled by en banc circuit or Supreme Court); Hellman, *supra* note 17, at 545 & n.13. A few circuits allow a panel to overrule existing circuit precedent if the panel circulates a proposal to do so and none of the other active judges disagrees. It is essentially an en-banc-bypass device. *See generally* Bennett & Pembroke, *supra* note 22 (examining this process at length).

182. 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 that has a random probability of less than .05 is described as statistically significant. Alan Agresti & Barbara Finlay, *Statistical Methods for the Social Sciences* 146, 152 (2d ed. 1986) (explaining meaning of  $p$ -values and distinction between statistical and practical significance).

183. I use Fisher's exact test rather than the traditional chi-square test of independence because the expected frequency is less than five for one cell in a two-by-two table (that is, in 25% of the cells). *See, e.g., id.* at 207 (explaining rationale for using different test for smaller expected frequencies); Hubert M. Blalock, *Social Statistics* 292-97 (rev. 2d ed. 1979) (providing method for computing Fisher's exact statistic); R. Mark Sirkin, *Statistics for the Social Sciences* 364 (1995) (presenting contingency flow chart for tests of relationship including chi-square and Fisher's exact).

184. Arthur Hellman asked lawyers, district judges, and circuit judges in the Ninth Circuit whether they agreed with the following statement: "When intracircuit conflicts do arise, the Court of Appeals generally resolves them through modification of opinions or en banc rehearsings." Hellman, *Maintaining Consistency*, *supra* note 99, at 56. Nineteen out of 21 circuit judges agreed, but only one-third of the district judges and fewer than one-third of the lawyers agreed. *Id.* My data indicates that for the circuits considered here, the statement is true for conflicts acknowledged in a majority, concurring, or dissenting opinion.

**Table 1. Relationship Between Intracircuit Conflict  
and En Banc Rehearing**

	INTRACIRCUIT CONFLICT		ROW TOTAL
	<i>Conflict Cited</i>	<i>No Conflict</i>	
<i>Reheard En Banc</i>	12	293	305
<i>No Rehearing</i>	0	610	610
COLUMN TOTAL	12	903	915

• Fisher's exact test:  $p < .001$ .

## 2. *Considering an Intercircuit Conflict*

A majority of circuit judges did not display the same willingness to rehear en banc cases involving a legal question that is the subject of a clear and direct *intercircuit* conflict; but, as Table 2 reveals, panels reheard en banc were nearly six times more likely to involve an intercircuit dispute than panels not reheard en banc. The data also disclose that judges did not frequently cite intercircuit conflict, an interesting point in light of the growing concern about a *perceived* crisis of doctrinal inconsistency between circuit courts.<sup>185</sup> Again, the relationship between rehearing en banc and the hypothesized factor—an acknowledged intercircuit conflict—is statistically significant: it is highly unlikely (less than .01%) that this correlation resulted from chance.<sup>186</sup>

185. See, e.g., Estreicher & Sexton, *supra* note 61, at 25–40 (providing overview of debate over Supreme Court's failure and/or inability to address all intercircuit conflicts); Hellman, *supra* note 179, at 794–97 (acknowledging that substantial portion of Supreme Court's docket consists of cases involving circuit split, but concluding, based on study of petitions for certiorari, that concern over increasing numbers of unresolved intercircuit conflicts is "misplaced" because existing conflicts are "tolerable" for various reasons).

186. For this table and those that follow, I utilize a Pearson chi-square statistic ( $\chi^2$ ) to determine whether the two nominal variables are independent or dependent. The smaller the value of  $\chi^2$ , the greater the likelihood that the variables are dependent. The degrees of freedom of the chi-square distribution is noted after "df." Agresti & Finlay, *supra* note 182, at 202–09.

<b>Table 2. Relationship Between Intercircuit Conflict and En Banc Rehearing</b>			
	INTERCIRCUIT CONFLICT		ROW
	<i>Conflict Cited</i>	<i>No Conflict</i>	TOTAL
<i>Reheard En Banc</i>	37	268	305
<i>No Rehearing</i>	15	595	610
<b>COLUMN TOTAL</b>	<b>52</b>	<b>863</b>	<b>915</b>
• $\chi^2 = 35.49$ , $df = 1$ , $p < .001$ .			

### 3. Questioning the Ideological Direction of the Case

Table 3(a) sets forth the ideological direction of the cases without considering the composition of the circuit (including only the 890 cases coded for ideological direction). The results indicate that a substantial majority of panel rulings in the random sample, approximately seventy-one percent, are ideologically conservative. In stark contrast, panels reheard en banc reached a *liberal* decision nearly sixty-seven percent of the time. The large, statistically significant chi square is expected in light of these statistical findings. The data presents an image of extremely conservative courts of appeals that are far more likely to rehear a liberal decision en banc than a conservative one.

<b>Table 3(a). Relationship Between Ideological Direction and En Banc Rehearing</b>			
	PANEL DIRECTION		ROW
	<i>Liberal</i>	<i>Conservative</i>	TOTAL
<i>Reheard En Banc</i>	192	96	288
<i>No Rehearing</i>	172	430	602
<b>COLUMN TOTAL</b>	<b>364</b>	<b>526</b>	<b>890</b>
• $\chi^2 = 129.10$ , $df = 1$ , $p < .001$ .			
• 25 cases were excluded because the panel ruling was not coded for ideology.			

Table 3(b) divides cases according to their ideological direction *as compared to* the ideological direction of the court's majority (necessarily excluding cases decided when the circuit court was evenly divided).<sup>187</sup>

187. The Second Circuit had a Republican appointee majority for the entire period, but both the Fourth and Eighth Circuits were at various times dominated by Republican appointees, Democratic

Again, a significant relationship exists between en banc rehearing and the ideological direction of interest. The circuit courts were much more likely to vote to rehear en banc panel rulings adopting the outlier ideological position. The relationship, however, is not as strong as that tested in Table 3(a).

<b>Table 3(b). Relationship Between Outlier Ideological Direction and En Banc Rehearing</b>			
	PANEL DIRECTION COMPARED TO MAJORITY'S POSITION		ROW TOTAL
	<i>Disagreed</i>	<i>Agreed</i>	
<i>Reheard En Banc</i>	144	128	272
<i>No Rehearing</i>	204	303	507
<b>COLUMN TOTAL</b>	<b>348</b>	<b>431</b>	<b>779</b>
<ul style="list-style-type: none"> <li>• <math>\chi^2 = 11.56</math>, <math>df = 1</math>, <math>\rho &lt; .001</math>.</li> <li>• 25 cases were excluded because the panel ruling was not coded for ideology.</li> <li>• 111 cases were excluded because the full court was evenly divided.</li> </ul>			

#### 4. *Examining Decisions of Panels Controlled by Outliers*

While the ideological direction of a panel's decision is strongly correlated to the court's decision to grant en banc rehearing, the ideological *composition* of the panel is *not* correlated to the court's decision. Table 4 sets forth the number of panels with an outlier majority (that is, two or three circuit judges from the minority party) that the court reheard en banc.

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appointees, or neither (that is, the court had an equal number of Republican and Democratic appointees).

**Table 4. Relationship Between Panel Outlier Majority  
and En Banc Rehearing**

	OUTLIER MAJORITY		ROW TOTAL
	<i>Yes</i>	<i>No</i>	
<i>Reheard En Banc</i>	58	159	217
<i>No Rehearing</i>	122	311	433
COLUMN TOTAL	180	470	650

- $\chi^2 = 0.15$ ,  $df = 1$ , N.S. (not significant).
- 111 cases were excluded because the full court was evenly divided.
- 154 cases were excluded because the panel was evenly divided (one Republican appointee, one Democratic appointee, and one designated judge).

Obviously, as a statistical matter, minority party judges will constitute the majority of fewer panels, with the relative number influenced by how much the majority outnumbered the minority. Thus, the fact that most panels reheard en banc did not have an outlier majority does not alone warrant rejecting the hypothesis. The percentage of panels reheard en banc that had an outlier majority, however, essentially equaled the percentage of panels not reheard en banc (26.7% versus 28.2%). Not surprisingly then, the relationship between the panel's ideological composition and rehearing en banc is not statistically significant, as reflected in the chi-square statistic.<sup>188</sup>

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188. One possible explanation for the failure of the outlier majority hypothesis can be found in the organization theory work of Frank Cross and Emerson Tiller, and Steve Van Winkle. Cross and Tiller argue that a three-judge majority is more likely than a two-judge majority to issue a partisan decision because the presence of a single judge with a contrary position who can threaten to "blow the whistle" has "a distinct political moderating effect." Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155, 2173 (1998). Thus, Cross and Tiller conclude that a two-one ideological split is less likely to produce a politically motivated outcome because of the strategic influence of the one politically opposed judge. Van Winkle likewise has concluded that "[a] panel with three outliers is most likely to behave opportunistically." Van Winkle, *supra* note 126, at 9. Van Winkle also observes that a mainstreamer on a panel with two outliers has an incentive to dissent if the outliers are reaching a decision contrary to the mainstreamers' preferences. *Id.* Their propositions support the argument that a nonpanelist would only be inclined to grant en banc review to panels composed only of outliers *or* composed of two outliers and a dissenting mainstreamer. These perspectives may explain the failure of the outlier majority hypothesis, which does not differentiate between a majority of two outliers and a majority of three outliers.

### 5. Reinforcing the Affirmation Norm

In the random sample, panels affirmed the lower court or agency in nearly seventy-three percent of the cases, as reflected in Table 5.<sup>189</sup> Panels reheard en banc affirmed the lower court or agency less than forty percent of the time. The relationship between the panel's treatment of the lower court or agency's ruling and the panel being reheard en banc reaches the level of statistical significance, as reflected in the large chi-square. In this instance, the correlation is so apparent from the bare numbers that one hardly needs to look to statistical tests to conclude that the data strongly supports the hypothesis that panels violating the affirmation norm are much more likely to be reheard by the full court.

	TREATMENT OF LOWER COURT OR AGENCY		ROW TOTAL
	<i>Affirm</i>	<i>Reverse</i>	
<i>Reheard En Banc</i>	120	185	305
<i>No Rehearing</i>	442	168	610
<b>COLUMN TOTAL</b>	<b>562</b>	<b>353</b>	<b>915</b>

•  $\chi^2 = 94.10$ ,  $df = 1$ ,  $p < .001$ .

### 6. Responding to a Dissenting Judge

My data discloses that the typical case rarely has a dissent: a judge expressly disagreed with her two colleagues in less than seven percent of the panels in the random sample.<sup>190</sup> The contrast between the random

189. This figure is similar to that reported by Davis and Songer for all circuits in 1984, and by Howard for the Second, Fifth, and D.C. Circuits in 1965–67. See Davis & Songer, *supra* note 1, at 333 (reporting reversal rate of 17.5% for all circuits in 1984); Howard, *supra* note 1, at app. A (reporting reversal rate of 17.2% for Second Circuit, 24.4% for Fifth Circuit, and 19.6% for D.C. Circuit).

190. The results from my sample are consistent with those found in studies of all cases, despite the possibility that the authors of those studies adopted a different (probably a more liberal) definition of "dissent." See, e.g., Atkins & Green, *supra* note 132, at 742–43 (finding that dissenting votes were cast in 6.9% of all court of appeals decisions between 1966 and 1970); Goldman, *supra* note 129, at 377 (finding that split decisions during fiscal years 1962–1964 accounted for 11.5% of Second Circuit cases, 5.9% of Fourth Circuit cases, and 3.3% of Eighth Circuit cases); Goldman, *supra* note 5, at 493; cf. Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. Colo. L. Rev. 619, 642 (1985) (reporting 5.8% dissent rate in D.C. Circuit during 1983–1984 term).



sample and the en banc cases is astounding, as the dissent rate increases more than ten-fold to seventy-five percent. Thus, when a panel member dissents, the panel's ruling is much more likely to be reheard en banc than when the panel is unanimous.

**Table 6. Relationship Between Unanimous Panel and En Banc Rehearing**

	PANEL MAJORITY VOTE		ROW
	<i>Unanimous</i>	<i>Dissent</i>	TOTAL
<i>Reheard En Banc</i>	76	229	305
<i>No Rehearing</i>	569	41	610
COLUMN TOTAL	645	270	915

•  $\chi^2 = 456.81$ ,  $df = 1$ ,  $p < .001$ .

Results for the Second, Fourth, and Eighth Circuits are consistent with Ginsburg and Falk's study of D.C. Circuit en banc decisions for the 1987 through 1990 terms.<sup>191</sup> In their study, dissents from panel decisions were also rare—only eleven percent of published panel decisions were divided. In contrast, panel decisions reheard en banc were divided in sixty-eight percent of the cases. The probability of the D.C. Circuit rehearing a unanimous panel decision was one-half of one percent compared to nine percent for divided panels.<sup>192</sup>

### 7. *Limiting Influence of Designated and/or Senior Judges*

Circuit courts frequently rely on visiting judges to assist in the resolution of cases, but do not appear more likely to grant en banc rehearing to panels with a visiting judge. One, in a few instances two, designated judges participated in nearly one-third (31%) of the panels in the random sample; but, the difference between the participation rate in panels reheard en banc and those not reheard en banc is small (5%) and not statistically significant as reflected in Table 7(a). Despite the perception of some judges and commentators that the involvement of designated judges alone increases the likelihood of en banc

191. Ginsburg & Falk, *supra* note 16, at 1046–47.

192. *Id.*

reconsideration,<sup>193</sup> the evidence from the Second, Fourth, and Eighth Circuits does not support that conclusion.<sup>194</sup>

Table 7(a). Relationship Between Designated Judge on Panel and En Banc Rehearing			
	DESIGNATED JUDGES		ROW TOTAL
	<i>None</i>	<i>One or More</i> <sup>195</sup>	
<i>Reheard En Banc</i>	195	110	305
<i>No Rehearing</i>	419	191	610
COLUMN TOTAL	614	301	915
• $\chi^2 = 2.09$ , $df = 1$ , N.S. (not significant).			

The reason for the nonsignificant result may be simple: designated judges are unlikely to disagree with circuit judges and even less likely to express that disagreement in a written opinion (majority or dissenting). Designated judges participated in 110 panel decisions reheard en banc by the three circuits. Seventy-two of those panels were divided. The designated judge dissented in only seven of the seventy-two divided

193. See, e.g., Alexander, *supra* note 2, at 595–96.

194. But, other studies have found some evidence for the proposition that cases involving designated judges are more likely to be reviewed en banc. Justin Green, in a study of the influence of visiting judges on circuit law, examined 297 cases in which a designated judge wrote the majority opinion and a circuit judge dissented and compared those cases to a random sample of unanimous decisions by panels comprised of circuit judges. He found a higher rate of en banc review for the former group. Saphire & Solimine, *supra* note 166, at 373–74 (citing Justin J. Green, *The Influence on Circuit Law of Judges Sitting "By Designation,"* 5–6 (paper delivered at Annual Meeting of American Political Science Ass'n, Sept. 2, 1979)). Similarly, in an article considering the phenomenon of visiting judges, Solimine reexamined the cases giving rise to en banc review that were the basis of his earlier study and found nearly 29% involved a designated district judge, a much higher rate than the rate of such participation in panels as a whole. Saphire & Solimine, *supra* note 166, at 374–75. I also found some evidence to support this hypothesis in Ginsburg and Falk's appendix presenting information about panels reheard en banc by the D.C. Circuit for fiscal years 1981 through 1991 (the authors do not consider the panel participation of non-active judges as a relevant factor in the en banc process). Ginsburg & Falk, *supra* note 16, at 1056–91. The D.C. Circuit granted en banc review to 42 panels during this period. A senior and/or designated judge participated in 35 of the panel rulings. A senior judge participated in 21 cases (one-half of the panels reviewed en banc), and a designated judge participated in 20 cases (nearly 48%). Six cases were decided by a panel whose majority was comprised of non-active judges, as one designated judge and one senior judge sat on the panel.

195. Two designated judges participated in a small number of cases (10) included in this study. The Second Circuit cases included one reheard en banc and three that were not reheard. The Fourth Circuit cases included one reheard en banc and five not reheard. There was no relationship between designated judges comprising a majority of the panel and the decision to grant en banc review.

cases and wrote the majority opinion in only eighteen of the seventy cases with an authored majority opinion. Designated judges participated in 191 panel decisions not reheard en banc in the random sample. Of those cases, a panelist dissented in twelve. A designated judge wrote the dissent in only two cases and the majority opinion in only four.

If senior judges and designated judges are considered together, then non-active panelists appear to increase the likelihood of en banc review. A majority of a circuit will more often grant en banc review to panels with non-active judges, and the relationship between the number of non-active judges and rehearing en banc is statistically significant as reflected in Table 7(b).

	SENIOR and/or DESIGNATED JUDGES				ROW
	<i>None</i>	<i>One</i>	<i>Two</i>	<i>Three</i>	TOTAL
<i>Reheard En Banc</i>	90	166	49	0	305
<i>No Rehearing</i>	249	306	52	3	610
COLUMN TOTAL	339	472	101	3	915
• $\chi^2 = 19.1$ , $df = 3$ , $p < .001$ .					

### C. *Multivariate Test of an Integrated Model of the Decision to Grant En Banc Rehearing*

While the descriptive statistics are very promising (that is, most of the hypotheses appear to have some support in the data), those statistics cannot alone provide an explanation for the role of each factor in the decision to grant en banc rehearing.<sup>196</sup> Thus, this section sets forth logistic regression analysis in order to discover the *relative* influence of each particular variable on the decision to grant en banc rehearing by subjugating the individual variables (i.e., the panel characteristics) to multivariate controls.<sup>197</sup> The results should shed more light on the reasons that the circuit court uses its en banc power.

196. Karl Llewellyn admonished students of the courts to utilize the best empirical techniques when he opined: "I do not like coarse analysis and coarse results when more refined analysis and results are available." Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 516 (1960).

197. The resulting model has as its dependent variable the grant of en banc rehearing and as its independent variables the legal, attitudinal, and hierarchical factors.

## I. Statistical Method

I have proposed a single integrated model of the decision to grant en banc review,<sup>198</sup> but present three forms or versions of that model because of the interrelationship between some of the hypotheses. For example, the ideological direction of the panel's ruling is highly correlated with the panel's composition, so one model cannot include both these variables because the interaction between the two variables would skew the results. Similarly, a panel's composition necessarily correlates highly with the number of designated judges on the panel, so those two variables cannot be tested together. Finally, the variables "liberal ruling" and "outlier ruling" necessarily strongly relate to each other because they are derived from the same figure—the direction of the panel's ruling—so one must test them separately. As a result of these constraints, this section tests three configurations of the integrated model, as set forth in the table below as Models I, II, and III.<sup>199</sup>

		MODEL		
	Independent variables	I	II	III
<i>Legal Theory</i>	Intercircuit conflict	✓	✓	✓
	Outlier ideology	✓		
<i>Attitudinal Theory</i>	Liberal ruling		✓	
	Outlier majority			✓
	Reversal	✓	✓	✓
<i>Hierarchical Theory</i>	Dissenting panelist	✓	✓	✓
	Non-active judges	✓	✓	
Number of cases (N)		779	890	650

198. In testing the integrated model, I am seeking to explain the decision to rehear a panel decision en banc. This is the dependent variable. The dependent variable is the phenomena I seek to explain and I think is influenced, affected, or caused by some other phenomenon known as independent variables. The dependent variable here is a binary variable equal to 0 if the panel is not reheard en banc, and 1 if it is reheard. I seek to explain the dependent variable by looking at the delineated panel characteristics, which are the independent variables. The independent variables (or explanatory variables) are the factors I believe cause variation in the dependent variable. I am seeking to test whether there is a relationship between the dependent variable and the independent variables and, if so, to estimate the strength of that relationship.

199. These multivariate models (models with multiple independent variables) hypothesize that the presence of the indicated factors (independent variables) causes variation in the grant of en banc rehearing (the dependent variable).

The three model formulations are tested against different quantities of cases. Model I tests cases decided during periods when the court had an ideological majority and coded for ideological direction (N = 779 cases). The data had to be restricted to such cases to test the outlier ideology hypothesis because in an evenly divided circuit court there are no mainstreamers or outliers. Model II includes all cases coded for ideological direction without regard for the circuit's composition (N = 890 cases). Finally, Model III tests a subset of the Model I cases. The additional restriction includes the requirement that the panel also must have an ideological majority (N = 650 cases). None of the models includes intracircuit conflict as a variable because the statistical test utilized (logit) cannot estimate the effect of an independent variable that has no variation with respect to one of the outcomes.<sup>200</sup> Intracircuit conflict was not cited in any of the panels not reheard en banc, thus logit cannot estimate the impact of intracircuit conflict on the decision to grant en banc review.<sup>201</sup>

Each model is tested using the parameter estimation strategy of logit (a logistic regression method).<sup>202</sup> One uses logit, a variation of the more

200. J. Scott Long, *Regression Models for Categorical and Limited Dependent Variables* 59 (1997).

201. A logit model containing an independent variable with no variation with respect to one value of the binary dependent variable will not converge when estimating the coefficient of that variable. In essence, the computer program (here, SAS) crashes because whenever the dependent variable equals 0 (not reheard en banc), the intracircuit variable is also 0 (no intracircuit conflict cited). *Id.*

202. Logit fits a logistic regression model for binary response data by the method of maximum likelihood. A multiple logistic regression model takes the form:

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

See Agresti & Finlay, *supra* note 182, at 483, 486–92 (discussing logit models for categorical independent variables), 488–92 (discussing study of effects of racial characteristics of defendant and of victim on decision to impose death penalty after defendant was convicted of homicide); Long, *supra* note 200, at ch. 3 (explaining models appropriate for binary dependent variables); Segal & Spaeth, *supra* note 124, at 370–72 (discussing logit model).

I use logit (a logistic regression method) 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 court voting for en banc rehearing of a panel ruling). Also, linear models predict values of the dependent variable in the whole range of numbers (negative infinity to infinity) 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 182, at 489; Segal & Spaeth, *supra* note 124, at 368–69 (discussing why linear regression poses mathematical problems when used to estimate relationships where dependent variable is dichotomous (has only two values)).

familiar statistical technique of linear regression, when the observed event, or dependent variable, is restricted to two values (typically the occurrence or nonoccurrence of the observed event).<sup>203</sup> Because the dependent variable in the integrated model is restricted to two values (either the panel was reheard en banc or it was not), logit is the appropriate statistical technique to utilize to test the model. Logit produces a formula that predicts the probability of the occurrence of the observed event (e.g., the grant of en banc rehearing) as a function of the independent variables (i.e., the panel characteristics).<sup>204</sup>

The coefficients estimated by maximum likelihood (MLE) reflect the strength and direction of the relationship between the independent variables and the dependent variable.<sup>205</sup> A variable's MLE represents the change in the likelihood that a panel will be reheard en banc when the variable is present. A positive MLE for a given variable indicates that the presence of that variable (that is, a particular panel characteristic) increases the probability of a panel being reheard en banc. The significance level for the variable (indicated in the column headed "Sig (p < x)") discloses the probability that the MLEs could have occurred by chance. For example, a significance level of .01 (p < .01) indicates that there is less than a one percent chance that the independent variable has no effect on the dependent variable (that is, the decision to grant en banc rehearing).

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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 124, at 370. In addition, the problem of serial correlation has proven to be "untractable" in logit. See George & Epstein, *supra* note 106, at 335 n.21 (quoting John H. Aldrich & Forrest D. Nelson, *Linear Probability, Logit, and Probit Models* 81 (1984)).

203. See David C. Nixon, *Appendix B: Probit and Logit*, in *Contemplating Courts*, *supra* note 27, at 430, 430. In this excellent introduction to logistic regression methods, Nixon explains that "[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." *Id.*

204. *Id.* (explaining that "[i]t is easiest to understand and interpret the probit and logit models by focusing on the *probabilities* of observing these discrete dependent variables. . . . [W]hat are the chances of observing one outcome rather than the other?").

205. Agresti & Finlay, *supra* note 182, at 489.

2. *Three Configurations of an Integrated Model of the Decision to Grant En Banc Rehearing*

Three configurations of the integrated model, Models I, II, and III, are tested. Each model is tested against a slightly different dataset, depending on the case characteristics included in the model.

a. *Model I*

The first version of the integrated model (Model I) includes the legal variable “intercircuit conflict,” all hierarchical variables, and the attitudinal variable “outlier ideology,” which reflects whether the ideological direction of the panel’s decision is contrary to the court’s majority ideological position. As you will recall, attitudinal theory predicts that judges seek to maximize their personal policy preferences such that a Republican-appointee majority will be more likely to vote to rehear liberal panel rulings. Model I tests that prediction.

Model I performs well. It correctly classifies 87% of en banc grants. Model I reduces error by 62.9%.<sup>206</sup>

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206. One way to evaluate the strength of a model is to consider whether the model improves on simply guessing the outcome. A guess that each panel in the Model I sample was *not* reheard en banc would be correct 68% of the time. The reduction of error number captures that idea by comparing the model’s percentage correct to the modal category (here, the percentage of cases not reheard en banc). The reduction of error (ROE) is calculated as follows:  $ROE = 100 \times (\% \text{ correctly classified} - \% \text{ in the modal category}) / (100\% - \% \text{ in the modal category})$ . George & Epstein, *supra* note 106, at 335 n.20.

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**Logistic Regression of Model I**


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<i>Independent Variables (panel attributes)</i>	<i>MLE</i>	<i>S.E.</i>	<i>Sig (p &lt; x)</i>
Intercircuit Conflict	0.54	0.50	N.S.
Outlier Ideology	0.50	0.23	.03
Reversal of Lower Court or Agency	1.26	0.23	.0001
Dissenting Panelist	3.66	0.24	.0001
Non-Active Judges	0.67	0.17	.0001
<i>Constant</i>	-3.28	0.27	--
-2 Log Likelihood	462.78		$\rho = .0001$

- $N = 779$ .
  - The dependent variable is whether the case was reheard en banc for all cases categorized for direction where the circuit court had an ideological majority. The model is calculating the probability of a given panel being reheard en banc.
  - Of the 779 cases, 272, or 35%, were reheard en banc.
  - The model correctly classified 87.0%.
  - MLE = maximum likelihood estimate for the parameter; S.E. = standard error; Sig = significance levels, N.S. = not significant.
- 

As the hierarchical theory predicts, violation of court norms positively affects the court's propensity to rehear the case en banc. The prediction that the violation of the affirmation norm (a reversal) will increase the probability of en banc rehearing is correct. The reversal variable is statistically significant at the .0001 level. The odds that a panel ruling will be reheard en banc are estimated to be 3.52 times higher when the panel reverses than when the panel affirms the lower court.

Hierarchy theory also produced the hypothesis that judges vote to grant en banc review when they can easily learn of a breach of their relational contract with a panel. I suggested that the court would be more likely to rehear a case en banc if a panelist dissented from the ruling. When a panelist dissents, it results in a 3.66 standard deviation addition to the cumulative normal probability function. The dissenting panelist variable is the strongest contributing factor to the explanatory power of the model. The odds that a divided panel will be reheard en banc are 38.85 times higher than the odds for a unanimous panel.

The final hierarchical hypothesis—that panels with non-active judges will be more likely to be reheard en banc—is also proven to be true. The non-active judges variable is statistically significant, although its contribution to the explanatory value of the model is weak as compared to the other hierarchical variables. Similarly, the outlier ideology



variable, although statistically significant, does not contribute much to the model's explanatory power.

The legal hypothesis is the only variable that does not find support in the data. The presence of an intercircuit conflict does not have a statistically significant impact on a court's decision to rehear a panel ruling en banc. The variable does not provide any additional explanation for the decision to grant en banc review on top of that already provided by the other variables.<sup>207</sup>

Finally, the combined effects of the variables are significant as reflected in the -2 Log Likelihood of  $\rho = .0001$ . Generally, larger values of the -2 Log Likelihood statistic for the same dataset indicate greater explanatory value.

*b. Model II*

Model II includes all of the legal and hierarchical factors in Model I but considers the "liberal ruling" variable instead of the "outlier ideology" variable. This alternative model is also very strong. It correctly predicts more than 87% of the en banc grants and produces a reduction in error of 62.2%.

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207. I determined this by removing the two variables from the model, reestimating it, and comparing the log-likelihood ratio it produced with that listed in the Model I table. Overall, the removal of those variables did not result in a significant reduction in the model's explanatory power.

<b>Logistic Regression of Model II</b>			
<i>Independent Variables (panel attributes)</i>	<i>MLE</i>	<i>S.E.</i>	<i>Sig (p &lt; x)</i>
Intercircuit Conflict	0.81	0.48	N.S.
Liberal Ruling	1.15	0.24	.0001
Reversal of Lower Court or Agency	0.77	0.23	.001
Dissenting Panelist	3.58	0.23	.0001
Non-Active Judges	0.49	0.16	.002
<i>Constant</i>	-3.32	0.24	--
-2 Log Likelihood	522.36		$\rho = .0001$

- $N = 890$ .
- The dependent variable is whether the case was reheard en banc for all cases categorized for direction. The model is calculating the probability of a given panel being reheard en banc.
- Of the 890 cases, 288, or 32%, were reheard en banc.
- The model correctly classified 87.9%.
- MLE = maximum likelihood estimate for the parameter; S.E. = standard error; Sig = significance levels, N.S. = not significant, -- = not applicable.

In general, the maximum likelihood estimates for the second version of the integrated model (Model II) meet the expectations set forth previously. The prediction that a liberal ruling will increase the probability of en banc rehearing is correct. The variable is statistically significant and contributes a 1.15 standard deviation addition to the cumulative normal probability function. A liberal panel ruling is approximately three times more likely to be reheard en banc than a conservative ruling. The other variables remain stable as seen by comparing the two tables.

### c. *Model III*

The third version of the model (Model III) varies the previous versions by changing the attitudinal variable and eliminating the non-active judges variable. Model III tests the outlier majority variable which reflects the ideological composition of the panel as measured by the party of the President who appointed the circuit judges on the panel. If a majority of the panelists were judges from the circuit minority (e.g., two or more Democratic appointees to the circuit when the circuit is dominated by Republican appointees), then the panel was coded as having an outlier majority.

Logistic Regression of Model III			
<i>Independent Variables (panel attributes)</i>	<i>MLE</i>	<i>S.E.</i>	<i>Sig (p &lt; x)</i>
Intercircuit Conflict	0.66	0.55	N.S.
Outlier Majority	0.33	0.27	N.S.
Reversal of Lower Court or Agency	1.25	0.25	.0001
Dissenting Panelist	3.72	0.27	.0001
<i>Constant</i>	-2.70	0.22	--
-2 Log Likelihood	374.16		$\rho = .0001$

•  $N = 650$ .

• The dependent variable is whether the case was reheard en banc for all cases categorized for direction where the circuit court had an ideological majority and the panel also had an ideological majority. The model is calculating the probability of a given panel being reheard en banc.

• Of the 650 cases, 217, or 33%, were reheard en banc.

• The model correctly classified 88.0% of the cases.

• MLE = maximum likelihood estimate for parameter; S.E. = standard error;

Sig = significance level, N.S. = not significant, -- = not applicable.

Model III is a very strong model, correctly classifying 88% of the en banc grants and producing a reduction in error of 63.6%. Interestingly, though, outlier majority is not a statistically significant variable. It does contribute to the model's overall explanatory power, however.

#### IV. IMPLICATIONS

The integrated model of the decision to grant en banc review explains a sizeable percentage of the grants of en banc rehearing and provides a valuable aid to our understanding of how appellate judges exercise discretion. The empirical results should assist litigators in deciding whether to file a suggestion for rehearing en banc, contribute to the debate about the value of the en banc procedure, and reveal a great deal about judicial behavior. The following are some of the practical implications for litigators, normative implications for the judiciary, and positive implications for judicial process scholars.

##### A. *Practical Implications for Litigators*

In a market where clients are seeking to contain litigation expenses and in a legal setting where courts are discouraging en banc suggestions, lawyers should think carefully before filing a request for en banc

consideration. Lawyers, of course, should continue to argue when appropriate that an intracircuit or intercircuit conflict necessitates en banc rehearing, but they should not anticipate that such an argument will succeed on its own. They should instead look to panel characteristics found to be relevant here.

For a lawyer seeking an en banc rehearing, a dissenting panelist represents the single most helpful factor. Three-quarters of the en banc rehearings in this study (229 out of 305 cases) followed a divided panel decision; in contrast, fewer than one in twelve panel decisions not reheard en banc were divided. In all of the model configurations, the dissent variable was the leading determinant of the grant of en banc rehearing.<sup>208</sup> The odds of a panel decision being reheard en banc are nearly forty times higher when a panelist dissents than when the panel is unanimous. Two other factors also contributed strongly to the model: liberal ruling and reversal of the lower court or agency. Half of the panels reheard en banc issued liberal reversals compared to fewer than one-sixth of the panels not reheard en banc. Of the seventy-six unanimous panels reheard en banc, forty-seven reversed a lower court's liberal decision.<sup>209</sup> Using the Model II parameter estimates, the predicted probability of a divided panel that issues a liberal reversal being reheard en banc is nearly ninety percent.

Conventional wisdom among appellate lawyers is that a panel's composition is also a significant determinant of whether the full court will grant rehearing en banc. For example, a lawyer handed a defeat by a panel with two Republican appointees will look at the circuit's composition in evaluating whether a suggestion for en banc rehearing may succeed. The lawyer may assume that her odds are much more favorable if the circuit is dominated by Democratic appointees rather than Republican appointees. The intuition behind this conclusion is appealing. Litigators typically reason that colleagues with similar ideological positions will defer to each other's panel decisions, but do not feel the same deference (and may in fact feel some suspicion) toward colleagues with whom they disagree. The evidence, however, does not support this belief. The fact that a panel had an outlier majority did not significantly influence the courts' decisions to grant en banc review; in

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208. The finding that a divided panel greatly increased the odds of en banc rehearing was highly statistically significant (the probability that this finding is the product of chance is less than one in 10,000).

209. Of the 305 panels reheard en banc, only 14 were unanimous, conservative affirmances.

fact, slightly more panels *not* reheard en banc had an outlier majority than panels reheard en banc (28.2% compared with 26.7%).

### *B. Normative Implications for the Judiciary*

Courts of appeals appear to be conservative and passive institutions that affirm the status quo and act as a whole only when a dissenting panel member signals them to do so. Courts of appeals may be coping with burgeoning caseloads by allowing panels to act essentially unreviewed. The notion, expressed by the Supreme Court in *Textile Mills*, that the “court of appeals” was the entire body of circuit judges may be an artifact of an era of fewer cases and judges; yet, that notion has been central to the delegation of substantial lawmaking authority to the circuit court level. The courts of appeals will lose their legitimacy if they do not appear to control the integrity of circuit law. The results of this study could be used to argue that courts must introduce more active methods of monitoring the decisions of panels to ensure consistency and uniformity of the law and to maintain meaningful authority as the final word in the run of federal cases.

This study also can support a very different view of the management strategy employed by circuit courts. The courts of appeals are most likely to grant en banc review if a panelist dissents or if the panel disagrees with the lower court or agency. If all of the judges (or decisionmakers) who have heard a dispute agree as to its resolution (that is, a unanimous panel affirms the lower court or agency), then the circuit court defers to their decision. The courts of appeals, then, are choosing to utilize scarce resources to rehear cases en banc only when there is some express disagreement between the judges who have considered the case. Such a strategy is arguably a wise one given growing caseloads and limited judicial resources.

### *C. Positive Implications for Judicial Process Scholars*

Studies of the judicial process traditionally set forth a preferred paradigm and build an argument upon it.<sup>210</sup> They rarely look to or incorporate other studies, but rather seek to displace or “beat” other approaches. I do not conceive of the various theories of judicial

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210. See Gibson, *supra* note 102, at 8 (observing that “research that *integrates* various theories [of judicial behavior] is much too rare” and arguing “for the integration of alternative theoretical approaches to judicial decision making”).

decisionmaking as competitive, but rather as complementary.<sup>211</sup> No single approach can encompass the complexity of the process by which judges make decisions. Hence, the overarching implication of my work for judicial process scholarship is that we should seek to integrate multiple perspectives into a broader, richer understanding of judicial behavior.<sup>212</sup>

## V. CONCLUSION

This Article began by asking why the Fourth Circuit decided to rehear a minor contract interpretation case such as *Hardester* but not *O'Connor*, a case involving a significant intercourt conflict. We can now answer that question by considering two factors found relevant in the tests of the hybrid theory, namely a dissenting panelist and a reversal of the lower court. The *Hardester* panel was divided, while the *O'Connor* panel was unanimous. The *Hardester* panel reversed the lower court, while the *O'Connor* panel affirmed the lower court. Both panels reached a conservative conclusion. Thus, *O'Connor* did not have any of the characteristics found to be significant to the decision to grant en banc review, although it did have one characteristic—intercourt conflict—traditionally believed to be relevant but which was shown not to be a strong factor.

The hybrid theory also explains why the Fourth Circuit refused to grant rehearing en banc to the highly publicized VMI case, *United States v. Virginia*, while granting rehearing to a civil suit of no particular note. The VMI case involved a matter of import and wide applicability and thus may have seemed to be a likely candidate for en banc rehearing. Yet, the hybrid theory would have predicted correctly that the VMI case would *not* be reheard en banc because the panel was unanimous, the panel largely agreed with the lower court, and the outcome was conservative. The hybrid theory would have predicted that the seemingly unimportant civil suit was a likely candidate for en banc rehearing because it was decided by a divided panel that reversed the lower court.

The Supreme Court is, as a technical matter, the ultimate authority on constitutional and federal law; but, as a practical matter the courts of

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211. See generally George, *supra* note 104; George & Epstein, *supra* note 106.

212. Segal, Songer, and Cameron made a similar point when they argued that “the hierarchical model—viewing lower-court judges as value driven, as in the attitudinal model, but constrained by institutional rules and procedures from the free exercise of those values—hints at a productive way to move the theoretical debate.” Segal et al., *supra* note 125, at 244.

appeals serve this role. Yet, courts of appeals decide cases in a manner that most would challenge if adopted by the Supreme Court, namely, simultaneous divisional sittings of three judges. I proffered at the outset of this Article that we may accept the panel practice in courts of appeals because en banc procedures allow the full court to regulate and restrain panels. In fact, the full court does seem to utilize the en banc mechanism to check panel rulings out of line with the court's position, but only when the full court learns of a deviation. Courts of appeals appear to be affected by the monitoring and information asymmetry problems that plague many hierarchical organizations. Whether these problems will undermine the panel practice remains to be seen. Studies such as this one seeking to explain how judges make decisions will aid in the resolution of that question and others regarding the judicial system.