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### PITFALLS OF EMPIRICAL STUDIES THAT ATTEMPT TO UNDERSTAND THE FACTORS AFFECTING APPELLATE DECISIONMAKING

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## PREFACE

*When court of appeals judges decide a case, they focus on legal materials to reach their result. These materials include the case record compiled in the trial court or agency; the judgment, decision, or verdict under review from the trial court or agency; the precise issues that have been raised and preserved by the litigants; the parties' arguments as reflected in written briefs and oral arguments; the applicable constitutional, treaty, statutory, rules, or contractual provisions; the applicable standards of review; and controlling case precedent where applicable. Because we typically sit and hear cases in panels of three, appellate judges do not act alone in deciding cases; rather, we deliberate—often extensively—to determine the correct result in a case. When the relevant legal materials are uncomplicated, the issues are uncontroversial, and precedent is clear, judges' deliberations are straightforward and judgments are easily reached.*

*Crucially, court of appeals judges understand that, save when the court sits en banc, we are bound by established circuit precedent. And we are always bound by Supreme Court precedent in deciding cases.*

*The essence of the common law doctrine of precedent or stare decisis is that the rule of the case creates a binding legal precept. The doctrine is so central to Anglo-American jurisprudence that it scarcely need be mentioned, let alone discussed at length. A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.<sup>1</sup>*

*As Justice Cardozo once said, precedents “fix the point of departure from which the labor of the judge begins.”<sup>2</sup> If precedent controls the disposition of a pending case, appellate judges must follow it. It does not matter whether an appellate judge agrees with established precedent; we are bound to apply established precedent in deciding cases before us. And this is precisely what most federal appellate judges faithfully do in exercising their responsibilities on the bench.*

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1. *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969–70 (3d Cir. 1979).

2. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20 (Yale Univ. Press 1964) (1921).

*In some cases, however, the matter under review presents an issue of first impression; or the issue before the court is highly complicated or controversial; or there is no clearly controlling precedent. In these circumstances, deliberations among appellate judges are more difficult and there is more room for discretion in the exercise of appellate decisionmaking. Appellate cases are idiosyncratic; it is therefore hard to generalize meaningfully about their susceptibility to determinate resolution. Based on what I have seen during the course of twenty-nine years on the bench, however, I have estimated that approximately one-half of the cases decided by the courts of appeals are “easy”; in other words, the pertinent legal rules seem unambiguous and their application to the facts appears clear. A dispute falling into this category, I believe, admits of only one “right answer.” Were I to vote to decide an easy case in any other way, I would expect to be accused of having made an error, not merely of having voted or ruled unwisely. Again, using rough estimates, I have estimated that in only 5 to 15 percent of the disputes that come before me in any given term do I conclude, after reviewing the record and all of the pertinent legal materials, that the competing arguments drawn from those sources are equally strong. Put differently, only in those few cases do I feel that fair application of the law to the facts leaves me in equipoise and that to dispose of the appeal I must rely on some significant measure of discretion. I view these cases as “very hard.” That leaves roughly 35 percent to 45 percent of the cases per year that are neither “easy” nor “very hard.” In appeals falling into this middle category, each party is able to make at least one legal argument that I find colorable, but, after research, reflection, and discussion, the argument(s) advanced by one party seem to me demonstrably stronger than the argument(s) advanced by the other. Under such circumstances, I feel constrained to render judgment in favor of the party who has made the more compelling claims.<sup>3</sup>*

*A “hard” or “very hard” case often results in extended and weighty deliberations between the judges who have been assigned to decide the case. Judges often start with different “takes” on the correct*

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3. I first discussed these ideas in *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*. Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385 (1983–84). My general assessment of the breakdown of “easy,” “hard,” and “very hard” cases heard by court of appeals judges has remained the same over my twenty-nine years on the bench. See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1685 (2003) [hereinafter Edwards, *Collegiality*]; Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 854.

*disposition. But, after careful analysis of the relevant legal materials, thoughtful deliberations more often than not lead to a unanimous judgment. Very few federal court of appeals decisions include a dissent, which indicates that deliberations are productive. Thus, while “hard” and “very hard” cases admit of a measure of judicial discretion, that discretion is channeled through a deliberative process that, in the vast majority of cases, leads to a consensus opinion as to the best legal answer within the adversarial context.*

*Because it is undisputed that some cases admit of discretion in the exercise of appellate decisionmaking, scholars and commentators sometimes contend that judges must be influenced in their decisionmaking by their personal political or ideological predilections. This may happen at times. But any assessment of appellate decisionmaking that fails to discriminate between forms of moral/political reasoning intrinsic to law and those that are extrinsic to law is flawed. It is well understood that legal reasoning involves moral judgment (not in the form of personal whim or preference, but rather in the situated and disciplined elaboration of the conventional norms of the American political community) in cases in which judges exercise delegated or common law-making authority. Therefore, the mere assertion that judges are sometimes influenced by political or ideological considerations in their decisionmaking is unilluminating.*

*Legal scholars remain interested in trying to use empirical methods—most notably the statistical analysis of case outcomes—to understand the effect of extralegal factors on appellate decisionmaking. In our view, the principal problem with such empirical legal analyses is that they cannot distinguish between legal and extralegal factors without considering and accurately accounting for the most important determinants of appellate decisionmaking: (1) the case records on appeal, (2) the applicable law, (3) controlling precedent, and (4) judicial deliberations. By failing to take account of these core determinants—in part, perhaps, because they cannot be easily or accurately measured—the field of empirical legal studies fails to provide a nuanced understanding of how legal and extralegal factors interact to generate judicial decisions, and likely overemphasizes extralegal factors. These empirical legal analyses are also flawed in their failure to take account of “unpublished” decisions issued by the federal courts of appeals, which in 2007 constituted over 80 percent of the cases decided by the appellate courts.<sup>4</sup> The omission of unpublished decisions almost surely skews results in favor of*

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4. See *infra* note 69.

*finding greater influence from extralegal factors. It is noteworthy, however, that even on their own limited terms, empirical studies predict very little about the effects of extralegal factors on appellate decisionmaking.*

*This Article is a modest attempt to survey the state of empirical analysis of decisionmaking in the federal courts of appeals. In the Introduction and Part I, we discuss some of the limitations of empirical legal analysis and point out how a number of scholars, in their efforts to understand appellate decisionmaking, have focused on the wrong factors. This may explain why empirical studies are not able to predict much about appellate decisionmaking. In Part II, we consider several studies that attempt to quantify the effects of politics and ideology on appellate decisionmaking and highlight the limited findings of these studies. Throughout the article (especially in Parts I through III), we reject many of the broader conclusions of empirical studies that have attempted to assess appellate decisionmaking. First, we note that empirical work in this area suffers from several important methodological limitations that render bold conclusions highly suspect; second, we argue that without considering how judges have applied the law and relied on controlling precedent, empirical studies cannot meaningfully claim to understand the effects of politics and ideology on appellate decisionmaking; and, finally, we contend that, because appellate decisions are made by panels, rather than by individuals acting alone, studies that fail to take account of judicial deliberations are incomplete.*

*In Part III, we conclude that empirical studies predict very little, if anything, about the effects of extralegal factors on appellate decisionmaking. The hypothesis that judicial decisionmaking is influenced by the ideology of judges only implicates extralegal factors if and to the extent that any such ideological influence is extrinsic to law. However, as we note, empirical studies fail to discriminate between forms of moral/political reasoning intrinsic to law and those extrinsic to law—in part because the measure of “ideology” is very crude, and in part because the role of legal factors is not taken into account. Most members of the legal profession—judges, lawyers, and scholars—subscribe to a conception of law that encompasses, at least in some circumstances, forms of moral or political reasoning. If one accepts that such reasoning is legal reasoning, then any statistical model that uses a measure of ideology that potentially captures reasoning of this sort cannot tell us much about appellate decisionmaking beyond the bland assertion that judicial disagreement explains variation in outcomes. It cannot disprove the hypothesis that*

*legitimate differences in legal reasoning, properly understood, are responsible for the variation. Ideology may inappropriately affect variation in legal outcomes only if (a) ideology or politics takes on an impermissible, extralegal characteristic—something that empirical scholarship has not shown—or (b) we are wrong in our view that some political and ideological questions are intrinsic to law itself. Thus, empirical scholars can convince us to accept their central claim (that extralegal judicial “ideology” explains variation in some legal outcomes) only if they first convince us that we are wrong in our view that some political and ideological questions are intrinsic to law itself. In other words, empirical ideologists must convince us that we should adopt a formalistic or “hard” positivistic theory that insists that legal questions never appropriately subsume moral or political questions. But, of course, if empirical scholars could do this (assuming they wanted to), they would not be showing that judges have been substituting their ideology for law but, rather, that judges have been following a conception of law that we should reject for normative reasons. And, if they are right in this, their claim would be recognized as a contribution to philosophical jurisprudence, not empirical legal studies.*

*In Part IV, I offer some data from the U.S. Court of Appeals for the D.C. Circuit, with an explanation of how the judges on my court go about deciding cases. In doing so, I argue that my colleagues and I are committed to applying the law and adhering to controlling precedent, not giving vent to our personal political and ideological leanings, and that we achieve this goal most of the time. As the data show, an overwhelming majority of the decisions of the D.C. Circuit are issued without a dissent. This is true in most circuits.*

*In Part V, we briefly explore some new studies that are being conducted in an effort to understand the effects of cultural cognition on judicial decisionmaking and consider whether such studies will produce more nuanced and fruitful results than those that have attempted to measure the effects of politics and ideology. We conclude with a discussion of the importance of judicial deliberations and note that, at least to date, it has been virtually impossible for empirical scholars to meaningfully quantify this critical aspect of appellate decisionmaking.*

*Finally, it is worth noting that, in writing this Article, we do not mean to dispute the reality that presidents often seek to appoint judges whose views are consistent with their own. Indeed, when a court is composed of judges who come from a variety of professional and*

*political backgrounds, this can make for better-informed deliberations. Our principal point, however, is that it does not follow from the political reality of partisan appointments that judges act in a partisan way in deciding cases once on the bench. Rather, what we believe is that, on an appellate court that adheres to collegial principles, the applicable law, controlling precedent, and the collegial deliberative process in appellate decisionmaking are the primary determinants of case outcomes. Certainly, no study has shown otherwise.*

*Harry T. Edwards  
Senior Circuit Judge*



## INTRODUCTION

The federal judiciary is a uniquely difficult object of scholarly inquiry for those committed to empirical investigation. Two points are worth stressing. First, “the close study of precedents and their impact [on appellate decisionmaking] is impossible with currently available or readily foreseeable empirical tools.”<sup>5</sup> This is a serious issue, because precedents “fix the point of departure from which the labor of the judge begins.”<sup>6</sup> Second, judicial decisionmaking takes place in a closed environment and deliberating judges are bound by propriety and ethics to maintain confidentiality. The outputs are clear enough—judicial decisions that resolve disputes between litigants before the court, determine the rights of parties, and construe and apply the nation’s laws. At least some of the inputs—the judgment, verdict, or order under review, the record before the appellate court, the parties’ briefs and oral arguments, applicable statutory and regulatory provisions, and precedent—are published as well. But the deliberative process pursuant to which case inputs are transformed into a judicial decision cannot be observed by outsiders; nor is there a transcript of judges’ deliberations leading to a decision. As a result, scholars and other interested parties have no access to the actual process of appellate decisionmaking.

In recent years, there has been a greater effort on the part of legal scholars to apply various empirical methodologies to the study of judicial decisionmaking. Empirical researchers generally seek to provide a clearer understanding of how judicial decisionmaking works, rather than to prescribe how judges should make decisions. Rather than reading and interpreting judicial opinions in light of existing law—the mainstay of traditional legal analysis—these new methodologies treat judicial decisions as raw data and then analyze these data using statistical techniques. This “empirical legal analysis” seeks to describe meaningful relationships between identified variables to either prove or disprove particular hypotheses about those relationships.<sup>7</sup> Judicial decisions are treated largely as

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5. FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 202 (2007).

6. CARDOZO, *supra* note 2, at 20.

7. In this Article, we use a restricted view of “empirical legal analysis.” For our purposes, we are referring to the body of literature that applies social science techniques of data analysis to legal opinions. Lee Epstein and Gary King, in a wide-ranging critique of empirical work in the legal academy, provide a much more expansive definition. *See* Lee Epstein & Gary King,

epiphenomenal responses to extralegal factors (such as “ideology”), and the goal of empirical analysis is to measure the effects of these factors.

There are many empirical studies devoted to the decisions of the Supreme Court. However, because of the Court’s unique status and operating procedures, it is difficult to draw broad conclusions about decisionmaking in the federal courts of appeals from studies of the Supreme Court. The Court, which is seen by many to play a major role in American political life, controls the evolution of federal constitutional law, fixes constructions of disputed federal statutes and regulations, gives content to federal common law, and has great discretion in choosing which cases to hear and resolve. The Court hears only a limited number of cases each year, and many of those involve high profile, controversial, and difficult legal issues. In contrast, the intermediate courts of appeals only occasionally deal with very high profile issues. The courts of appeals also hear far more cases each year than does the Supreme Court, have only very limited control over their dockets, and normally sit in panels of three (not en banc).

The federal courts of appeals are very important in their own right, however. Each year they resolve thousands of cases, involving many important questions of federal law from which no review is taken. Because the courts of appeals have such a large role in the development and enforcement of federal law, they have drawn the attention of a number of legal scholars interested in using empirical methods to understand judicial decisionmaking.

There have been some notable controversies over the accuracy of empirical studies that have sought to measure the effects of extralegal factors on decisionmaking in the courts of appeals.<sup>8</sup>

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*The Rules of Inference*, 69 U. CHI. L. REV. 1, 2–3 (2002). Epstein and King invoke a broader understanding of “[t]he word ‘empirical’ [to] denote[] evidence about the world based on observation or experience. That evidence can be numerical (quantitative) or nonnumerical (qualitative) . . . . What makes research empirical is that it is based on observations of the world—in other words, *data*, which is just a term for facts about the world.” *Id.* at 2–3.

8. See, e.g., 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, 2157 (1998); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1336 (1998); Edwards, *Collegiality*, *supra* note 3, at 1641; Epstein & King, *supra* note 7, at 2; William S. Jordon, III, *Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45, 52 (2001); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 188 (2002) [hereinafter Revesz, *A Defense of Empirical Legal Scholarship*]; Richard L. Revesz,

However, these debates have tempered in recent years as some empiricists have employed more sophisticated techniques, acknowledged the limitations of their methodologies, and offered more nuanced conclusions that confirm the limited power of current methods to predict legal outcomes. Some scholars have even taken steps to break from the constraining mind-set of “left-right” partisan politics and have attempted to provide richer accounts of how individual factors, such as cultural cognition,<sup>9</sup> can influence judicial decisionmaking. Perhaps most importantly, some empirical researchers acknowledge the importance of precedent on judicial decisionmaking;<sup>10</sup> and concomitantly, a number of researchers now give recognition to the role of law in appellate decisions.<sup>11</sup>

Despite these recent improvements in empirical studies, significant challenges remain. As noted above, in deciding cases, appellate judges rely on *legal materials* and *legal reasoning*. Appellate judges also deliberate with their colleagues before a decision can be reached. Given how appellate judges routinely decide cases, it would be very difficult to meaningfully assess decisionmaking in the courts of appeals without considering the effects of legal materials on the decisions reached by appellate panels. As currently structured, empirical research also cannot discern whether judges’ political views or ideology *override* the governing law. To make this assessment, empiricists would first have to distinguish between forms of moral/political reasoning intrinsic to law and those extrinsic to law. Were an empirical study able to do this, it might then be possible to assess how extralegal factors impermissibly influence judicial interpretation of governing law. Until these questions are directly investigated, however, attempts to understand appellate

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*Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1771 (1997) [hereinafter Revesz, *Environmental Regulation*]; Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805, 851 (1999); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 746 (2005); Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 239 (1999); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 877 (2008) (book review).

9. Dan M. Kahan, “*Ideology in*” vs. “*Cultural Cognition of*” Law: What Difference Does it Make? 1 (Harvard Law Sch. Program on Risk Regulation, Research Paper No. 08-22, 2008), available at <http://ssrn.com/abstract=1111865>. For a discussion of cultural cognition, see *infra* Part V.

10. See, e.g., CROSS, *supra* note 5, at 201–27.

11. See, e.g., Sisk, *supra* note 8, at 876.

decisionmaking through empirical studies will remain something of a peripheral undertaking.

Legal scholars understand that studying the effect of precedent will be no mean feat:

More sophisticated statistical models that include legal factors and legal reasoning as variables are perhaps the greatest priority in continued quantitative examination of the federal judiciary. A fully specified legal model will prove eternally elusive [however] because legal reasoning is not formulaic in nature: the reasonable parameters for debate on the determinate nature of text and doctrine cannot be described by number.<sup>12</sup>

The deliberative process, which cannot be directly studied, further complicates empirical researchers' attempts to consider the effects of precedent on appellate decisionmaking. This is especially true in "hard" and "very hard" cases in which the law may be unclear. In these cases, the deliberative process takes on added importance. Judges, working with the available legal materials, attempt to arrive at a shared vision of the law, and a judge's initial view may change several times as it is tested and revised in the face of the competing perspectives of his or her colleagues. During deliberations, the differing views of three experienced lawyers are—more often than not—forged into one. This process can be complex—cognitively, sociologically, and psychologically. Empiricists, however, have no access to these important confidential exchanges between appellate judges during their deliberations over "hard" and "very hard" cases. As a result, when the court issues a unanimous decision in a hard or very hard case, it is very difficult, if not impossible, for a researcher to determine whether and how any individual judge on the panel was influenced by extralegal factors.

There are other important limitations in empirical legal studies. These limitations include methodological challenges (including questions about translating textual decisions into raw data), as well as conceptual issues (including the validity of the attitudinal model of judicial behavior discussed in Part I.B *infra*). A pervasive limitation is the lack of a good proxy for judicial ideology, which has caused

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12. *Id.* at 884.

empirical legal scholars to dubiously equate the political party of the president who appoints a judge with that judge's "ideology."<sup>13</sup>

These limitations do not mean that empirical legal studies are worthless. Properly done and interpreted, empirical legal studies sometimes may illuminate our understanding of judicial behavior. However, the limitations of empirical legal studies mean that researchers must be "less expansive . . . in drawing conclusions from their findings."<sup>14</sup>

## I. LIMITATIONS IN EMPIRICAL LEGAL STUDIES

### A. Introduction

Most empirical legal analysis is, from a technical standpoint, fairly straightforward. Independent variables are identified and compared to an output variable. Where they exist, statistically significant correlations are found. However, ascribing meaning to those correlations is a much more difficult task. As Professor Cross cautions: "[a] reader [of empirical studies] should not place undue importance on a finding of statistical significance, because such a finding shows a correlation between variables but by itself does not prove the substantive significance of that correlation. One must also consider the magnitude of the association."<sup>15</sup> Even where a strong relationship is shown, the meaning of that relationship may still be unclear. It has been argued that "*the current state of empirical legal scholarship is deeply flawed,*" in part because "readers learn considerably less accurate information about the empirical world than the studies' stridently stated, but overly confident, conclusions suggest."<sup>16</sup> This harsh indictment may be somewhat overstated, but it is not fanciful, and any serious claim that empirical legal studies are

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13. Scholars in the field typically refer to variables relating to the appointment process of judges, like the party of appointing president, as "ideology" or "ideological variables"—a convention we reject. We instead refer to party of appointing president and other such measures as "appointment variables."

14. Sisk, *supra* note 8, at 886 n.72.

15. CROSS, *supra* note 5, at 4.

16. Epstein & King, *supra* note 7, at 6–7. *But see* Revesz, *A Defense of Empirical Legal Scholarship*, *supra* note 8, at 188–89 ("[E]mpirical legal scholarship has a great deal to contribute to the understanding of law and legal institutions, and social scientists would benefit from paying close attention to the methodological innovations performed by legal scholars. Because of their flawed methodology and unwarranted criticisms and exaggerations, Epstein and King have missed an important opportunity to examine what legal and social science empirical scholarship can learn from one another.").

flawed raises an extremely important concern, because most law students and members of the legal profession are not trained in the nuances and limits of empirical analysis. While empirical scholarship can shed light on certain aspects of the judicial process, uninitiated readers must understand where the light is shining and which areas remain unilluminated. Some empirical scholars are very responsible in reporting their findings and, thus, avoid overstating their conclusions. But there is still room for improvement, especially given the naïveté of many readers who are unfamiliar with the art of empirical study and the meaning of statistical concepts.

In our view, there are two major problems with empirical legal studies that aim to understand the effects of extralegal factors on appellate decisionmaking. We will first highlight these problems and then discuss them in a bit more detail in the subsections that follow this introduction.

First, empirical studies of judicial decisionmaking are too often informed by the “attitudinal model” of judicial behavior.<sup>17</sup> This model posits a stark difference between “legal” and “ideological” decisions, and it is premised on the view that the law plays little role in structuring judicial decisions. In other words, the attitudinal model assumes that judicial decisions are determined principally by the political preferences of judges.

[M]any social scientists—especially political scientists [and some legal scholars following their lead]—believe that the “law” boils down to outcomes, and that whatever rationales or justifications judges invoke are mere smokescreens designed to hide the fact that politics drives the result. Political scientists might ask, “Why bother to study smokescreens when it is the outcome that matters to all the relevant actors, including the judges?”<sup>18</sup>

However, as any good lawyer knows, a “focus on outcome to the exclusion of law can reach extremes that . . . are mind-boggling”<sup>19</sup> and is likely to lead to very poor predictive results.

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17. For a description of the attitudinal model, see, for example, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86–97 (2002).

18. Lee Epstein, Nancy Staudt & Peter Wiedenbeck, *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J.L. & POL’Y 305, 320 (2003).

19. Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 486–87 (2009). Professor Shapiro offers the following example of a “mind-boggling” analysis:

Unsurprisingly, the attitudinal model, which rests on a simplistic liberal/conservative dichotomy, has been sharply criticized. As Professor Shapiro argues,

In the attitudinal model's starkest form, with its emphasis solely on case outcomes, there is no difference, for example, between Justice Kennedy's opinion in the recent school desegregation case[, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,] and the plurality opinion authored by Chief Justice Roberts. Both justices sided with the white plaintiffs in their equal protection challenges to integration plans of the Seattle and Louisville school districts. But the contents of those opinions are significantly different. Justice Kennedy, who cast the deciding vote, explicitly rejected the plurality's "all-too-unyielding insistence that race cannot [ever] be a factor" in school district decisions. Despite their agreement on "outcome," the opinions are not uniformly "conservative." And the differences between Kennedy and Roberts are likely to be central to the real-world impact of the case.<sup>20</sup>

Some contemporary empirical legal scholars have tried to construct studies that limit the worst effects of the attitudinal model.<sup>21</sup> However, so long as empirical legal studies draw conclusions based on binary liberal/conservative outcomes and follow the attitudinal model in failing to account for the effects of law, precedent, and deliberations on judicial decisionmaking, these studies will be seriously wanting.

Second, there are several important methodological limitations of empirical legal studies. Some methodological limitations—such as

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[D]escribing the "apparently unidimensional nature of Supreme Court decisionmaking," two political scientists (including [Harold] Spaeth's frequent co-author Jeffrey Segal) assert in a 2005 article: "The vote on the merits in any given case is as straightforward as a majority rule process gets. Justices essentially make a binary, reverse or affirm decision."

*Id.* at 486 n.41 (quoting Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. REV. 1323, 1324 (2005)).

20. *Id.* at 486–87 (footnotes omitted) (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Kennedy, J., concurring in part and concurring in the judgment)).

21. For example, a major problem in many studies premised on the attitudinal model is that overly simplistic proxies for "ideology," such as the party of the president who appointed a judge, are often used. Scholars in this area have attempted to develop more sophisticated proxies. For example, Cross uses Giles scores to "assign[] relative levels of ideological preferences to particular presidents and to the judges that those presidents appointed." CROSS, *supra* note 5, at 19. However, the use of Giles scores results in only a small, marginal improvement over the party-of-the-appointing-president proxy. And naturally, this change does not address the issue of the binary nature of outcomes in his or other studies.

appropriate data samples—are general and apply to any kind of empirical study. Others—such as difficulties that arise when scholars attempt to translate the written language of judicial decisions into data that are susceptible to mathematical analysis—are more specific to the field. For studies that attempt to account for the effects of ideology on decisionmaking, there is the recurring problem of defining a measurable variable:

The available methods for measuring the ideology of judges and decisions are rough and imperfect. Translating something so amorphous as ideology into a numerical measure for quantitative analysis will inevitably be imperfect. Moreover, rarely does one have the same ideological perspective on all subjects. It is relatively common for an individual to be liberal on some social issues and conservative on economic issues, for example. In such a case, a simple single-point measure will miss much of the individual's ideological preference pattern.<sup>22</sup>

*B. The Attitudinal Model and Its Role in Empirical Legal Analysis*

1. *Historical Context—Simplistic Assumptions about the Nature of Law.* The empirical study of legal decisions is not new, and contemporary scholarship has been deeply influenced by early work in the field. As early as the 1920s, political scientists were using basic empirical analyses to support the newly prominent legal realists' perspective on judicial decisionmaking. In an article published in the *Illinois Law Review* in 1922, political scientist Charles Grove Haines called for greater scrutiny of extralegal factors in judicial decisionmaking:

[L]egal logic, tradition and precedent, has received extended and adequate treatment at the hands of lawyers and political scientists . . . [while] the element of free conception, in which individual views and personal notions have influenced and have frequently predetermined judicial decisions, has received scant attention.<sup>23</sup>

Haines used an early attempt at empirical analysis to support his claim that “individual views and personal notions” influence judicial

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22. *Id.* at 20.

23. Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 114 (1922).



decisions. Looking to the records of the New York City magistrate courts, Haines found significant variations between individual judges:

In 1916, 17,075 persons were charged before the magistrates with intoxication. Of these, 92 per cent were convicted. But . . . one judge discharged 79 per cent of this class of cases. In cases for disorderly conduct one judge heard 566 cases and discharged one person, whereas another judge discharged 18 per cent; another 54 per cent.<sup>24</sup>

From these data Haines found that “the magistrates differed to an amazing degree in their treatment of similar classes of cases.”<sup>25</sup> Haines thus concluded that it “was inescapable that justice is a personal thing, reflecting the temperament, the personality, the education, environment, and personal traits of the magistrates.”<sup>26</sup>

Haines’ article strikingly foreshadows the development of empirical study of judicial decisionmaking. A recent characterization of Haines’ pieces notes “its incipient quantitative analysis” as well as its “nascent attitudinalism.”<sup>27</sup> The second characteristic is important because it describes a methodological perspective that has come to dominate empirical analysis of judicial decisionmaking. As noted above, the attitudinal model holds that judges decide cases on the basis of their personal policy preferences; the role of law in structuring judicial decisions is assumed to be minimal.<sup>28</sup> As described by Glendon Schubert—an early innovator in the application of empirical techniques to the study of judicial decisions—the attitudinal model assumes that jurists have “relatively well-structured attitudes toward the recurrent major issues of public policy that confront the [Supreme] Court for decision.”<sup>29</sup> According to this model, the opinions of the Court can best be understood as reflecting the attitudes of the Justices. As Schubert put it:

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24. *Id.* at 105 (citing George Everson, *The Human Element in Justice*, 10 J. CRIM. L. & CRIMINOLOGY 90, 98 (1919)).

25. *Id.*

26. *Id.*

27. Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 1, 8 (Nancy Maveety ed., 2005).

28. See DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 134–57 (1976); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993); SEGAL & SPAETH, *supra* note 17, at 86; Harold J. Spaeth, *The Attitudinal Model*, in *CONTEMPLATING COURTS* 296, 296 (Lee Epstein ed., 1995); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265–79 (1997).

29. GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946–1963*, at 37 (1965).

[G]iven a particular structure of attitudinal relationships among the justices, and a set of cases raising questions that correspond to degrees of valuation along [those same] . . . attitudinal dimensions . . . it is then possible to specify (in theory) how each justice voted in each case . . . .<sup>30</sup>

Schubert thus argued that cases before the Court present “complex stimuli, which (in effect) ask questions about issues to which the justices are asked to respond.”<sup>31</sup>

An influential gloss on the attitudinal model posits that judges do not always *vote* their preferences, because they may sometimes act strategically to maximize their preferences in the long run by voting against their preferences in a particular case. Under this model, judges exist within an institutional context with “structural constraints that, in a collegial decision-making environment, operate to make judicial choices about voting or opinion writing interdependent and a function of the actors’ strategy for maximizing policy preferences.”<sup>32</sup> This strategic model is fundamentally congruent with earlier attitudinal models in that both assume a set of policy preferences in the mind of the judge that are stable over time and control the judge’s decisionmaking. Whether simply “voting” according to attitudes, or acting strategically to maximize preferences, judges’ views on cases are assumed to be determined by fixed, predetermined views.

Since the 1960s, the attitudinal model has been “the major approach guiding research into judicial decision making.”<sup>33</sup> For those interested in pursuing empirical study of judicial decisionmaking, the attitudinal model has the advantage of “parsimonious explanation.”<sup>34</sup> The model reduces the number of variables under study to a bare minimum and thus holds out the promise of an easy formula for the assessment of judicial decisionmaking. However, because the attitudinal model trivializes the significance of “law” and fails to account for judicial deliberations—matters that are indispensable aspects of an appellate judge’s work—the attitudinal model is at best a specious account of appellate decisionmaking.<sup>35</sup>

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30. *Id.* at 42.

31. *Id.* at 37.

32. Maveety, *supra* note 27, at 25–26.

33. *Id.* at 22.

34. *Id.*

35. See Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 15, 27 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing how

The attitudinal model continues to influence the studies undertaken by contemporary legal empirical scholars. Just as Haines used rudimentary empirical analysis to test his theory of legal realism,<sup>36</sup> contemporary scholars (either explicitly or implicitly) use empirical analysis to test versions of the attitudinal model. As described by Cross: “Judicial politics or ideology is commonly juxtaposed with decision making according to law. . . . Whether the judge is deciding [cases] according to the better legal arguments or to his or her ideology is the question. Quantitative empirical research is suited to help answer this question.”<sup>37</sup>

The attitudinal model thus structures the hypotheses that many empirical studies set out to test. In Haines’s early empirical work, the null hypothesis was that the law fully determines outcomes and that judges decide all cases according to law.<sup>38</sup> This null hypothesis was falsified on the basis of data showing different judges who seemed to be treating the same types of cases in different ways.<sup>39</sup> Therefore, the thinking goes, we should reject the null hypothesis in favor of the alternative—that judges’ personal preferences determine legal outcomes. Recent empirical studies, while clearly more sophisticated than Haines’s study, rely on a similar model whose premise is that *either* law determines case outcomes, *or* judicial decisionmaking is impermissibly dominated by ideology and politics.

2. *Criticisms of the Attitudinal Model.* The attitudinal model has been a consistent target for attack, and for good reasons: it does not adequately account for the role of law and precedent in judicial

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attitudinalists simply assume that judges “vote their policy preferences and use legal principles to mask their true motives”).

36. Haines referred to legal realists’ ideas as a conception of “free legal decision.” Haines, *supra* note 23, at 96–102.

37. CROSS, *supra* note 5, at 12, 14.

38. Haines’s research agenda was deeply influenced by his views concerning how judges make decisions. Haines contrasted two theories of decisionmaking, which he termed the “mechanical theory” and the “theory of free legal decision.” Haines, *supra* note 23, at 96–102. The mechanical theory—which today we might refer to as legal formalism—“postulates absolute legal principles, existing prior to and independent of all judicial decisions, and merely discovered and applied by courts.” *Id.* at 97. The theory of free legal decision, which Haines embraced, postulated “that judicial decisions are affected by the judge’s views of public policy and by the personality of the particular judge rendering the decision.” *Id.* at 102. Haines’s theory of free legal decision was deeply influenced by legal realists of his time—Justice Holmes and other legal realists are quoted extensively by Haines to support his views of how judges make decisions.

39. *Id.* at 105.

decisionmaking, it indulges fanciful assumptions about the nature of judicial preferences, it fails to account for judicial deliberations, and it has an impoverished account of ideology and law.

*a. Failure to Adequately Account for the Role of Law.* From its inception, the attitudinal model has been criticized for misstating the role of law and precedent in judicial decisions, and for largely ignoring judicial deliberations. For example, shortly after publication of Glendon A. Schubert's *The Judicial Mind: the Attitudes and Ideologies of Supreme Court Justices 1946–1963*<sup>40</sup>—a seminal work in the development of the attitudinal model<sup>41</sup>—a reviewer criticized Schubert for “evad[ing]” questions such as whether “the legal argument” before the Court might be “so powerful or appealing that one’s position on the liberalism-conservatism pragmatism-dogmatism scale would have little or no effect.”<sup>42</sup>

The attitudinal model is similar to legal realism and critical legal studies in that all, to some extent, posit that “legal decisionmaking is substantially congruent with decisionmaking *simpliciter*, and . . . legal justification, which attempts to make legal decisionmaking look more different from nonlegal decisionmaking than it in fact is, is best seen as a form of stylized and *post hoc* rationalization.”<sup>43</sup> Judge Posner has forwarded a similar view in his theory of “pragmatic adjudication.”<sup>44</sup> While Judge Posner acknowledges that judges are bound by the law when statutes and precedent dispose of the precise question on appeal, he also believes that a large percentage of the issues decided by the appellate courts do not so precisely fall within the confines of existing law. Instead, according to Judge Posner, it is the responsibility of judges to “come up with the decision that will be best

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40. SCHUBERT, *supra* note 29.

41. Maveety, *supra* note 27, at 14.

42. Anthony D. Castberg, Book Review, 19 W. POL. Q. 583, 585 (1966) (reviewing SCHUBERT, *supra* note 29); *see also* Joseph Tanenhaus, *The Cumulative Scaling of Judicial Decisions*, 79 HARV. L. REV. 1583, 1591 (1966) (“[T]he application of Schubert’s rules can lead to odd results.”).

43. Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1096–97 (1997).

44. Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 20 (1996). Judge Posner rejects the attitudinal model as an overly simplistic model of judicial behavior. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1059 (2006) [hereinafter Posner, *The Role of the Judge*]. However, the model that he and Landes use in their empirical analysis, discussed in Part II.C, has features that appear to be quite similar to the attitudinal model.

with regard to present and future needs.”<sup>45</sup> The theories underlying the attitudinal model, legal realism, critical legal studies, and pragmatic adjudication share the view that the law generally does not constrain judges in their decisionmaking because it does not provide clear answers.

“Legal formalism”—which posits that “law” is a determinate set of rules distinct from political and social factors—often serves as a foil for the legal realist and critical legal studies positions (and, by extension, the attitudinal model). But the truth of the matter is that legal formalism, at least in its most rigid formulation, has not been broadly embraced by the judiciary for many decades, if ever. In an interesting and illuminating study, Professor Brian Tamanaha demonstrates that judges historically have eschewed legal formalism and have been quite self-aware of the limits of the law and of their own capacities to enforce it:

Judges as a group have been neither deluded nor duplicitous about what is involved in the process of judging. It is time to get over this dismissive notion and pay attention to what they are saying, for they offer a font of reliable information about what is involved in judging. Judges have acknowledged the openness of law and their frailty as humans, but steadfastly maintain that this reality does not prevent them from carrying out their charge to make decisions in accordance with the law to the best of their ability.<sup>46</sup>

The point is that even if law draws on interdisciplinary sources in judicial decisionmaking, judicial decisionmaking can still retain autonomy from illicit extralegal forces.

We think it is fair to say that most appellate judges, while they would acknowledge that the law is unclear in some cases, believe that the vast majority of cases in the circuit courts admit of a right or a best answer and do not require the exercise of unbridled discretion.<sup>47</sup>

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45. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 242 (1999).

46. Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 56 CLEV. ST. L. REV. (forthcoming 2009) (manuscript at 13–14), available at <http://ssrn.com/abstract=1024747>.

47. Edwards, *Collegiality*, *supra* note 3, at 1644; see also Alex Kozinski, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, What I Ate for Breakfast and Other Mysteries of Judicial Decision Making, Address at the Symposium on the California Judiciary, Loyola Law School, Los Angeles (Mar. 19, 1993), in 26 LOY. L.A. L. REV. 993, 994 (1993) (“The larger reality . . . is that judges exercise their powers subject to very significant constraints.”); Wald, *supra* note 8, at 237 (“At this point I must reveal [the D.C. Circuit’s] ‘dirty little secret’: A large portion of our cases (particularly administrative law cases) have no apparent ideology to

Moreover, as their published opinions show, most judges reach this conclusion without relying on strong formalist claims about what the law dictates. In other words, while these judges acknowledge that the law has sources of potential indeterminacy, they believe that in most instances one legal argument will have greater plausibility within the legal community than the others pressed by the litigants. As experienced members of the legal community, judges recognize which arguments are fundamentally more plausible and decide cases accordingly. Deciding cases according to law and precedent, rather than personal political or ideological predilections, does not require judges to embrace the simpler and less defensible view that law absolutely dictates outcomes. Nor does it cause judges to deny that moral and political values can at times influence how they read the law. This certainly is the case when political or ideological questions are intrinsic to the law itself. It does mean that, according to norms of professional responsibility and integrity, judges are required to apply the law neutrally and to follow precedent as they read it, irrespective of how they might *prefer* a case to come out.<sup>48</sup> These norms are sufficiently strong—and the law sufficiently clear—that most of the time judges are capable of setting aside idiosyncratic readings of the law for the one most likely to be embraced by the legal community.

*b. Questionable Assumptions about Judicial Views and Preferences, and the Failure to Account for Judicial Deliberations.* The attitudinal model also makes strong—and highly contestable—assumptions about the nature of judicial views and preferences. Possibly the most obviously questionable assumption underlying the attitudinal model is that an individual judge's personal views are immutable and easily characterized pursuant to a two-dimensional left-right axis. For most judges, these are absurd notions—there is no reason to think that judges' preferences are particularly stable, and few judges can be easily pigeonholed as consistently “conservative” or “liberal” on all issues.

Furthermore, adherents of the attitudinal model fail to comprehend the importance of assessing judges' work in the context of the judiciary's institutional norms:

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support or reject at all—the judges are tasked simply with plowing through volumes of complex data and reams of statistical evidence to see if the agency has substantial evidence to back its findings or has acted in an arbitrary and capricious way.”).

48. See Kozinski, *supra* note 47, at 995; Sisk & Heise, *supra* note 8, at 793–94.

Individuals who are associated with particular institutions often come to believe that their position imposes upon them an obligation to act in accordance with particular expectations and responsibilities. In other words, institutions not only structure one's ability to act on a set of beliefs; they are also a source of distinctive political purposes, goals, and preferences. In fact, it is tempting to argue that what makes something a recognizable "institution" is not the hard reality of a building but instead some discrete and discernible habits of thought, including a set of attitudes about the appropriate functions to be performed by people associated with the institution . . . .<sup>49</sup>

Judges, in their professional roles, differ from other governmental actors. The judiciary demands that its members neutrally interpret and apply the law and follow precedent. There is a process of socialization and acculturation during which new judges join the judiciary's culture in which respect for law is accorded a high value. To be sure, there can be no guarantee that a particular judge will be affected by group norms of judicial restraint, but few question that this process, by and large, produces judges of integrity who have a felt obligation to follow the law, adhere to precedent, and faithfully engage in judicial deliberations that determine case outcomes based on the applicable law and controlling precedent. These obligations help mute whatever policy preferences a particular judge may bring to the bench, and facilitate neutral interpretation.

The attitudinal model also fails to take into account deliberation between judges. The model focuses on the views of individual judges; however, appellate judicial decisions are rendered by three-judge panels. The effects of collegiality and interjudge deliberations are not accounted for in the attitudinal model of judging.<sup>50</sup> Collegial relations among judges explicitly embrace the possibility that a judge's view regarding the correct case outcome under the law changes through the course of deliberations. If, as judges report, judicial views about the correct outcome of a case may change during the course of

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49. Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING, *supra* note 35, at 1, 4–5.

50. See Edwards, *Collegiality*, *supra* note 3, at 1656–57; Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585, 586 (1995) ("I urge that we go beyond the matrix of computerized decisionmaking to consider the qualitative aspects of judicial interaction . . . ."); Wald, *supra* note 8, at 255 (noting that the "formal labeling of judges" by political party "is the antithesis of collegial decisionmaking").

deliberations,<sup>51</sup> then the attitudinal model ignores a crucial part of judicial decisionmaking.

A related criticism of the attitudinal model is that it is not an observation about how judges behave so much as a theory of judicial behavior. For example, the so-called “strategic” gloss on the attitudinal model *assumes* that judges have stable preferences on all issues, and then posits that they sometimes suppress these preferences in the short term to achieve long-term objectives. This gloss aims to account for so-called “panel effects,” *i.e.*, empirical studies showing variables for some judges that appear to have predictive value for all judges on a panel. Many appellate judges would laugh at the suggestion that they are participants in such a long-term strategic game, in part because judges often cannot remember many of the cases that they decided in years past and so could not possibly implement “strategies” to gain payback in future cases.

The strategic gloss on the attitudinal model may simplify empirical analysis, but it does not fully and accurately portray how judges routinely perform their work or interact with their colleagues. There are more straightforward and compelling ways to theorize about the data supporting the strategic model:

Where theorists of the strategic model might see a judge sacrificing his or her principles or convictions to respond to colleagues’ pressure, [the alternative is to] see a judge who is open and responsive to colleagues’ arguments, criticisms, and insights, with the result being the thoughtful and efficient development of a judicial outcome through the deliberative process.<sup>52</sup>

*c. Failure to Meaningfully Define and Measure “Ideology.”* In part because of the focus of the attitudinal model on judicial preferences—largely eschewing the effects of law and precedent, and ignoring the impact of judicial deliberations—legal empiricists have expended significant efforts in attempting to measure the effect of judicial

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51. See Edwards, *Collegiality*, *supra* note 3, at 1648–52. For a compilation of additional sources discussing the influence of collegiality on decisionmaking, see *id.* at 1641 n.10.

52. Edwards, *Collegiality*, *supra* note 3, at 1661; see also Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1112 (2001) (stating that “panel effects” can be explained by either a “deliberation hypothesis,” pursuant to which judges modify their views because they take seriously the views of their colleagues, or a “dissent hypothesis,” under which a judge who sits with two colleagues from a different political party moderates his or her views in order to avoid having to write a dissent).



“ideology” on decisionmaking. Because ideology is difficult (if not impossible) to measure directly, scholars have generally used proxies for ideology. Typical proxies include some variable associated with the appointment process of a particular judge, the most common being the party of appointing president.<sup>53</sup> In other words, it is assumed that judges appointed by Republican presidents are “conservative” and judges appointed by Democratic presidents are “liberal.” Unsurprisingly, the meanings of conservative and liberal are invariably elusive.

This party-of-appointing-president (“PAP”) proxy measure has come under criticism. As an initial matter, it is not the case that “all Republican presidents are conservatives and all Democratic presidents are liberal.”<sup>54</sup> Further, presidents are not solely “motivated to appoint judges who reflect their ideologies.”<sup>55</sup> Commentators have noted alternative motivations for presidents’ judicial choices other than ideology, such as personal relationships or party building.<sup>56</sup> More sophisticated attempts to capture judicial ideology (such as the Giles scores used by Cross and discussed more fully below<sup>57</sup>) only marginally improve on the use of PAP as a proxy for ideology.

Alternative interpretations of correlations between appointment variables and case outcome are possible. William Landes and Judge Richard Posner argue that

[i]f the question, for example, is whether Democratic Presidents appoint more liberal judges than Republican Presidents do, the classification of the votes supplies the answer: If judges appointed by Democratic Presidents vote more often for liberal outcomes than judges appointed by Republican Presidents, it doesn’t matter

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53. Alternative approaches have been proposed, but have not yet been widely adopted by the empirical legal community. *See, e.g.*, Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL’Y (forthcoming 2009) (manuscript at 3–4), available at [http://works.bepress.com/david\\_law/14](http://works.bepress.com/david_law/14) (suggesting that empiricists have failed meaningfully to define “ideology” for purposes of assessing appellate decisionmaking and proposing a new methodology for characterizing judges’ votes based on past voting behavior).

54. Epstein & King, *supra* note 7, at 88.

55. *Id.* at 89.

56. *Id.* at 89 n.280.

57. *See infra* notes 149–66 and accompanying text.

whether a particular judge, when appointed, would have been considered liberal.<sup>58</sup>

However, such a study would be limited by many of the same methodological issues faced by other empirical analyses, and it would not address the extent to which appellate decisionmaking is influenced by extralegal factors, rather than by the law, precedent, and judicial deliberations.<sup>59</sup> Ideology is a complex idea that has never, to our knowledge, been convincingly captured in any empirical legal analysis. Judge Posner argues that we should distinguish between a judge's presumed political party affiliation, which he finds largely insignificant in assessing the effect of extralegal factors on appellate decisionmaking, and a judge's "ideology":

The question is what determines the judge's discretionary judgment.

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... "Politics" is not quite right, because it implies partisanship . . . . [M]ost of our judges do not identify with a political party . . . . "Ideology" is better. "Ideology" is a body of more or less coherent bedrock beliefs about social, economic, and political questions, or, more precisely perhaps, a worldview that shapes one's answers to those questions. Our principal political parties are coalitions and so lack coherent ideologies. A judge may lean more toward the set of policies associated with the Democratic Party or more toward the set associated with the Republican Party, but neither party is ideologically consistent; that is why party affiliation has only limited value in predicting judicial decisions even in the open area.<sup>60</sup>

Judge Posner conjectures that the principal "sources of judges' ideologies" are "moral and religious values."<sup>61</sup> He then argues that these values

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58. William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 3 (Univ. of Chi. Law & Econ., Olin Working Paper No. 404, 2008), available at <http://papers.ssrn.com/abstract=1126403>.

59. As discussed in Part I, that the party of the president and Senate at the time of a judge's confirmation correlates with some measure of case outcomes does not confirm that extralegal factors are in fact determining those outcomes. Debates and differences of perspective fully *within* the law could equally account for such differences.

60. Posner, *The Role of the Judge*, *supra* note 44, at 1058–59.

61. *Id.* at 1060.

are a product of upbringing, education, salient life experiences, and personal characteristics (which may determine those experiences) such as race, sex, and ethnicity; and also of temperament, which shapes not only values but also dispositions, such as timidity and boldness, that influence a judge's response to cases. At bottom, then, the sources of ideology are both cognitive and psychological, but I think the psychological dominates, because psychology exerts such a great influence on our interpretation of our experiences, including the weights assigned to the possible consequences of deciding a case one way or the other.<sup>62</sup>

In addition, a richer and more accurate account would acknowledge that ideology is unlikely to remain fixed after early childhood, but would continue to respond to experience and evolve over the course of a person's lifetime.

No empirical study of which we are aware accurately measures the relationship between ideology, either in Judge Posner's terms or another equally nuanced view, and case outcomes. As Professor Sisk has noted,

[W]e should be far from satisfied with the concept of ideology as presently applied in empirical work regarding the courts. The *International Encyclopedia of the Social Sciences* defines ideology as "one variant form of those comprehensive patterns of cognitive and moral beliefs about man, society, and the universe in relation to man and society, which flourish in human societies." Nothing nearly so sophisticated is in operation in most empirical research conducted on the courts, whether undertaken by political scientists or law professors.<sup>63</sup>

Nor is this problem amenable to easy solutions:

[R]efinement of the statistical measurement of ideology [does not] appear likely to revolutionize the empirical research process in a manner that will permit more confident conclusions. The empirical evidence cannot justify elevating the assumed ideological or partisan affiliations of judges above such traditional measures of judicial temperament as legal experience, quality of legal reasoning, respect for other actors in the legal process, and integrity.<sup>64</sup>

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62. *Id.* (footnote omitted).

63. Sisk, *supra* note 8, at 892 (footnote omitted).

64. Sisk & Heise, *supra* note 8, at 794.

In the final analysis, it is dangerous to assume that appointment variables are a useful proxy for ideology. While appointment variables may be easily identified, the link between those measures and some concept of “ideology” is contestable. When researchers attempt to link an appointment variable with ideology, they weaken, rather than strengthen, the quality of their analyses. Instead of theorizing about a correlation that they can show—PAP and case outcome, for example—they assume an identity between ideology and PAP and then conclude that they have shown a correlation between “ideology” and outcome. This connection is murky at best. Researchers are on much safer ground theorizing about the *reasons* for any perceived connection between PAP and outcome rather than *assuming* the connection between PAP and ideology, and then claiming to have shown a connection between ideology and outcome.

*C. Methodological Problems Inherent in Empirical Studies That Seek to Understand Judicial Decisionmaking*

Empirical studies of judicial decisionmaking face several important methodological hurdles as well. Before statistical techniques can be applied, the inputs and outputs of the judicial process must be translated into mathematical terms. This process must be carefully structured to avoid introducing errors in the analysis; and conclusions that are drawn necessarily must be circumscribed to acknowledge the simplifications inherent in coding. As with any other statistical analysis, close attention must be paid to the selection of data and the relationships between variables under study. While all of the difficulties of traditional data analysis are present, a host of additional problems arise when judicial decisionmaking—a fundamentally textual (and contextual) enterprise—is reduced to statistical information.

1. *Problems with the U.S. Courts of Appeals Database Used by Empiricists—Coding Errors and the Total Omission of Unpublished Decisions.* Many empiricists rely on the “U.S. Courts of Appeals Database,” sometimes called the “Songer database” to provide the raw data for their analyses.<sup>65</sup> The database, which codes a random

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65. See The Judicial Research Initiative, Appeals Court Data, <http://www.cas.sc.edu/poli/juri/appctdata.htm> (last visited Jan. 21, 2008). The database was originally compiled by Donald R. Songer and then updated by Ashlyn K. Kuersten and Susan B. Haire.

sample of published court of appeals decisions issued since 1925, was “designed to create an extensive dataset to facilitate the empirical analysis of the votes of judges and the decisions of the U.S. Courts of Appeals.”<sup>66</sup> Although the database is routinely used by empirical legal scholars, it has at least two serious flaws.

First, as Landes and Posner discovered, the Songer database has significant coding mistakes that can distort the accuracy of dependent variables in empirical studies.<sup>67</sup> These mistakes are explained in the next section. Second, the Songer database does not include *unpublished decisions* issued by the courts of appeals.<sup>68</sup> This is an extremely important omission, because a huge percentage of courts of appeals decisions are reported but unpublished. In fact, in 2007, less than 17 percent of all opinions in the courts of appeals were published.<sup>69</sup> Published decisions as a sample of total decisions are far from random: the judgments rendered in unpublished decisions are largely unanimous, and these cases typically involve more straightforward applications of law. Unpublished decisions, no less than published decisions, dispose of appeals on the merits. Importantly, unpublished decisions offer valuable information regarding a court’s adherence to precedent, because in these cases the law is often most clear. Law professors and researchers tend to focus on published decisions that raise difficult issues and establish new precedent. For the vast majority of litigants, however, it is often of no moment whether a case is published or not. The court’s judgment is what matters. And every judgment counts when one attempts to accurately measure the work of the appellate courts. Therefore, any assessment of the work of the courts of appeals that does not include unpublished decisions cannot be seen as complete.

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66. *Id.*

67. *See infra* text accompanying notes 74–77.

68. DONALD R. SONGER, THE UNITED STATES COURTS OF APPEALS DATA BASE DOCUMENTATION FOR PHASE 1, at 8 (n.d.), available at [http://www.cas.sc.edu/poli/juri/cta\\_codebook.pdf](http://www.cas.sc.edu/poli/juri/cta_codebook.pdf). *See generally* Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349, 351–57 tbl.1 (2004) (setting forth publication standards in different circuits).

69. 57,973 appeals were filed in the courts of appeals for the year ending December 31, 2007. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl.B (2007), available at <http://www.uscourts.gov/stats/dec07>. During this same period, courts of appeals terminated 31,340 cases on the merits. *Id.* at tbl.B-5. Less than 17 percent of those dispositions were published. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 48 tbl.S-3 (2007), available at <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf>.

2. *Problems with Dependent Variables—Trying to Code Judicial Decisions.* Empirical studies of judicial decisions look at “dependent” and “independent” variables. Dependent variables concern the object under study, while the independent variables are those that are hypothesized to affect the dependent variable. In studies of judicial decisionmaking, the dependent variables relate to judicial opinions. Typically, the component of a judicial opinion that has been treated as a dependant variable is the case “outcome.”

Coding the outcome of a case involves significant difficulties. Scholars have noted that there are many possible dispositions of cases decided by the appellate courts:

- stay, petition, or motion granted
- affirmed; or affirmed and petition denied
- reversed (including reversed and vacated)
- reversed and remanded (or just remanded)
- vacated and remanded (also set aside and remanded; modified and remanded)
- affirmed in part and reversed in part (or modified or affirmed and modified)
- affirmed in part, reversed in part, and remanded; affirmed in part, vacated in part, and remanded
- vacated
- petition denied or appeal dismissed
- certification to another court<sup>70</sup>

Empirical studies routinely collapse the dispositions into a simple binary outcome—such as “appellant prevails” or “appellee prevails.” Reducing complex case outcomes to a binary variable may lead to repeatability problems and create a significant source of potential coding errors.<sup>71</sup>

Some studies seek to code case outcome according to topical or political criteria. For example, in an empirical study done by Glendon Schubert, Supreme Court decisions issued between 1946 and 1963 were coded along two axes—political liberal/conservative and

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70. Epstein & King, *supra* note 7, at 85 tbl.5 (citing The Judicial Research Initiative, *supra* note 65).

71. *Id.* (noting that a researcher seeking to replicate or update a study based on a binary coding system for case outcome will have to make “judgment call[s], which may or may not be the same one[s] [the author] made. . . [thereby] detract[ing] from the reliability of [the] measure”).

economic liberal/conservative.<sup>72</sup> Cases also have been coded as pro-/antienvironment, pro-/anticriminal defendant, pro-/anti-civil rights, and so on. Perhaps the most common metric used in empirical studies is a simple “left/right” or “liberal/conservative” binary.<sup>73</sup> These topical or political measures used to describe cases will necessarily simplify a court’s holding and reduce what may be a complex and nuanced decision into an often uninformative binary.

When decisions are coded as liberal or conservative, *every issue* resolved by the court in a single case must be collapsed into a single determination of whether the outcome falls on the left or right side of the binary. In other words, case outcomes normally are not measured to give a complete reflection of the outcome in political terms. In an administrative law case, for example, the court’s disposition might include a judgment on standing that appears to be “conservative,” a judgment on “arbitrary and capricious” review that appears to be “liberal,” and a judgment under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>74</sup> review that is neither—this nuance is lost in a binary outcome characterization.

In this same vein, it is very difficult to characterize many case outcomes. For example, the general rights embraced by freedom of religion and freedom of expression sometimes conflict with the exercise of other rights; it may not be clear how presumed liberal or conservative judges should be expected to vote in such cases. Cases may be disposed of on procedural grounds that are essentially nonideological, leading to coding errors when the outcome must be coded as liberal or conservative. A court’s interpretation of a statute may defy ideological description (*e.g.*, rate allocations in a matter before the Federal Energy Regulatory Commission, where the parties before the court are competing companies). Even a cursory review of some of the cases listed in Appendix B, *infra*, shows that many appeals involve multiple, complex issues, thus making it impossible to describe the appellate court’s disposition as liberal or conservative. Finally, coding normally does not take into account the role of the

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72. SCHUBERT, *supra* note 29, at 97.

73. *See, e.g.*, Songer, *supra* note 68, at 5–6 (“[In the Songer database], the directionality of the court’s decision was recorded, using conventional definitions of directionality that are closely analogous to those in the Spaeth Supreme Court data base [*sic*]. For most, but not all issue categories, these will correspond to notions of ‘liberal’ (coded as ‘3’) and ‘conservative’ (coded as ‘1’) that are commonly used in the public law literature.”).

74. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

record on appeal, whether certain issues have been forfeited or waived, the role of precedent, or the effect of judicial deliberations.

That coding is an imperfect enterprise is strikingly revealed in Landes and Posner's efforts to correct the Songer courts of appeals database that has been used by many empirical legal scholars. In a "spot check of 40 cases" from the database, Landes and Posner found "a high error rate in cases decided before 1960."<sup>75</sup> They also found "a number of the systematic classification decisions that the coders made [which were] erroneous, such as classifying all votes for plaintiffs in intellectual-property cases as liberal."<sup>76</sup> While Landes and Posner attempted to eliminate the systematic coding errors, no attempt was made to "correct the misclassification of individual cases."<sup>77</sup> While this evidence is anecdotal, it shows that errors exist, and furthermore shows that classification decisions are not uncontroversial. In addition to simple mistakes—where data are incorrectly inputted—there can be disagreement about where certain kinds of decisions fall on the political spectrum. These "classification errors" will not only introduce random "noise" into the data, but can systematically skew the data and create the possibility of false correlations.<sup>78</sup>

A final, and perhaps the most troubling, problem with coding decisions—and one well recognized by many scholars who undertake empirical legal scholarship—is that only the outcomes of decisions are coded, not the content. A disposition on procedural grounds against an environmental group is treated exactly the same as a decision on the merits, although the consequences can be quite different. Opinions that reach broad conclusions of law and include significant dicta are treated the same as opinions that decide cases narrowly on only the arguments presented. Whether an opinion hews closely to precedent, or decides a case on first principles, is usually ignored. Coding only for outcome eliminates large amounts of data and treats, as identical, opinions that are, in many ways, quite different.<sup>79</sup>

A related problem is that empirical studies tend to reduce judicial decisionmaking to the private goal of dispute resolution in individual cases. But judicial decisionmaking also serves public

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75. Landes & Posner, *supra* note 58, at 3.

76. *Id.*

77. *Id.*

78. See Shapiro, *supra* note 19, at 481–82 (providing in-depth analysis of coding problems in a widely used database of Supreme Court cases).

79. For an example of an attempt to add legal issues to the coding process, see *id.*



goals—indeed, that is why it is a public good—of elaborating, creating and changing legal norms, of providing guidance to institutional actors both within and outside the courts, and of establishing democratic habits of trust and civility.<sup>80</sup> Writers within the field of law and economics certainly acknowledge these public dimensions, focusing on such matters as incentives, transparency, and accountability.<sup>81</sup> Measures of case outcome, however, do not incorporate these multiple purposes, instead reducing judicial decisionmaking to a single datum based on whichever litigant prevailed.<sup>82</sup> Empiricists who rely solely on case outcomes thus equate a part of judicial decisionmaking with the entirety of the enterprise.

Some empirical legal scholars understand that their research must “move beyond asking which litigant prevailed in a case and now also ask how the advocates and the court framed the question presented and how the legal analysis unfolded in the opinion.”<sup>83</sup> Law professors should be well positioned to develop methods for systematically analyzing opinions.<sup>84</sup> But significant difficulties would no doubt arise if legal academics made a serious effort to “transform classic interpretive skills into recognizable and transferable social science knowledge.”<sup>85</sup>

3. *Problems with Independent Variables—The Problematic Absence of Data on Case Records, Applicable Law, Governing Precedent, and Judicial Deliberations.* In empirical studies of judicial decisionmaking, certain independent variables that have been studied—such as demographic information about the judges (e.g., age, race, and gender)—are published and clear. Likewise, certain

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80. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 938 (1975).

81. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW passim* (7th ed. 2007).

82. Cass Sunstein has written extensively on “judicial minimalism,” the theory that courts should address only the case at hand, hew closely to precedent, and avoid overly disruptive changes in the law. See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 27–30 (2005). The simple measure of case outcome fails to distinguish between a minimalist and its opposite—clearly a distinction that Sunstein would find important.

83. Sisk, *supra* note 8, at 885.

84. See Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 64 (2008).

85. *Id.* at 121. Unlike more traditional subjects of statistical study—like physical phenomena—“many of the civil justice phenomena that need study are not [well] suited to current quantitative analytic techniques.” Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 LAW & CONTEMP. PROBS. 55, 63 (Summer 1988).

data emanating from outside the courtroom, like the political party in control of Congress at the time of decision, can also be conclusively established. Characteristics of the president and Congress at the time of a judge's nomination and appointment are also known, and can be easily coded as an independent variable.

However, the most important variables for appellate decisionmaking—the record before the court, the applicable law, governing precedent, and judicial deliberations—pose very large coding difficulties, and have gone largely unstudied as a result. For example, the task of truly “coding” precedent would be enormous. Formalized and repeatable procedures would have to be developed for identifying the legal issues present in a case, determining the scope of authoritative and persuasive law, and characterizing the effect of that law on the outcome of the case. This process—the heart of legal reasoning—involves an extraordinarily complex set of analytical skills. Breaking all of this down into a routine that could be done on a rote basis would be extremely difficult. An empirical legal scholar would also be required to decide how far afield to look for precedent, whether an argument by analogy is appropriate, and how to account for the normative weight and persuasive authority of past cases. Given these issues and the limitations of even foreseeable computing, it seems likely that directly coding “precedent” as an independent variable will remain extraordinarily difficult, if not impossible, for a long time.

A small number of empirical legal studies have attempted to develop some method for examining the role of precedent, but the task is daunting. Lindquist and Cross constructed a study to test whether judges' ideological preferences are given freer rein in cases of first impression, where there is no controlling precedent. They used lawyers' descriptions and assessments of judges in the *Almanac of the Federal Judiciary*, supplemented by characteristics of the appointing president, for the “ideology” variable, and selected cases from several circuits where either the majority or the dissent “expressly noted that the case raised an issue of first impression.”<sup>86</sup> Lindquist and Cross then conducted logistic regression analysis and found that “judicial ideology is stronger in cases of first impression.”<sup>87</sup> Putting aside the question of whether the nonrandom sample of assessments offered by

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86. Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1180–81 (2005).

87. *Id.* at 1184.

lawyers who respond to queries from the almanac are a suitable measure of judicial “ideology,” and the authors’ inability to account for judicial deliberations, the Lindquist and Cross study suggests that cases of first impression are different in some measurable way from cases with relatively clear precedent.<sup>88</sup> Cross has also published two analyses that are meant to test the effect of law on judicial decisionmaking. He analyzed whether courts show affirmance deference—*i.e.*, whether courts tend to affirm lower court decisions—and found that affirmance deference is a powerful predictor of appellate decisionmaking.<sup>89</sup> Cross also found that in cases involving a controlling legal threshold, such as jurisdiction or standing, those thresholds “appear to exercise some classical legal tug.”<sup>90</sup> In each instance, the Cross studies suggest that law influences appellate decisionmaking.

Because many of the factors that contribute to judicial decisionmaking are either inaccessible, such as judicial deliberations, or extremely difficult to measure, such as precedent and the myriad personal beliefs and values that make up a judge’s “ideology,” empirical studies tend to focus on factors that are more amenable to empirical study—such as party of appointing president—even if those factors ultimately have little explanatory power. The real problem here is not that scholars focus on variables that are more easily measured, but that some empirical studies exaggerate their conclusions and leave readers with the impression that there is strong evidence showing a powerful across-the-board relationship between the party of appointing president and appellate decisionmaking.<sup>91</sup> And from this, readers are sometimes led to believe that appellate decisionmaking is largely influenced by the judges’ personal ideological preferences. Readers often may not understand the coding problems inherent in many empirical studies, the problems underlying proxies for ideology, and the differences between moral

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88. In another part of the study, Lindquist and Cross found that, in the context of interpreting the phrase “under color of” state law from 42 U.S.C. § 1983, the power of precedent to reduce the predictive power of the almanac variable does not uniformly increase over time. *Id.* at 1198–200.

89. CROSS, *supra* note 5, at 54.

90. *Id.* at 200.

91. See, e.g., CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 150 (2006) (“The most difficult issues are resolved, [and] the principal empirical findings are clear. In many domains, Republican appointees vote very differently from Democratic appointees, and ideological tendencies are both dampened and amplified by the composition of the panel.”).

and political judgment legitimately exercised in interpreting the law and extralegal preferences. Nor may they appreciate the consequences of not including unpublished decisions and not accounting for case records, the application of law, the effect of precedent, and the impact of judicial deliberations. For these reasons, empirical studies should carefully and fully reveal their limitations and state their conclusions with caution.

## II. RECENT EMPIRICAL ANALYSES OF DECISIONMAKING IN THE FEDERAL COURTS OF APPEALS

Legal scholars applying social science methodologies to the examination of the federal appellate courts have analyzed the effect of appointment variables on case outcomes in many areas, including review of environmental regulation,<sup>92</sup> and application of the *Chevron* doctrine,<sup>93</sup> as well as the propensity to dissent.<sup>94</sup> Studies also have looked at the influence of Congress on judicial decisions<sup>95</sup> and the contribution of visiting judges.<sup>96</sup> Together, these and other studies have contributed to “a flowering of ‘large-scale quantitative studies of facts and outcome[s]’”<sup>97</sup> that have ultimately led to “an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets.”<sup>98</sup> Professor Gregory Sisk has characterized the growth of empirical legal studies as a “‘Quantitative Moment’ in the legal academy.”<sup>99</sup>

We examine three relatively recent contributions to this “Quantitative Moment”: Frank B. Cross’s *Decision Making in the*

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92. See, e.g., Jordan, *supra* note 8 *passim*; Revesz, *Environmental Regulation*, *supra* note 8 *passim*.

93. See, e.g., Cross & Tiller, *supra* note 8 *passim*; Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 38–39 (1998); see also Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1758–63 (1999) (correlating appointment variables and outcomes in standing cases).

94. See, e.g., VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* *passim* (2006).

95. See, e.g., Revesz, *supra* note 52 *passim*.

96. See, e.g., Sara C. Benesh, *The Contribution of “Extra” Judges*, 48 ARIZ. L. REV. 301 *passim* (2006).

97. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 831 (2008) (quoting Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1244 (1931)).

98. *Id.*

99. Sisk, *supra* note 8, at 876.

*U.S. Courts of Appeals* (“Cross”),<sup>100</sup> Cass R. Sunstein, David Schkade, Lisa M. Ellman, and Andres Sawicki’s *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (“Sunstein”),<sup>101</sup> and William M. Landes and Richard A. Posner’s, *Rational Judicial Behavior: A Statistical Study* (“Landes and Posner”).<sup>102</sup> All three studies focus solely on “published” opinions and do not attempt to calculate the outcomes reached in the huge mass of “unpublished” court of appeals decisions.<sup>103</sup> As with many of their peers, these scholars focus mostly on characteristics of judges, such as party of appointing president, and attempt to draw “causal inferences about the effect of judicial characteristics on outcomes.”<sup>104</sup>

In order to draw these inferences, standard statistical techniques are used to varying degrees in each of the studies. The results of these three analyses are consistent with other empirical studies that have looked at a broad cross section of cases, in that they do not “demonstrate that any extralegal factor—ideology, judicial background, strategic reaction to other institutions, the nature of litigants, or the makeup of appellate panels—explains more than a very small part of the variation in outcomes.”<sup>105</sup>

#### A. *A Look at Sunstein, Are Judges Political?*

Sunstein has described federal appellate decisions as “an extraordinary and longstanding natural experiment . . . involv[ing] the relationship between presidential choices and judicial decisions.”<sup>106</sup> The “presidential choices” to which Sunstein refers are the choices that presidents have made in selecting their judicial nominees. The purpose of Sunstein’s study is to determine “how Republican and Democratic appointees differ from one another.”<sup>107</sup>

The Sunstein study proposes three hypotheses. Sunstein’s first hypothesis, “ideological voting,” posits that “a judge’s ideological

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100. FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007).

101. SUNSTEIN ET AL., *supra* note 91.

102. Landes & Posner, *supra* note 58.

103. CROSS, *supra* note 5, at 3 (noting the use of two databases of published opinions); Landes & Posner, *supra* note 58, at 2 (same); Miles & Sunstein, *supra* note 97, at 18 (“Most of the relevant studies are limited to published judicial opinions.”).

104. Miles & Sunstein, *supra* note 97, at 835.

105. Sisk, *supra* note 8, at 877.

106. SUNSTEIN ET AL., *supra* note 91, at 4.

107. *Id.*

tendency can be predicted by the party of the appointing president.”<sup>108</sup> In his formulation, the phrase “ideological tendency” means the tendency of a judge to “vote” in a stereotypically conservative or liberal fashion—where a judge “votes” for a case outcome by joining the majority and “votes” against the outcome by authoring or joining a dissent.<sup>109</sup> This hypothesis is tested by using the party of the president that appointed a judge (“party of appointing President” or PAP)<sup>110</sup> as an independent variable, and the judge’s vote—classified by Sunstein as either “liberal” or “conservative”—as the dependent variable.<sup>111</sup>

The second Sunstein hypothesis, “ideological dampening,” posits that a judge sitting on a “mixed panel”—that is, sitting with two judges appointed by presidents of the other party—will be less likely to vote according to his or her own ideological preferences.<sup>112</sup> Sunstein uses PAP as a proxy for the judge’s ideological leanings to test this hypothesis and seeks to determine if sitting on a mixed panel reduces the predictive power of PAP for a judge’s vote.<sup>113</sup>

The final hypothesis, “ideological amplification,” posits that when all of the judges on a panel share ideology, they will be more likely to vote in a stereotypical fashion.<sup>114</sup> To test this hypothesis, Sunstein again uses PAP as a proxy for ideology and seeks to determine if PAP is a stronger predictor of a judge’s voting when that judge sits on a nonmixed panel—that is, one comprised entirely of judges appointed by presidents of the same party.<sup>115</sup>

To test these hypotheses, Sunstein selected 6,408 published three-judge panel decisions in several relatively high profile and politically charged areas of law, including abortion, affirmative action, and challenges to environmental regulation.<sup>116</sup> These cases and nearly 20,000 associated individual votes were compiled using a series of relatively straightforward Lexis searches.<sup>117</sup> Each case and vote was

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108. *Id.* at 8.

109. *Id.* at 19.

110. *Id.* at 6, 153 nn.4–7 (noting that the party of the appointing president is a “crude” proxy for judicial ideology).

111. *Id.* at 163.

112. *Id.* at 8–9.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 117.

117. *Id.* at 157–63 nn.2–25.

then coded as “liberal” or “conservative,” based on the outcome. For example, in cases involving challenges to environmental regulations, “[a] vote counted as liberal if it favored upholding an agency’s decision that was against industry attack, or if it favored striking down an agency’s decision in the face of a challenge by a public interest group.”<sup>118</sup> The choice between liberal or conservative was binary: there was no scale; the coding was determined purely by the outcome, and no account was taken of the reasoning supporting a decision or the effect of governing precedent.<sup>119</sup>

Sunstein then compared the judges’ votes with the party of appointing presidents. The votes of “Democratic” judges and “Republican” judges (based on PAP) were compared for each of the types of cases examined.<sup>120</sup> This analysis found differences in voting patterns in some substantive areas, but not others. The largest difference was found in the area of gay and lesbian rights, where Democratic-PAP judges voted for the plaintiff in 57 percent of cases, but Republican-PAP judges voted for the plaintiff in only 16 percent of cases.<sup>121</sup> Other areas with relatively large differences included capital punishment cases, labor cases, and sex discrimination cases.<sup>122</sup> There were several areas where there was little or no difference in voting between Republican-PAP and Democratic-PAP judges, including criminal appeals, takings cases, and punitive damages cases.<sup>123</sup>

To test the second hypothesis, ideological dampening, Sunstein sought to identify the effects of other panel members’ ideological preferences on a judge’s vote.<sup>124</sup> PAP is used as a proxy for ideology, and judges are classified according to the presumed political affiliation of their panel colleagues into three categories—both Democratic PAP, one Democratic PAP and one Republican PAP, and both Republican PAP.<sup>125</sup> Here, the authors again found variation by subject matter. In gay and lesbian cases, where the other two judges on a panel were both Republican PAP, the third judge voted in favor of expanding or protecting gay and lesbian rights only 27

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118. *Id.* at 161 n.20.

119. *Id.* at 19.

120. *Id.*

121. *Id.* at 20–21 tbl.2-1.

122. *Id.*

123. *Id.*

124. *Id.* at 22.

125. *Id.* at 23, 163 n.30.

percent of the time.<sup>126</sup> In contrast, when the other two judges were Democratic PAP, the third judge voted in favor of expanding or protecting rights 60 percent of the time.<sup>127</sup> Other issue areas—for example, abortion and capital punishment cases—showed no such effects.<sup>128</sup>

To test the ideological amplification hypothesis, Sunstein compared mixed panels with nonmixed panels.<sup>129</sup> Again, some issue areas showed greater differences than others. For example, in cases involving the National Environmental Policy Act, panels consisting of three Democratic-PAP judges favored an expanded view of the act 71 percent of the time, while panels with two Democratic-PAP judges and one Republican-PAP judge favored an expanded view of the act 42 percent of the time.<sup>130</sup> Sunstein also reports that in deciding cases governed by *Chevron*,<sup>131</sup> D.C. Circuit panels made up entirely of Republican-PAP judges invalidated agency action “when expected to do so on political grounds” 67 percent of the time, while panels with two Republican-PAP judges and one Democratic-PAP judge did so in 38 percent of cases.<sup>132</sup>

Sunstein claims that, in several issue areas, all three hypotheses—*i.e.*, that judges vote ideologically, that mixed panels dampen ideological effects, and that nonmixed panels amplify ideological effects—were confirmed.<sup>133</sup> These areas included affirmative action cases, labor cases, cases brought under the Americans with Disabilities Act, cases brought under the National Environmental Policy Act, desegregation cases, and campaign finance cases.<sup>134</sup> There were five areas where all of the hypotheses were rebutted: criminal appeals, federalism cases, takings cases, cases involving punitive damages, and standing cases. In these latter areas, Sunstein concluded that “there is no significant difference between the votes of Republican appointees and those of Democratic appointees.”<sup>135</sup> Finally, in abortion and capital punishment cases,

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126. *Id.* at 20–21 tbl.2-1.

127. *Id.*

128. *Id.*

129. *Id.* at 25.

130. *Id.* at 20–21 tbl.2-1.

131. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

132. SUNSTEIN ET AL., *supra* note 91, at 80.

133. *Id.* at 24.

134. *Id.*

135. *Id.* at 48.



panel effects were not found—the votes of judges were unaffected by panel composition.<sup>136</sup>

The Sunstein authors conclude that there is “considerable evidence” confirming that “[f]requently the law is clear” and appellate judges “simply implement it, no matter who has appointed them.”<sup>137</sup> They claim, however, that, while the results of their study may leave some questions open, “the most difficult issues are resolved,” and “the principal empirical findings are clear.”<sup>138</sup> “In many domains,” according to the Sunstein authors, “Republican appointees vote very differently from Democratic appointees, and ideological tendencies are both dampened and amplified by the composition of the panel.”<sup>139</sup> The authors thus believe their findings justify specific policy proposals geared towards encouraging the diversity of ideological viewpoints on the federal judiciary. Although they “are not prepared to suggest a formal requirement that federal tribunals should be balanced along party lines,”<sup>140</sup> they conclude that, “in the abstract, a mix is much better than uniformity,”<sup>141</sup> and that “the evidence outlined [in the book] can easily be taken to support the view that the Senate has a responsibility to . . . ensure a reasonable diversity of views.”<sup>142</sup>

#### B. *A Look at Cross*, Decision Making in the U.S. Courts of Appeals

The Cross analysis differs from Sunstein’s in several key respects. Rather than limiting the sample to particular issue areas, or attempting to code case outcome himself, Cross “draw[s] heavily on large, publicly available data sets,”<sup>143</sup> especially the United States Courts of Appeals Database and the Database on the Attributes of the United States Appeals Courts Judges, supplemented by other sources. The courts of appeals database (discussed in Part I.C.1 *supra*) includes several thousand cases—at least fifteen cases per circuit starting in 1925.<sup>144</sup> The cases have been coded for “numerous variables,” including “the ideological direction of the decisional

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136. *Id.* at 54–57.

137. *Id.* at 5.

138. *Id.* at 150.

139. *Id.*

140. *Id.* at 138.

141. *Id.*

142. *Id.* at 141–42.

143. CROSS, *supra* note 5, at 3.

144. *Id.*

outcome (whether liberal or conservative) . . . the type of case being decided . . . and some of the legal issues presented in the case.”<sup>145</sup> The database of attributes provides information on factors such “as race, gender, religion [and] the identity of the appointing president.”<sup>146</sup> Cross uses these databases and runs a large number of logistic regression analyses to test a variety of hypotheses.<sup>147</sup>

Several chapters of Cross’ study are devoted to the impact of ideology on judicial decisionmaking. In contrast to the Sunstein study, which uses PAP as a proxy for ideology, Cross’ “Ideology” variable is based on a measure created by Michael Giles of Emory University, which accounts for both the ideological preferences of appointing presidents and the preferences of “the senators who are typically consulted” during the judicial appointment process.<sup>148</sup> As in the Sunstein study, the coding of cases as liberal or conservative, part of the courts of appeals database, is binary. Cross acknowledges that

[t]he available methods for measuring the ideology of judges and decisions are rough and imperfect. Translating something so amorphous as ideology into a numerical measure for quantitative analysis will inevitably be imperfect.<sup>149</sup>

Using Giles scores as the independent variable and conservative/liberal outcome as the dependant variable in a logistic regression, Cross finds a statistically significant relationship<sup>150</sup> that he interprets to mean that “a unitary change in the judicial ideology measure [from most conservative to most liberal] will produce a 6% change in associated ideological decisions.”<sup>151</sup>

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145. *Id.*

146. *Id.*

147. Sunstein also uses logistic regression to determine statistical significance. *See* SUNSTEIN ET AL., *supra* note 91, at 163 n.30. However, the main analyses that Sunstein reports are not based on logistic regressions. Many people are familiar with ordinary least squares (OLS) regression, where a line of “best-fit” is developed for a given data set. Logistic regression is a form of regression used when the dependent variable is binary. While logistic regression differs in important ways from OLS regression, the idea is similar and each technique attempts to model the relationship between variables.

148. CROSS, *supra* note 5, at 19.

149. *Id.* at 20.

150. Cross found a logit coefficient of .061. *Id.* at 24.

151. *Id.* This finding is based on the coefficient of .061. A logit coefficient must be interpreted with care. Unlike in the case of ordinary least square regressions, the slope coefficient in a logistic regression is not (an estimation of) the rate of change in the dependent variable as the independent variable changes. Rather, the slope coefficient is the rate of change in the log odds as the independent variable changes. FRED C. PAMPEL, LOGISTIC REGRESSION:

Cross also divides the cases into the following case categories: criminal, civil rights, First Amendment, privacy, labor relations, economic, and miscellaneous.<sup>152</sup> Cross finds no statistically significant relationship between Giles scores and outcome in the First Amendment, privacy, and miscellaneous categories.<sup>153</sup> The relationship between Giles scores and outcome is strongest in due process cases, with a relatively strong relationship in labor relations cases as well.<sup>154</sup> Cross then divides the cases into a different set of categories: constitutional cases, cases interpreting a federal statute, cases where an *amicus curiae* filed a brief, class actions, criminal procedure cases, and diversity cases.<sup>155</sup> Again, there are differences. This time, the strongest relationships are found in cases in which *amici* are present, in criminal procedure cases, and in cases in which a federal statute is in play.

Cross additionally attempts to examine the role of deference to lower courts in appellate decisionmaking. To do this, he creates a new independent variable by assigning the lower court decision an ideological label based on case outcome.<sup>156</sup> His regression using the ideological direction of the lower court decision and Giles scores found that both Giles scores and the new variable have statistically significant relationships with case outcomes.<sup>157</sup>

Cross also examines panel effects. In the first panel analysis, Cross looks at the effect on a judge's vote of "the total ideological [*i.e.*, Giles] score of the other judges on the panel."<sup>158</sup> He finds that this variable has a stronger relationship to the judge's vote than the judge's own Giles score.<sup>159</sup> Cross describes these results as

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A PRIMER 18–39 (2000). Where logistic regression is used only for the purposes of computing statistical significance (as in Sunstein's work), the interpretation of the logit coefficient does not pose a problem. However, where conclusions are drawn directly from the logit coefficients, there must be adequate explanation of how those conclusions follow.

152. CROSS, *supra* note 5, at 27 tbl.1.3.

153. *Id.* at 27.

154. *Id.* at tbl.1.3.

155. *Id.* at 28 tbl.1.4.

156. *Id.*

157. *Id.* at 54 tbl.2.2. The logit coefficients were .040 for Giles score and .149 for the new lower court variable—indicating that the later variable had more explanatory power. *Id.*

158. *Id.* at 165.

159. *Id.* at 165 tbl.6.2. The Giles scores of the other judges (referred to by Cross as "OtherIdeology") had a coefficient of .086 and a p-score of .000, while the Giles score of the judge in question had a coefficient of .020 and a p-score of .106. *Id.*

“appear[ing] to show distinct panel effects.”<sup>160</sup> Cross then attempts to test the “median voter” theory, *i.e.*, the idea that the views of the median panel voter will carry the day. With the median Giles score and the total Giles score as independent variables and case outcome as the dependent variable, Cross finds that the median Giles score was not statistically significant but that the total Giles score was a statistically significant predictor.<sup>161</sup> Cross interprets the data to mean that “[t]he median voter theorem appears entirely inapplicable to circuit court panels.”<sup>162</sup> Cross views these analyses as “striking in their demonstration of panel effects.”<sup>163</sup>

Cross examines several other variables, including other background characteristics of judges, such as the race, gender, and past employment; the “ideological preferences of the Supreme Court,” as measured by Segal-Cover scores;<sup>164</sup> various measures of the “preferences of the legislature” at the time of decision; and the types of litigants before the court. Cross finds these variables to have either no statistically significant relationship or weak relationships to outcomes.

Cross concludes that, while appointment variables had measurable effects, they had “very limited . . . explanatory power,” especially when compared to legal variables for which “there was consistently a statistically significant association that was robust to different samples and control variables.”<sup>165</sup> Among the important legal variables studied was deference to lower court decisions, which was “by far the most important single variable substantively in explaining circuit court outcomes.”<sup>166</sup> Cross also suggests that, on

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160. *Id.* at 165.

161. *Id.* at 166 tbl.6.3. The median Giles score (referred to by Cross as “MedianIdeology”) had a coefficient of .04 and a p-score of .816. The total Giles score (referred to by Cross as “TotalIdeology”) had a coefficient of .087 and a p-score of .003. *Id.*

162. *Id.* at 166.

163. *Id.*

164. *Id.* at 103. Segal-Cover scores were developed by Jeffrey A. Segal and Albert D. Cover and attempt to identify ideological leanings of Supreme Court Justices using newspaper articles about the Justice prior to confirmation. *See generally* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989) (using content-analytic techniques to create a predictive attitudinal model for judges’ voting).

165. CROSS, *supra* note 5, at 229.

166. *Id.* at 228.

mixed panels, the use of “nonideological law [can be] a persuasive argument that overcomes ideological preferences.”<sup>167</sup>

### C. *A Look at Landes and Posner, Rational Judicial Behavior*

Landes and Posner take a similar approach in a recent study that looks at both Supreme Court and appellate court decisions. They propose an informal model of a “rational-choice (economic) approach to judicial behavior.”<sup>168</sup> Landes and Posner assume that, because federal judges have life tenure, external motivations such as fear of firing or hope of promotion are largely irrelevant. Rather, they “expect that leisure” would be a major judicial motivation as well as “self-expression, for example of political preferences,” and “esteem (prestige, reputation, etc).”<sup>169</sup>

Based on this model, Landes and Posner conduct an analysis of the same database used in the Cross study, but only after making some corrections for the coding errors discussed in Part I.C.2 *supra*. Like Sunstein and Cross, Landes and Posner examine the relationship between political factors and judicial votes. The political variables in the Landes and Posner study are “party of appointing President,” as well as the composition of the Senate at the time of a judge’s appointment. The Landes and Posner analysis shows a statistically significant relationship between PAP and the percentage of judges’ votes that were conservative or liberal. However, these relationships, while statistically significant, were not very powerful.<sup>170</sup> Landes and Posner also found that the partisan composition of the Senate had a statistically significant relationship with the fraction of judges’ votes that were conservative or liberal in civil, but not in criminal, cases.<sup>171</sup> Gender and race were not found to be significant predictors of judges’ votes.

Landes and Posner, like Sunstein and Cross, are interested in the group dynamics on the bench as well. Landes and Posner, however, take a different approach from Sunstein and Cross. Rather than

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167. *Id.* at 168.

168. Landes & Posner, *supra* note 58, at 4.

169. *Id.* at 5.

170. *Id.* at 56 tbl.12. In Landes and Posner’s analysis, whether PAP was Republican was the independent variable. The coefficient for fraction conservative in civil cases was .023; the coefficient for fraction liberal in civil cases was -.028; the coefficient for fraction conservative in criminal cases was .059; the coefficient for fraction liberal in criminal cases was -.051. *Id.*

171. *See id.* (noting that the coefficients were .192 for fraction conservative, and -.193 for fraction liberal in civil cases).

looking at particular panel compositions, Landes and Posner look to the fraction of judges on a circuit appointed by a given party. They test three hypotheses: the “conformity hypothesis,” the “group-polarization hypothesis,” and the “political-polarization effect.”<sup>172</sup> The first hypothesis is that an increase in the number of Republicans on a circuit “will increase the likelihood that any judge in the circuit will cast a conservative vote.”<sup>173</sup> The second is that “judges appointed by Republican Presidents will vote more conservatively in response to an increase in the fraction of the judges on their court appointed by Republican Presidents[,] but that judges appointed by Democratic Presidents will not.”<sup>174</sup> The final hypothesis is that “an increase in the size of one of the blocs relative to another will cause the second to vote more antagonistically to the first.”<sup>175</sup>

Landes and Posner found that the conformity hypothesis was supported by their analysis. In a multivariable regression that accounted for PAP as well as other variables, the fraction of Republicans in a circuit was significantly correlated with the fraction of conservative votes, with a coefficient of .221—much larger than the .092 coefficient for PAP in that regression. Landes and Posner interpret that to mean that if, “in a circuit that has 6 judges appointed by Republican Presidents and 6 appointed by Democratic Presidents, one of the judges that had been appointed by a Democratic President is replaced by a judge appointed by a Republican President,” then “[t]he mean value of the fraction of conservative votes in civil cases for the average judge will increase from .52 to .54” and in criminal cases “from .74 to .78.”<sup>176</sup>

There was “some evidence of group polarization” such that “the in-group becomes more extreme.”<sup>177</sup> The political-polarization hypothesis, which postulates that the minority becomes more antagonistic to the majority the fewer its members, was not supported. Based on these findings, Landes and Posner concluded that there was

a triple effect of a change in the ideological composition of a court when a member of the [Democratic] minority bloc on the court . . . is

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172. *Id.* at 30.

173. *Id.* at 32.

174. *Id.*

175. *Id.*

176. *Id.* at 33.

177. *Id.* at 33, 34.

replaced by a member of the [Republican] majority bloc: The majority becomes larger and therefore the court becomes more conservative irrespective of any group effects; the members of the majority become more conservative than they were when there were fewer of them; and the minority becomes more docile.<sup>178</sup>

Landes and Posner also offer a “possible economic explanation” for the conformity effect in the appellate courts, which they did not find in the Supreme Court.

The workload of the courts of appeals is heavier than that of the Supreme Court . . . Especially given leisure preference, the heavier workload in the courts of appeals makes the cost of a dissent greater . . . The heavier workload also increases the benefits of decision according to precedent, which greatly reduces the time and effort involved in a decision; instead of having to analyze the case from the ground up, the court looks for a very similar previous case and decides the new case the same way.<sup>179</sup>

According to Landes and Posner, due to heavy workloads in the courts of appeals, appellate judges have little incentive to dissent, knowing that the majority opinion will be followed and the dissent will be ignored in future cases.

### III. WHY EMPIRICAL STUDIES DO NOT TELL US VERY MUCH ABOUT APPELLATE DECISIONMAKING

#### A. *Our Assessment of Empirical Legal Studies That Attempt to Understand Extralegal Factors Affecting Appellate Decisionmaking*

The Cross, Landes and Posner, and Sunstein studies represent some of the most recent, large-scale efforts to apply empirical methodology to the study of judicial decisionmaking in the federal courts of appeals. It is fair to ask whether, given their conceptual and methodological limitations, these studies tell us anything new, interesting, or useful about judicial decisionmaking. One noteworthy finding of these projects is that, even on their own limited terms, the studies do not show that a substantial percentage of published federal appellate cases are decided on political or ideological grounds (as crudely defined). In other words—and again on their own terms—

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178. *Id.* at 34.

179. *Id.* at 34–35.

empirical studies predict very little about the effects of extralegal factors on appellate decisionmaking. And, unsurprisingly, the studies do not refute the claim that case records, the applicable law, controlling precedent, and judicial deliberations are critically important determinants of appellate decisionmaking.

Because the Cross and Landes and Posner studies looked at a random sample of cases (putting aside the absence of any data on “unpublished decisions—an important caveat), those studies provide the more meaningful bases from which to draw general conclusions about the judiciary. Perhaps most striking is the degree to which the party of appointing president and the Giles scores were *not* found predictive of appellate court decisions. Cross found that nonlegal variables, such as party affiliation, had, in general, “very limited . . . explanatory power.”<sup>180</sup> In Landes and Posner’s regressions, while the party of appointing president was a statistically significant variable, it was not strongly predictive of the fraction of conservative or liberal votes of appellate judges. As Cross explains,<sup>181</sup> statistical significance in studies with large data sets does not alone imply a *strong* relationship—it simply means that the presumed relationship is unlikely to be one that resulted from chance, and therefore the relationship is probably genuine, whether strong or weak. The hypothesis that law substantially influences outcomes in most cases certainly has not been disproved by the analyses offered in the Cross and Landes and Posner studies.

The Sunstein study principally focuses on substantive areas of the law in which the authors expected to find the largest effect from ideology. They found that the party of appointing president had statistically significant relationships with judicial decisions within some, but not all, of the substantive areas that they studied. The Sunstein study thus suggests some areas of law in which the party of appointing president may have more of a relationship to case outcomes than others. However, the Sunstein study also expresses the view that “[f]requently the law is clear, and judges should and will simply implement it, no matter who has appointed them.”<sup>182</sup> The data in their study do not in any way refute this view.

The studies on “panel effects”—that is, the effects that judges have on one another in appellate decisionmaking—tend to confirm

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180. CROSS, *supra* note 5, at 229.

181. *Id.* at 4–5.

182. SUNSTEIN ET AL., *supra* note 91, at 5.



the widely shared understanding that judges are influenced by each other. Neither Cross, Landes and Posner, nor Sunstein investigated whether these panel effects are the result of genuine judicial deliberations or “strategic voting” on the part of judges. Any conclusion that judges’ behavior is dominated by the latter has not been shown.

The answer to the question of whether politics or ideology plays a role in judicial decisionmaking is most significant in the normative sense—that is, does politics or ideology play an *inappropriate* role in judicial decisionmaking? Given that we would want and expect some aspects of “ideology” to bear on judicial decisionmaking—for example, in situations in which ideological or political questions are intrinsic to law—the mere fact that ideology plays some role is hardly cause for concern. Even where appointment variables have statistically significant relationships to case outcomes, the existence of a relationship (especially a weak one) is only troubling for someone who believes that, during the appointment process, it is inappropriate for presidents and senators to take into account judicial characteristics that may potentially bear on the moral and political questions that appropriately arise in legal disputes or are intrinsic to law itself. It surely does not indicate that, once confirmed, judges act inappropriately or place their personal leanings over respect for their understanding of governing law and precedent. Judges have maintained for decades that “they follow the law in the substantial proportion of the cases where the legal result is clear [and] in the remaining cases they do the best they can to arrive at the strongest legal answer.”<sup>183</sup> The simple point here is that appointment variables manifestly cannot show that judges are abusing their roles on the bench by forwarding their personal preferences at the expense of governing law or abusing their legitimate discretion.

When thinking about these matters, it is important to recall that, in their “published” opinions, federal appellate judges routinely render unanimous decisions about 90 percent of the time.<sup>184</sup> The rate of dissents is much lower when “unpublished” decisions—which in 2007 constituted over 80 percent of the cases decided by the appellate

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183. Tamanaha, *supra* note 46 (manuscript at 11).

184. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 237 (1999). Administrative Office of the Courts data on the D.C. Circuit show that dissent rates hover from below 5 percent to 10 percent of cases for which opinions were written. When all dispositions (including unreported judgments) are taken into account, the dissent rate is even lower.

courts<sup>185</sup>—are counted.<sup>186</sup> In other words, judicial deliberations produce agreement in the vast majority of cases decided in the federal courts of appeals. This is an impressive feat, given the complex set of laws that must be interpreted by the judiciary and the fact that judges are required to exercise discretion in a number of cases. “No more could be asked or expected of a rule of law system manned by human judges.”<sup>187</sup>

If politics and partisan ideological gamesmanship ruled the day on the federal bench, the high level of consensus would almost certainly fall. It is no answer to suggest that judges often vote to join opinions to avoid the cost of dissent. Indeed, this argument borders on absurd. A judge is not appreciably burdened if she or he decides to dissent, for all the judge need do is say, “I dissent.” Even if a judge elects to write an opinion in dissent, no undue effort is involved once the judge has read the parties’ briefs, heard oral argument, engaged in deliberations with the other judges on the panel, and read the majority opinion. The simple point here is that the lack of dissenting opinions shows that judges appointed by both Democrats and Republicans usually can, and do, agree on the requirements of the law, without regard to their political and ideological leanings. And the low rate of dissents indicates a commitment by appellate judges to follow their shared understanding of governing precedent. This is not surprising. The individuals who make up the federal appellate bench are, by and large, a highly dedicated and committed group. Most members of the bench care about the law, about acting responsibly towards the litigants before them, and about discharging their duty to the American people according to the highest professional standards.

*B. Response to Potential Critiques of Our Assessment of Empirical Legal Studies*

There are two areas of disagreement that might arise with respect to our analysis of empirical legal studies. We address these matters in turn.

1. *Crude Proxies and the Unsophisticated Separation of Law and Values.* We have argued that a number of empirical legal studies are deficient because of the crudeness of the measures used to assess

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185. See *supra* note 69.

186. Judges rarely dissent in “unpublished” decisions.

187. Tamanaha, *supra* note 46 (manuscript at 12).

judicial “ideology.” In particular, the use of the party of a judge’s appointing president is an attenuated and flattened-out representation of a judge’s ideology; and the characterization of case outcomes as “liberal” or “conservative” is maddeningly simplistic (both because of the assumption it makes about the straightforward ideological valence of results and because of the disregard it shows for dispositions that are more subtle than “affirm” and “reverse”).

There are two potential responses to our critique, both of which fail. First, it might be argued that the crudeness of an independent variable generates noisy—rather than invalid—results. It is often the case in empirical studies involving correlational analyses that researchers do not have direct access to the phenomena they want to measure and must therefore resort to proxies. Proxies are in their nature imperfect representations of those phenomena. But so long as there is a general correlation between the proxy and the underlying phenomenon (and in particular, so long as the proxy is not correlated significantly with the absence of that phenomenon), the imperfections merely burden the estimates with a degree of randomness or noise that actually reduces the likelihood of detecting real and significant effects. If the researcher finds significant effects notwithstanding the admitted noisiness of such measures, there is reason to believe that there are significant correlations between the true phenomena the proxies represent. Second, some empirical scholars might simply demur, arguing that PAP should not be treated as anything other than PAP, and that outcome labels should not be seen as anything more than labels attached to outcomes. These empirical scholars will then say that, on this view of their work, there is still a significant relationship between PAP and case outcomes, and that the correlation cannot be connected to anything intrinsic to legal reasoning.

Neither of the foregoing claims holds up under close scrutiny. The crudeness of the measures used to support the ideology thesis rest on an implausibly formalistic and positivistic conception of law. *The hypothesis that judicial decisionmaking is influenced by the ideology of judges is remarkable only if and to the extent that ideology is extrinsic to law.* If we do not subscribe to this assumption, then both law *and* ideology can influence outcomes, and greater contributions from the later tell us nothing about the contribution of the former. The crude measure of “ideology” fails to discriminate between forms of moral/political reasoning intrinsic to law and those extrinsic to law. It is well understood that legal reasoning partakes of moral judgment

in cases in which judges routinely exercise delegated or common law-making authority. This need not, and generally does not, take the form of personal whim or preference. Rather, in cases where the law requires it, judicial decisionmaking can include a situated and disciplined elaboration of the conventional norms of the American political community. This occurs in both “hard” and “very hard” cases, including, for example, cases involving judicial resolutions of disputes in areas of law ranging from constitutional interpretation to the administration of the antitrust laws. This reality might be contested by some, but it is far and away the dominant understanding of how adjudication works in our judicial system.<sup>188</sup>

On this account, some play for inherently contestable political judgments is simply built into law and strikes us as a normal constituent of good judging. It is obvious—to the point of being mundane—to suggest that there is a correlation between how individual judges will carry out this aspect of judicial reasoning and their “ideologies.” When positive law is imprecise and judges are required to exercise delegated or common law-making authority in hard or very hard cases, they often are obliged to refer to the conception of our community’s political morality that strikes them as the most compelling. Good examples of this are seen in the political (Meiklejohnian) conception of free speech that animated the Supreme Court’s seminal decision *New York Times v. Sullivan*,<sup>189</sup> in the neoclassical conception of economics that triumphed with the Borkian “public welfare” understanding of antitrust law,<sup>190</sup> and in the

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188. See, e.g., RONALD DWORKIN, LAW’S EMPIRE 130–50 (1986). Compare *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 229–30 (1986) (“[N]ot every matter touching on politics is a political question, and . . . it is ‘error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.’” (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962))), with *United States v. Pink*, 315 U.S. 203, 229 (1942) (“What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.” (quoting *Guar. Trust Co. v. United States*, 304 U.S. 126, 137 (1938))).

189. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); see also GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 138 (2d ed. 2003) (discussing *New York Times v. Sullivan* and invoking Meiklejohn); Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 208, 221 n.125 (noting, in discussing *New York Times v. Sullivan*, that “[t]he Amendment has a ‘central meaning’—a core of protection of speech without which democracy cannot function” and that Professor Meiklejohn had described the case as “an occasion for dancing in the streets”).

190. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710, 2714 (2007) (overruling the holding of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), that it is a *per se* violation of the Sherman Act for a manufacturer to agree with its distributor to set a minimum price for the good at issue and citing Bork regarding the

extensive jurisprudence surrounding the enforcement of collective bargaining agreements pursuant to section 301 of the Labor Management Relations Act.<sup>191</sup> The judging that gave rise to those conceptions of law can be described as either (1) not ideological in any manner opposed to law or (2) ideological in a manner intrinsic to law itself. These views of the law defeated competing conceptions that, had they triumphed, would likewise have been characterized either as nonideological or ideological in a law-like way.

Judges who exercise delegated or common law-making authority to decide cases of this sort (whether they involve First Amendment issues, antitrust law, or other similarly complex questions that come before the courts) are *obliged* to rely—and to do so self-consciously and overtly—on political and ideological values in their legal reasoning. This cannot seriously be doubted, nor can it reasonably be seen as surprising. It is merely part of the judicial function. If one

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“procompetitive” effects of resale price maintenance (citing ROBERT H. BORK, *THE ANTITRUST PARADOX* 288–91 (1978)); *State Oil Co. v. Khan*, 522 U.S. 3, 7, 16 (1997) (overruling the holding of *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), that vertical maximum price fixing is a *per se* violation of the Sherman Act and quoting Bork for the proposition that such price fixing had “no anticonsumer effect” (quoting BORK, *supra*, at 281–82)).

191. In *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), the Court held that a grievance-arbitration provision of a collective bargaining agreement could be enforced against unions and employers under section 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185, *id.* at 451. The Court found that congressional policy, as embodied in section 203(d) of the LMRA, 29 U.S.C. § 173(d), was to promote industrial peace and that the grievance-arbitration provision of a collective agreement was a major factor in achieving this goal. *Id.* at 453–55. In the seminal “*Steelworkers Trilogy*,” the Court amplified this policy by declaring that the parties’ agreement to arbitrate their disputes under a collective bargaining agreement would be enforced unless it could “be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960); *see also* *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596–97 (1960) (part of the *Steelworkers trilogy*); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960) (same); *cf.* *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43–44 (1987) (emphasizing that a court may not set aside an arbitrator’s award on grounds of public policy unless the policy clearly can be “ascertained ‘by reference to laws and legal precedents and not from general considerations of supposed public interests’” (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 (1974) (holding that an employee’s statutory right to trial de novo under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, is not foreclosed by prior submission of claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement); *Boys Mkts., Inc. v. Retail Clerk’s Union, Local 770*, 398 U.S. 235, 237–38 (1970) (holding that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104, do not preclude a federal district court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement when the agreement contains provisions enforceable under section 301(a) of the LMRA for binding arbitration of the grievance dispute concerning which the strike was called).

accepts that such reasoning is *legal reasoning*, then any regression model that uses a crude measure of ideology that spills over to evaluative reasoning of this sort will produce results that merely state the obvious, *i.e.*, that judicial disagreement over how to understand the law helps explain variations in case outcomes.

Empirical studies of this sort, in sum, assume not only that judicial decisionmaking is sometimes influenced by the ideology of judges, but also that ideology is invariably extrinsic to law. But this turns out, surprisingly, to be a normative claim (one it seems unlikely that most empirical theorists would actually endorse) in the guise of an empirical one. The fact is that most members of the legal profession—judges, lawyers, and scholars—subscribe to a conception of law that sees forms of moral or political reasoning as intrinsic to law in some circumstances. Thus, empirical scholars can convince us to accept their central claim (that extralegal judicial “ideology” explains variation in some legal outcomes) only if they first convince us that we are wrong in our view that some political and ideological questions are intrinsic to law itself. In other words, empirical ideologists must convince us that we should adopt a formalistic or “hard” positivistic theory that insists that legal questions never subsume moral or political questions. But, of course, if empirical scholars could do this (assuming they wanted to), they would not be showing that judges have been substituting their ideology for law but, rather, that judges have been following a conception of law that we should reject for normative reasons. And, if they are right in this, their claim would be recognized as a contribution to philosophical jurisprudence, not empirical legal studies.

2. *Omitted Variables.* We have also argued that any empirical study that attempts to assess appellate decisionmaking without taking account of variables like the applicable law, controlling precedent, and judicial deliberations will be incomplete. In response to this critique, it can be argued that there is a difference between omitted variables and omitted variable bias. Omitting relevant variables creates bias when one has reason to believe that those variables might be related to ones in the model, because then one cannot rule out that the observed effect between the included variables and the dependent variable is due in whole or in part to the omitted ones. But where there is no correlation between independent variables, the omission of one should have no effect on the estimate of another on the dependent variable. The argument runs that because the influence of

law, precedent, and deliberations across cases is not correlated with the ideology of the judges who decide them (or with PAP or any other measure of it), leaving the former variables out does not bias any estimate of how much of the variance in outcomes is attributable to ideology; it merely reduces the model's power.<sup>192</sup>

There are at least two problems with the foregoing argument. First, there are convincing reasons to believe that judicial deliberation is an institutional practice that mitigates the impact of “bad” ideology (in the form of judges’ willful or subconscious indulgence of political or ideological predilections extrinsic to legal reasoning) on judicial decisionmaking. Given this reality, it is fair to assume that such “bad” ideology matters less, and precedent or any other law-intrinsic influence matter more, as the quality of judicial deliberations improves. Therefore, omitting variables like deliberation and precedent *will* distort the result of a theoretical analysis capable of measuring “bad” ideology by failing to capture a likely interaction between it and law-intrinsic influences like deliberation. Thus, so long as we have good reason to believe that the quality of judicial deliberations matters, we have good reason to believe that an empirical model that leaves out this variable will falsely suggest that ideology’s influence is *immutable and endemic to judicial decisionmaking* rather than the source of a correctable pathology that is likely concentrated in relatively discrete segments of the federal circuit courts at any given time. Second, empirical studies also go wrong when they assume that as ideological correlations go up, precedent correlations invariably go down. This is not a safe assumption, because higher correlations between ideology and case outcomes tell us nothing about the relationship between controlling precedent and case outcomes. And if a case outcome adheres to controlling precedent, it really does not matter whether the outcome is consistent with judges’ personal political or ideological views. If empirical ideologists want to study the effect of precedent on case outcomes, they need to do it directly, not simply as the inverse of PAP correlation.

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192. Indeed, omitting variables also increases the standard errors of included variables, and hence the omission of precedent and deliberation may reduce the likelihood of finding a significant effect from ideology. See JACOB COHEN, PATRICIA COHEN, STEPHEN G. WEST & LEONA S. AIKEN, *APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES* 143–44 (3d ed. 2003).

3. *The Bottom Line—Empirical Studies Do Not Tell Very Much about the Factors Affecting Appellate Decisionmaking.* We recognize that questions relating to crude proxies and omitted variables may be areas of potential disagreement. But (for the reasons indicated above) we do not believe that the objections that might be raised can defeat the principal concerns that we raise in this Article. In the end, however, any disagreements that arise will be of little moment. For, as noted above, on their own limited terms, the empirical studies that we have discussed show that a substantial percentage of published federal appellate decisions are resolved on grounds other than ideology and politics. We can only assume that unpublished decisions would show even less effect from nonlegal factors. The simple point here—one that has been acknowledged by several leading empirical legal scholars—is that empirical studies generally are not able to predict much about the effects of extralegal factors on appellate decisionmaking.<sup>193</sup>

#### IV. AN INSIDER'S LOOK<sup>194</sup> AT THE DECISIONS OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT REVIEWING ADMINISTRATIVE AGENCY ACTIONS BETWEEN 2000 AND 2008

I have had the good fortune to sit as a member of the U.S. Court of Appeals for the D.C. Circuit for twenty-nine years, serving as Chief Judge for seven years. I have worked with many brilliant colleagues who have been notably diverse in their backgrounds, skills, interests, and political leanings. I have been most impressed, however, with the intellect, independence, integrity, and commitment of my colleagues. I have never worked with a colleague who was lazy, unprepared, or shy about expressing his or her views. My life as an appellate judge has been fulfilling in large part because I have worked with colleagues who have been largely committed to applying the law and adhering to precedent, not giving vent to their political and ideological leanings.

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193. See, e.g., CROSS, *supra* note 5, at 202 (“The close study of precedents and their impact [on appellate decisionmaking] is impossible with currently available or readily foreseeable empirical tools.”); SISK, *supra* note 8, at 884 (“More sophisticated statistical models that include legal factors and legal reasoning as variables are perhaps the greatest priority in continued quantitative examination of the federal judiciary. A fully specified legal model will prove eternally elusive [however] because legal reasoning is not formulaic in nature: the reasonable parameters for debate on the determinate nature of text and doctrine cannot be described by number.” (footnote omitted)).

194. This Part has been written solely by Judge Edwards.



This is not to say that life on the court of appeals always has been easy. “During my extended tenure on the D.C. Circuit, now in its third decade, I have seen the court go through many different phases and express a number of different moods. It has gone from a divided and divisive place, to one stamped with the [best elements] of collegiality.”<sup>195</sup> The importance of collegiality cannot be overstated.

When I speak of a collegial court, I do not mean that all judges are friends. And I do not mean that the members of the court never disagree on substantive issues. That would not be collegiality, but homogeneity or conformity, which would make for a decidedly unhealthy judiciary. Instead, what I mean is that judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a *process* that helps to create the conditions for *principled* agreement, by allowing all points of view to be aired and considered. Specifically, it is my contention that collegiality plays an important part in *mitigating* the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.<sup>196</sup>

The D.C. Circuit has benefitted from collegiality among its members, most notably during the last fifteen to eighteen years. This is not to deny that there have been sharp differences among judges during deliberations over some hard and very hard cases. There also have been some decisions that have drawn strong dissents. There have even been a few rehearings en banc, but not many. On occasions, my colleagues and I have weighed moral/political questions, especially when those questions are intrinsic to the law itself. And on some occasions, we may even have been influenced by extralegal factors. But for the most part, my colleagues and I have deliberated seriously and focused on getting the law right.<sup>197</sup>

Based on my twenty-nine years on the court, my claim is that decisions are based on legal materials and are the product of fruitful judicial deliberations. In other words, the case record, applicable law,

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195. Edwards, *Collegiality*, *supra* note 3, at 1648.

196. *Id.* at 1644–45 (footnotes omitted).

197. Judge Posner has suggested that judges “don’t deliberate very much” and that “Judicial deliberation is overrated.” Posner, *The Role of the Judge*, *supra* note 44, at 1051. I could not disagree more. It may be that his experience on the Seventh Circuit has been different from mine on the D.C. Circuit.

controlling precedent, and deliberations—not impermissible political or ideological considerations—are what appellate judges focus on in reaching a consensus in most cases, even those that are “hard” and “very hard.” Legal scholars who have attempted to measure “panel effects” to determine whether judges impermissibly rely on extralegal factors in their decisionmaking are *merely guessing* in their conclusions. The truth is that these scholars cannot conclusively show *impermissible* ideological voting patterns in the myriad decisions that issue without a dissent. For example, as Dean Richard Revesz has stated, “panel effects” can be explained by either a “deliberation hypothesis,” pursuant to which judges modify their views because they take seriously the views of their colleagues, or a “dissent hypothesis,” under which “a judge who sits with two colleagues [from a different political] party moderates [his or] her views in order to avoid [having to] writ[e] a dissent.”<sup>198</sup> No empirical study has *proven* the truth of what has been suggested about panel effects, nor has any study disproved my claim that judicial deliberations produce consensus.

I make the further claim that even when a decision draws a dissent, which is rare, this most often reflects nothing more than an honest disagreement among the judges over the correct legal result, not simply a difference in judges’ personal political or ideological preferences. I am convinced of this based largely on my personal experiences during my twenty-nine years on the bench. A recent review of the court’s data also tends to confirm my conviction: when judges do dissent, they routinely do so across perceived political lines. That is, in “mixed panels—panels with two judges appointed by the president of one party and one judge appointed by the president of the other party—the dissenting judge often is one of the two judges in the political majority. This is commonplace, as is shown in Appendix A.

Landes and Posner suggest that there are relatively few dissents in appellate courts because judges prefer to avoid the extra work.<sup>199</sup> In other words, they claim that, due to heavy workloads, appellate judges have little incentive to dissent, knowing that the majority opinion will be followed and the dissent will be ignored in future cases. Nothing in my experience as an appellate judge supports that claim. I have found that when a judge earnestly disagrees with the

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198. Revesz, *supra* note 52, at 1112.

199. Landes & Posner, *supra* note 58, at 34–35.

majority and believes that a point of legal principle is a stake, he or she will dissent. It is true that judges do not waste time writing separately just to offer their “voice” to the court’s disposition; but they do dissent when they disagree over matters that they perceive to be important.

No reliable empirical study shows me to be wrong in my claim that, although politics, ideology, and/or cognitive factors sometimes affect our decisionmaking, most appellate decisions are based on legal materials, not extralegal factors. I say this not to gloat but because I am comforted—as we all should be—in knowing that it has never been shown that appellate judges are generally lawless in their work. It would be disheartening, to say the least, to think that my colleagues and I routinely ignore the case record, the applicable law, and controlling precedent and decide cases on the basis of our personal political views or ideological preferences.

I cannot offer a transcript or other hard data to prove my claim that the decisions in most “hard” and “very hard” cases benefit from fruitful judicial deliberations.<sup>200</sup> But as someone who has served on the court for twenty-nine years, I can confidently confirm that this is so. The court’s low number of dissents is a result of these deliberations, during which judges air their disagreements and reach consensus.

Although Cross, Landes and Posner, and Sunstein all appear to agree that the law substantially determines outcomes in most cases, neither they nor I can point to any comprehensive quantitative studies confirming the effects of legal materials on appellate decisionmaking.<sup>201</sup> And no one has even suggested a way to meaningfully measure the effects of confidential judicial deliberations on appellate decisionmaking. What I can offer, however, is a qualitative view of some of the work of my own court to show a few salient facts: (1) most decisions issue without a dissent; (2) judges routinely cross over presumed political lines when they do issue dissenting opinions; (3) “mixed panels” of the court routinely issue decisions in numerous complex, difficult, and important cases with no

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200. “Easy” cases can be decided easily, with minimal judicial deliberations, so long as every judge is diligent in reviewing the case record. This is routine.

201. Cross and Lindquist and Cross, himself, have tried in a limited way to measure the effects of the law and controlling precedent on judicial decisionmaking. See CROSS, *supra* note 5; Lindquist & Cross, *supra* note 86, at 1157–58. But a number of empirical scholars have acknowledged that it is very difficult to capture the effects of law and precedent in a quantitative study. See *supra* Part I.C.3.

dissent; (4) the written decisions in these hard and very hard cases show, at the very least, that panels interact in a serious way with the case records, the applicable law, and controlling precedent; and (5) the court rarely rehears cases en banc. For the data set that I looked at, it is also worth noting that the number of decisions reversing or vacating federal agency actions did not materially vary with the composition of the panel with respect to PAP.<sup>202</sup>

In offering this qualitative view of the work of my court, I will focus on the *judgments of the D.C. Circuit reviewing administrative agency actions between 2000 and 2008*.<sup>203</sup> I selected this eight-year period because a Republican president, George W. Bush, was in the White House, Congress was controlled by Republicans for a majority of the eight years, and a clear majority of the judges on the D.C. Circuit was appointed by Republican presidents. I selected administrative agency actions because it is well understood that this large category of cases includes some of the most difficult and controversial appeals heard by the D.C. Circuit. If judges' personal political and ideological predilections played a significant role in their decisions during this period, a place to look for its effect would be the court's decisions to support or overturn agency actions (in support of or against the Republican administration) and/or sharp divisions among judges along political lines. That is not what our case dispositions indicate.

The members of the D.C. Circuit during the 2000–2008 period are shown on the accompanying chart:

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202. I include this information more as a qualitative point of interest than a formalized analytic finding.

203. The data cover cases decided between September 2000 and July 2008. In the database compiled by the Clerk's Office for the U.S. Court of Appeals for the D.C. Circuit, cases involving *review of administrative agency actions* include matters in which a federal agency is a party and there is either a direct petition for review, an application for enforcement, a cross-application for enforcement, or a direct petition for mandamus. The Clerk's Office *review of administrative agency actions* database does not include agency actions that are first reviewed in the district court and then appealed to the court of appeals. Nor does it include cases that are resolved by special panels (that is, three-judge panels that dispose of motions for summary affirmance, summary reversal, dismissals for want of jurisdiction, and dismissals on grounds of ripeness). Special panels almost always act without hearing oral argument, and they usually issue unpublished judgments, orders, and memoranda disposing of the matters under review. Judges almost never dissent from a special panel decision; and special panels rarely reverse agency actions.

*Active Members of the U.S. Court of Appeals for the D.C. Circuit  
September 2000–August 2008*

<i>Name</i>	<i>Year of Appointment</i>	<i>Appointing President</i>	<i>Current Status</i>
<i>David B. Sentelle, Chief Judge</i>	<i>1987</i>	<i>Ronald W. Reagan</i>	<i>Chief Judge since February 2008</i>
<i>Douglas H. Ginsburg</i>	<i>1986</i>	<i>Ronald W. Reagan</i>	<i>Circuit Judge; served as Chief Judge from 2001–2008</i>
<i>Karen LeCraft Henderson</i>	<i>1990</i>	<i>George H. W. Bush</i>	<i>Circuit Judge</i>
<i>A. Raymond Randolph</i>	<i>1990</i>	<i>George H. W. Bush</i>	<i>Senior Judge since 2008</i>
<i>Judith W. Rogers</i>	<i>1994</i>	<i>William J. Clinton</i>	<i>Circuit Judge</i>
<i>David S. Tatel</i>	<i>1994</i>	<i>William J. Clinton</i>	<i>Circuit Judge</i>
<i>Merrick B. Garland</i>	<i>1997</i>	<i>William J. Clinton</i>	<i>Circuit Judge</i>
<i>John G. Roberts, Jr.</i>	<i>2003</i>	<i>George W. Bush</i>	<i>Appointed to the Supreme Court in 2005</i>
<i>Janice Rogers Brown</i>	<i>2005</i>	<i>George W. Bush</i>	<i>Circuit Judge</i>
<i>Thomas B. Griffith</i>	<i>2005</i>	<i>George W. Bush</i>	<i>Circuit Judge</i>
<i>Brett M. Kavanaugh</i>	<i>2006</i>	<i>George W. Bush</i>	<i>Circuit Judge</i>
<i>Harry T. Edwards</i>	<i>1980</i>	<i>James E. Carter, Jr.</i>	<i>Senior Judge since 2005; Chief Judge from 1994–2001</i>
<i>Laurence H. Silberman</i>	<i>1985</i>	<i>Ronald W. Reagan</i>	<i>Senior Circuit Judge since 2000<sup>204</sup></i>
<i>Stephen F. Williams</i>	<i>1986</i>	<i>Ronald W. Reagan</i>	<i>Senior Circuit Judge since 2001</i>

As can be seen from the chart, ten of the fourteen judges who served on the court during 2000–2008 were appointed by Republican presidents. Former Judge Roberts, who is now a member of the

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204. Between February 2004 and March 2005, Judge Silberman served as the cochair of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction.

Supreme Court and serves as Chief Justice, was a member of the D.C. Circuit for two of the eight years.

The following chart shows the number of cases involving review of administrative agency action during the 2000–2008 period<sup>205</sup>:

Total Number of Dispositions of “Lead Cases” <sup>206</sup> Involving Review of Administrative Agency Actions <sup>207</sup>	Total Number of Lead Case Dispositions Involving Review of Administrative Agency Actions Resulting in “Published Opinions”	Total Number of Lead Case Dispositions Involving Review of Administrative Agency Actions in Which a Dissenting Opinion Issued	Number of Dissents as a Percentage of “Total Dispositions” Involving Review of Administrative Agency Actions	Number of Dissents as a Percentage of “Published Opinions” Involving Review of Administrative Agency Actions
913	713	41	4%	6%

It is clear from these data that very few dispositions involve dissenting opinions. During the eight years, from September 2000 through July 2008, there were only forty-one instances in which dissenting opinions issued in cases involving review of administrative agency action. The frequency of dissents did not increase when I did a rough scan of agency actions that were first reviewed in the district court and then appealed to the court of appeals. And, notably, the percentage of dissenting opinions would be even smaller had I been able to determine the precise number of decisions issued by special panels.<sup>208</sup>

The data also show that judges routinely crossed presumed political party lines when they dissented. As can be seen in the chart

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205. Data compiled by and on file with the Clerk’s Office of the U.S. Court of Appeals for the D.C. Circuit, Washington, D.C.

206. “Lead cases” include all cases that have been consolidated with the principal case under review. Even though the court’s decision, judgment, or order disposes of more than one case, only the lead case is counted. For example, a disposition may include a lead case and seven separate consolidated appeals or petitions for review, but the disposition counts as only one case.

207. For a definition of cases involving *review of administrative agency actions*, see *supra* note 203. This total number includes both published and unpublished lead case dispositions, but excludes unpublished decisions issued by special panels.

208. Special panel orders, judgments, memoranda, and opinions almost never draw a dissent. For an explanation of special panels, see *supra* note 203. The Clerk’s Office estimates that, from 2000–2001 through 2007–2008, special panels issued an additional 345 lead-case dispositions in cases involving administrative agency actions.

in Appendix A, only forty-one dissents were issued in 913 cases disposing of actions involving review of administrative agencies. There were “mixed panel splits” in twenty-two of the forty-one dispositions—that is, in three-judge panels consisting of judges appointed by presidents of both political parties, the two judges appointed by presidents of the same party disagreed; and in en banc dispositions, judges appointed by presidents of the same party joined both the majority and dissent. An additional two of the forty-one dissents involved situations in which all of the judges on the panel were appointed by presidents of the same political party and one of the judges dissented. *These data indicate that in almost 60 percent of the cases in which a dissent was filed, the judges did not vote along presumed political party lines.*<sup>209</sup>

The chart in Appendix B offers some examples of hard and very hard cases, involving mixed panels in which the decision of the court is unanimous. These opinions are offered to show how the judges of the court carefully consider the record, construe the law, and apply precedent to reach a consensus in difficult and important cases. All of the cases cited involved meaningful judicial deliberations, as do most hard and very hard cases. It is no answer for an empirical legal scholar to tell us that the judges who joined the decision really did not mean what is said in the opinion or that some judges concurred in the result even though they disagreed with the outcome. Empirical legal scholars make such claims,<sup>210</sup> but they are specious. We mean what we say in our opinions and our judgments constitute the law of the case and the law of the circuit.<sup>211</sup> We take this seriously.

During the eight-year period from September 2000 through July 2008, the court reversed or vacated, in whole or in part, in 245 lead cases involving review of administrative agency action.<sup>212</sup> The breakdown of these cases was as follows:

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209. The figures were largely the same when I roughly scanned the agency actions that were first reviewed in the district court and then appealed to the court of appeals.

210. See, e.g., Clayton, *supra* note 35, at 27 (discussing how attitudinalists simply assume that judges “vote their policy preferences and use legal principles to mask their true motives”).

211. See, e.g., LaShawn A. v. Barry, 87 F.3d 1389, 1396–97 (D.C. Cir. 1996) (en banc) (holding that one panel of the court may not reconsider a prior panel’s decision in the same case).

212. Data compiled by and on file with the Clerk’s Office of the U.S. Court of Appeals for the D.C. Circuit, Washington, D.C.

Total Number of Cases Reversed or Vacated	245
Number of Cases Reversed or Vacated by a Panel That Included Three Judges Appointed by a Republican President	29
Number of Cases Reversed or Vacated by a Panel That Included Three Judges Appointed by a Democratic President	8

During the relevant time period, Republican judicial appointees outnumbered Democratic appointees by roughly three and a half to one. It is unsurprising, then, that panels including three judges appointed by Republican presidents reversed more agency decisions than panels including three judges appointed by Democratic presidents.

Finally, during the 2000–2001 through the 2007–2008 terms, only two cases involving review of administrative agency actions were reheard en banc.<sup>213</sup> Not only do individual judges not dissent very often, they do not vote to rehear cases that have been decided by other judges. This, too, is unsurprising to me. If members of the court trust their colleagues to decide cases based on the applicable law and controlling precedent, they are not inclined to call for en banc review.<sup>214</sup> The information that is offered here does not constitute a rigorous quantitative study of the work of my court. But I believe that the data lend support to my view that, in deciding the cases that come before our court, my colleagues and I are committed to applying the law and adhering to precedent, not giving vent to our political and ideological leanings. In my experience, we achieve this goal most of the time.

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213. Data compiled by and on file with the Clerk's Office of the U.S. Court of Appeals for the D.C. Circuit, Washington, D.C.

214. See Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991–2002*, 70 GEO. WASH. L. REV. 259, 259–60 (2002) (noting that the number of en banc cases heard by the D.C. Circuit declined from sixty-three in the 1980s to thirty-three in the 1990s); see also *id.* at 260 (arguing that the decrease in the number of cases reheard en banc in the D.C. Circuit could be partially attributed to the judges becoming “more collegial, in the sense that the judges, notwithstanding their different views, had more confidence in each other’s good faith and competence, and so deferred more to judgments of panels on which they did not sit”).



## V. CULTURAL COGNITION AND JUDICIAL DELIBERATIONS

A. *Cultural Cognition*

As noted in the earlier Parts of this Article, in seeking to determine the effects of nonlegal factors on judicial decisionmaking in the federal courts of appeals, empirical legal scholars routinely “correlate[] federal judges’ decisions with some measure of their ideology, typically the political party of the President who appointed them.”<sup>215</sup> There are some scholars who now argue that proponents of the “ideology thesis” have failed to “adequately specif[y] the mechanism by which they understand values to be influencing judges. They have failed, in particular, to distinguish between values as a *self-conscious motive* for decisionmaking and values as a *subconscious influence on cognition*.”<sup>216</sup> These scholars, most notably Professor Dan Kahan of the Yale Law School and his colleagues at the Cultural Cognition Project,<sup>217</sup> argue that there is a significant difference between ideology and cultural cognition and that it makes a difference whether judges are affected by one or the other.

Kahan suggests that there are three very distinct ways in which judges’ values might influence decisionmaking. “First, values could supply a self-conscious *partisan motivation* for decision. That is, judges could be choosing the outcome that best promotes their political preferences without regard for the law.”<sup>218</sup>

Second, values could supply a self-conscious *legal motivation* for decision. On one popular account of judicial decisionmaking, particularly in constitutional law, there is not a strict separation

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215. Kahan, *supra* note 9, at 1.

216. *Id.*

217. Yale Law School, The Cultural Cognition Project, <http://culturalcognition.net/> (“The Cultural Cognition Project is a group of scholars from Yale and other universities interested in studying how cultural values shape the public’s risk perceptions and related policy beliefs. Cultural cognition refers to the tendency of individuals to conform their beliefs about disputed matters of fact (for example, whether global warming is a serious threat; whether the death penalty deters murder; whether gun control makes society more safe or less) to values that define their cultural identities. Project members are using the methods of various disciplines—including social psychology, anthropology, communications, and political science—to chart the impact of this phenomenon and to identify the mechanisms through which it operates. The Project also has an explicit normative objective: to identify processes of democratic decisionmaking by which society can resolve culturally grounded differences in belief in a manner that is both congenial to persons of diverse cultural outlooks and consistent with sound public policymaking.”).

218. Kahan, *supra* note 9, at 3.

between moral reasoning and legal reasoning. Judges must resort to normative theories to connect abstract concepts like ‘free speech’ and ‘equal protection’ to particular cases.<sup>219</sup>

Finally, judges’ understandings of what the law requires may be “shaped by their values—operating not as resources for theorizing law, but as a subconscious, extralegal influence on their perception of legally consequential facts.”<sup>220</sup> In other words, especially in areas of law when it is very difficult “to verify (or falsify) empirical claims by objective data . . . judges perforce fall back on their emotions or intuitions. They practice . . . ‘cultural cognition.’”<sup>221</sup>

In an article authored by Professor Kahan and Professor Donald Braman, the authors explain that *cultural cognition* “refers to the tendency of individuals to conform their views about risks and benefits of putatively dangerous activities to their cultural evaluations of those activities.”<sup>222</sup> This tendency extends to evaluations of “the instrumental efficacy (or perversity) of law” based on “cultural evaluations of the activities subject to regulation.”<sup>223</sup> Under the cultural cognition theory, it is assumed that “people are motivated to believe that behavior they find noble is also socially beneficial (or at least benign) and behavior they find base is also socially harmful.”<sup>224</sup> Professor Kahan offers cogent examples of what he and his colleagues have in mind:

Psychologically speaking, it’s much easier, to believe that behavior one finds noble is also socially beneficial, and behavior one finds base is dangerous, than vice versa. Persons who have relatively individualistic values, for example, tend to be skeptical about environment risks, because they perceive (subconsciously) that concerns about such risks could lead to restrictions on commerce and industry, activities that people with individualistic values like. People with egalitarian values, in contrast, see commerce and industry as sources of unjust disparities in wealth, and thus readily embrace the claim that these activities are environmentally harmful,

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219. *Id.* at 3 (footnote omitted).

220. *Id.* at 5.

221. Posner, *The Role of the Judge*, *supra* note 44, at 1065.

222. Kahan, *supra* note 9, at 5.

223. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 152 (2006).

224. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 852 (2009).

and should be regulated. Research . . . shows that these dynamics generate political conflict on a host of risk issues, from global warming to domestic terrorism, from school shootings to mandatory vaccination of school girls against HPV.

Research [additionally] . . . shows that cultural cognition also creates conflict over legally consequential facts. In one study, for example, we found that people of egalitarian and hierarchical dispositions tend to form opposing beliefs about ambiguous facts in controversial self-defense cases. Egalitarians tended to believe, and hierarchs to disbelieve, that a battered woman who killed her abusive husband in his sleep faced a genuine threat, honestly believed she was in danger, had no realistic opportunity to escape, and suffered from a psychological impairment of perception; however, in a case involving a beleaguered commuter who killed a panhandling African-American teen, it was hierarchs who believed, and egalitarians who disbelieved, the parallel set of pro-defense factual claims.

In a second study, [we] found that cultural cognition influenced perceptions among subjects who watched a videotape of a high-speed car chase, shot from inside a police cruiser. In *Scott v. Harris*, the U.S. Supreme Court had held that “no reasonable jury” could watch the tape and fail to conclude the driver posed a risk sufficiently lethal to justify deadly force to stop him (namely, the ramming of his car). But we found that hierarchical and individualistic white males were significantly more likely to perceive that than were egalitarians and communitarians of either race or gender.<sup>225</sup>

The idea of cultural cognition, at least as described by Professor Kahan and his colleagues, does not square with Judge Posner’s view of “ideology.”<sup>226</sup> Judge Posner argues that “the sources of ideology are both cognitive and psychological,”<sup>227</sup> but he and other empiricists focus their studies of appellate decisionmaking on the relationships between case outcomes and observable political factors (for example, the political party of appointing president). The scholars who seek to study the effects of cultural cognition on decisionmaking train their sights on *subconscious* influences that may affect a judge’s votes. Any

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225. Kahan, *supra* note 9, at 5–6 (footnotes omitted).

226. See Posner, *The Role of the Judge*, *supra* note 44, at 1059.

227. *Id.* at 1060.

relationships between such subconscious influences and the observable political factors studied by Judge Posner are far from proven.

Furthermore, the cultural cognition thesis is not simply the attitudinal model by another name. Variants of the attitudinal model often are premised on notions of legal realism, which posits that “legal decisionmaking is substantially congruent with decisionmaking *simpliciter*, and . . . legal justification, which attempts to make legal decisionmaking look more different from nonlegal decisionmaking than it in fact is, is best seen as a form of stylized and *post hoc* rationalization.”<sup>228</sup> Professor Kahan and his colleagues do not subscribe to this view.

It would not take a flight of fancy to believe that judges are sometimes affected by subconscious influences on cognition. Does it matter that this influence is subconscious rather than intentional? Or, more pointedly, “Does it make any difference whether [appellate] decisions . . . reflect values as a self-conscious *partisan* influence on decisionmaking—the conventional understanding of the ideology thesis—or as a subconscious *cognitive* one in the way the cultural cognition theory contemplates?”<sup>229</sup> Professor Kahan argues that

[n]ot only would the cultural cognition thesis, if true, spare us from the disappointment associated with believing that judicial disagreement stems from self-conscious, and self-consciously concealed, political disregard for law. It would also supply us with tools for mitigating this form of judicial conflict. Research has a [*sic*] revealed a variety of techniques for counteracting cultural cognition. Many of these techniques could likely be employed by judges, who . . . recognize that they, like everyone else, are prone to adopt factual beliefs congenial to their values.<sup>230</sup>

If scholars were able to catalog meaningfully the effects of cultural cognition on appellate decisionmaking, the data surely would be more illuminating than studies resting on judges’ assumed political predilections as determined by the party of the presidents who appointed the judges. Individuals are a composite of personal values that extend well beyond their allegiances to political parties.<sup>231</sup> And individual views may vary (say, from “conservative,” to “moderate,”

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228. Schauer & Wise, *supra* note 43, at 1096–97.

229. Kahan, *supra* note 9, at 8–9.

230. *Id.* at 9.

231. This point is well documented in Kahan et al., *supra* note 224, at 879.

to “liberal”) on different issues.<sup>232</sup> We would understand much more about individual judges and how they think if we understood cognitive influences on their decisionmaking.

It is far from clear, however, that empirical scholars will ever be able to meaningfully measure the effects of cultural cognition on appellate decisionmaking. Even if data could be collected on the subconscious factors that influence individual judges—no easy task in itself—it would tell us very little about the product of deliberations between appellate judges. Individual judges change their minds during the course of judicial deliberations. While it is possible that cultural cognition influences how judges view underlying facts or even legal precedent, the process of deliberation in a collegial environment can reduce the impact of any individual judge’s cultural cognition.

[J]udging on the appellate bench is a group process. Too often researchers ignore the fact that appellate judges sit in panels of three and decide cases together through deliberation. A model that takes each appellate judge as an atomized individual casting a purely individual vote in any given case will not produce a good explanation of how judges decide cases. The appellate courts are courts of collective decision, and appellate judges act collectively as a court in disposing of cases.<sup>233</sup>

In other words, it is likely the case that judicial deliberations often will counter any effects of cultural cognition. Therefore, in their effort to understand the effects of extralegal factors on appellate decisionmaking, studies of cultural cognition must also take account of the influence of judicial deliberations; this will be no easy feat given that these deliberations are confidential.<sup>234</sup>

### *B. Judicial Deliberations*

Judicial deliberations, broadly understood, are pervasive throughout the judicial process.<sup>235</sup> Judicial colleagues who have

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232. *Id.* at 879–80.

233. Edwards, *Collegiality*, *supra* note 3, at 1656.

234. See Hensler, *supra* note 85, at 63 (“Researchers simply do not have available very good quantitative approaches to studying large social organizations [like courts] or interaction processes [within the courts].”).

235. Deliberation and its hallmarks are at the core of a collegial court:

The deliberately cultivated attitude among judges of equal status and sometimes widely differing views working in intimate, continuing, open, and noncompetitive relationship with each other, which manifests respect for the strengths of the others, restrains one’s pride of authorship, while respecting one’s own deepest convictions,

worked together over time and come to know each others' perspectives and views can anticipate one another's initial "takes" on certain cases without ever having to discuss the case in detail. In many such situations, a judge's cultural cognition can be moderated in anticipation of a colleague's views—a kind of tacit deliberation. Judges deliberate when they raise questions during oral argument to alert their colleagues to their concerns. Judges deliberate in conference and continue to deliberate after conference when they raise issues uncovered in their research. Judges deliberate when they circulate draft opinions, receive their colleagues' responses, and negotiate resolutions to any differences.

There may be some judges who care little about their colleagues' views and who are determined not to engage in collegial interactions. However, they are not in the majority. Unless an appellate court is fractured due to an absence of collegiality, appellate judges routinely deliberate in reaching their decisions.<sup>236</sup> Indeed, the Judicial Conference of the United States has placed collegiality at the center of its definition of a "court":

[A] "court" is a cohesive group of individuals who are familiar with one another's way of thinking, reacting, persuading, and being persuaded. The court becomes an institution – an incorporeal body of precedent and tradition, of shared experiences and collegial feelings, whose members possess a common devotion to mastering circuit law, maintaining its coherence and consistency (thus assuring its predictability), and adjudicating cases in like manner.<sup>237</sup>

During the course of judicial deliberations, judges more often than not persuade one another until a consensus is reached. The effect of any individual judge's cultural cognition is thereby limited.<sup>238</sup> Because of this important group dynamic, "[a]ny credible attempt to explain judges' behavior . . . must take account of the collective nature of the enterprise. . . . While a judge spends much time working alone, the crucial decisional points in appellate judging occur in the

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values patience in understanding and compromise in nonessentials, and seeks as much excellence in the court's decision as the combined talents, experience, insight, and energy of the judges permit.

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

236. Edwards, *Collegiality*, *supra* note 3, at 1648.

237. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 44 (1995).

238. See Kahan et al., *supra* note 224, at 900–01.

company of, and in active engagement with, one's colleagues."<sup>239</sup> When empirical legal scholars conduct studies that rely solely on the voting records of appellate judges and case outcomes, they do not learn enough to fully understand appellate decisionmaking.

[S]tudy of groups also requires consideration of interpersonal interaction and influence. The fact that two or more Justices vote together is rather weak evidence that their votes are the result of interaction; standing alone, voting records tell very little about the force or direction of any interpersonal influence that may exist. Small group analysis requires other kinds of data and a more general understanding of the impact of a group decisional situation on individual behavior.<sup>240</sup>

The group dynamics of judicial decisionmaking are influenced by a variety of intangible factors including the relative intelligence of the participating judges, intimidation, friendship, age, aversion to confrontation, a belief that little is to be gained in disagreement, impatience, institutional norms and/or rules, and views of the trial court judge. Special expertise of a particular judge or a reputation for thoughtfulness and preparation can be credited by other judges during the deliberation process. Perhaps most important is the role of precedent in deliberation. All judges are bound by precedent, and almost all judges recognize this fact. Therefore, arguments about the meaning of precedent, and the legitimate readings that can be given to governing precedent, are crucially significant in every case. Because precedent can be read according to rules that are broadly shared and understood, even if not objective or universal, judges who might agree about little else can come to a common reading of governing law. Consensus typically fails only when the governing precedent is read in divergent and irreconcilable ways, and judges disagree in how they would exercise any discretion that is given to the court by a lack of clarity in the governing law. Before judges admit to that failure, however, they have ample opportunity to persuade and look for a reasonable resolution on legal grounds.

In light of these considerations, there are significant difficulties faced by scholars seeking to build useful models of judicial decisionmaking from which generalizations may be drawn regarding the effects of cultural cognition on appellate decisionmaking. It is one

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239. Edwards, *Collegiality*, *supra* note 3, at 1656, 1657.

240. Walter F. Murphy, *Courts as Small Groups*, 79 HARV. L. REV. 1565, 1566-67 (1966).

thing to determine how cultural cognition or ideology may cause different individuals to view the same evidence differently. It is quite another matter, however, to determine how and why the views of these individuals change when they deliberate over their differing views with an eye toward reaching a consensus.

#### CONCLUSION

The growing field of empirical legal studies need not conflict with “the persistent normative appeal of the legal model of judging.”<sup>241</sup> Rather, properly conducted, empirical legal studies can supplement traditional legal scholarship to “help[] inform litigants, policymakers, and society as a whole about how the legal system works.”<sup>242</sup> Both judges and scholars can benefit from a productive conversation between their two perspectives on appellate decisionmaking.

The potential for fruitful dialogue is lost when judges and empirical scholars are unable to communicate. There are many possible reasons for this failure, such as scholars’ use of terms like “ideology variables” (rather than “appointment variables”) in their studies. These terms tend to obscure rather than illuminate the issues under study and add an unnecessary charge to what might otherwise be a dispassionate discussion of methodological techniques. And models of appellate decisionmaking that reduce judging to either the application of fully determinate law or the exercise of bare political power are not only overly simplistic, but carry a normative valence that undermines the credibility of the many members of the judiciary who routinely put aside personal preferences and give due respect to the law.

In order for empirical scholarship to serve its highest function, it is of the utmost importance that scholars in this field acknowledge the limits of their research and maintain an appropriate level of modesty in their claims. Human institutions that are built on trust, respect, and a willingness to set aside personal interests for the good of society are fragile. It is important that institutions serving the public—and the individuals who comprise them—receive useful feedback. But critiques will not be taken seriously unless they are well targeted and

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241. Sisk, *supra* note 8, at 894.

242. Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1741 (2004).



supported in fact. Empirical legal studies can play a productive role in strengthening legal institutions by providing insights on the judicial process and suggesting areas for reform. This productive role will only increase as the field matures in its understanding of what it can, and cannot, do.

APPENDIX A<sup>243</sup>*Dissenting Opinions in Cases Involving Review of Administrative Agency Actions from September 2000–July 2008*

<b>Case Name; Citation; and Court Term</b>	<b>Majority and Judge Writing for Majority (*)</b>	<b>Dissenting Judge[s] [“MPS”= mixed panel split]<sup>244</sup> [“PS” = panel split]<sup>245</sup></b>	<b>Court’s Action as Described in Westlaw</b>
Hoffman Plastic Compounds, Inc. v. NLRB, 208 F.3d 229 (D.C. Cir. 2000)	Tatel* Rogers	Sentelle	Cross-application granted; petition denied.
Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639 (D.C. Cir. 2001) (en banc)	Tatel* Edwards Williams Rogers Tatel Silberman	Sentelle* Ginsburg* Henderson Randolph [MPS]	Enforcement granted.
Crowley Marine Servs., Inc. v. NLRB, 234 F.3d 1295 (D.C. Cir. 2000) (per curiam)	(per curiam) Edwards Sentelle	Henderson [MPS]	Petition denied; cross-application granted.
Yukon-Kuskokwim Health Corp. v. NLRB, 234 F.3d 714 (D.C. Cir. 2000)	Ginsburg* Tatel	Randolph [MPS]	Enforcement denied; remanded.
Garvey Marine, Inc. v. NLRB, 245 F.3d 819 (D.C. Cir. 2001)	Ginsburg* Rogers	Randolph [MPS]	Employer’s petition denied; Board’s application granted.

243. Cases compiled by the Clerk’s Office of the U.S. Court of Appeals for the D.C. Circuit, Washington, D.C.

244. “MPS” denotes decisions involving mixed panels, that is, a three-judge panel consisting of judges appointed by presidents of both political parties in which the two judges appointed by presidents of the same party disagree. In an en banc decision, it means that judges appointed by presidents of the same party joined both the majority and dissent.

245. “PS” denotes decisions in which all of the judges on the panel were appointed by presidents of the same political party, and one of the judges dissented.

Ross Stores, Inc. v. NLRB, 235 F.3d 669 (D.C. Cir. 2001)	Henderson* Randolph	Garland	Petition for review granted in part and denied in part, and enforcement denied in part.
Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002)	Rogers* Williams	Sentelle [MPS]	Remanded.
Ruggiero v. FCC, 278 F.3d 1323 (D.C. Cir. 2002)	Tatel* Rogers	Henderson	Relief granted.
KPMG, LLP v. SEC, 289 F.3d 109 (D.C. Cir. 2002)	Rogers* Henderson	Randolph [MPS]	Petition denied.
Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002)	Henderson* Rogers	Randolph [MPS]	Petition denied; cross-application granted.
New World Radio, Inc. v. FCC, 294 F.3d 164 (D.C. Cir. 2002)	Henderson* Rogers	Randolph [MPS]	Appeal dismissed.
BFI Waste Sys. of N. Am., Inc. v. FAA, 293 F.3d 527 (D.C. Cir. 2002)	Henderson* Sentelle	Tatel	Relief granted.
Am. Corn Growers Ass'n v. EPA, 291 F.3d 1 (D.C. Cir. 2002) (per curiam)	(per curiam) Edwards Randolph	Garland [MPS]	Regulation sustained in part and vacated in part.
ExxonMobil Gas Mktg. Co. v. FERC, 297 F.3d 1071 (D.C. Cir. 2002)	Sentelle* Ginsburg	Edwards	Petitions for review denied.
Sec'y of Labor, Mine Safety & Health Admin. v. Excel Mining, LLC, 334 F.3d 1 (D.C. Cir. 2003)	Garland* Rogers	Sentelle	Petition granted; reversed.

Ruggiero v. FCC, 317 F.3d 239 (D.C. Cir. 2003)	Ginsburg* Edwards Sentelle Henderson Randolph Rogers	Tatel [MPS]	Relief denied.
Int'l Alliance of Theatrical & Stage Employees v. NLRB, 334 F.3d 27 (D.C. Cir. 2003)	Sentelle* Henderson	Tatel	Employers' and carpenters' union's petitions granted; theatrical employees' union's petition dismissed; cross-application denied.
21st Century Telesis Joint Venture v. FCC, 318 F.3d 192 (D.C. Cir. 2003)	Rogers* Randolph	Williams [MPS]	Petition dismissed in part and denied in part.
Pub. Util. Comm'n v. FERC, 367 F.3d 925 (D.C. Cir. 2004)	Randolph* Sentelle	Rogers	Petition for review denied.
Honeywell Int'l Inc. v. EPA, 374 F.3d 1363 (D.C. Cir. 2004) (per curiam)	(per curiam) Randolph Sentelle	Rogers	Vacated and remanded.
Brewers & Maltsters, Local Union No. 6 v. NLRB, 414 F.3d 36 (D.C. Cir. 2005)	Rogers* Ginsburg	Sentelle [MPS]	Employer's petition denied; union's petition granted; remanded.
Federated Logistics & Operations v. NLRB, 400 F.3d 920 (D.C. Cir. 2005)	Sentelle* Tatel	Henderson [MPS]	Petition denied.
Rainbow/PUSH Coal. v. FCC, 396 F.3d 1235 (D.C. Cir. 2005)	Henderson* Tatel	Rogers [MPS]	Appeal dismissed.

Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005)	Randolph* Tatel	Tatel Sentelle [MPS]	Petitions dismissed or denied.
Detroit Newspaper Agency v. NLRB, 435 F.3d 302 (D.C. Cir. 2006)	Edwards* Williams	Henderson [MPS]	Remanded.
Vill. of Bensenville v. FAA, 457 F.3d 52 (D.C. Cir. 2006)	Rogers* Henderson	Griffith [MPS]	Petitions for review denied.
Am. Council on Educ. v. FCC, 451 F.3d 226 (D.C. Cir. 2006)	Sentelle* Brown	Edwards	Petition denied.
Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277 (D.C. Cir. 2007)	Williams* Edwards	Sentelle [MPS]	Orders upheld.
Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161 (D.C. Cir. 2007)	Henderson* Tatel	Sentelle [MPS]	Affirmed in part and remanded in part.
Am. Chemistry Council v. Dep't of Transp., 468 F.3d 810 (D.C. Cir. 2006)	Griffith* Sentelle	Rogers	Petitions dismissed.
Ass'n of Irrigated Residents v. EPA, 494 F.3d 1027 (D.C. Cir. 2007)	Sentelle* Kavanaugh	Rogers	Petitions dismissed.
Sec'y of Labor, Mine Safety & Health Admin. v. Nat'l Cement Co., 494 F.3d 1066 (D.C. Cir. 2007)	Henderson* Sentelle	Rogers	Vacated and remanded.

Fin. Planning Ass'n v. SEC, 482 F.3d 481 (D.C. Cir. 2007)	Rogers* Kavanaugh	Garland [MPS]	Petition granted and rule vacated.
PNC Fin. Servs. Group, Inc. v. Comm'r, 503 F.3d 119 (D.C. Cir. 2007)	Brown* Rogers	Griffith [MPS]	Affirmed.
Natural Res. Def. Council v. EPA, 489 F.3d 1250 (D.C. Cir. 2007)	Henderson* Randolph	Rogers	Rules vacated and remanded.
Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279 (D.C. Cir. 2007)	Kavanaugh* Randolph	Sentelle [PS]	Petition concerning Safety Standard 110 was dismissed for lack of subject matter jurisdiction; petition challenging the adoption of Safety Standard 138 dismissed for lack of standing; and action on petition filed by Public Citizen postponed pending the filing of supplemental submissions.
Cogeneration Ass'n of Cal. v. FERC, 525 F.3d 1279 (D.C. Cir. 2008)	Griffith* Kavanaugh	Randolph [PS]	Petition denied.
Ass'n of Civilian Technicians, N.Y. State Council v. FLRA, 507 F.3d 697 (D.C. Cir. 2007)	Sentelle* Griffith	Tatel	Dismissed.
Agri Processor Co. v. NLRB, 514 F.3d 1 (D.C. Cir. 2008)	Tatel* Henderson	Kavanaugh [MPS]	Petition denied and cross-petition granted.

Am. Bird Conservancy, Inc. v. FCC, 516 F.3d 1027 (D.C. Cir. 2008) (per curiam)	(per curiam) Rogers Garland	Kavanaugh	Vacated in part.
Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227 (D.C. Cir. 2008)	Rogers* Tatel	Kavanaugh	Petition granted in part and remanded.

## SUMMARY

*Mixed Panel Splits.* There were “mixed panel splits” in *twenty-two of the forty-one* dispositions—that is, in three-judge panels consisting of judges appointed by presidents of both political parties, the two judges appointed by presidents of the same party disagreed; and, in en banc dispositions, judges appointed by presidents of the same party joined both the majority and dissent.

*Split Panels.* *Two of the forty-one* dissents involved situations in which all of the judges on the panel were appointed by presidents of the same political party and one of the judges dissented.

These data indicate that in *twenty-four of the forty-one* cases in which a dissent was filed (*59 percent*), the judges did not vote along presumed political party lines.

## APPENDIX B

*A Sample of Unanimous Decisions Involving “Mixed Panels”  
Reviewing Complicated and Important Administrative Agency  
Actions September 2000–July 2008*

<b>Case Name; Citation; and Court Term</b>	<b>Panel and Judge Writing (*)</b>	<b>Description from the Court Opinion or Westlaw</b>
BNSF Ry. Co. v. Surface Transp. Bd., 526 F.3d 770 (D.C. Cir. 2008)	Ginsburg Rogers Kavanaugh*	The Surface Transportation Board changed aspects of its rail rate-setting methodology. Railroads and shippers both petitioned for review—railroads arguing that certain changes improperly benefit shippers and shippers arguing that certain changes improperly benefit railroads. The court concluded that the board’s changes were reasonable and reasonably explained. Petitions for review denied.
Pirlott v. NLRB, 522 F.3d 423 (D.C. Cir. 2008)	Randolph, Rogers Edwards*	Bargaining unit employees filed unfair labor practice charges against their local union, complaining it violated its duty of fair representation by spending their dues for organizing activities and failing to provide them with adequate financial disclosures. The National Labor Relations Board (NLRB) found that the union’s financial disclosures were adequate but determined that the union had not justified its expenditures. The union petitioned for review, and the NLRB cross-applied for enforcement of its order. The court held that (1) remand was warranted for NLRB to reconsider the issue of adequacy of the union’s financial disclosure in light of intervening case law; (2) the charging parties were not “aggrieved” within meaning of National Labor Relations Act on the issue of whether expenses incurred in organizing employees of other employers could ever be charged to



		objectors; and (3) the NLRB did not arbitrarily depart from precedent, misconstrue evidence before it, or deny the union a fair hearing in finding that the union's organizing expenses were not germane to employees. Petition denied, cross-application granted in part, and case remanded.
Maine Pub. Util. Comm'n v. FERC, 520 F.3d 464 (D.C. Cir. 2008) (per curiam)	(per curiam) Rogers Garland Silberman	Consolidated petitions for review challenged the Federal Energy Regulatory Commission's (FERC') approval of a comprehensive settlement that redesigned New England's capacity market. The Maine Public Utilities Commission and the attorneys general of Connecticut and Massachusetts asserted that FERC's approval of the settlement was arbitrary and capricious, contrary to law, and beyond the commission's jurisdiction. The court rejected most of these arguments but agreed with the petitioners that the commission unlawfully deprived nonsettling parties of their rights under the Federal Power Act. Petitions denied in part, granted in part, and case remanded.
New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008)	Rogers* Tatel Brown	States and other parties petitioned for review of Environmental Protection Agency (EPA) rules regarding the emission of hazardous air pollutants from coal- and oil-fired electric utility steam-generating units. The principal issue was whether the EPA had authority to delist coal- and oil-fired utility units without following statutory delisting provisions. The court held: Once EPA determined that certain coal- and oil-fired electric utility steam generating units were to be regulated as sources of hazardous air pollutants under the Clean Air Act, the EPA had no authority to delist them without following a provision governing the removal of any source category. A provision of the Clean Air Act

		<p>which imposed certain requirements upon the EPA in delisting certain electric utility steam generating units as sources of hazardous air pollutants was not ambiguous, notwithstanding a separate provision which allowed the EPA to make a determination as to whether power plants should be regulated as emitting hazardous air pollutants; a provision granting the EPA discretion governed how the EPA was to decide whether to list units but said nothing about delisting units, and had Congress wished to except units from delisting requirements, it would have said so explicitly. Petitions granted and rule vacated.</p>
<p>Mail Contractors of Am. v. NLRB, 514 F.3d 27 (D.C. Cir. 2008)</p>	<p>Ginsburg* Tatel Brown</p>	<p>Court held that the NLRB's decision, that an employer violated National Labor Relations Act when, following an impasse, it unilaterally imposed provision reserving right to change truck drivers' relay points, was arbitrary and capricious. Petition for review granted.</p>
<p>Qwest Servs. Corp. v. FCC, 509 F.3d 531 (D.C. Cir. 2007)</p>	<p>Sentelle Tatel Williams*</p>	<p>Prepaid calling card provider and local exchange carrier petitioned for review of order of FCC ruling that both internet protocol (IP) transport cards, which use IP technology to transport part or all of telephone call, and menu-driven cards, which offer menu-driven interface through which users can either make call or access several types of information, offer "telecommunications services" subject to payment-of-access charges to local exchange carriers and other obligations, under Telecommunications Act, but which retroactively applied ruling only to IP-transport cards, but not menu-driven cards. Holdings: (1) bifurcation of FCC proceeding was not barred; (2) retroactive</p>

		application of order to IP-transport cards was not manifest injustice; (3) local exchange carrier had standing; and (4) retroactive application of order to menu-driven cards would not be manifest injustice. Order vacated in part.
PAZ Sec., Inc. v. SEC, 494 F.3d 1059 (D.C. Cir. 2007)	Ginsburg* Rogers Kavanaugh	Securities firm and its president petitioned for review of an order of the SEC upholding the decision of the National Association of Securities Dealers (NASD) to expel firm from membership and to bar president from ever associating with any NASD member firm as sanctions for president's failure to respond to the NASD's repeated requests for information from and about firm. Court held that SEC abused its discretion in failing to address certain mitigating factors raised by the petitioners, and in failing to identify any remedial – as opposed to punitive – purpose for the sanctions it approved. Petitions for review granted and case remanded for SEC to consider anew whether the sanctions were excessive or oppressive
Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188 (D.C. Cir. 2007)	Ginsburg Henderson Garland*	Two groups—one led by public citizen and the other by the Owner-Operator Independent Drivers Association—sought review of rules adopted by the Federal Motor Carrier Safety Administration regulating the hours of commercial long-haul truck drivers. The court rejected the challenges raised by the owner-operators, but granted the petition filed by Public Citizen, Inc. The court concluded that the agency violated the Administrative Procedure Act (APA) because it failed to give interested parties an opportunity to comment on the methodology of the crash-risk model that the agency used to justify an increase in the maximum number of daily and weekly hours that truck drivers may drive and work. The court also found that the agency failed to provide an

		explanation for critical elements of that methodology. Petition granted in part and denied in part.
San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007)	Garland Brown* Williams	Petitioners claimed that the National Labor Relations Act (NLRA) did not apply to employment at a casino the San Manuel Band of Serrano Mission Indians operates on its reservation. Because the casino employed many non-Indians and catered primarily to non-Indians, the court upheld the NLRB's decision that the NLRA applied to employment at this casino. The petition for review was denied.
Envtl. Def. v. EPA, 467 F.3d 1329 (D.C. Cir. 2006)	Randolph Tatel Griffith*	Environmental organizations brought a petition for review from final order of EPA challenging three sets of regulations governing how states were to bring transportation plans into conformity with Clean Air Act. Held: (1) court lacked jurisdiction to hear belated challenge to regulation; (2) regulation establishing interim tests for demonstrating conformity to National Ambient Air Quality Standards was unreasonable; and (3) regulation providing for use of interim tests for making conformity determinations under State Implementation Plans was proper. Petition granted in part, denied in part, and dismissed in part.
EarthLink, Inc. v. FCC, 462 F.3d 1 (D.C. Cir. 2006)	Sentelle Brown* Edwards	The FCC agreed not to require the Bell Operating Companies to provide their competitors with "unbundled" access to certain fiber-based network facilities. EarthLink, Inc., an internet service provider that benefits from such unbundling, challenged the FCC's order. The court concluded that the agency's interpretation and application of the statutory scheme were permissible and thus denied the petition for review.

<p><i>In re Core Commc'ns, Inc.</i>, 455 F.3d 267 (D.C. Cir. 2006)</p>	<p>Tatel Garland* Sentelle</p>	<p>Petitioners challenged the FCC's refusal to forebear in the enforcement of intercarrier compensation rules governing telecommunications traffic bound for internet service providers. The court found that FCC's decision was not arbitrary and capricious and thus denied the petitions for review.</p>
<p>Niagara Mohawk Power Corp. v. FERC, 452 F.3d 822 (D.C. Cir. 2006)</p>	<p>Griffith Edwards Silberman*</p>	<p>New York electric power utilities and the New York State Public Service Commission petitioned for review of FERC orders approving and enforcing a tariff filed by the New York Independent System Operator (NYISO), the manager of New York's electric power transmission facilities. The tariff allowed electricity generators that provided power to the transmission grid to avoid transmission and local distribution charges for the power these generators take from the grid for such purposes as heating, air conditioning, lighting, and powering office equipment, so long as the power the generators produced in any month exceeded the power taken. Petitioners asserted that FERC's approval of monthly netting for NYISO was unlawful and unreasonable and that the netting formula imposed in the NYISO tariff should be supplanted with a one-hour netting period. The court denied the petition for review.</p>
<p>Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006)</p>	<p>Randolph* Edwards Griffith</p>	<p>The SEC's hedge-fund rule, requiring that investors in a hedge fund be counted as clients of the fund's adviser for purposes of fewer-than-fifteen-clients exemption from registration under Investment Advisers Act, was invalid as conflicting with purposes underlying the statute. Rule vacated and case remanded.</p>

<p>Nat'l Ass'n of Sec. Dealers, Inc. v. SEC, 431 F.3d 803 (D.C. Cir. 2005)</p>	<p>Tatel Brown Edwards*</p>	<p>The National Association of Securities Dealers (NASD) wears two institutional hats: it serves as a professional association, promoting the interests of its members, and it serves as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the Exchange Act or SEC regulations. In NASD proceeding, the National Adjudicatory Council disciplined a member and its owner for, among other things, engaging in a manipulative scheme. The SEC reversed. NASD petitioned for review. The court found that, during the nearly seventy years that self-regulatory organizations had been recognized under the Exchange Act, Congress had never granted NASD a statutory right to seek judicial review of an SEC decision reversing disciplinary action taken by NASD as a first-level adjudicator under the statute. The court held that NASD, acting in its adjudicative capacity as a lower tribunal subject to SEC plenary review of its disciplinary decisions, was not an "aggrieved person." NASD's petition for review was dismissed for want of jurisdiction.</p>
<p>Kidd Commc'ns v. FCC, 427 F.3d 1 (D.C. Cir. 2005)</p>	<p>Garland Silberman* Williams</p>	<p>Kidd Communications appealed an FCC decision approving a transfer of Kidd's radio station license to Paradise Broadcasting, Inc., from whom Kidd originally purchased the station. The transfer was effected in two steps pursuant to a California state court order: first, an involuntary assignment from Kidd to a trustee, and then the trustee's voluntary assignment to Paradise. Kidd challenged the commission's decision as inconsistent with both an FCC regulation prohibiting a seller from retaining a reversionary interest in a</p>

		<p>station license and the commission's general policy prohibiting a license holder from granting a security interest in a broadcast license (as opposed to in a station's physical assets). The court ruled that the FCC inadequately explained why these related policies do not apply and failed to reconcile them with its competing policy of accommodating state court decisions. Decision vacated and case remanded.</p>
<p>S. Cal. Edison Co. v. FERC, 415 F.3d 17 (D.C. Cir. 2005)</p>	<p>Ginsburg Sentelle* Rogers</p>	<p>Transmission operators (TO) and municipal customers petitioned for review of FERC orders disallowing proposed tariff provisions designed to recover cost differentials from additional expenses arising out of formation and maintenance of independent system operators (ISO). Held: The court ruled that TOs could recover cost differentials from new customers. Because the order by FERC contravened the explicit language of the FERC-approved ISO tariff schedule to which the tariffs must conform, the order was vacated as arbitrary and capricious and the case remanded.</p>
<p>Northpoint Tech., Ltd. v. FCC, 412 F.3d 145 (D.C. Cir. 2005)</p>	<p>Edwards Henderson* Randolph</p>	<p>An applicant for license to provide direct broadcast satellite (DBS) service petitioned for review of decision of FCC finding that agency was authorized to auction licenses to operate DBS service channels. The court held that (1) ORBIT Act provision providing that FCC did not have authority to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services was ambiguous and (2) FCC's construction of ORBIT Act provision as allowing for auction for DBS licenses was unreasonable. Disputed decision vacated and case remanded.</p>

<p>Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005)</p>	<p>Ginsburg* Rogers Tatel</p>	<p>Petitioner sought review of a rule promulgated by the SEC under the Investment Company Act. The disputed rule required that a mutual fund must have a board (1) with no less than 75 percent independent directors and (2) an independent chairman. The court held that SEC did not exceed its statutory authority in adopting the two conditions, and the commission's rationales for the two conditions satisfied the APA. But the court found that the agency did violate the APA by failing adequately to consider the costs mutual funds would incur in order to comply with the conditions and by failing adequately to consider a proposed alternative to the independent chairman condition. Petition for review granted in part and case remanded.</p>
<p>Am. Library Ass'n v. FCC, 406 F.3d 689 (D.C. Cir. 2005)</p>	<p>Edwards* Sentelle Rogers</p>	<p>Petitioners challenged FCC's "broadcast flag" regulations. A broadcast flag was a digital code embedded in a DTV broadcasting stream which prevented digital television reception equipment from redistributing broadcast content. The broadcast flag affects receiver devices only after a broadcast transmission is complete. The court held that the FCC acted outside the scope of its delegated authority when it adopted the disputed broadcast flag regulations. Petition granted and rule vacated.</p>
<p>Nat'l Treasury Employees Union v. FLRA, 404 F.3d 454 (D.C. Cir. 2005)</p>	<p>Edwards Sentelle* Roberts</p>	<p>The Federal Labor Relations Authority erred in holding that the U.S. Customs Service is not required to negotiate over a union proposal concerning the storage of handguns. Because the authority erred in failing to follow its own precedent in determining whether the bargaining proposal constituted an "appropriate arrangement" subjecting it to bargainability under 5 U.S.C. § 7106(b)(3),</p>



		the agency order was vacated and the case remanded.
Edison Elec. Inst. v. EPA, 391 F.3d 1267 (D.C. Cir. 2004)	Edwards Randolph* Williams	Edison Electric Institute and corporate and municipal dischargers brought petitions for review from final order of Environmental Protection Agency (EPA), alleging that EPA's whole effluent toxicity test methods were invalid. The court held that (1) EPA accounted for departures from standard evaluation criteria, (2) EPA accounted for "false positive" test results, (3) EPA accounted for failure to establish detection limits, (4) EPA demonstrated ability of laboratories to conduct consistent testing, and (5) EPA established ability of test results to predict instream effects. Petitions denied.
Vill. of Bensenville v. FAA, 376 F.3d 1114 (D.C. Cir. 2004)	Edwards Henderson* Williams	Three suburbs petitioned for review of decision by the Federal Aviation Administration (FAA), which approved city's request to impose passenger facility fee to fund airport modernization program, alleging violations of the Federal Aviation Act, APA, National Environmental Policy Act, and FAA regulations. The court held that (1) suburbs had standing to challenge the fee, (2) action was ripe, and (3) FAA acted arbitrarily and capriciously in approving fee. Petitions granted and case remanded.
U.S. Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004)	Edwards Randolph Williams*	Telecommunications service providers petitioned for review of FCC order concerning incumbent local exchange carriers' (ILEC') obligation to unbundle network elements they made available to competitive local exchange carriers (CLECs). Holdings: (1) FCC could not delegate unbundling decisions to state utility commissions; (2) finding that CLECs were impaired absent access to mass market switches and high-capacity dedicated

		<p>transport facilities was unreasonable; (3) FCC could reasonably withhold unbundling orders, even in face of some impairment of CLECs' ability to compete, where such unbundling would pose excessive impediments to infrastructure investment; (4) FCC reasonably declined to unbundle broadband loops, enterprise market switches, and call-related databases and signaling systems; (5) FCC reasonably determined that ILECs' anti-impairment unbundling obligations were distinct from unbundling obligations they faced as condition for providing long-distance service; and (6) criteria established by FCC for determining whether CLEC was eligible to purchase unbundled enhanced exchange links were reasonable. Vacated and remanded in part, and dismissed in part.</p>
<p>Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395 (D.C. Cir. 2004)</p>	<p>Edwards Sentelle* Rogers</p>	<p>California Independent System Operator Corporation (CAISO) and two California agencies petitioned for review of a final order of FERC replacing the governing board of CAISO. The court held that FERC did not have authority under the Federal Power Act to make or enforce the order.</p>
<p>Sierra Club v. EPA, 356 F.3d 296 (D.C. Cir. 2004)</p>	<p>Sentelle Henderson Garland*</p>	<p>Petitioner challenged two final actions of the EPA regarding ozone control plans for the Washington, D.C. area. The court agreed with petitioner's principal contention that EPA was not authorized to grant conditional approval to plans that did nothing more than promise to do tomorrow what the act requires today. The court vacated the conditional approval and remanded the matter to EPA for further action.</p>

<p>Collins v. NTSB, 351 F.3d 1246 (D.C. Cir. 2003)</p>	<p>Randolph Rogers Williams*</p>	<p>Commandant of Coast Guard affirmed finding of an ALJ that Coast Guard–licensed pilot committed misconduct under 1972 International Regulations for Preventing Collisions at Sea when he failed to sound warning signal after he ascertained that another vessel was not taking sufficient action to avoid collision. National Transportation Safety Board (NTSB) reversed determination. Coast Guard appealed, and pilot intervened. The court held that (1) commandant was “person” entitled to appeal the determination; (2) appeal was timely; (3) at minimum, <i>Skidmore</i> deference was owed to Coast Guard’s interpretation of regulation under treaty; and (4) NTSB erred in failing to defer to Coast Guard’s reasonable application of rule to cases where mariners are certain that “sufficient action” is not “being taken by other [vessel] to avoid collision.” Reversed and remanded.</p>
<p>Sierra Club v. EPA, 325 F.3d 374 (D.C. Cir. 2003)</p>	<p>Randolph Rogers Williams*</p>	<p>Various environmental groups, two states, and trucking concerns petitioned for judicial review of regulations promulgated by the EPA to regulate emission of toxic chemicals from fuels. The court held that (1) the section of the Clean Air Act requiring the EPA to conduct a study to assess the “need for, and feasibility of, controlling emissions of toxic air pollutants” from motor vehicles and then, “based on” that study, to promulgate emissions standards to require the greatest degree of emission reduction achievable in light of “the availability and costs of the technology, and noise, energy, and safety factors, and lead time,” did not make validity of standards dependent on that of initial study; (2) EPA’s decision to adopt mere antibacksliding rule to prevent toxic emissions from increasing above historic levels rather</p>

		<p>than more aggressive emissions cap was not arbitrary or capricious; (3) EPA did not sufficiently explain its decision not to require on-board diagnostic equipment for new heavy-duty vehicles over 14,000 pounds; and (4) EPA's decision merely to list diesel exhaust as mobile air toxic that would be considered for purposes of future regulation did not present any issue ripe for judicial review. Petitioners' claims denied in part, remanded in part, and dismissed as unripe in part.</p>
<p>Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796 (D.C. Cir. 2002)</p>	<p>Edwards* Henderson Rogers</p>	<p>Petitioners challenged FCC rules mandating television programming with video descriptions. The court ruled that the statute does not instruct (or even permit) the FCC to promulgate regulations mandating video descriptions. The court reversed and vacated the FCC's order.</p>
<p>U.S. Air Tour Ass'n v. FAA, 298 F.3d 997 (D.C. Cir. 2002)</p>	<p>Edwards Henderson Garland*</p>	<p>Air tour operators and environmental organizations petitioned for review of FAA rule imposing cap on total number of commercial air tours that operators could run in Grand Canyon National Park. The court held that (1) FAA's change in its noise evaluation methodology for air tours was not arbitrary and capricious, (2) rule did not ignore needs of elderly and disabled, (3) challenges to rule raised by environmental groups were ripe for review, (4) remand was required to determine whether FAA unlawfully altered National Park Service's definition of "substantial restoration of the natural quiet" in the Overflights Act, and (5) FAA's noise-methodology supporting rule was arbitrary and capricious. Petitions granted in part, denied in part, and case remanded.</p>

<p>Sierra Club v. EPA, 292 F.3d 895 (D.C. Cir. 2002)</p>	<p>Ginsburg* Sentelle Tatel</p>	<p>The Environmental Protection Agency promulgated a rule to establish the conditions under which it would consider certain wastewater treatment sludges “hazardous” within the meaning of the Resource Conservation and Recovery Act (RCRA). The Sierra Club and the Environmental Technology Council challenged the rule as unreasonable and as inconsistent with the plain meaning of the RCRA. The court dismissed the petitions because neither petitioner had standing to seek review.</p>
<p>U.S. Telecom Ass’n v. FCC, 290 F.3d 415 (D.C. Cir. 2002)</p>	<p>Edwards Randolph Williams*</p>	<p>Incumbent local exchange carriers (ILECs) petitioned for judicial review of orders of the FCC which adopted uniform national rule that required ILECs to lease variety of unbundled networks elements to competitive local exchange carriers (CLECs) in all geographic markets and customer classes and which ordered the unbundling of high frequency spectrum of copper loop to enable CLECs to provide digital subscriber line service. The court held that (1) FCC’s “impairment” standard was unlawful because it chose to adopt uniform national rule without regard to state of competitive impairment in any particular market and (2) FCC should not have entered unbundling order without first considering relevance of competition in broadband services coming from cable and, to lesser extent, satellite. Petitions for review granted and case remanded.</p>
<p>Town of Stratford v. FAA, 285 F.3d 84 (D.C. Cir. 2002)</p>	<p>Rogers Garland Silberman*</p>	<p>The town of Stratford petitioned for review of an FAA decision concerning the Bridgeport-Sikorsky Memorial Airport and disposal of land from the Stratford Army Engine Plant. The court concluded that Stratford lacked prudential standing to pursue its claims that the FAA’s Environmental Impact Statement was inadequate under the</p>

		National Environmental Policy Act and that its remaining claims were without merit. Stratford's petition was therefore denied.
Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002)	Sentelle* Rogers Williams	The court agreed with the university that it was exempt from NLRB jurisdiction as a religiously operated institution under the doctrine of <i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979). No <i>Chevron</i> deference was required. In applying the Supreme Court's jurisprudence, the court inquired whether the university (a) held itself out to the public as a religious institution, (b) was nonprofit, and (c) was religiously affiliated. Finding that the university met these criteria, the decision and order of NLRB were vacated.
Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001)	Ginsburg Edwards Sentelle*	The EPA exceeded its authority under the Clean Air Act in proposing to promulgate and administer a federal operating permits program for areas where EPA believes the Indian country status is in question and in proposing to make state/tribe jurisdictional determinations on a case-by-case basis rather than through notice and comment rulemaking.
NextWave Pers. Commc'ns, Inc. v. FCC, 254 F.3d 130 (D.C. Cir. 2001)	Sentelle Tatel* Garland	Chapter 11 debtor challenged authority of FCC to cancel its broadband personal communications service (PCS) licenses for failure to make purchase price installment payments. The court held that (1) circuit appellate court's decision reversing bankruptcy court's determination that FCC could not cancel licenses was based on the bankruptcy court's lack of jurisdiction rather than on merits of underlying dispute and thus was not <i>res judicata</i> except for those issues actually decided and (2) FCC was barred from canceling licenses solely for debtor's failure to make installment payments after declaring bankruptcy. Reversed and remanded.

<p>Trans Union Corp. v. FTC, 245 F.3d 809 (D.C. Cir. 2001)</p>	<p>Edwards Ginsburg Tatel*</p>	<p>Consumer reporting agency petitioned for review of order of the Federal Trade Commission (FTC) holding that agency's sale of certain mailing lists containing names of consumers who met specific criteria was communication of "consumer reports" for a purpose that was impermissible under Fair Credit Reporting Act (FCRA). The court held that (1) agency did not properly challenge FTC's statutory interpretation or launch specific substantial evidence challenge on its key findings, (2) FCRA was not unconstitutionally vague under Fifth Amendment due process guarantees, and (3) ban on sale of lists did not violate credit reporting agency's First Amendment rights. Petition for review denied.</p>
<p>Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001)</p>	<p>Williams* Randolph Tatel</p>	<p>This court addressed FCC regulations promulgated pursuant to the Cable Television Consumer Protection and Competition Act of 1992. It held that the horizontal rule was in excess of statutory authority, that the vertical rule did not survive intermediate scrutiny under the First Amendment, that the elimination of the majority shareholder exception was arbitrary and capricious, but that the basic 5 percent rule and 33 percent equity-and-debt rule were not arbitrary and capricious. Reversed and remanded in part and affirmed in part.</p>