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Decisionmaking in the U.S. Circuit Courts of Appeals

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This Article empirically examines the determinants of decisionmaking in the U.S. Circuit Courts of Appeals. It explains the four primary theoretical models for such decisionmaking: the legal model of decisionmaking strictly according to the law, the political model of ideological judicial decisionmaking, the strategic model of adapting decisions to the preferences of the U.S. Supreme Court, and the litigant-driven model, which predicts that strategic decisions of parties drive judicial outcomes. After reviewing the existing literature for each of these models, the Article conducts an empirical study of decisionmaking determinants, using a database that includes thousands of decisions. This study finds that legal and political factors are statistically significant determinants of decisions, with legal factors having the greatest impact. Strategic and litigant-driven factors have no significance.

INTRODUCTION

Legal scholarship often presumes that judges capture the complete reasoning behind their decisions in their written opinions. However, a long-standing and growing body of research calls this presumption into question. Researchers in other social sciences, such as economics and political science, typically reject conventional legal wisdom and contend that judicial decisions are explained by factors that have little to do with what is conventionally known as law. This Article reviews, evaluates, and tests competing theories of the factors that influence circuit court decisions.

This Article focuses on the decisions of the U.S. Circuit Courts of Appeals, which are probably the decisions of greatest importance for the development of the law in the United States.[1] Although decisions of the U.S. Supreme Court are preeminent, circuit court decisions are far more numerous and of far greater practical significance. Circuit courts are the courts of last resort for the vast majority of litigants and, hence, for the vast

1. I, like others who seek to understand circuit court decisionmaking, am indebted to the pathbreaking work in the field, J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM (1981). My research builds on this book, with the benefit of considerable intervening research and data now available.

majority of contested legal issues. While circuit court decisions are less dramatic than those of the Supreme Court, circuit courts "are major political institutions that function not only as norm enforcers but also as important creators of public policy."[2] These are the courts that define and develop "principles of law and policy directly governing their respective regions and indirectly affecting the rest of the nation."[3]

Ascertaining the determinants of circuit court decisionmaking is, therefore, central to any understanding of the forces that shape the law. Describing what drives judicial decisions, however, has proven perplexing.[4] One may rule out certain factors that have no logical bearing on decisionmaking, such as income. For instance, because circuit judges' salaries are largely fixed, judges' interest in personal wealth maximization have little bearing on their decisions. Similarly, because federal judicial tenure is lifelong, judges' concern for job preservation has no effect on their decisionmaking processes. The judiciary, nonetheless, remains free to base its decisions on factors other than income. This Article explores those factors.

The first Part of the Article evaluates existing research on four distinct theories of judicial decisionmaking: the legal model (according to which judges decide only through neutral application of the law cited in their opinions), the political model (according to which judges decide based on their personal ideological preferenccs), the strategic model (according to which judges decide in order to minimize responses from other institutions that may directly or indirectly reverse their conclusions), and the litigant-driven model (according to which the choices of litigants primarily dictates published judicial decisions). While these are not the only theories on judicial decisionmaking,[5] they represent the four predominant paradigms for explaining decisions. For each paradigm, this Article examines the theory, the direct evidence for the theory based on judicial self-reporting, and the existing empirical evidence supporting the theory.

The second Part of the Article embarks upon an empirical test of the theories of judicial decisionmaking, using a large database of circuit court decisions.[6] The empirical analysis begins by testing the effect of legal variables, in isolation, on judicial decisions. The analysis continues with a test

2. DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 3 (2000).

3. Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1636 (1998).

4. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993) (stating that the problem of explaining the economic behavior of the judiciary is a "mystery that is also an embarrassment").

5. *See* Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1378-80 (1998) (reviewing other possible determinants, such as the personal background variables of sex, race, and prior employment experience).

6. For a description of the database used, see *infra* note 271.

of the effect of ideological variables on judicial outcomes, both in isolation and in combination with legal variables. Both legal and ideological variables appear to play a role in predicting judicial decisions. The test of the strategic model overlays additional variables on the first two sets of results. Finally, the analysis incorporates litigant characteristics in order to test whether the decisions of parties drive judicial outcomes. The full test of all models suggests that only traditional legal and ideological variables significantly explain judicial decisionmaking.

This Article constitutes the first systematic, integrated theoretical and empirical analysis of the accuracy and practical significance of the four models.[7] James Gibson has argued that judges' decisions "are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do."[8] This claim, which recognizes a role for each of the first three theories, is plausible but offers no insight into the relative significance or importance of the three variables. This Article sets out to learn something about the relative importance of the different determinants of judicial decisionmaking at the circuit court level.

I
THEORIES OF JUDICIAL DECISIONMAKING

This Part reviews the four primary theories of the determinants of legal decisions, as explicated by considerable research in law, political science, and economics. The first theory is the legal model. Proponents of this theory claim that the legal reasons judges give in their decisions reflect the actual logic the judges followed in reaching their conclusions. This is the "traditional legal analysis" as it is typically taught in law schools. The second theory is the political model, sometimes called the attitudinal model.[9] Advocates of the political model contend that judicial outcomes are driven by the ideological preferences of the judges hearing the case. The third theory is the strategic model. Proponents of this model largely accept the premises of the political model but suggest that judges are more sophisticated and consider external responses to their decisions that would alter the decisions' ideological effect. The fourth theory is a litigant-driven model. Under this theory, judicial outcomes have little to do with the judges themselves. Instead, they are determined by the strategic assessments of the

7. *See, e.g.*, Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 323 (1992) (noting that for "all the years this debate has raged, it is almost startling to find that scholars have yet to compare these basic models systematically").

8. James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 32 (1983).

9. *See* 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) (reviewing the attitudinal model of judicial decisionmaking).

parties to the action, who may settle or litigate vigorously, depending upon their interests and the circumstances of the case.

A. *The Legal Theory of Decisionmaking*

The most obvious and straightforward theory of judicial decisionmaking is the legal one. According to this theory, judges decide cases through systematic application of the external, objective sources of authority that classically comprise the law. When judges write opinions or orally explain their decisions from the bench, they justify their conclusions by reasoned application of those authorities to the facts of the instant case. This model reflects the theory of judicial decisionmaking commonly taught in law school: judicial decisions are the product of impartial, reasoned analysis grounded in accepted sources of authority.

1. The Theory

Various legal theories of judicial decisionmaking have come into being over the past century. While some dispute exists over the precise details of the legal model,[10] one feature of that model is clear: when properly performed, judicial decisionmaking should not be in any way contingent on the preferences of the judges making the decision. As Kathleen Sullivan described the position: "Courts are to stick to law, judgment, and reason in making their decisions and should leave politics, will, and value choice to others."[11] Such legal analysis "can and should be free from contaminating political or ideological elements."[12] The law is separate from politics.

Though the classical legal theory of decisionmaking assumes a formal process, this process cannot be reduced to an algorithm.[13] The legal model states that judges take the applicable authorized legal tools—the rules, standards, and principles embodied in authoritative sources, such as statutory text and precedent—and use reasoned decisionmaking to apply those legal tools to the facts of the case in order to reach a judgment.[14] If a statute

10. Commentators generally agree upon the characteristic sources, such as statutes and precedents, but some, such as Ronald Dworkin, would expand those sources to include broader moral and political principles underlying the law. *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) (arguing that certain moral principles imbue the Constitution and its legal interpretation).

11. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 64-65 (1992).

12. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 250 (1993).

13. The legal model may take a variety of forms, ranging from classical Langdellian formalism to a more flexible approach. Central to the legal model, though, is some element of formalism, because the legal model implies that the law itself can provide certain correct answers to legal questions without reference to external sources.

14. *See* Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1439-43 (2001) (reviewing legal model of judicial decisionmaking).

or precedent case plainly proscribes behavior, the court will so hold. If the scope of a statute is ambiguous, the court will use tools of interpretation, such as the canons of construction, and perhaps a sense of the purpose underlying the statute to determine whether it should apply. In undertaking this decisionmaking, a court may be influenced by the preferences of the lawmaking legislature but is not to take into account its own preferences.

Several schools of jurisprudenee faithful to this concept have gained prominence. The legal process school arose in the 1950s to "relegitimate the judiciary" after the rise of the legal realist school.[15] For the legal process school, the law was less about substantive standards and outcomes than about a particular process and rules of adjudication.[16] Principled reason was the key to these processes and rules. In the legal process conception of jurisprudence, decisions were founded on reason, and "judicial activity motivated by personal instinct or by considerations of policy [was] purged from the system."[17]

The contours of legal process theory, like those of any other broad theory, were imprecise. Legal process theory emphasized the importance of procedure over substantive values in law. It focused on principles of rationality. A key element of the theory, as of all legal model theories, is the principle that judges make decisions without regard to their own personal political views.

Legal process theory also inspired the more controversial Weehslerian "neutral principles."[18] For Herbert Weehsler, judicial decisionmaking must rest upon neutral principles, which are "standards that transcend the case at hand."[19] They are "criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will."[20] Ultimately, in this view, "integrity," decisionmaking by "disinterested and objective standards," and the pursuit of "impartial justice *under law*" characterize judging.[21] While the academy has criticized and even ridiculed Wechslerian neutral principles, they remain a commonly used model of judicial decisionmaking.[22]

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15. *See* Kimberlé Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1712 (1998).

16. *See, e.g.*, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 210 (1995) (noting that "the study of law became the study of a proeedure by whieh judges, rather than simply apply doctrine in a mechanical fashion, use doctrine in the process of reasoning towards a decision").

17. *Id.* at 261-62.

18. The jurisprudence of neutral principles is traced to Herbert Wechsler's seminal 1959 lecture at Harvard Law School. *See* Hcrbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

19. *Id.* at 17.

20. *Id.* at 11.

21. TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 81 (1999).

22. *See* Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200, 215-16 (1984) (suggesting that while judicial

Over the years, numerous critics have attacked various aspects of the legal model of decisionmaking; legal process theory "has been killed again and again, but has always refused to stay dead."[23] The attack on the legal model has commonly centered on its theoretical and empirical indeterminacy. While some measure of indeterminacy is inescapable, indeterminacy itself does not doom the formalistic legal theory of judicial decisionmaking.[24] Steven Burton, for example, recognizes that judges act within a discretionary space, due to the indeterminacy of legal materials, but argues that this discretion is bounded and that, within the discretionary space, judges are to act in a "good faith" effort to find the result that is legally best.[25] At minimum, even absent this good faith, the legal theory holds that the law serves as an objective constraint on the discretion of judges.[26] If the legal theory fails to describe all judicial behavior, it may still provide an accurate prediction of most outcomes.

The legal theory also has normative support: one generally considers judging according to the law to be the duty of the judiciary.[27] However, one cannot merely presume that judges consistently do their duty; the legal model may be no more than an idealized notion that poorly reflects the reality of judicial decisionmaking. The accuracy of the legal model is a descriptive question that must find factual, as well as theoretical, support.

2. *Self-Reporting*

The most obvious form of judicial self-reporting occurs in judicial opinions. A typical opinion explains its outcome by reference to the traditional materials of the legal model. A judge will not claim in an opinion, "I rule for the plaintiff because I am a liberal" or ". . . because he has the better lawyer" or " . . . because of what I ate for breakfast." Rather, judges justify their conclusions by referring to analogous precedents or other governing texts that, at least purportedly, dictate the judge's decision.

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decisionmaking is not entirely devoted to neutral principles, the neutral principles theory generally describes such decisionmaking).

23. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 951 (1988). Some measure of formalism has an inexorable appeal to legal academics. *See, e.g.*, Cross & Nelson, *supra* note 14, at 1441 (maintaining that at least some degree of legal formalism is irresistible to law professors).

24. *See* Weinrib, *supra* note 23, at 1008-12 (describing how perfect determinacy of outcomes in individual cases is not necessary to legal formalism).

25. *See generally* STEVEN J. BURTON, JUDGING IN GOOD FAITH (1992).

26. PERETTI, *supra* note 21, at 38.

27. *See* Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1640-41 (observing that all "agree that it is a prime duty for a judge to obey the law"); Weinrib, *supra* note 23, at 985-86 (describing the role of the judge "as the guardian and expositor of whatever is non-politically legal"); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that it is "the province and duty of the judicial department to say what the law is").

One should not accept this self-reporting uncritically. Judges are supposed to decide cases according to the law, and this practice may be essential to the legitimacy of the judiciary.[28] Thus, even if judges in fact reach decisions based on personal preferences or whims, one would expect them to explain their decisions by reference to the materials of the law.[29] Realists claim that a "court can decide one way or the other and in either case can make its reasoning appear equally flawless."[30] The invocation in opinions of precedents and other legal sources does not demonstrate that these materials are the true determinants of the court's decision. Judge Posner has cautioned that we not "be so naive as to infer the nature of the judicial process from the rhetoric of judicial opinions."[31] For proponents of the political model, "the legal model and its components serve only to rationalize the Court's decisions and to cloak the reality of the Court's decisionmaking process."[32]

Interviews and surveys of judges provide what may be more reliable evidence, because in these contexts judges may feel pressure to rationalize their conclusions according to the legal model, and surveys offer anonymity. J. Woodford Howard surveyed numerous circuit court judges and concluded that on the whole, the judges "felt obliged to obey the Supreme Court."[33] The strongest determinant of decisionmaking in his survey was "[p]recedent, when clear and relevant."[34] Even when precedent was unclear, two-thirds of the responding judges reported that the "closest precedent in the circuit" was very important, and the remainder found it moderately important.[35]

While the Howard survey plainly shows that judges may consider extralegal factors in decisionmaking, the judges maintained that roughly 90% of the cases they heard had settled rules of decision, for which their

28. *See, e.g.*, Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 406 (1989) (declaring that only "[a]s long as courts cultivate the perception that they are constrained and distinguishable from the political branches [will] their legitimacy . . . remain intact").

29. *See* Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551, 1552 (1966) (noting that assessing the importance of extralegal factors in opinions "is particularly difficult because of norms which prevent judges from openly casting their decisions in such terms").

30. JEROME FRANK, LAW AND THE MODERN MIND 66 (1930). *But see* Newman, *supra* note 22, at 205 (arguing that the law in fact constrains judges in most instances). Yet even former Judge Wald has conceded that there is "precedent nowadays for virtually every proposition." Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1400 (1995).

31. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988).

32. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 53 (2002).

33. HOWARD, *supra* note 1, at 156. Howard studied the Second, Fifth, and D.C. Circuits in depth and conducted interviews with more than thirty judges from those circuits. He also analyzed more than 4,900 cases decided by these circuits between 1965 and 1967.

34. *Id.* at 164 tbl.6.2.

35. *Id.* at 165 tbl.6.3.

decisions were not governed by extralegal factors.[36] Howard concluded from the survey (and some empirical data) that "[a]dherence to precedent remains the everyday, working rule of American law, enabling appellate judges to control the premises of decision of subordinates who apply general rules to particular cases."[37] More recently, David Klein conducted a set of interviews of circuit court judges. Of the twenty-two judges whose responses he could "confidently classify, fifteen seemed to view 'legally correct' decisions as very important while the rest considered it important."[38] This anonymous self-reporting demonstrates that judges are concerned about adhering to the legal model.

Judicial writings confirm this finding. Judge Harry T. Edwards of the D.C. Circuit has emphasized that "it is the law—and not the personal politics of individual judges—that controls judicial decisionmaking in most cases resolved by the court of appeals."[39] Judge Priscilla Wald has urged that "it is not fair to say that political philosophy is the invisible hand guiding all or even most appellate decisionmaking."[40] Judge Jon O. Newman, while conceding a role for judicial preferences, contends that "[o]nly infrequently does legal realism accurately describe the day-to-day decisionmaking of most judges."[41]

For reasons discussed in detail below,[42] even a sincere belief in judicial fealty to the legal model is not conclusive evidence of that model's power, since people may be unaware of their true motivations.[43] The surveys are imperfect guides, because judges "cannot be expected to understand their own motivations perfeetly or to report them with undiluted candor."[44] Judge Richard Posner has even suggested that "much of what judges say about their jobs in speeches and opinions partakes of the same falsity that characterizes other political discourse."[45]

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36. *Id.* at 187.

37. *Id.*

38. DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 21 (2002).

39. Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 620 (1985).

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

41. Newman, *supra* note 22, at 204. Newman also stresses that "the accepted body of law—constitutional, statutory, and decisional—exerts a profoundly restrictive effect upon the outcome of most legal confrontations, even those that find their way up to the federal courts of appeals." *Id.* at 205. *See also* Cross, *supra* note 9, at 270 (concluding that the judicial sense of being constrained by the law survives even "introspective self-examination"); Patrick Wiseman, *Ethical Jurisprudence*, 40 LOY. L. REV. 281, 293, 307 (1994) (finding that "[j]udges certainly do not experience the law as imposing no constraints," and that a judge "who explieitly behaves as if law is politics is properly perceived by other practitioners as aberrational").

42. *See* discussion *infra* Part I.B.2.

43. *See, e.g.*, Robert P. Abelson, *The Secret Existence of Expressive Behavior*, 9 CRITICAL REV. 25, 32 (1995) (claiming that "people typically have no awareness of the true reasons for their behavior").

44. KLEIN, *supra* note 38, at 138.

45. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 190 (1990).

Nevertheless, the self-reporting of judicial commitment to the legal model provides at least some material evidence of its validity: "any credible description of a social practice, such as law, must account for the beliefs of participants as to what they are doing."[46] While thousands of judges have served on the circuit courts, the research for this Article yielded none who have claimed, even after their retirement, that the legal model of decisionmaking is unimportant.

3. *Empirical Evidence*

Traditionally, the "lack of empirical support is the greatest shortcoming for those who believe in the legal model."[47] Empirically testing the legal model of decisionmaking is a daunting challenge. The very definition of the legal model is imprecise.[48] By its nature, the legal model is difficult to frame as a falsifiable hypothesis. Some have even suggested that "legal reasoning [is] essentially a 'low form of rational behavior,' no more a science 'than creative writing, necromancy, or finger painting.'"[49] However, recent years have witnessed a stronger effort to find some reliable empirical test of the accuracy with which the legal model describes the determinants of judicial decisionmaking.

Because judges invariably support their rulings with legal authority, an empirical test must produce some external evaluation of the validity of that legal support, which implies a second-guessing of the judge's decision. One way to evaluate the importance of the legal model for judges deciding individual cases is to find a legal model test that is more authoritative and reliable than the judges themselves. Still, one could reasonably question how any test relying on the evaluation of an external observer could be privileged over the opinion of the judge who decided the case. The search for such a test seems fruitless. This problem has led researchers to produce some creative methods for testing the legal model without second-guessing the specific decisions of judges.

Two legal model skeptics have designed a test for the effect of precedent on Supreme Court justices.[50] The authors identified in their analysis a

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46. ALLAN C. HUTCHINSON, IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION 143 (2000).

47. Cross & Nelson, *supra* note 14, at 1443.

48. *See* KLEIN, *supra* note 38, at 29-30 (noting that "'legal soundness' is extremely difficult to conceptualize" and that even the judges involved in his study "struggled unsuccessfully to explain what the concept meant to them").

49. Howard Gillman, *What's Law Got To Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decisionmaking*, 26 LAW & SOC. INQUIRY 465, 470 (2001) (reviewing HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999)).

50. *See* SPAETH & SEGAL, *supra* note 49.

group of more than one hundred decisions regarded as major opinions.[51] They then identified the cases relying on those landmark rulings.[52] The authors examined the rulings of justices who were on the Court for both the initial ruling and progeny rulings. The authors' theory was that justices who dissented in the original opinions should switch their votes in those opinions' progeny out of deference to the stare decisis effect of the majority holding in the original opinion, if the legal model bound them. The authors characterized such a switch as a "precedential" vote and a continued dissent on the opinion as a "preferential" one. The authors found that only 11.9% of the justices' votes were precedential.[53] They concluded that "precedent rarely influences United States Supreme Court justices" and suggested that this called the legal model into question.[54] While these findings are interesting and significant, the study's methodology hardly captured the true legal model.[55]

Perhaps a better approach to studying the legal model, at least in lower courts, is an examination of broad trends in decisions over time as controlling precedents or statutes change. For example, the legal model suggests that when the Supreme Court issues a ruling that apparently changes the law, one should expect to see lower court decisions change in response to the new Supreme Court precedent.

Political scientists have occasionally employed this methodology to test judicial decisionmaking. One study examined appellate court decisions in the wake of the landmark First Amendment decision *New York Times v. Sullivan*[56] and concluded that lower courts faithfully followed the new precedent.[57] Other studies reached similar conclusions on circuit court responses to Supreme Court obscenity rulings[58] and the *Miranda* ruling.[59] Another study found that "after the Supreme Court made a major shift in policy, the decisional trends of the courts of appeals moved in the same

51. *Id.* at 24. The authors excluded unanimously decided cases from the sample used for their study. *Id.*

52. *Id.* at 25-29.

53. *Id.* at 287.

54. *Id.*

55. *See* Gillman, *supra* note 49, at 480-82 (discussing criticisms of the Spaeth and Segal study). Most apparently, there is not even a clear legal model norm that "obligates justices to defer to precedents against which they have written dissents." *Id.* at 482. When a justice believes a case to have been wrongly decided, he or she need not acquiesce in that error in future decisions.

56. 376 U.S. 254 (1964).

57. *See* John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502 (1980).

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

59. *See* Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes:* Miranda *and* New York Times *in the United States Courts of Appeals*, 43 W. POL. Q. 297 (1990).

direction to a statistically significant degree."[60] Still another review found "a highly credible body of evidence showing that circuit judges and other lower court judges are generally (though not perfectly) responsive to the policies announced by their superiors."[61] A study of circuit court decisions concerning search and seizure questions, an area of law in which Supreme Court precedent is extensive and relatively clear, found that lower courts generally changed their opinions in response to conservative Court trends; however, the same study found that the ideology of the circuit court panel had an even greater influence.[62] One study reached a contrary conclusion, finding little change in circuit court opinions following the Supreme Court federalism ruling in *United States v. Lopez*.[63]

The studies considering circuit decisionmaking over time provide only incomplete support for the legal model. First, such studies may capture some nonlegal factor that explains decisional trends at both the Supreme Court and lower court levels. For example, ideological positions themselves change over time in response to broad social trends—consider the "conservative" position on racial equality, which has evolved from open support for racial segregation to a position in favor of color-blindness, or liberal positions, which have shifted, though less dramatically, from support for color-blindness to support for affirmative action. Second, the studies are also consistent with the strategic model of judicial decisionmaking discussed below.[64] The courts may be responding to the threat of reversal by the Supreme Court rather than to changes in precedent. Third, even if the presence of a shift in lower court deeisions provides some support for the legal model, the shift does not demonstrate that the model is perfectly controlling. It may be that the lower courts shifted to a lesser degree than the legal model would dictate they should.

Some recent studies have attempted to avoid the limitations of earlier research by examining the effect of contemporaneous horizontal precedents. Gregory C. Sisk, Michael Heise, and Andrew P. Morriss studied the impact of horizontal precedent in decisions considering the constitutionality of the Federal Sentencing Guidelincs.[65] They found that district court precedent within the circuit was a significant determinant of subsequent district court holdings.[66] Similarly, David Klein studied circuit court decisions that developed new legal rules in significant unsettled areas of

60. Donald R. Songer, *The Circuit Courts of Appeals*, *in* THE AMERICAN COURTS: A CRITICAL APPRAISAL 35, 44 (John B. Gates & Charles A. Johnson eds., 1991).

61. KLEIN, *supra* note 38, at 7.

62. *See* Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 688 (1994).

63. *See* Antony Barone Kolenc, Casenote, *Commerce Clause Challenges After* United States v. Lopez, 50 FLA. L. REV. 867 (1998).

64. *See infra* Part I.C.

65. *See* Sisk et al., *supra* note 5.

66. *Id.* at 1433 tbl.4.

antitrust, search and seizure, and environmental law, analyzing the determinants for these decisions.[67] To model the precedential value of the new rules, Klein employed variables measuring the prestige of the first judge adopting the rule and the field-specific expertise of that judge.[68] Both variables proved statistically significant.[69] The outcomes of prior decisions on the issue by other circuit courts were also significant.[70]

These studies of horizontal precedent do not directly measure the legal model, since decisions from courts at the same hierarchical level are not binding precedent. However, deference to horizontal precedent is generally consistent with legal process theories. Furthermore, while adherence to vertical precedent is equally consistent with the legal model and the strategic model, only the legal model would predict horizontal deference. Thus, the studies demonstrating the influence of horizontal precedent provide additional support for the legal model.

Social scientists have increasingly turned to more creative and elaborate methods in testing the legal model. Mark J. Richards and Herbert M. Kritzer considered Supreme Court opinions, where the evidence of extralegal decisionmaking is particularly strong, and found that the law had a significant effect on decisions.[71] Richards and Kritzer identified "jurisprudential regimes" that dictated the structure of subsequent decisions "by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors."[72] For example, the study analyzed the Court's free speech decisions between 1953 and 1998 and found that *Grayned v. Rockford*,[73] requiring any speech restrictions to be content neutral, had a demonstrably significant effect on future rulings.[74] The rationale of the opinion plainly affected subsequent votes of the justices.

Daniel Pinello has also found that precedent had a distinct effect on judicial decisionmaking in a study examining gay-rights decisions in state courts between 1982 and 1998.[75] He compared the outcomes of each case to numerous personal characteristics of the judges and to the precedent of the particular jurisdiction. For both intermediate appellate courts and courts

67. The cases he considered are listed in KLEIN, *supra* note 38, at 147-67.

68. *Id.* at 65-69. Klein measured prestige by counting citations and expertise by evaluating the substance and extent of a judge's prior writings in the area.

69. *Id.* at 73.

70. *Id.* at 75-76.

71. Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305 (2002).

72. *Id.*

73. 408 U.S. 104 (1972).

74. Richards & Kritzer, *supra* note 71, at 312-15.

75. Daniel R. Pinello, The Impact of *Stare Decisis* on Policymaking by Appellate Judges: An Empirical Test (2000) (unpublished manuscript, on file with author) [hereinafter Pinello, The Impact of *Stare Decisis*]. A revised account of this study is available in DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW (2003).

of last resort, the existence of a positive precedent recognizing a gay rights claim had a statistically and substantively significant effect on judicial decisionmaking.[76] A negative prior precedent rejecting a gay rights claim, though, had relatively little impact on future decisions.[77] While this result does not support the dispositive power of the legal model, it demonstrates that the model has some explanatory power.

Empirical research conducted in recent years has given the legal model a much firmer grounding. Strong descriptive evidence now exists to support the claim that the law matters, at least sometimes, in judicial decisionmaking. Existing evidence falls far short, however, of demonstrating that the legal model completely determines outcomes. At best, the evidence shows some legal influence on judicial decisions. It leaves considerable room for other determinants.

B. The Political Theory of Decisionmaking

While judges' opinions almost universally explain their decisions by reference to the legal model, many have questioned whether the case results are truly explained by the law. Political scientists and a considerable number of legal scholars argue that decisions are driven instead by the personal ideologies of judges. Judges, like other officers of government, seek to project their views of justice onto society through the force of their decisions.[78] While many criticize the concept of political decisionmaking, some praise it.[79] The concern of this Article is simply descriptive.

1. The Theory

Adherents of the political theory of judicial decisionmaking do not claim that judges are political in the same way that legislators or executive officers are political. Judges, at least at the federal circuit level, do not engage in the campaigning and partisanship of the political branches. Nor does the political theory of judicial decisionmaking refer to politics in the broadest sense, such as a devotion to democracy or individual rights. Viewed at a sufficiently high level, all law is a translation of some political concept. Ronald Dworkin, for example, thus recognizes that his concept of law is "deeply and thoroughly political."[80]

Rather, according to the political theory, judges are dedicated to advancing their own personal ideological preferences, which generally fall along a conventional liberal-to-conservative continuum.[81] Because judges'

76. Pinello, The Impact of *Stare Decisis*, *supra* note 75, at 41, 61-62.

77. *Id.*

78. *See* Richards & Kritzer, *supra* note 71, at 305 (noting that attitudinalists view the Supreme Court as equivalent to a "small legislative body" in its decisionmaking).

79. *See, e.g.*, PERETTI, *supra* note 21, at 133.

80. RONALD DWORKIN, A MATTER OF PRINCIPLE 146 (1985).

81. For a good review of the development of this theory, see George, *supra* note 3, at 1646-50.

compensation does not depend on their adherence to the law,[82] one might expect judges' "policy goals" to exert considerable influence on their decisions.[83] Judge Posner suggests that judges may wish to "impose their political vision on society" through rulings, just as an artist imposes an aesthetic vision on society.[84] Judges are officers of the government, with the ability to achieve political goals through legal rulings. One might reasonably expect them to take advantage of that ability and deploy their personal political predilections in their decisions.

The political theory gained prominence through the legal realist movement in the first half of the twentieth century.[85] Legal realists argued that the indeterminate materials available to judges at the appellate level could not clearly resolve the disputes these judges confronted.[86] Consequently, the determinants of legal outcomes came from individuating characteristics of individual judges.

This view retains considerable currency.[87] One observer suggests that "circuit judges frequently encounter cases where their policy preferences are likely to come into play and where the costs of heeding them are acceptable."[88] Others suggest that the growth in the use of law clerks has enabled judges to be more ideological and to rely on the clerks to draft opinions that are "just briefs to support a predetermined result."[89] Some behavioralist or attitudinalist advocates of the ideological model of decisionmaking believe that the legal model is useless. They have been "remarkably dismissive" of the traditional legal model, characterizing it as "meaningless" or "silly."[90]

Social scientists are skeptical of the theory underlying the legal model, because it assumes that judges actually do what they are supposed to do. Meanwhile, economists and political scientists tend to assume that

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82. *See* Cross, *supra* note 9, at 295-96 (explaining how conventional economic explanations of human behavior do not apply well to judging).

83. RICHARD A. POSNER, OVERCOMING LAW 372 (1995).

84. *Id.* at 121.

85. For a good review of this movement, see BRIAN LEITER, AMERICAN LEGAL REALISM (2002) (University of Texas School of Law Public Law & Legal Theory Research Paper No. 042), *available at* http://ssrn.com/abstract_id=339562 (last visited July 26, 2003).

86. *See id.* at 3 (discussing how legal realists argued both that the law was rationally indeterminate, such that legal reasons could not dictate a unique decision, and causally indeterminate, so that those reasons could not explain the specific decisions reached by judges).

87. *See, e.g.*, Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821-22 (1983) (contending that one can manipulate legal rules so much that judges are largely free to fulfill their preferences while apparently remaining within those rules).

88. KLEIN, *supra* note 38, at 15; *see also* Gillman, *supra* note 49, at 471 (discussing the belief that the "constraints under which the [Supreme Court] Justices decide their cases do not inhibit them from expressing their preferences insofar as voting on the cases before them is concerned").

89. John Kester, *The Law Clerks Explosion*, 9 LITIGATION 20, 20 (1983), *quoted in* JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS 10 (2002).

90. *See* Cross, *supra* note 9, at 264.

people are more likely to conduct themselves as they prefer than to act as they are supposed to behave, at least without external checks. Even if one accepts the possibility that people can be authentically altruistic at times, it is difficult to claim that people are primarily altruistic in their behavior. For example, some people contribute to charities, but very few people give more money to charities than they spend on themselves. Correspondingly, adherents to political theories do not necessarily claim that judges never follow their legal responsibilities; supporters of the political model simply maintain that such behavior is not the norm.

As a preempirical matter, however, there is no basis for the social scientists' dismissiveness. Without any motivation to follow the legal model, of course, it seems likely that judges would generally render justice as they see fit on the basis of their ideological predispositions.[91] The question, therefore, is whether some countervailing force constrains those innate inclinations. Attitudinalists may believe that judges likely care more for ideological results than for legal results, but this is by no means self-evident.

It is perfectly plausible to suggest that "judges derive utility from legal procedures as well as from policy outcomes."[92] Judges assume a role in which they are expected to follow the law, after having spent much of their life in training under the legal model.[93] This role may become an "intervening variable between institutional and personality factors in the judicial process."[94] James Gibson describes role orientation as "a psychological construct which is the combination of the occupant's perception of the role expectations of significant others and his or her own norms and expectations of proper behavior for a judge."[95] Gibson contends

91. The response of a circuit court judge in an interview illustrates this phenomenon well: "Of course, if within applicable precedent you can choose one or the other, you will take the one that leads to the good outcome. . . ." KLEIN, *supra* note 38, at 22.

92. Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 71 (1994); *see also* Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 755 (2002) (noting that a legal-model judge would "maximize utility by adhering faithfully to these internal rules, regardless of the external result"); Cross & Nelson, *supra* note 14, at 1443 (noting that "[t]here is nothing intrinsically inconceivable about the notion that judges might value accurate legal decisionmaking, independent of [political] results").

93. On the socializing effect of legal training and experience, see, for example, Robert Carp & Russell Wheeler, *Sink or Swim: The Socialization of a Federal District Judge*, 21 J. PUB. L. 359 (1972), and Beverly B. Cook, *The Socialization of New Federal Judges: Impact on District Court Business*, 1971 WASH. U. L.Q. 253. *See also* SARA C. BENESH, THE U.S. COURT OF APPEALS AND THE LAW OF CONFESSIONS 17 (2002) (listing factors, including socialization, that explain lower courts' compliance with Supreme Court decisions); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 436 (1994) (suggesting that socialization explains the laek of gender effect on outcomes in obscenity cases).

94. HOWARD, *supra* note 1, at xxiii.

95. James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 917 (1978).

that role orientation mediates ideological attitudes, but does not completely supplant those attitudes in judicial decisionmaking.[96]

Judges may thus gain utility from adhering to the standards of their profession. Circuit court judges share

> most of the elements that students of the subject consider requisite for the professionalization of an occupation: a basic body of theory or specialized techniques, authority recognized by clientele groups and sanction by the community, a code of ethics regulating relations of professionals with clients and colleagues, self-consciousness and a 'professional culture' sustained by at least the rudiments of formal associations to guard over standards of training, performance, and mutual protection.[97]

As an occupation becomes more professionalized, "conformity to occupational expectations [will increasingly tend to] be achieved through internalized values and peer-group pressure."[98] Judges may simply "feel an obligation to do the job right."[99] This concern may be referred to as "craft values" or "reasoning utility," and it may countermand political concerns.[100] Even narrow economic models of rationality make some allowance for "rule-abiding attitudes" and "altruism."[101]

Other actors in the legal system may reinforce the judicial desire to perform as the judicial oath prescribes. One economist suggests that "peer pressure and public scrutiny" help to "induce judges to abide by their oath."[102] Judges may care about their reputation with the lawyers and litigants who appear before them.[103] Dedication to the values of the judicial

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96. *Id.* at 922.

97. HOWARD, *supra* note 1, at 89.

98. *Id.* at 122. Howard notes, though, that "[t]his is not to say that professionalism necessarily supplants personal predilections in Courts of Appeals." *Id.*

99. Thomas O. McGarity, *On Making Judges Do the Right Thing*, 44 DUKE L.J. 1104, 1105 (1995); *see also* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 61 (1997) (suggesting that "it pleases judges to carry out what they conceive as the judge's role"); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 213-14 (1998) (suggesting that "since judges are supposed to decide cases by following legal doctrine, the inclination to do so is part of their more general desire to act in the proper fashion," which is "a well-recognized motivation").

100. *See, e.g.*, Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 474 (contrasting ideological utility and reasoning utility as factors in judicial decisionmaking); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1058 (1995) (noting reputational significance of adherence to judicial craft values).

101. Ha-Joon Chang, *The Economics and Politics of Regulation*, 21 CAMBRIDGE J. ECON. 703, 722 (1997); *see also* Richard S. Kay, *American Constitutionalism*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16, 46 (Larry Alexander ed., 1998) (contending that judges are driven to follow legal rules in part because of innate human tendencies to do so, as well as because of their background and training and the manner in which cases are presented to them).

102. DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 284 (1996).

103. Robert D. Cooter, *The Objectives of Public and Private Judges*, 41 PUB. CHOICE 107, 129 (1983); *see also* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75

craft through conscious adherence to the legal model may enhance the judge's prestige in the legal community.[104] The combination of concern for reputation in the legal profession and a desire to promote stability and continuity in the law may combine to induce judges to follow the legal model.[105] David Klein has observed that "[w]e may sometimes internalize norms to the point where we follow them unthinkingly, but often we adhere to them because we desire the respect and good opinion of others or ourselves."[106] Both pressures combine to promote some level of judicial adherence to the legal model of decisionmaking.[107]

Moreover, it is "highly likely that at least some judges find the search for good answers to legal questions intrinsically rewarding" and that the "challenge of reaching decisions supported by legal reasoning actually attracts judges to their profession."[108] Interviews with trial judges reveal that they "derive their satisfaction from the activities and behaviors which are associated with judging" more than "the achievement of particular substantive results."[109] Judge Posner has analogized the judging process to a "game" with rules.[110] These rules include legal model constraints, which affect judicial outcomes.[111] Viewing judicial decisionmaking as a sort of game does not exclude politieal considerations, but suggests that judges playing the game may also follow legal rules in good faith.[112]

Finally, adherence to legal rules is itself ideological. Judges may pursue the legal model precisely in order to achieve relative legal stability.[113] Decisionmaking according to law furthers political ends. While these ends may not seem ideological, in that they are not stereotypically liberal or conservative, they nonetheless reflect a notion of the good society.

B.U. L. REV. 941, 971 (1995) (suggesting that "[j]udges gain the respect of professionals—lawyers, fellow judges, law professors—for operating within the model").

104. *See, e.g.*, Drahozal, *supra* note 100, at 475 (claiming that judges "gain respect within the legal community based on how well they apply professional norms of legal reasoning in deciding cases"); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31, 49 (1994) (suggesting that judges trade off their "private utility" in the outcome of the case with "reputational utility" in their expectation of how observers would view the opinion); Shapiro & Levy, *supra* note 100 (noting reputational significance of adherence to judicial craft values).

105. *See* Sisk et al., *supra* note 5, at 1497-98 (explaining why judges follow precedent).

106. KLEIN, *supra* note 38, at 11.

107. The effect of reputation on legal model adherence is contested. For instance, it may be that even the groups forming the judiciary's constituency are not very committed to the sincere legal model. *See, e.g.*, Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 630 (2000) (suggesting that "judicial craft is far less important to these esteem-granting groups, and sympathy with the outcome is far more important").

108. KLEIN, *supra* note 38, at 12.

109. Austin Sarat, *Judging in Trial Courts: An Exploratory Study*, 39 J. POL. 368, 376 (1977).

110. POSNER, *supra* note 83, at 109-44.

111. *See id.* at 134 (suggesting that "a legislature can expect a fair degree of compliance by the judges with its rules even though there is no sanction for noncompliance").

112. *See generally* HUTCHINSON, *supra* note 46 (contending that judicial decisionmaking is game-like, as judges strive to reach preferred decisions only insofar as the legal materials allow).

113. *See* de Mesquita & Stephenson, *supra* note 92, at 757.

Impartial decisionmaking, according to the rule of law, may be viewed as intrinsic to fairness and may also have pragmatic value. A growing number of empirical studies have shown that rule-of-law decisionmaking furthers economic growth.[114]

For the above reasons, the descriptive power of the political theory is not self-evident. Judges may reasonably prefer to adhere to their legal responsibilities or to the challenge of the judicial game rather than effect their political preferences. On the other hand, it is not self-evident that judges prefer legal decisionmaking to political decisionmaking. Other government officers, in the legislative and executive branches, clearly act for ideological reasons. One might expect the same of judges. Resolution of the issue requires empirical evidence.

2. Self-Reporting

In their opinions, judges do not directly ascribe their decisions to any personal factors, much less personal ideologies. Indeed, judges hasten to urge that ideology is not an important determinant of their decisions. Judge Harry Edwards has stressed that "it is the law—and not the personal politics of individual judges—that controls judicial decisionmaking in most cases resolved by the court of appeals."[115] Still, judges do sometimes acknowledge the role of extralegal factors in their decisionmaking.

For instance, judges relatively infrequently address and even rely upon "policy arguments" in reaching their decisions. Judges claim, however, that even these policy-focused decisions are based on external, objective factors. Justice Stevens has observed that courts must sometimes reconcile competing political interests, "but not on the basis of the judges' personal policy preferences."[116] When judicial opinions discuss policy concerns, "they nearly always reflect respect for a congressional policy" rather than for the judges' own.[117]

Superficial reliance on legal analysis does not necessarily demonstrate that the legal model determined the outcome of a decision. For many political scientists, "the legal model is merely a convenient legitimating myth, so persuasive that it fools even those participating in its construction and perpetuation."[118] Because judges are expected to justify their decisions with legal analysis, they do so.

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114. *See* Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737, 1768-69 (2002) (summarizing recent studies).

115. Edwards, *supra* note 39, at 620.

116. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

117. Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 537 (1998) (book review).

118. Cross, *supra* note 9, at 253-54.

Concluding that judicial self-reporting in decisions is unreliable does not suggest that judges or their opinions are necessarily dishonest.[119] All human reasoning is influenced by experiences and preferences. A judicial tendency to manipulate precedent for ideological ends may be entirely subconscious, and even "if judges try not to be result oriented, the law provides them with inadequate guidance" to avoid such an orientation in every case.[120] The most prominent devotees of the political model have expressed "agnosticism" about whether the effect of ideology on judicial decisions is self-aware or subconscious.[121] Certain precedents may seem more apt because they are consistent with the judge's preferred case outcome.[122] Judge Wald, while claiming that judges do not decide cases ideologically, concedes that judges may "react instinctively against" an agency decision they are reviewing.[123]

Such a process is consistent with the psychological notion of motivated reasoning. Individuals engaged in motivated reasoning search their "memory for those beliefs and rules that could support their desired conclusion" in an "attempt to be rational and construct a justification of the desired conclusion that would persuade a dispassionate observer."[124] There is ample psychological evidence that people will "perceive information that is consistent with a preferred judgment conclusion . . . as more valid than information that is inconsistent with that conclusion."[125] Studies have indicated that individuals will sometimes "*misread* evidence as *additional* support for initial hypotheses" even when its true import is to undermine those hypotheses.[126] This sort of motivated reasoning places a thumb on the scale when an individual reasons towards a conclusion.

The extension of general psychological principles of motivated reasoning to judicial decisionmaking is an easy one.[127] One study of district courts concluded that judges used "cognitive shortcuts to process imperfect information" under the legal model and in the process produced ideological

119. Indeed, conscious dishonesty seems extraordinarily unlikely. The secret would leak from a group as large as the federal judiciary.

120. Newman, *supra* note 22, at 203.

121. SEGAL & SPAETH, *supra* note 32, at 433.

122. Thus, "it may be that the process of interpretation occurs so quickly that the judge never consciously considers the reasons for the choice and therefore believes that the decision was compelled by objective, external sources." Zeppos, *supra* note 28, at 407; *see also id.* at 410 & n.308 (citing psychological studies supporting this theory).

123. Wald, *supra* note 40, at 249.

124. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 482-83 (1990).

125. *See, e.g.*, Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568, 569 (1992).

126. Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 26 (1998).

127. *See* LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 55-56 (1999) (discussing how judges may be subjeet to motivated reasoning).

results.[128] Chris Schroeder has explained persuasively how the ideological, directional goals of motivated reasoning can have substantial effects on the Supreme Court's constitutional decisionmaking.[129] Justice Frankfurter perhaps acknowledged the role of such reasoning when he spoke of "how powerful is the pull of the unconscious and how treacherous the rational process."[130]

Given that motivated reasoning may preclude entirely sincere self-reporting of ideological influences on judicial decisionmaking, one would expect little self-reporting that suggests a role for judicial ideology. In fact, however, judges intermittently have declared that their decisions may be influenced by their personal values. Given the general disapprobation of ideological judicial decisionmaking and the pull of motivated reasoning under the legal model, these statements of the ideological influence in decisionmaking would seem especially persuasive testimony in support of the political model.

Some judges have written that decisionmaking is more than pure legalism. While Judge Wald has criticized those who emphasize the ideological component of judging, she has also acknowledged that "subtly or unconsciously, the judge's politics *will* affect decisionmaking."[131] Judge Newman concedes that "some judges in some cases permit personal predilections to determine the result."[132] Justice Breyer claims that "politics" does not exist in the judicial decisionmaking process but concedes that "personal ideology or philosophy is a different matter."[133] Judges do not like the label of political or ideological decisionmaking, preferring to call such decisionmaking a matter of philosophy or background. Neither the label nor the internal aspects of decisionmaking are central to the present question, however. Both the parties to an individual case and the path of the law itself are affected by ideological judicial outcomes, regardless of the label applied to the process by which those outcomes were reached.

Surveys of judges have also hinted at a significant role for ideology in judicial decisionmaking. In Howard's survey, a majority of responding judges ranked a judge's "[p]ersonal views of justice in the case" as "[v]ery important" to decisionmaking.[134] Only 5% considered this factor not

128. C. K. ROWLAND & RONALD A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 171 (1996).

129. *See* Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 352-54 (2001).

130. Pennekamp v. Florida, 328 U.S. 331, 357 (1946) (Frankfurter, J., concurring).

131. Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the* Harvard Law Review *and Other Great Books*, 100 HARV. L. REV. 887, 895 (1987).

132. Newman, *supra* note 22, at 204.

133. Stephen G. Breyer, *The Work of the Supreme Court*, BULL. AM. ACAD. ARTS & SCI., Sept.-Oct. 1998, at 47, 58.

134. HOWARD, *supra* note 1, at 164 tbl.6.2.

important.[135] Moreover, "[c]ommon sense," which may be aligned with judicial ideology, was "[v]ery important" for around 80% of the judges.[136] When the precedents were unclear, the "[d]ictates of justice" and the "[n]eeds of public policy" were the first and third most important factors in the survey.[137] Klein's interviews likewise found that a substantial majority of circuit court judges counted "good or just outcomes" as important or very important goals of decisions.[138]

Judicial self-reporting provides persuasive support for the political model of circuit court decisionmaking. The legal model is the expected norm, and a judge would naturally have some reluctance to confess to a departure from that norm. Judges' reports of extralegal factors in decisionmaking, a form of testimony against interest, are therefore fairly credible evidence.

3. Empirical Evidence

The bulk of the empirical research on political decisionmaking focuses on the Supreme Court. At this level, the empirical evidence is strong, and "it is widely considered a settled social scientific fact that law has almost no influence on the justices."[139] Some have extended this conclusion to appellate judges in general.[140] Most empirical studies of ideology in decisionmaking use the political party of the judge's appointing president as a proxy for the judge's own political ideology.[141] Thus, the general hypothesis is that judges appointed by Reagan are more likely to produce conservative decisions than judges appointed by Carter. While this proxy for judicial ideology is obviously imperfect, it seems unlikely to produce a false positive correlation. Any deviation of the judge's ideology from that of the appointing president will only obscure or understate a true correlation of ideology and outcomes.

While much of the research on the political model studies the Supreme Court, one early study of the circuit courts by Sheldon Goldman examined the effects of ideology on decisions, broken down by different areas of law.[142] Goldman found that the political party of the appointing

135. *Id.*

136. *Id.*

137. *Id.* at 165 tbl.6.3.

138. KLEIN, *supra* note 38, at 21-22.

139. Gillman, *supra* note 49, at 466.

140. *See id.*

141. *See* George, *supra* note 3, at 1651 (noting that "social scientists have discovered that the political party of the appointing President is a good proxy for a justice's attitudes"); Donald R. Songer & Martha Humphries Ginn, *Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals*, 55 POL. RES. Q. 299 (2002) (finding a strong correlation between the preferences of appointing presidents and their judges' voting behavior).

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

president explained a material portion of the variance of decisions in areas such as criminal procedure (9.2%), civil liberties (8.8%), labor (17.7%), and economic liberalism (roughly, government regulation of business) (15.2%), among others.[143] While finding that ideology was a significant determinant, he concluded that it "does not account for all or almost all of the variance" and that numerous other variables were relevant.[144] The article cautioned, though, that ideological decisionmaking appeared to be on the increase.[145]

Richard Revesz studied D.C. Circuit rulings in environmental regulation cases from 1970 to 1994.[146] He broke the court's decisions into several discrete periods, as its members changed and its composition shifted from Democratic to Republican. While he found no significant effect for the political model in the 1970s, it became a pronounced determinant of circuit court decisionmaking in the 1980s.[147] Overall, Revesz found "reasonably pervasive (though not universal) differences in the voting records of Democratic judges on the one hand and Republican judges on the other."[148] He also found that judges were influenced by the ideology of other members of their panel.[149]

Tracey George studied all the en banc decisions of the Fourth Circuit Court of Appeals from 1962 to 1996 and found a plain pattern of ideological voting among the judges.[150] Of the twenty-six judges included in the study, all but two had an "ideological bias"—a result that is "consistent with the hypothesized effect of the party of the President who appointed the judge."[151] For seventeen of these judges, the ideological pattern was statistically significant.[152] The study clearly provided support for the effect of ideology on circuit court decisionmaking.

Emerson H. Tiller, along with the author of this Article, examined D.C. Circuit Court of Appeals opinions that employed the deferential *Chevron* doctrine of review of administrative agencies in the first half of the 1990s.[153] This study found a very significant ideological effect, namely that the judges were significantly more likely to defer to agency opinions with which they presumably agreed and more likely to reverse those with

143. *Id.* at 501 tbl.7.

144. *Id.* at 506.

145. *Id.*

146. *See* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

147. *Id.* at 1742-43.

148. *Id.* at 1746.

149. *Id.* at 1754-58.

150. *See* George, *supra* note 3.

151. *Id.* at 1685.

152. *Id.* at 1685 tbl.4.

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

which they disagreed, regardless of the Supreme Court's command for deference to the agencies.[154] This effect depended substantially on the panel's composition. "Unified" panels drawn entirely from judges appointed by presidents of the same party were distinctly more ideological than "split" panels, with two judges of one party and one of the other.[155]

The most thorough review of ideological judicial decisionmaking in U.S. circuit courts is a meta-analysis by Dan Pinello.[156] Meta-analysis is a statistical method allowing the combination of data from different studies—so long as they meet certain criteria—in order to produce a larger sample.[157] Pinello's article reviewed various studies of all levels of courts, including more than twenty studies specific to the U.S. Courts of Appeals that cover more than 79,000 decisions from 1962 to 1996 in various types of cases.[158] "The weighted-mean effect on the entire group was 0.242, which suggests that the political party affiliation of the judges influenced nearly one-fourth of the decisions."[159] Pinello's finding provides substantial evidence of a material role for the political model of judging.

Empirical research on the political model, however, does not support this conclusion. Sisk, Heise, and Morriss found that district court ideology was generally not a determinant of rulings on the constitutionality of the Federal Sentencing Guidelines, though it did have a significant effect on the legal theories used by the judges.[160] Of course, the issue of the constitutionality of the Federal Sentencing Guidelines is not one where ideological lines had been drawn, so no clear ideological effect might be expected.[161] Moreover, the study was of trial courts, whose opinions are less likely to be ideological than those of higher courts.[162]

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154. *Id.* at 2170-71.

155. *Id.* at 2172-73. The above studies are only a few examples of a broader pattern of research showing an impact for the political model at the circuit court level. Other recent studies include Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298 (1993) (finding appointees of President George H.W. Bush to have very conservative voting records), and Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48 (1986) (finding appointees of Ronald Reagan to be conservative in decisions).

156. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219 (1999).

157. *See id.* at 220-21 (offering a brief description of meta-analyses).

158. *See id.* at 225-26, 236.

159. *Id.* at 236.

160. Sisk et al., *supra* note 5, at 1465-70 (reporting that ideology did not determine outcomes); *id.* at 1450 tbl.12 (finding that ideology affected the use of originalist reasoning in the decisions).

161. *See id.* at 1465 (noting the difficulty of characterizing the sentencing guidelines dispute ideologically).

162. Trial judges tend to confront more "easy cases," with less ideological contestation, than appellate judges do, and trial judges' decisions have less precedential impact. As a result, their opinions are somewhat less ideological than those of appellate courts. *See* Pinello, *supra* note 156, at 236 tbl.3.

The weight of the empirical evidence clearly reveals some role for ideology in judicial decisionmaking.[163] As Charles Songer and others have articulated, "[t]he general picture presented by these studies is clear: across a wide variety of courts and issue areas, Democratic judges are more likely to support the liberal position in case outcomes than their Republican colleagues."[164] The evidence for the political model is "abundant and convincing."[165]

But while the empirical evidence on the political model may conflict with the legal model, it is not so strong as to demonstrate that the legal model has no practical importance. The Pinello analysis, which is the most comprehensive study on the ideological model to date, suggests that the model explains around 24% of circuit court decisions.[166] Indeed, if the ideological theory explained everything, "we would never see unanimous [Supreme Court] decisions and judges with ideologically polarized views would never agree." To the contrary, both events happen with some regularity.[167] One problem with much of the empirical research on the political theory of judging is its failure to control for legal model variables.[168] Such variables may account for a substantial percentage of the outcomes not explained by the political model.[169] These outcomes might also be attributed to the imperfect operationalization of the political model or to yet another model of decisionmaking, such as the strategic model.

C. *The Strategic Theory of Decisionmaking*

A strategic theory of judicial decisionmaking recently has gained increasing acceptance among political scientists. Proponents of this theory generally accept the political theory of judicial motivations, though this

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163. *See* George, *supra* note 3, at 1654 n.65 (observing the "widespread agreement among social scientists that the attitudinal model has a tremendous amount of explanatory power"). While the preceding discussion is limited to statistical analyses of voting, other legal academics have observed this effect without such analyses. *See, e.g.*, Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300.

164. SONGER ET AL., *supra* note 2, at 112.

165. Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 103, 110 (Stephen B. Burbank & Barry Friedman eds., 2002).

166. *See* Pinello, *supra* note 156, at 236 tbl.3 (reporting weighted mean effect size of party affiliation on circuit courts at .242).

167. Peretti, *supra* note 165, at 110.

168. *See, e.g.*, Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 165, at 9, 25 (contending that "[u]ntil law is successfully taken into account—a task that is exceedingly difficult but worth pursuing—it is impossible to understand the relative role played by ideology").

169. *See* Cross, *supra* note 9, at 303-05 (discussing the considerable number of outcomes that the attitudinal model fails to explain, even when it appears as a statistically significant variable).

presumption is not essential to the strategic theory.[170] The strategic theory suggests that judges, regardless of what they are trying to achieve, are mindful of the positions and powers of other institutions and external forces that could affect the judges' attainment of their goals.

1. The Theory

The strategic theory derives from rational choice theory, a commonly accepted methodology used in political science and economics to explain individual decisionmaking. Under this theory, a circuit court judge realizes that she cannot ensure the effectuation of her ideological preferences simply by deciding a case in accord with those preferences, if that holding would subsequently be reversed by the Supreme Court. Hence, the strategic judge would account for the preferences of the Supreme Court in rendering opinions and would avoid issuing rulings that may be reversed.

The strategic theory of circuit court decisionmaking implies, generally, that the Supreme Court truly controls the output of lower courts. As the peak of the judicial hierarchy, the Supreme Court has the ability to reverse the rulings of all lower courts. Some argue that the circuit courts will fall into line in response to Supreme Court preferences.[171] McNollgast presents a more sophisticated theory recognizing the limited resources of the Supreme Court and proposing that the Court allows some doctrinal interval around its precise preferences but effectively can prevent decisions that stray too far outside that interval.[172]

There is substantial theoretical reason to doubt the significance of the strategic theory of appellate court decisionmaking under either model, primarily due to the very low rate of Supreme Court review of circuit court opinions. While the circuit courts decide tens of thousands of cases per year, the Supreme Court recently has reviewed fewer than one hundred of those decisions, or less than 3% of the petitions filed, per year.[173] Hence, as Songer has stated, "the decision of the court of appeals was left undisturbed in 99.7[%] of [those courts'] cases."[174] Some argue that "[t]he

170. *See* SEGAL & SPAETH, *supra* note 32, at 52 (noting that theorists of the rational choice strategic model "hold open the possibility that judges have legal considcrations as goals" but "typically conceive of justices as primarily interested in policy outcomes"); de Mesquita & Stephenson, *supra* note 92, at 755 n.1 (obscrving that both the attitudinal model and the strategic model typically assume that judges arc policy-oriented).

171. *See, e.g.*, Linda R. Cohen, *Politics and the Courts: A Comment on McNollgast*, 68 S. CAL. L. REV. 1685 (1995); Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605 (1995).

172. *See* McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995). .

173. In 1999, for example, the circuit courts terminated more than 54,000 cascs, while the Supreme Court granted only 92 petitions for certiorari. *See* COHEN, *supra* note 89, at 43 tbl.2; *see also* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 83 tbl.2-6 (2d cd. 1996).

174. SONGER ET AL., *supra* note 2, at 17.

sheer number of cases heard by appeals courts makes it impossible for the Supreme Court to adequately monitor the lower courts."[175] Peter Strauss has suggested that "the Court's awareness [of] how infrequently it is able to review lower court decisions has led it to be tolerant, even approving, of lower court and party indiscipline in relation to existing law."[176] For circuit courts, "being overturned is not a likely prospect and is becoming less so."[177]

A low rate of review does not intrinsically disprove the strategic theory, however, as "appellate judges no more need to review every decision below than a teacher must admonish every child to maintain order on a playground."[178] One need not exact punishment if the subject parties are intimidated into compliance by the prospect of punishment. Surely there must be some credible threat of review, though, for the theory to operate. In the context of circuit court decisionmaking, the question is whether nine "teachers," who are capable of reprimanding fewer than one hundred "students," can maintain order in a playground filled with tens of thousands.

The strategic control problem is compounded by the limited sanctions available for noncompliance. If a reviewing court could wield a severe sanction for misbehavior, the expected punishment, a function both of its frequency and its severity, might be sufficient. However, the Supreme Court does not wield this sort of power. A reversal will alter the policy consequence of the circuit court decision, but this leaves the lower court no worse off than if it had acquiesced in the first place, so there is no meaningful sanction for nonacquiescence. For circuit court judges primarily concerned about case outcomes, deference to the Supreme Court is not the rational choice.[179]

Nor do reversals of circuit court judges' rulings by the Supreme Court cause personal harm to judges. It is possible that Supreme Court reversals will carry some stigma that will cause the circuit court judges to be disrespected or "reduce [their] opportunities for professional recognition and advancement."[180] Yet this consequence is not plainly evident. Howard

175. *Id.* at 132-33.

176. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095 (1987). This lament has been updated: "[W]hen the Court was deciding only 150 cases a year, it was tolerating widespread undiscipline by lower federal courts; now that it has cut that number almost in half, it is forsaking responsibility for holding lower courts in line." Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 401 (1999) (citation omitted).

177. COHEN, *supra* note 89, at 42.

178. HOWARD, *supra* note 1, at 82.

179. BENESH, *supra* note 93, at 26-30.

180. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77 (1994); *see also* BENESH, *supra* note 93, at 17 (suggesting that some stigma may attach to a judge's reversal rate).

found that "[c]ircuit reputations appear to be independent of Supreme Court support."[181] Indeed, during the Warren Court era, some judges "wore reversals as badges of honor."[182] Insofar as decisions of the Supreme Court are ideological, generally a premise of the strategic model, reversal should carry with it no disrepute.[183] Some have hypothesized that frequent reversals would hurt a judge's chances for promotion to the Supreme Court and thereby influence appellate judicial behavior, though evidence has not confirmed this hypothesis.[184]

One further problem with the strategic model is more practical. Judges' cognitive limitations, reinforced by the time constraints and heavy caseloads of the appellate judiciary, may "make it impossible for judges to act strategically all the time."[185] In addition, circuit court judges inevitably lack the complete information necessary to make accurate strategic decisions. Such decisions require a reliable assessment of the probability of appeal, the probability of settlement, the probability of the Court's granting certiorari, and the precise preferences of the justices in order to calculate the risk of reversal. Without a reliable estimate of those probabilities, it is impossible for a court to make a strategic choice.

Without the ability and information necessary to make a correct strategic choice, an attempt to be strategic could well be counterproductive. In this circumstance, the more rational choice might well be for a circuit court panel to render its preferred opinion without regard for the risk of reversal rather than needlessly compromise its preferences due to an inaccurate fear of reversal. Even if the difficulty of strategic decisionmaking precludes its universal operation, though, the consideration might remain an important one in some subset of cases where the risk of reversal is clear.

2. *Self-Reporting*

Just as they are unwilling to express their political preferences in their opinions, judges are unlikely to express the strategic explanation for their decisions in judicial opinions. Judges have occasionally discussed their attitudes toward being reversed by higher courts, but these discussions are mixed, as described above. Occasionally, one can find hints of anticipation of hypothesized current Supreme Court positions in circuit court decisions. Dissenters in the Fifth Circuit, for instance, claimed that the court's anti-affirmative action decision in *Hopwood v. Texas* was just such an example

181. HOWARD, *supra* note 1, at 139.

182. *Id.* at 140.

183. *See* Cass, *supra* note 103, at 985 (noting that judges may perceive reversal "as criticism on grounds that are more political than professional" and hence "may find little discomfort in being reversed").

184. *See* Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980).

185. KLEIN, *supra* note 38, at 14.

of anticipating Supreme Court preferences.[186] Lower court judges in a number of other cases have also sought to anticipate the Supreme Court's view of precedents in their holdings.[187] Some circuit court judges have explicitly embraced this approach to decisionmaking.[188] Learned Hand declared that "it was the duty of an inferior court . . . to try to prophesy what the appellate courts would do."[189] Other judges have been equally explicit in rejecting the approach.[190] Judge Stephen Reinhardt of the Ninth Circuit has declared that his court would not change its view of the law "in order to please the Supreme Court."[191]

Howard's survey of circuit court judges found that judges sincerely sought to follow the law rather than to respond to the anticipated reaction of and potential reversal by the Supreme Court.[192] One judge responded that "anticipating overrulings" was "not a very profitable enterprise unless the occasion for it is patent," which is "rare."[193] In the survey, the anticipated response of the Supreme Court was the sixth most important of seven factors affecting decisionmaking, ranking below clear precedent, common sense, personal views of justice, and even respect for the prior judge.[194] Even when precedents were unclear, the Supreme Court response was still sixth out of seven factors, below the dictates of justice, the elosest precedent, needs of public policy, and other factors.[195] While the anticipated Supreme Court reaction was not a primary factor, about half of the judges still rated it "moderately important."[196] In Klein's survey, the occasional

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186. *See, e.g.*, Hopwood v. Texas, 84 F.3d 720 (5th Cir. 1996) (Politz, C.J., dissenting from denial of rehearing en banc) (claiming that the majority had improperly anticipated the overruling of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)).

187. *See* C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 43-48 (1990) (reviewing cases in which lower courts expressed some willingness to predict Supreme Court overrulings).

188. *See, e.g.*, United States v. Girouard, 149 F.2d 760, 765 (1st Cir. 1945) (Woodbury, J., dissenting) (writing that a "highly important [factor] for us to take into consideration in concluding how we should decide a case is the view which we think the Supreme Court would take on the question at issue before us"), *rev'd*, 328 U.S. 61 (1946).

189. *See* Lawrence Baum, *Lower Court Response to Supreme Court Decisions: Rcconsidering a Negative Picture*, 3 JUST. SYS. J. 208, 212 (1978) (quoting internal memorandum prepared by Judge Hand).

190. *See, e.g.*, Family Sec. Life Ins. Co. v. Daniel, 79 F. Supp. 62, 69 (E.D.S.C. 1948) (holding that "[i]t is not our duty to speculate on what the Supreme Court as now constituted may do on an appeal in this case" but that it is the judge's duty "to decide the case as we think it ought to be decided on the decisions as they now stand"), *rev'd*, 336 U.S. 220 (1949).

191. *See* Bob Egelko, *Maverick Court?*, DAILY BREEZE (Torrance), Aug. 17, 1997, at B1, *quoted in* Robert S. Thompson, *Comment on Professors Karlan's and Abrams' Structural Threats to Judicial Independence*, 72 S. CAL. L. REV. 559, 559 (1999). Another circuit judge declared that "you cannot really worry so much" about Supreme Court review. *See* COHEN, *supra* note 89, at 44.

192. HOWARD, *supra* note 1, at 156.

193. *Id.* at 163 n.c.

194. *Id.* at 164 tbl.6.2.

195. *Id.* at 165 tbl.6.3.

196. *Id.* at 164-65.

judge suggested that he might try to anticipate the Supreme Court in making a ruling.[197]

There is other reported evidence that judges might adapt their opinions to avoid Supreme Court reversal. Judge Posner has written that "most judges are highly sensitive to being reversed, and for them the prediction theory makes good sense to follow."[198] He consequently suggests that "[t]he theory has greater explanatory force than its critics allow."[199] Judge Jerome Farris, though, has questioned the significance of reversal, noting that his Ninth Circuit has had a high proportion of its reviewed cases reversed by the Court but that this represented only 0.3% of the circuit's output.[200] In these circumstances, Farris urged that the risk of reversal "should not—cannot—drive the system."[201] Another review found that "the judges on the courts of appeals reported that they are not seriously concerned about the possibility that they will be overturned."[202]

The self-reporting evidence provides little support for theories of strategic decisionmaking. Most judges appear to adhere to what they consider the existing state of the law, instead of trying to avoid reversal by anticipating the preferences of higher courts. Still, there is some evidence of strategic behavior, and as always, self-reporting is not conclusive evidence of actual behavior.

3. *Empirical Evidence*

The strategic model of judicial decisionmaking has not been studied as extensively as the political model, but an increasing number of studies are being conducted and published. Like the research on the political model, much research on the strategic model has centered on the Supreme Court and its interaction with Congress. Some studies of the strategic model also consider the circuit courts. These studies generally examine whether circuit court decisions tend to be responsive to the presumed preferences of the Supreme Court, which may review and reverse the circuit court holdings.

An empirical test must separate the effects of the strategic model from those of the legal model. The circuit courts are legally compelled to follow Supreme Court directions, so any deference could simply be legal, rather than strategic. Confirming the strategic model thus requires identifying circumstances in which circuit court judges respond to the current

197. KLEIN, *supra* note 38, at 108-09.

198. POSNER, *supra* note 45, at 224.

199. *Id.*

200. Jerome Farris, *The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?*, 58 OHIO ST. L.J. 1465, 1465 (1997). Farris also observed that the Supreme Court is not infallible and reversed itself at a higher rate than it reversed the Ninth Circuit. *Id.* at 1469.

201. *Id.* at 1471.

202. COHEN, *supra* note 89, at 82.

preferences of the Supreme Court rather than to its preexisting precedents.[203] Courts that engage in this behavior are sometimes said to be involved in "anticipatory overruling" of past precedent.[204] Thus, a circuit court that rules in a manner congruent with the preferences of the contemporaneous Supreme Court, rather than the precedents of prior Courts, is engaged in strategic behavior.[205]

Klein tested the strategic model as well as the political model. He identified eighty-one groups of cases involving new rules and found that over 86% of these rules were appealed to the Supreme Court.[206] The Court reviewed 16% of the rules appealed, a rate much higher than the norm.[207] The process of Supreme Court review took from fourteen months to more than nine years.[208] Klein found no circuit court response when Justice Marshall was replaced by the far more conservative Justiee Thomas,[209] a replacement that had a major effect on Supreme Court decisionmaking.[210] Even after he sought to isolate those cases in which a grant of certiorari was most likely, Klein found no evidence of strategic decisionmaking.[211]

The study by George discussed in Part I.B.3 also examined whether circuit judges decided cases strategically. While most of the judges did not do so, George identified "a few judges" who might be called swing voters and who appeared to vote strategically.[212] Her research shows the need to test not only individual judges but also individual decisions. In some cases she studied, the decisions did not match the ideological balance of the en banc panels because a few swing judges voted against their ideological preferences, even though a majority of the judges voted according to their political beliefs.[213] George found that although most judges voted in

203. See Caminker, *supra* note 180, for a discussion of this approach to circuit court decisionmaking.

204. For example, some have charged that the Fifth Circuit engaged in such an anticipatory overruling of *Bakke* when it rendered its opinion on affirmative action in *Hopwood*. *See, e.g.*, Casenote, *Constitutional Law—Equal Protection—Affirmative Action—Fifth Circuit Holds that Educational Diversity Is No Longer a Compelling State Interest.*—Hopwood v. Texas, 110 HARV. L. REV. 775 (1997).

205. While one might argue that such anticipatory overruling is in conformity with the legal model, the Supreme Court has made clear in its own precedents that this is not the case. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 237 (1997) (directing lower courts not to find that past precedents had been overruled by implication); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (directing circuit courts to follow controlling precedent until it is overruled).

206. KLEIN, *supra* note 38, at 51.

207. *Id.*

208. *Id.*

209. *Id.* at 113.

210. *See* SEGAL & SPAETH, *supra* note 32, at 319 (noting that whenever a Warren Court appointee was replaced by a Republican appointee, it made a significant difference).

211. KLEIN, *supra* note 38, at 124.

212. George, *supra* note 3, at 1686.

213. *Id.* at 1690 (pointing out that "we will not be able to explain the en banc court's decisions by looking primarily to its composition because the swing judges will vote against their party cohort to join majorities").

ideological conformity with their appointing president, some judges were more likely to vote contrary to their presumed ideology in order to form a majority for the opposing ideology. Statistical analysis demonstrated that this occurred when the Supreme Court shared that opposing ideology, suggesting that these swing votes were strategically cast to avoid reversal. Even so, George observed the strategic effect to be a "weak factor."[214]

Revesz has also studied the possibility of strategic effects on circuit court decisionmaking. His study does not focus on outcomes so much as on judicial reasoning. He contends that the Supreme Court is far more likely to review a statutory interpretation decision than one involving only administrative law.[215] With this as a premise, he hypothesizes that ideological judging will more likely appear in administrative decisions than in those involving statutory interpretation, because judges will wish to evade review and reversal by the Supreme Court.[216] Revesz found some support for this hypothesis in industry challenges to environmental regulations during the 1980s, though not in environmentalist challenges.[217] Based on these findings, he concluded that the D.C. Circuit judges studied employed "a strategically ideological approach."[218] Both the George and Revesz studies suggest that circuit judges are somewhat strategic, but both found the effect to be small compared to the ideological effect.

Sara Benesh conducted a very detailed examination of the determinants of circuit court decisions in the context of the admissibility of confessions in criminal law.[219] She considered an extensive list of variables, including factual variables (such as the receipt of *Miranda* warnings and the race of the defendant), legal variables (expressed as the effect of an intervening Supreme Court decision), a measure of the ideology of the panel, and a measure of the ideology of the contemporaneous Supreme Court.[220] Benesh found that certain facts were significant, that certain Supreme Court decisions were significant when combined with relevant facts, that the ideology of the circuit court panel was highly significant, and that the high court's ideology was also siguificant.[221] But while Supreme Court ideology was significant both statistically and substantively (explaining up to 9% of the outcomes), it was less significant than the ideology of the circuit court panel itself.[222] Although this research does not confirm the strict strategic model, it does provide empirical evidence that some level of

214. *Id.* at 1694.
215. Revesz, *supra* note 146, at 1730.
216. *Id.* at 1747.
217. *Id.* at 1750.
218. *Id.* at 1766.
219. *See generally* BENESH, *supra* note 93.
220. *Id.* at 63-75.
221. *Id.* at 75.
222. *Id.* at 75-76.

strategizing takes place. However, this study did not control for the possibility that current Supreme Court ideology might simply reflect controlling precedent. Therefore, the results may provide support for the legal model rather than for the strategic model.[223]

A recent study by Benesh and Malia Reddick attempted to test this distinction by inquiring whether circuit court decisions were more consistent with current or historical Supreme Court views.[224] The authors considered cases in which the Supreme Court overruled a precedent after signaling weakness in the earlier precedent and investigated the degree to which circuit court panels had anticipated that overruling in their decisions. Benesh and Riddick found, for example, that circuit court holdings on abortion rights apparently anticipated the shift to a more restrictive Supreme Court standard.[225] One could attribute this anticipation in part to a circuit court's assessment of the ideological position of the contemporaneous Supreme Court.[226] However, the ideological composition of the circuit court panel was the primary factor.[227] Thus, as the Supreme Court became more conservative, conservative circuit judges were more willing to ignore or defy an existing liberal precedent, but liberal circuit court judges were more likely to adhere to the existing liberal precedent than to anticipate a Supreme Court overruling.

Relatively little empirical evidence exists to support the purely strategic model of judicial decisionmaking, according to which the Supreme Court's current preferences determine circuit court decisions. The limited evidence for strategic decisionmaking also fails to consider the effect of independent legal model variables. Current empirical evidence suggests only that strategy is one component of circuit court decisionmaking, in addition to precedent and the panel's own ideological preferences.

D. The Litigant-Driven Theory of Decisionmaking

A final set of theories of judicial decisionmaking—associated more with economics than with political science—claims that litigants, rather than judges, drive judicial outcomes. Under these theories, litigants' decisions affect results regardless of whether judges produce outcomes based on formal legal reasoning, personal ideology, or anticipated Supreme Court

223. Even Benesh suggested that the results were not explained by the conventional rational choice model of circuit court decisionmaking but could be attributed to the "moral authority" of the Supreme Court. *Id.* at 129.

224. Malia Reddick & Sara C. Benesh, *Norm Violation by the Lower Courts in the Treatment of Supreme Court Precedent: A Research Framework*, 21 JUST. SYS. J. 117 (2000).

225. *Id.* at 125. The authors also identified numerous other circuit court cases that appeared to abandon existing Supreme Court precedent in anticipation of an express alteration of the existing rule. *Id.* at 125-27.

226. *Id.* at 134.

227. *Id.*

preferences. Proponents of litigant-driven theories maintain that the actual decisions produced by courts will be controlled largely by the strategic litigation decisions made by the parties to the action.

1. The Theory

The key to litigant-driven theories of judicial decisionmaking is the fact that decisions do not represent a complete or random sample of legal disputes found in the real world, or even a random sample of those disputes that produce actual lawsuits. Courts are constrained by their "procedural passivity," their ability to act only "upon a request by litigants."[228] Cases proceed to a judicial decision only when the parties have decided to force this sort of outcome to their dispute. It is "[l]itigants, not judges, [who] set court agendas."[229] The vast majority of cases of all types settle before the judge reaches a final decision.[230] Those cases that reach a judicial decision are the cases that the parties have chosen not to settle and thus represent a subset of disputes chosen by the parties, not by the judges. The same theoretical analysis generally applies to decisions pursued on an appeal.

George L. Priest and Benjamin Klein articulated the seminal litigant-driven theory.[231] They noted that settlement is more efficient for parties than litigation. If the parties have accurate expectations of the outcome of a suit based on settled law and information about the judge, they should settle for an amount approximating the expected outcome after trial.[232] When cases do proceed to trial or are appealed, the parties presumably have significantly divergent expectations about the outcome. The plaintiff, for example, may expect a positive verdict, while the defendant may expect to prevail on the merits or to pay only minimal damages. Priest and Klein hypothesized that only close cases in untested areas of the law would produce the divergence that results in litigation.[233] Because the tried cases are not a representative sample of all filed cases but a sample of cases on the margin, Priest and Klein expected that plaintiffs and defendants would each win about 50% of the time.

This simple 50% hypothesis unrealistically assumes that both parties have equivalent, if not perfect, information about the likely outcome if the case were tried. Theorists have noted that the 50% prediction cannot hold if

228. CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 10-11 (2002).

229. HOWARD, *supra* note 1, at 17.

230. *See, e.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 498 (1991) (reporting that only about 5% of filed cases are tried to judgment); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 107 n.1 (1994) (noting evidence that most cases settle).

231. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

232. *Id.* at 16-17.

233. *Id.*

the parties possess asymmetric information about probable outcomes.[234] If one party has better information about the likely outcome upon litigation, its settlement decisions will be wiser. The ill-informed party will settle some cases it should win and refuse to settle other cases that it likely will lose. Thus, in a higher proportion of cases, the party with the better information on probable litigation outcomes will win.[235]

The most significant theoretical problem with the 50% hypothesis occurs when the parties have unequal stakes in the litigation. The basic version of the Priest-Klein hypothesis assumes that both parties are only interested in the outcome of the particular case. In practice, though, one of the parties may have a more substantial interest in the litigation, including an interest not just in the outcome of the case but also in the precedent set by that outcome. A more sophisticated model suggests that if one party has precedential interest, that party will strive to appeal only cases that it is likely to win and will settle marginal cases. The party will pick cases strategically and pursue those with the best facts or with the potential for a particularly sympathetic hearing on appeal.[236] The party with the interest in the precedent set by the case will "settle strategically in cases where the type of judge or set of facts seems likely to lead to unfavorable precedent."[237] This refinement of the litigant-driven theory suggests:

> Sophisticated "haves" presumably only appeal cases they are likely to win, whereas "have nots" often cannot afford to appeal and are presumably more haphazard in their selections of cases when they can. The result theory tells us that the mix of cases heard by appellate courts is dominated by cases that "haves" have selected because they are likely to win. Missing from the mix are potentially important, precedent-setting cases that "have nots" are likely to win. When a "have not" threatens to appeal such a case, the "have," motivated by his or her interest as a repeat player, typically

234. *See, e.g.*, Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993).

235. *See, e.g.*, Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984); Hylton, *supra* note 234.

236. *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 241 (1999) (discussing "strategy of picking cases with favorable facts and sympathetic plaintiffs"). The theory of strategic precedent manipulation is discussed at greater length in Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 6-8 (2000).

237. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 78 (1991); *see also* Martin J. Bailey & Paul H. Rubin, *A Positive Theory of Legal Change*, 14 INT'L REV. L. & ECON. 467 (1994) (contending that parties with the greatest interest in precedent will tend to prevail more often in setting precedents).

settles, on the plaintiff's terms if necessary, to prevent the appellate court from setting an adverse precedent.[238]

This so-called "strategic settlement" hypothesis predicts outcomes far different from those of the simple 50% hypothesis. Repeat players will not allow the marginal cases to go to trial or judgment, because those cases present a real risk of creating adverse precedent. Instead, repeat players will push cases they are likely to win and settle the marginal cases. Hence, this refined hypothesis predicts that such repeat players will prevail in a disproportionate number of cases.

The intersection of the litigant-driven hypothesis (generally propounded by economists)[239] and the judge-driven hypotheses (typically advanced by political scientists) has not been extensively explored. For instance, even assuming that judges tend to decide cases ideologically or strategically, litigants concerned about economical consequences would be well aware of that tendency when making litigation and settlement decisions. Consequently, any judicial bias would not necessarily affect actual judicial outcomes. As the judiciary became more conservative, aware litigants would have realized that the ideological location of the marginal case had shifted to the right with the judiciary. As this occurred, cases formerly at the ideological center would have been settled, and a set of relatively more conservative cases would have been pursued to an outcome.[240]

Under the 50% hypothesis, a change in the ideological makeup of the judiciary would not change the frequency of conservative and liberal outcomes, though the conservative outcomes would be relatively more conservative.[241] Likewise, a change in a legal standard under the legal model would alter the composition of cases tried to judgment but should not affect the 50% distribution of outcomes. In sum, under the 50% hypothesis, the litigant-driven model subsumes all of the judge-driven models.

Under the strategic settlement hypothesis, though, it is plausible that a more conservative judiciary would produce more conservative outcomes than liberal outcomes. Conservative repeat players would push relatively

238. Richard Lempert, *A Classic at 25: Reflections on Galanter's "Haves" Article and Work It Has Inspired*, 33 LAW & SOC'Y REV. 1099, 1109 (1999). "Haves" are repeat players with large financial interest in the status of legal doctrine. *See id.*

239. *See, e.g.*, Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1091 (1989) (noting how economists have focused on litigants and not on the role of judges in decisionmaking).

240. Before the ideological shift in the judiciary, those more conservative cases would appear to be too conservative to succeed and would be settled. After the shift, those more conservative cases would appear to litigants to be on the margin, with a reasonable prospect for success; therefore, they would be tried.

241. *See, e.g.*, George L. Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399, 408 (1980) (suggesting that once a judge's attitudes are known, the litigants will adapt to them and only "raise the most troublesome issues for a person with the judge's attitudes to decide"); Priest & Klein, *supra* note 231, at 36 (contending that this problem illustrates "the failure of the attempts of an extensive and ambitious political science literature to measure the effect of judicial attitudes").

more cases to judgment, knowing that their overall chances of success were greater. As courts become more conservative, an increasing number of conservative outcomes would become possible. Strategic litigants would drive more of them to resolution and the consequent production of favorable precedents.

The litigant-driven hypothesis of decisionmaking makes sound theoretical sense, if its assumptions are valid. However, some of those assumptions are quite debatable. Litigants may not be exclusively interested in settling for money. The settlement market may not be an efficient one, preventing strategic case selection from operating efficiently. Problems of imperfect information about the prospects of any particular case before any particular judge also undermine the theory to a degree. Empirical inquiry is necessary to evaluate the theory's accuracy.

2. *Self-Reporting*

One cannot expect to find much evidence for the litigant-driven models of judicial decisionmaking in judicial self-reporting. The model, by its very nature, suggests that the goals of the judges are largely irrelevant to the legal product; judges are not likely to report, in decisions or otherwise, that they are knowingly being manipulated by the parties before them. However, judges do recognize the role of litigants in directing the path of the law. Judge Harvie J. Wilkinson III has stressed that "[j]udges cannot initiate change" and are "limited to the portion of a problem presented by the litigants."[242] Other judges acknowledge that the role of the judiciary is a "reactive" one, limited to the cases that are brought to court.[243] Yet this acknowledgement still falls short of recognition that the parties are manipulating the courts to achieve their own precedential ends.

Judges have explicitly recognized the potential for litigant manipulation in one context—when parties settle cases after a ruling and move to vacate that ruling. Some litigants, after losing at the circuit court level, settle with the victorious party, contingent upon the vacatur of the unfavorable opinion.[244] In these settlements, the party with the greater interest in precedent essentially purchases the destruction of the undesirable precedent, a clear example of litigant control over the course of the law.[245] The Supreme Court has prohibited this practice, urging that judicial precedents are "not

242. J. Harvie Wilkinson III, *The Role of Reason in the Rule of the Law*, 56 U. CHI. L. REV. 779, 787 (1989).

243. *See* Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 32 (2002).

244. *See* Cross, *supra* note 236, at 13.

245. Vacatur efforts were generally made by corporations and the government, the sorts of parties with a particular interest in precedent. *See* Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691, 1713 n.119 (1995).

merely the property of private litigants."[246] Even so, the courts have not and probably cannot prohibit manipulative predecisional settlements, leaving litigants with power over the cases heard and decided in court. In addition, parties may still influence the path of precedent by moving for publication of particular decisions.[247]

Judicial reporting is inconsistent with the 50% hypothesis, which assumes that parties litigate only difficult cases at the margin of the law. Judge Edwards estimates that about half the cases he hears are "easy" cases and only 5% to 15% are the very hard cases, which the Priest-Klein hypothesis suggests are the norm.[248] Judge Alvin B. Rubin suggests that 55% of the cases he hears are relatively easy ones under the legal model.[249] Another judge has estimated that 75% of the cases he hears have a relatively clear "right answer."[250] A prominent legal academic has likewise argued that the "cases at the margin are but a small percentage of the full domain of legal events; the bulk of the remaining cases are those in which we can answer questions by consulting the articulated norm."[251]

Judges do not acknowledge that the parties manipulate them as a general practice,[252] nor does one realistically expect the parties to confess that they really do manipulate judicial outcomes. Hence, self-reported evidence is particularly scarce for litigant-driven theories, which must be validated by empirical evidence.

3. *Empirical Evidence*

Empirical evidence exists to support the more sophisticated litigant-driven theories of judicial decisionmaking. The strict 50% hypothesis, however, finds little empirical support. Ample evidence shows that results in various case types differ considerably from 50%.[253] The empirical

246. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994) (quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)).

247. *See* Horton, *supra* note 245, at 1705-12.

248. 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, 389-90 (1983-84).

249. Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307, 310 (1987). Rubin contends that "legal doctrine is a real force, judges follow it, and they decide all but a small fraction of the cases that come before them in accordance with what they perceive to be the controlling legal rules." *Id.* at 307-08.

250. *See* COHEN, *supra* note 89, at 41.

251. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 423 (1985).

252. Howard's survey reported that circuit court judges believed themselves to be largely unaffected by "interest groups." HOWARD, *supra* note 1, at 150-51. However, the theory of law driven by litigants' case selection is an indirect effect of which judges could be unaware.

253. *See, e.g.*, Keven M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1136 (1992) (finding that plaintiff success rates exceeded 50% in only a minority of types of cases); Patricia Munch Danzon & Lee A. Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345, 348 (1983) (reporting a plaintiff success rate below 27% in malpractice actions); Daniel Kessler et al., *Explaining Deviations*

evidence on the political model of judging refutes the hypothesis that litigants correctly account for the political persuasions of judges in deciding whether to settle. If the hypothesis were correct, only cases near the judge's preferred decisional outcome would come to trial. The systematic ideological pattern in judicial outcomes thus contradicts the strict 50% hypothesis.[254]

While empirical studies generally fail to confirm the 50% hypothesis in its simplest form,[255] researchers have found certain data that support more sophisticated variations. A study of employment discrimination disputes found that weak cases tend to settle at a very high rate.[256] Studies of tort claims have concluded that plaintiff success rates are consistent with the selection model, adjusted for asymmetric information and unequal stakes.[257] A large study of many types of claims found that outcomes were consistent with the 50% hypothesis, as modified by factors such as asymmetric information.[258]

Studies have also addressed directly the strategic settlement hypothesis that repeat players with an interest in precedent will tend to prevail in cases. In a famous article, Marc Galanter noted that certain repeat-player "haves" were disproportionately successful.[259] Evidence exists that parties do strategically analyze possible precedential effects when deciding whether to settle cases.[260] As expected, defendants in product liability actions, who have a strong interest in precedent, win much more often than defendants in other types of tort actions.[261] Tort defendants are also more likely to settle cases when they will be heard by a pro-plaintiff judge.[262] Another study demonstrates the differential success of different litigants at

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from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation, 25 J. LEGAL STUD. 233, 236-42 (1996) (reviewing numerous studies in which the plaintiff success rates diverged from the 50% prediction).

254. *See generally supra* Part I.B.3.

255. *See, e.g.*, Kessler et al., *supra* note 253.

256. *See* Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427 (1995).

257. *See, e.g.*, Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Hylton, *supra* note 234, at 187; Joel Waldfogel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229 (1995).

258. *See* Kessler et al., *supra* note 253, at 236-42.

259. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

260. *See* Danzon & Lillard, *supra* note 253, at 367 (reporting that medical malpractice defendants consider the effects of precedent when making settlement offers); W. Kip Viscusi, *The Determinants of the Disposition of Product Liability Claims and Compensation for Bodily Injury*, 15 J. LEGAL STUD. 321, 345 (1986) (noting that firms base their decisions partially on the "stake in the court outcome that extends beyond the immediate court award").

261. Cross, *supra* note 236, at 10-11.

262. *Id.* at 12.

the Supreme Court level.[263] In the cases studied, the federal government was especially successful, winning 67.3% of the time, while poor individuals were least successful, with a 31.2% win rate.[264] The federal government is also very successful in antitrust cases, winning about 75% of the time.[265]

Not every study demonstrates the success of repeat player "haves." Leandra Lederman examined settlement patterns in cases at the Tax Court and found that the repeat player hypothesis did not generally apply, at least in high-stakes cases.[266] Another study found only a small advantage for the "haves" in state court litigation.[267] Still, the evidence generally supports the claims of strategic litigation, since the repeat players most interested in precedent tend to win more often than not.

The patterns of litigant success extend to the circuit courts of appeals as well. In the period between 1925 and 1988, the federal government has typically prevailed in around two-thirds of the cases in which it was a party.[268] Individual litigants, conversely, have won only about one-third of their cases.[269] Poor individuals have been even less successful.[270] Plainly, published circuit court decisions tend to favor certain groups of litigants.

In sum, considerable empirical evidence directly or indirectly refutes the simple 50% hypothesis for case selection. In this study, all of the empirical evidence on the impact of legal precedents and ideological variables on outcomes contradicts the simplest hypothesis. But these studies do not necessarily refute more elaborate variants of litigant-driven models, such as the strategic settlement theory. Moreover, the litigant-driven theory is intuitively appealing, since it recognizes that the parties to an action, not judges, ultimately control the cases that advance to a decision.

II

EMPIRICALLY TESTING THE THEORIES OF JUDICIAL DECISIONMAKING

This Part employs empirical methods to evaluate the four theories of judicial decisionmaking. Each test builds upon the results of the test for the prior theory. The result of the final test is a model that simultaneously considers the factors focused on by all four theories as potential determinants of judicial outcomes in the circuit courts of appeals.

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263. *See* Reginald S. Sheehan et al., *Ideology, Status and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464 (1992).

264. *Id.* at 465-66.

265. *See* Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 381 tbl.11 (1970).

266. Leandra Lederman, *Which Cases Go to Trial? An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 334 (1999).

267. Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 LAW & SOC'Y REV. 403 (1987).

268. SONGER ET AL., *supra* note 2, at 92 tbl.4.4.

269. *Id.*

270. *Id.* at 99 tbl.4.9.

The basic data for this test come from the Appeals Court Database, compiled under a National Science Foundation grant by a group led by Professor Donald Songer,[271] and the Database on the Attributes of United States Appeals Court Judges, compiled by Gary Zuk, Gerard S. Gryski, and Deborah J. Barrow[272] in order to associate judges with the parties of their appointing presidents. These data cover decisions issued between 1928 and 1992.

The database codes decisions as liberal or conservative, where possible, according to a now-conventional schema.[273] It also codes judges by their appointing president, which enables a test of the political model. The database allows for a test of the legal model by providing codes for how the district court precedent was treated (e.g., affirmed or reversed) and for the review standard used in many cases (e.g., de novo, arbitrary and capricious). The combination of these variables also enables the creation of a new variable on the ideological direction of the lower court decision.[274] Additionally, the database allows for a test of the strategic model by providing the year of the decision, which enables use of a variable representing the composition of the Supreme Court in a particular year. Finally, the database facilitates a test of the litigant-driven model by coding parties to litigation in categories such as the federal government, businesses, and natural persons.

The statistical method used in this test is partial correlation, which is similar to a regression analysis. A simple regression takes the form:

$$Y = a + (b * X)$$

In this equation, Y is the dependent variable, a is a constant, X is the independent variable studied, and b is the correlation coefficient that quantifies the magnitude of the effect of the independent variable on the dependent

271. The United States Courts of Appeals Database, developed by Professor Donald Songer of the University of South Carolina, is available through the Program for Law and Judicial Politics at Michigan State University. *See* Program for Law and Judicial Politics, Department of Political Science, Michigan State University, Research Databases and Data Archives—U.S. Courts of Appeals, *at* http://www.polisci.msu.edu/pljp/ctadata.html (last visited July 26, 2003). *See generally* Frank B. Cross, *Comparative Judicial Databases*, 83 JUDICATURE 248 (2000) (reviewing this database in contrast to others).

272. Gary Zuk et al., Multi-User Database on the Attributes of United States Appeals Court Judges (Jan. 9, 1997), *available at* http://ssdc.ucsd.edu/ssdc/icp06796.html (last visited July 26, 2003).

273. This coding relies on some simple presumptions, for example, that a vote for a criminal defendant is liberal, and a vote for the prosecution is conservative; that a vote for a union in a labor relations dispute is liberal, while a vote for the business is conservative; that a vote for abortion rights is liberal, and a contrary vote is conservative, and so forth. The full list of coding is found in the codebook with the database, at the location cited *infra* note 282. This coding is only roughly accurate, but any miscoded cases are more likely to obscure a true correlation than to create a false positive.

274. To create this variable, I took liberal decisions reversing the lower court and conservative decisions affirming the lower court, and coded the lower court ruling as conservative. Then, I took conservative reversals and liberal affirmances and coded the lower court ruling as liberal. This approach may not perfectly capture the directionality of the lower court decision, but it should be highly accurate.

variable. This simple formula, however, cannot control for the effect of other independent variables that may influence the outcome.

To test the effect of numerous independent variables in combination, multiple regression is often used, a method that takes the form:

$$Y = a + (b_1 * X_1) + (b_2 * X_2) + ... + (b_p * X_p)$$

Because one of the necessary variables for my test (the ideological direction of the lower court decision) was created through the use of two other necessary variables (the ideological direction of the circuit court opinion and whether it reversed or affirmed the lower court), multiple regression would not produce meaningful results.

Partial correlation for each of the numerous variables enables an estimate much like that produced by multiple regression. A partial correlation is a simple regression that also controls for other independent variables.[275] The partial correlation can be run on each of the independent variables while controlling for all the other independent variables. The correlation coefficient produced by the partial correlation estimates the effect of a unit change in the independent variable. Thus, if the independent variable was a binary code representing the party of the appointing president (e.g., 1 for Democrat, 0 for Republican), and the statistically significant correlation coefficient was .13, the result would suggest a 13% difference between the decisions of Democrats and Republicans. The particular statistical analyses in the remainder of this Part provide additional details on variables and methods.

The empirical test of the four models proceeds as follows. Part II.A tests three falsifiable hypotheses that, if true, support the legal model. Part II.B introduces a variable that measures the significance of the political variable and tests whether the legal variable retains significance even after controlling for the ideology of the circuit court panel, as well as whether the political variable is significant notwithstanding the legal model variable. Part II.C introduces a variable to capture the strategic model in order to determine which of the three variables, when considered together, are significant. Finally, Part II.D introduces a variable that takes the litigant-driven model into account in order to ascertain whether that model explains the decisional outcomes and whether the other models of decisionmaking remain significant even after considering the role of the parties to the litigation.

A. Testing the Legal Theory

Tests of the legal model of decisionmaking are difficult to design because of the difficulty in independently verifying the correctness of a

275. Partial correlation differs from multiple regression in that it provides a correlation coefficient for only the single variable of interest, not the control variables.

decision. To avoid this difficulty, this Article uses the legal procedural requirements of deference to inferior institutional entities, including district courts, as a test of the power of the legal model.[276] It is well established that circuit courts are to defer to district court findings regarding the facts of the case.[277] Thus, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[278] Trial court findings of fact are to be reversed only if they are "clearly erroneous."[279] Deference to lower courts is not applicable to all issues—the district court's pure findings of law generally do not receive deference from circuit courts.

Given the legal standard's command of some measure of deference to district courts, one would expect that appellees would prevail more often than appellants if circuit court judges were adhering to the legal model. The circuit court deference to lower courts is limited to factual determinations, and it is impossible to predict a quantitative amount of deference that would be expected from single adherence to the legal model. One can at least predict that legal model deference would yield a larger number of affirmations than reversals, depending on the particular appellate review standard. None of the other models of judicial decisionmaking would necessarily predict this outcome, so it could be associated with the legal model.[280] Another study has used the "rule deference" hypothesis to analyze Supreme Court decisions.[281] The Appeals Court Database provides the data to test this hypothesis for the circuit courts of appeals.

The Appeals Court Database codes decisions for "treatment," including whether the district court holding was affirmed, reversed, vacated, remanded, or certified to another court.[282] This analysis simplifies those values into a binary variable describing whether the lower court holding

276. Deference to a superior institution, such as the Supreme Court or Congress, might only demonstrate the operation of the strategic model. If a judge defers to an inferior institution when the law so directs, that should count as evidence supporting the legal model.

277. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440-41 (2001) (discussing this standard and the way it calls for deference to lower courts on findings of constitutionality of punitive damages).

278. Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

279. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

280. The unconstrained political model would suggest that judges vote their preferred outcomes, regardless of legal procedural standards. The strategic model would suggest that judges vote the preferred outcomes of the Supreme Court, regardless of such standards. Nor would the litigant-driven model predict that appellees would prevail more often, unless they happened more often to be repeat player "haves." While some might consider deference in itself an ideology, it is not ideological in the sense predicted by the political model.

281. *See* Cross & Nelson, *supra* note 14, at 1487-88.

282. *See generally* Donald R. Songer, *The United States Courts of Appeals Data Base Documentation for Phase 1*, *at* http://www.polisci.msu.edu/pljp/ctacode.PDF (last visited July 26, 2003).

was affirmed (coded "affirmed" or "petition denied" or "appeal dismissed") or reversed at least in part (all other categories). Of the 17,013 cases in the database for which valid codes were available, 64.2% of the decisions were affirmances, and 35.8% of the decisions were reversals. When tallied based on individual judge votes rather than on panel decisions, 67.2% of the votes were for affirmance, and 32.5% of the votes were for reversal.[283] Thus, there is an approximately 80% higher probability that an appeal will result in a total affirmance than that it will result in any sort of reversal or vacation of the lower court ruling. These simple summary data are highly consistent with the legal model hypothesis, which predicts a greater number of affirmances than of other outcomes.

Further analysis confirms that the legal model in fact explains the higher number of affirmances. The database also contains coding for the type of decision being appealed. These codes include codes for appeals from summary judgment rulings, appeals from trial verdicts, and appeals from postjudgment orders, such as j.n.o.v., but also include codes for other rulings, such as on attorney fees.[284] Under the legal model of deference, one would expect to see (1) the highest proportion of affirmances for appeals from trial; (2) a lower proportion for appeals of summary judgment rulings (which are not based on factual findings due deference from the reviewing court); and (3) perhaps an even lower proportion for appeals of j.n.o.v. rulings, because they typically reverse the judgments of a factfinding jury, which are due special deference. Table 1 reports the affirmance rates for full panel decisions for each of the different types of judgments appealed.

TABLE 1
PERCENT AFFIRMANCES

Trial judgment	64.1%
Summary judgment	57.6%
j.n.o.v.	49.7%

The relative probability of affirmance for the three types of orders is precisely as the legal model would project it to be.[285] The type of decision for

283. The different percentages for decisions and judge votes indicates that reversals are more likely to produce dissents than are affirmances.

284. The database also codes for appeals from other types of rulings, such as post-settlement orders, discovery rulings, and some cases that could not be categorized, but I exclude these from my comparison because they yield no obvious predictions.

285. The summary judgment numbers might seem somewhat high, as such legal determinations are not necessarily due any deference. In some circumstances, though, a summary judgment ruling may encompass factual findings, such as on admissibility of evidence, that are due deference by reviewing courts. *See, e.g.*, General Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997) (noting that different levels of deference may apply to different parts of summary judgment decision, which incorporates both findings

which the legal model is most likely to command deference—trial judgment—is the type for which deference is greatest. This stands as prima facie evidence of the validity of at least this legal model variable.

A second set of legal rules calls on the circuit courts to give varying levels of deference to the decisions of executive agencies, depending on the type of decision being reviewed. These standards of review include de novo review, review for substantial evidence, arbitrary and capricious review, review for abuse of discretion, and review for clear error. All but the first standard of review call for some amount of deference. While one would not necessarily expect cases decided under a de novo standard to yield more affirmances than reversals, the legal model would predict that at least the latter four standards would do so. The choice of a standard of review should, under the legal model, be "critical to the outcome."[286]

The precise degree of deference commanded by the different standards is somewhat ambiguous and certainly not quantifiable. Even the Supreme Court has admitted its failure "to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome."[287] Theoretical legal model differences between the standards exist, though, and de novo review is clearly the most intrusive. The clearly erroneous and abuse of discretion standards call for some degree of deference and are substantively the same standard.[288] The substantial evidence standard is sometimes considered more deferential than the clearly erroneous and abuse of discretion standards.[289] The arbitrary and capricious standard is generally understood to be the most deferential.[290] In sum, the expected ordering of the degree of deference required under the legal model would be as follows[291]:

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of fact and conclusions of law). One might, therefore, expect a slightly higher than 50% affirmance rate for summary judgment appeals.

286. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992).

287. Dickinson v. Zurko, 527 U.S. 150, 163 (1999).

288. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401 (1990) (referring to the two standards as "indistinguishable"). Under the clearly erroneous standard, the circuit court is to uphold the lower court's decision unless the panel has a "definite and firm conviction that a mistake has been committed." Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993).

289. *See* SSIH Equip. S.A. v. United States Int'l Trade Comm'n, 718 F.2d 365, 382 (Fed. Cir. 1983) (Nies, J., concurring) (reporting that "a 'substantial evidence' standard restricts an appellate court to a greater degree than 'clearly erroneous' review").

290. *See, e.g.*, *In re* Gartside, 203 F.3d 1305, 1312 (Fed. Cir. 2000) (noting that the arbitrary and capricious standard is "highly deferential" as compared to the substantial evidence standard); Munn v. Secretary of Dep't of Health & Human Servs., 970 F.2d 863, 870 (Fed. Cir. 1992) (calling this standard "the most deferential possible").

291. This ordering traces that of Francis M. Allegra, *Section 482: Mapping the Contours of the Abuse of Discretion Standard of Judicial Review*, 13 VA. TAX REV. 423, 461-73 (1994), and Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 689 (2002).

- Arbitrary and capricious
- Substantial evidence
- Clearly erroneous and abuse of discretion
- De novo

Table 2 reports the ratio of circuit court affirmances to reversals for each of these standards.

TABLE 2
AFFIRMANCES BY REVIEW STANDARD

Arbitrary and capricious	75%
Clearly erroneous	73%
Abuse of discretion	72%
Substantial evidence	70%
De novo	67%

These results are generally similar to what the legal model would predict.[292] The ordering of degrees of deference is roughly as articulated by the courts, though the substantial evidence standard is somewhat less deferential in fact than in prediction. While the relatively high degree of apparent deference under the de novo standard might seem surprising, the result is not implausible; it could simply indicate that the agency being reviewed was more often than not correct in its own legal determination.

The data are consistent with the prediction of the legal model, when only legal model variables are used as dependent variables. Courts affirm more cases than they reverse, and the ratio of affirmances depends on the nature of the lower court or agency ruling under review in the precise manner predicted by the legal model. These statistics clearly provide at least prima facie evidence of the legal model's validity. However, it is possible that some other variable could explain these results. For instance, there could be some correlation between the nature of the decisions reviewed and characteristics of the reviewing panel, such as ideology. Because presidents appoint both district court and circuit court judges, it might be that both judicial levels tend to have similar ideological compositions at any given point in time. If so, the political model would predict that lower court decisions would more often be affirmed for ideological reasons. The next section considers this possibility and the possible intervening effect of other strategic and litigant-driven variables.

292. This result is contrary to that reached by Verkuil, *supra* note 291. *See id.* at 742. Verkuil's research tied review standards to certain types of cases (e.g., social security cases and Freedom of Information Act cases). Consequently, his study's failure to find the predicted effect for review standards may be due to its associating review standards with particular doctrinal areas.

B. Testing the Political Theory

Ample evidence of some ideological decisionmaking on circuit courts already exists. The goal of this section is to supplement that research by testing the ideological decisionmaking with a control for the legal model (affirmance deference). A test of the political theory requires some measure of the ideological preferences of circuit court judges. As discussed above, the conventional measure of judges' ideological preferences has simply been the party of their appointing president.[293]

To test the legal and ideological variables together, this analysis uses the calculated variable LDIRECT for the ideological direction of the decision under review by the circuit court.[294] Table 3 is a cross-tabulation of votes to affirm or reverse, depending on the political makeup of the panel—as determined by whether the appointing president was a Democrat or Republican—when the decision being reviewed was a liberal one. This table describes all affirmances[295] but is limited to three-judge panels, excluding en banc decisions.

TABLE 3
AFFIRMANCE RATE FOR LIBERAL LDIRECT

Panel	Affirmance	Reversal	% Affirmance
3D	1006	578	63.5%
2D/1R	1307	872	60.0%
2R/1D	905	727	55.5%
3R	780	758	50.7%

Some clear ideological effect remains even after controlling for affirmances and reversals. A panel consisting entirely of Democrat appointees will affirm a liberal lower court decision about 13% more often than will a panel consisting entirely of Republican appointees. However, the legal variable remains relevant and relatively powerful. Regardless of the panel composition, an affirmance is more likely than a reversal of a liberal lower court decision, although the deference given by all-Republican panels is very slight. Table 4 reports the same data for cases in which the lower decision is conservative.

293. *See supra* Part I.B.3.

294. *See supra* note 274 and accompanying text.

295. For the legal variable, I use overall affirmances rather than the administrative review standards, because this provides a much larger number of cases and avoids the possibility that the court is manipulating results through its choice of review standard.

TABLE 4
AFFIRMANCE RATE FOR CONSERVATIVE LDIRECT

Panel	Affirmance	Reversal	% Affirmance
3D	1126	548	67.3%
2D/1R	1738	742	70.1%
2R/1D	1353	568	70.4%
3R	1251	442	73.9%

The direction of the results is again consistent with the ideological model, though the effect is distinctly less pronounced, revealing only a 6.6% difference between all-Democrat and all-Republican panels. The results are even more consistent with the legal model, as affirmances overwhelmingly predominate.[296]

Taking into account the ideology of the particular appointing president slightly improves the measure of judicial preferences. Mark Zupan has ranked presidents on a conservative-to-liberal scale according to their support for positions taken by the Americans for Democratic Action—their "ADA score."[297] The scores for the presidents roughly correspond to what the casual observer might expect.[298] This study associates with each judicial appointee the ideological score of his or her appointing president. The ideological score for each panel is simply the score of the ideologically median judge. Table 5 reports the affirmance rates for liberal and conservative decisions, grouped by appointing president of the median judge.[299]

296. The data reveal the rather surprising result that conservative lower court decisions are more likely to be affirmed than liberal lower court decisions by all panel compositions, including those that are all Democrat. While this is not obviously relevant to the present investigation, it is an interesting finding that demonstrates the importance of controlling for both legal and ideological analyses in judicial decisions.

297. *See* Mark A. Zupan, *Measuring the Ideological Preferences of U.S. Presidents: A Proposed (Extremely Simple) Method*, 73 PUB. CHOICE 351, 353-59 (1992); *see also* ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS OF THE U.S. COURTS OF APPEALS 79-80 (2001).

298. Higher numbers denote more liberal presidents. Carter, Johnson, and Truman were the most liberal presidents in the period considered, with scores of 81, 75, and 74 respectively. Reagan and the first President Bush were the most conservative, with scores of 0 and -1. Ford's score was 10, Nixon's was 19, and Eisenhower's was 35. While it might seem surprising that Bush was rated more conservative than Reagan (or Carter more liberal than Johnson), the system was based on the actual policy positions taken by presidents on major legislative proposals. *See* KUERSTEN & SONGER, *supra* note 297, at 138-62.

299. Zupan excluded Kennedy-appointed judges from his study because they were too few in number and could not readily be grouped with another president's judicial appointees.

TABLE 5
OVERALL AFFIRMANCE RATE BY APPOINTING PRESIDENT

	Conservative LDIRECT	Liberal LDIRECT
Reagan-Bush judges	75.0%	36.1%
Nixon-Ford judges	69.6%	41.2%
Eisenhower judges	75.2%	60.5%
Johnson-Truman judges	68.2%	69.6%
Carter judges	62.8%	47.2%

An ideological effect is clear, although it varies for each appointing president. Where a lower decision was liberal, a Johnson-Truman judge was 33% more likely to affirm than was a Reagan-Bush judge. This comparison is the greatest illustration of the ideological effect. When the lower decision was conservative, the difference in affirmance rates was much lower, explaining at most 12.2% of the differential (Reagan-Bush versus Carter). Still, these comparisons do not perfectly capture ideology because they are affected by differences in the absolute proclivities of certain judicial cohorts to affirm.[300]

The ideological effect for Republican appointees is most pronounced. Reagan-Bush and Nixon-Ford median judges, considered the most ideologically conservative, showed the most dramatic ideological influence, reversing most of the liberal lower court decisions that came before them, notwithstanding expectations of deference. They demonstrated some compliance with the legal model, in that they were more likely to affirm a conservative decision than to reverse a liberal decision, but this tendency was rather slight. Eisenhower-appointed judges, while producing ideologically directed results, still granted clear deference to even liberal lower decisions.

For judges appointed by Democrats, the ideological effect on outcomes was limited. Johnson-Truman judges showed no demonstrable ideological influence and considerable deference to even conservative lower court decisions, while Carter judges acted against their ideological preferences, giving much less deference to liberal lower court decisions than to conservative ones. The Carter judges in fact gave much less deference to liberal lower court decisions than did the Eisenhower judges. This finding is somewhat contrary to the conclusions of other studies of Carter appointees.[301] To explore this finding further, Table 6 reports affirmance rates by presidential cohorts, with criminal cases excluded.

300. For example, Carter appointees were relatively less likely to affirm lower decisions, whether liberal or conservative.

301. *See, e.g.*, Ronald Stidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16, 19 (1996) (reporting that Carter-appointed judges at both circuit court and district court levels were at least moderately liberal).

TABLE 6
NONCRIMINAL AFFIRMANCE RATE BY APPOINTING PRESIDENT

	Conservative LDIRECT	Liberal LDIRECT
Reagan-Bush judges	67.7%	43.6%
Nixon-Ford judges	58.3%	53.8%
Eisenhower judges	69.3%	62.7%
Johnson-Truman judges	59.2%	69.4%
Carter judges	50.9%	50.6%

This refinement sheds some further light on relative ideological bias. Carter appointees obviously were quite conservative in criminal cases but were less so in other cases, where they were nonideological and showed very little deference as a general matter.[302] Reagan-Bush judges remained quite conservative in noncriminal cases, and most of the presidential cohorts exhibited some ideological influence. Clearly, ideology has some effect on judicial decisionmaking within the circuit courts, but the nature and degree of that effect vary according to appointing presidents and case types. Only Reagan-Bush appointees were consistently conservative, with little deference to lower decisions in both criminal and noncriminal cases.

From these descriptive statistics, it is possible to estimate the relative importance of affirmance deference and ideology for different cohorts of judges. One can use the point halfway between the conservative and liberal affirmance rates for each cohort as a nonideological, neutral deference rate and, thus, ascribe departures from that neutral rate to ideology. This enables a comparison of the relative strengths of the affirmance deference and ideological factors for different cohorts of presidential appointees. While this approximation is not conclusive, it is at least reasonably nonbiased. Table 7 presents these estimates for all cases and noncriminal cases, by appointing president.[303]

302. This finding is consistent with the study by Stidham et al., which implicitly found Carter appointees to be much more conservative in criminal cases than in other cases. *See id.* at 19.

303. For the calculation, I added the conservative affirmance percentage to the liberal affirmative percentage, divided by two, and subtracted 50% to create a neutral deference affirmance percentage.

TABLE 7
AFFIRMANCE VERSUS IDEOLOGICAL IMPACT

	All Cases		Noncriminal Cases	
	Affirmance	Ideology	Affirmance	Ideology
Reagan-Bush judges	5.6%	19.4%	5.6%	11.1%
Nixon-Ford judges	5.2%	14.4%	6.1%	2.2%
Eisenhower judges	17.8%	7.4%	16.0%	3.3%
Johnson-Truman judges	18.9%	0.7%	14.3%	5.1%
Carter judges	5.0%	-7.8%	0.7%	-0.1%

Ideology is obviously a factor for most cohorts. Decisions in criminal cases are systematically more conservative for every presidential cohort and had a greater ideological component for most cohorts. The role of ideology is dramatically different for different presidential cohorts, nonetheless. The Carter cohort shows no liberal ideological effect. Only the Reagan-Bush cohort shows substantial ideological effect in all cases, an effect far exceeding the effects of deference. The ideological effects are not so profound for other cohorts.

This analysis supports two preliminary conclusions. First, one cannot generalize about models of judicial decisionmaking across all sets of judges, much less all individual judges. No single model consistently fits the results well. The relative impacts of the legal and political models are very different for different cohorts of judges and in different types of cases. Second, both models consistently have some measure of explanatory power. For every cohort, affirmances were more probable than reversals, and affirmances were at least 5% more probable for all but Carter-appointee noncriminal cases. The role of ideology was somewhat less consistent, at least in criminal cases, but still played a significant role for most judges.[304]

While Table 7 provides a plausible estimate of the importance of legal and political models, the ideal method for rigorously comparing the relative significance of legal deference and ideology in circuit court decisionmaking would be a multiple regression, in which each factor served as an independent variable for a dependent variable such as affirmance-to-reversal ratio or ideological direction of outcome. Although such an analysis is impossible using the available data, it is possible to determine relative significance of the variables through the method of partial correlations.

Table 8 summarizes the results of the partial correlation analysis. The dependent variable in the correlation is the ideological direction of the

304. The Carter judges are the most significant outlier. They simultaneously show little ideological influence and little deference to lower courts. The Reagan-Bush appointees are a second outlier, in their lack of deference.

outcome. Independent variables are affirmance deference and the ideological rating of the median panel member (each measure controlling for the other). This analysis attempts to determine whether the ideological direction of the outcome is explained better by the ideological preference of the median judge of the circuit court panel or by the ideological direction of the lower court decision and deference by the circuit court panel. Correlation coefficients are expressed as percentages per unit change, and statistical significance levels for the findings are in parentheses.[305] Results are provided both for all panels and for panels without Carter appointee median judges.[306]

TABLE 8
RELATIVE EFFECTS OF LEGAL AND POLITICAL VARIABLES

	All judges	No Carter judges
Affirmance deference	6.6% (.000)	7.3% (.000)
Ideology	5.3% (.000)	5.1% (.000)

The results show a measurable effect for both affirmance deference and ideology. The role of affirmance deference is slightly greater, particularly when Carter-appointee median judges are excluded.

Both the rough approximation in Table 7 and the more sophisticated partial correlation analysis in Table 8 support the validity of both the legal and political models. These results are still preliminary and could be explained by a different model of judicial decisionmaking. For example, the unexpected conservative results for Carter appointees and the very conservative results for Reagan-Bush appointees might be attributable to the strategic model and the oversight of a conservative Supreme Court at the time these decisions were rendered rather than to the ideologies of the particular circuit court judges. The following section considers this possibility.

C. *Testing the Strategic Theory*

The strategic theory predicts that circuit court outcomes will be determined by the ideological preferences of the current Supreme Court, which may review and reverse the circuit court decisions. A test of this theory requires a measure of Supreme Court preferences. Such a measure is readily available and has been widely used in social scientific research. The ideology of Supreme Court justices is commonly captured by a measure

305. As a practical matter, the percentages may somewhat overstate the role of ideology in real-world decisionmaking. The percentages are for a full 1.0 unit change in ideological score, while the greatest disparity among presidential cohorts is only a 0.82 unit change (Bush to Carter).

306. This analysis separates the Carter appointees because they showed unique results, with relatively little affirmance deference.

known as Segal-Cover scores.[307] These scores give each justice a rating on a liberal-to-conservative scale. The present test of the strategic theory uses the ideological position of the median Supreme Court justice for each year as a proxy for the overall ideology of the Court in that year. This measurement allows an examination of whether the circuit courts were responsive to the contemporaneous ideological makeup of the Supreme Court that could review their rulings.

The approach of testing the strategic model using only contemporaneous Supreme Court preferences contains a flaw typically not considered in the existing research: the contemporaneous ideological preferences of the Court may be stable over a number of years. For example, the current Supreme Court has had the same nine justices since Justice Breyer joined the Court in 1994. While nine years is an atypically long time for the makeup of the Court to remain unchanged, it is not uncommon for the Court to go several years with the same membership.[308] Moreover, a new appointment does not necessarily change the balance of preferences on the Supreme Court. For example, if a very conservative justice is replaced by another very conservative justice, the Court's median preference remains unchanged.

Consequently, a decision that appears to be strategically responsive to the contemporaneous preferences of the Court may in fact be based on the precedents set by that Court in recent years, a legal model variable. This study controls for the influence of precedent by creating a new variable, OldSC, representing the ideological median of the Supreme Court for the prior ten years. While the choice of ten years is obviously arbitrary, it provides some basis for evaluating whether circuit court judges are responding to the preferences of the contemporaneous Court (confirming the strategic model) or past Courts (confirming the legal model).

Table 9 reports the results of partial correlations on the ideological direction of the circuit court outcome for three equations. Equation 1 contains the contemporaneous Supreme Court ideological median, SCMed,

307. *See* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 560 tbl.1 (1989). Segal and Cover derived independent measures of ideology based on editorial reports at the time of a justice's nomination. These scores are commonly used in analyses of Supreme Court voting. *See, e.g.*, Richard C. Kearney & Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. POL. 1008 (1992); Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases*, 48 POL. RES. Q. 61 (1995); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993); Reddick & Benesh, *supra* note 224; Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. POL. SCI. REV. 96 (1992).

308. *See* Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 265 (1992) (outlining the history of "natural courts" and membership changes on the Supreme Court).

and Equation 2 considers both this median and OldSC. Each includes all decisions and all judges. Equation 3 is limited to criminal cases, which form a relatively high percentage of the Supreme Court's docket and, therefore, might be more subject to strategic calculation by circuit court panels.[309] Each cell of Table 9 presents the percentage of decisions attributable to each variable (taken from correlation coefficients), while controlling for the other variables. Significance levels are in parentheses.

TABLE 9
RELATIVE EFFECTS OF LEGAL, POLITICAL, AND STRATEGIC VARIABLES

	1	2	3
Affirmance deferenee	6.5% (.000)	6.6% (.000)	4.9% (.005)
Ideology	5.5% (.000)	4.8% (.000)	5.4% (.002)
SCMed	-0.9% (.336)	-3.9% (.000)	-5.7% (.001)
OldSC		4.2% (.000)	1.8% (.309)

The strategic response to the Supreme Court median turns substantially negative and insignificant once the old Supreme Court median is considered in Equations 2 and 3.[310] The effects for affirmance deference and ideological variables remain essentially unchanged after introduction of the SCMed variable. This evidence tends to negate an inference of strategic behavior by circuit court justices, even in the criminal cases where it was most expected. It is still possible, notwithstanding the significant negative effect of the strategic variable, that strategizing might explain an occasional particular decision for which Supreme Court review appeared especially likely.

The signifieant positive results for OldSC in the full database also provide additional confirmation for the validity of the legal model of circuit court decisionmaking. Circuit court decisions lag behind changes in the ideological makeup of the Court. There is no ideological or strategic reason for a circuit court panel to respond to the preferences of past Courts systematically. The legal model, though, predicts just such a response. The combination of procedural legal deference in affirmances and substantive legal deference to the precedent of the recent Supreme Court explains fully 11% of the variance in circuit court opinions in the full database, or more than twice that explained by circuit court ideology.

309. *See, e.g.*, Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again"*, 74 N.C. L. REV. 1559, 1559 (1996) (observing that "[i]n any given [t]erm, criminal cases comprise about a fourth of the Supreme Court's docket").

310. While the significant negative association is somewhat surprising, it is not implausible. Without OldSC, there was no significance to the association with SCMed. The significance arose with OldSC in the equation, which means that the negative association is attributable to the difference between SCMed and OldSC. This, in turn, means that circuit courts do not follow a change in Supreme Court preferences, which is precisely what the traditional legal model would predict.

The results for criminal cases are somewhat different. OldSC plays a lesser role when only criminal cases are considered, and legal variables are roughly equal in importance to ideological variables. The contemporaneous Supreme Court has an effect that is not only negative but also substantial in size. From this result it might seem that the circuit courts are affirmatively defying the preferences of the sitting Supreme Court—a result that no theory would predict. An alternative explanation for this result is that litigants are more aggressively pursuing appeals and new precedents when they believe that the Supreme Court is on their side, but the circuit courts are generally not responding. The next section tests the role of litigants in driving the composition of decisions.

The evidence examined to this point suggests a substantial role for the legal model—a lesser but significant role for the political model—and no role for the strategic model, at least in terms of case outcomes.[311] While these results suggest that factors such as law and ideology, but not strategy, are driving decisions, they may simply mask the litigation decisions made by strategic partics. The following section considers this possibility.

D. Testing the Litigant-Driven Theory

The litigant-driven theory of decisionmaking casts doubt on the findings of the preceding sections. As discussed above, the strict 50% hypothesis has serious flaws, but it remains possible that strategic repeat players are manipulating the path of the law with settlement decisions. The strategic theory predicts that repeat players should prevail a disproportionate amount of the time because of their interest in making favorable law through precedents. Moreover, the strategic theory suggests that litigant choices might effectively wash out the effects of other variables.

Testing thc litigant-drivcn theory requires introducing party types as variables. Table 10 reports the results of a regression using each of the available party types as a separate independent variable. The database breaks down parties into natural persons, businesses, associations and groups, the federal government, the state government, substate governments, and fiduciaries. The test includes all cases in the database. The dependent variable is affirmance deference, and results are broken down depending on whether the party was the appellant or respondent in the appeal.

311. The data permitted only a test of outcomes. Consequently, they cannot rule out the possibility that strategic considerations might play a role in the nature of the opinions. It is also possible that circuit courts respond strategically to the preferences of other institutional actors, such as Congress, rather than to those of the Supreme Court.

TABLE 10
PARTY EFFECTS ON AFFIRMANCE

	Appellant	Respondent
Persons	-1.3% (.091)	-0.6% (.476)
Businesses	0.0% (.993)	0.4% (.683)
Associations	-0.7% (.409)	0.2% (.805)
Federal government	4.2% (.000)	0.2% (.832)
Substate government	1.0% (.204)	-2.6% (.001)
State government	3.8% (.000)	0.9% (.259)
Fiduciaries	-1.4% (.112)	1.1% (.215)

The results in Table 10 show only mild support for the litigant-driven hypothesis. Federal and state governments are, as predicted, significantly more successful as appellants than random variation would predict. This suggests some strategic effect in choosing to appeal. Natural persons with little repeat-player interest are relatively unsuccessful as appellants, as anticipated by the litigant-driven model. However, the results for natural persons as respondents are statistically insignificant. Even before controlling for other variables, the size of the party effect was not great.

Incorporating litigant variables into the tests above is difficult because the dependent variable is ideological, and any type of party, such as the federal government, can be on either the conservative or liberal side of an appeal. Integrating the litigants into the model requires the identification of cases in which a particular type of litigant is systematically associated with a particular ideological position. This occurs in criminal litigation, where the government systematically opposes the rights of defendants.[312] Thus, in criminal cases, a federal appellant by definition is pursuing a conservative legal outcome. Table 11 incorporates the litigant variable of federal party into the partial correlations for criminal cases.

TABLE 11
RELATIVE EFFECTS OF LEGAL, POLITICAL, STRATEGIC, AND LITIGANT VARIABLES

	Criminal
Affirmance deference	5.0% (.004)
Ideology	5.4% (.002)
SCMed	-5.7% (.001)
OldSC	1.7% (.316)
Federal party	1.3% (.446)

312. In the database, rulings for the government in criminal cases are coded as conservative.

The effect of the presence of a federal party, with precedent-setting interest, was mild and not statistically significant. The inclusion of the federal party variable does not significantly alter the effects of other variables found in Equation 3 of Table 9. This result suggests that outcomes are driven more by judges than by litigants.

The data do not provide strong support for the economic litigant-driven hypothesis regarding judicial decisionmaking. Although government litigants tend to prevail more often, at least as appellants, the effect is not nearly as strong as the hypothesis would suggest. Nor do the data indicate that litigants strategically take advantage of the law and judicial ideological preferences in a way that robs those variables of independent significance. While it is very possible, and even likely, that strategic litigant decisions may influence the outcome of some cases, those cases appear to be isolated and infrequent.

CONCLUSION

The results of this study shed considerable light on the nature of judicial decisionmaking. The traditional legal model clearly explains a significant part of this decisionmaking, even after controlling for ideology and other variables. The legal model obviously leaves room for other considerations, though, since judicial ideology is also consistently a significant determinant of some decisions. The strategic model appears to explain little, if any, circuit court decisionmaking. The litigant-driven model, likewise, fails to offer adequate explanation for judicial decisions.

The dispute among theories of legal decisionmaking has been too binary (or quaternary, given the four theories discussed here), proceeding as if one theory must prevail and dispel the validity of all other theories. Weinrib's defense of legal formalism cautions that "once we step outside the most rigorous notion of internal coherence, the slide to nihilism is swift and easy."[313] Yet this claim is false. Acknowledging a material role for politics or strategy in judicial decisionmaking does not mean that legal reasoning is necessarily meaningless. The law may moderate the effects of political leanings in some cases or supplant them entirely in others. The presence of ideological or other determinants in some cases leaves a considerable role for the accurate operation of the traditional legal model.

Any empirical measure of the determinants of circuit court opinions is necessarily crude. Quantitative scales are only rough proxies for the concepts of interest. The variable for ideology is imperfect and likely underestimates the role of the political model. The tests for the legal model are likewise imperfectly specified and are also incomplete, as various legal considerations in circuit court decisions could not be operationalized at

313. Weinrib, *supra* note 23, at 1016.

all.[314] The test with the greatest explanatory power, summarized in Table 9, explains less than 20% of the variance of outcomes, leaving a considerable residual. This residual is probably attributable to legal and political factors that could not be captured effectively by the coding available in the database. A very detailed analysis of case facts may be necessary to produce a model with greater descriptive power.

The results of this analysis are also quite general and cannot necessarily be interpolated into particular areas of judicial decisionmaking. This study included all cases, or all criminal cases, in order to expand the sample size of the cases analyzed and to produce general conclusions about judicial decisionmaking. It is distinctly possible that studies of specific areas of the law could produce results varying from those found here. Thus, in cases of great political importance, the ideological effect might be greater than that identified in this research. This suggestion finds support in other research that has examined discrete areas of the law, such as review of administrative agency decisions.[315]

The results of this research illuminate Gibson's characterization of judicial decisionmaking as influenced by judicial preferences, judicial duties, and judicial abilities, complemented by the external effects of the parties to litigation.[316] This study indicates, though, that judicial duty, or the legal model, is the most powerful determinant. It generally explains more than do judicial preferences or the political model. There is no evidence that judicial abilities affect outcomes, when those abilities are operationalized as Supreme Court preferences and risk of reversal, though other constraints on judicial abilities could well explain some decisionmaking. The greatest constraint appears to be that of the law: the "neutral principles"[317] of the traditional legal model fare quite well as a descriptive model for judicial decisionmaking.

314. Because the proxies for attitudinal and legal variables are so rough, my results probably understate their true significance. *Cf.* Cross, *supra* note 9, at 303-05.

315. *See, e.g.*, Cross & Tiller, *supra* note 153, at 2173 (showing a much greater percentage of ideological decisionmaking in application of the *Chevron* doctrine).

316. *See* Gibson, *supra* note 8.

317. *See supra* note 18 and accompanying text.