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Institutions and Legal Consistency in the U.S. Courts of Appeals

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An abstract of
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James T. Laney School of Graduate Studies of Emory University
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Abstract

Institutions and Legal Consistency in the U.S. Courts of Appeals
By Joshua A. Strayhorn

Though judges face a professional obligation to decide cases according to pre-existing law, scholars of judicial politics have provided considerable evidence that they do not always do so, and instead often decide cases on the basis of their personal policy preferences. What factors explain whether or not judges follow the law? Prior research addressing the question of why independent judges defer to law is conflicted between legalist theories, which argue that judges hold strong internalized personal values that favor deference to law, and institutional theories, which argue that judges obey law because they are constrained by institutional arrangements and face potential consequences if they do not. In this project, I develop a theoretical framework for discriminating between these two accounts. I examine this question in the context of the U.S. Courts of Appeals, where the difficulties associated with consistently applying the law to every case are highly acute due to use of the three-judge panel system, where different, randomly selected groups of judges decide each case. Taking advantage of institutional diversity among the twelve U.S. Courts of Appeals, I assess whether the presence of institutions that provide more opportunities for peer-to-peer oversight of panel decisionmaking is associated with greater deference to law. Using data on the incidence of rehearings of panel decisions by a full court *en banc*, and on patterns of citation among Courts of Appeals panels, I provide evidence consistent with the institutional account and inconsistent with the legalist account.

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CHAPTER 1 INTRODUCTION

Why do judges follow the law? This question flows from a central conundrum in the design of judicial institutions, which concerns the tradeoff between judicial independence and judicial duty. Judges are expected to interpret the law faithfully and impartially; yet, as judges are made more and more independent from outside influence, they are also increasingly disconnected from incentives that might promote such faithfulness. Are judges meaningfully constrained by existing law even when they are given considerable discretion to pursue their own policy preferences? Why?

Though not all judicial systems are designed to maximize judicial independence,[1] and even highly independent judges must sometimes take into account the potential reaction to a decision of elected officials and the public (Clark 2011), the global trend has been toward greater insulation of judges from political or public pressure (Tate and Vallinder

[1] This is the case, for instance, in U.S. states whose judges are elected rather than appointed—judges are subject to the risk of removal by the public and may constrain their behavior in response. In some systems, judges are made accountable to executive or legislative actors via mechanisms such as periodic renewal or performance reviews.

1995). In the United States, public trust in the judiciary has grown substantially over time—carefully shepherded by the Supreme Court (Carrubba 2009)—to the point that even highly unpopular decisions are taken as legitimate by most members of the public, and do not seem to harm public trust in the courts (Gibson, Caldeira and Spence 2003, Gibson 2012). While this brings considerable benefits, giving the judiciary more freedom to take on important institutional roles such as acting as a counterweight to majoritarian overreach or aggressively protecting private property rights (cf. Dahl 1957, Landes and Posner 1975, North and Weingast 1989), it is not without costs. Independent judges acting sincerely may behave unpredictably. At the most extreme, highly independent judges may feel empowered to impose their personal preferences, ignoring statutory and constitutional law or judicial precedent. Though common law judges are expected to work within the parameters of existing law, if judicial decisionmaking is largely disconnected from personal consequences, this may create a moral hazard problem such that judges feel unconstrained by their normative obligations. Segal and Spaeth (2002) have argued that this dynamic largely describes the U.S. Supreme Court, explaining why the justices' behavior is strongly dependent on personal ideology and typically not constrained by precedent (see also Spaeth and Segal 2001).

This claim, that judicial independence implies a risk of more ideologically-driven judicial behavior, is not without its critics. Many scholars—and many judges—argue that this claim rests on an unrealistic portrait of judges' motivations (Landes and Posner 1975, Edwards 2003, Cross 2007, Epstein, Landes and Posner 2013). These critics downplay the importance of ideology and suggest instead that judges are primarily or at least substan-

tially motivated by a sense of obligation to the law, and when freed from the possibility of external influence, judges can be expected to act as faithful defenders of the rule of law (Breyer 1998). If this is true, and judges are responsible to the law for reasons other than the threat of accountability, then the above dilemma is not a serious one.

At the heart of this debate about the consequences of judicial independence is a disagreement about the behavioral foundations of the rule of law. The importance of the rule of law can hardly be overstated. As Carothers (1998) has noted, modern understandings of the state increasingly emphasize the importance of institutions that promote and protect the rule of law, and prevent laws from being abused or applied in an arbitrary fashion. Courts, because of their particularly direct connection to the law and its application, are especially well positioned to take on this important institutional role. When judges act to enforce pre-existing legal understandings, societal benefits follow; legislative policies are more durable and less subject to changing electoral trends (Landes and Posner 1975, Ginsburg 2003), and private actors can develop stronger expectations about legal outcomes (Caminker 1994). The existence of a robust rule of law has thus been linked to economic growth (North and Weingast 1989, Barro 1997, Acemoglu, Johnson and Robinson 2001, Stasavage 2002) as well as the protection of human rights (Cross 1999, Apodaca 2004).

Yet research on how highly independent judges actually make decisions suggests that judicial protection of the rule of law is not automatic. From early work by Pritchett (1948) and Schubert (1965) to more recent research by Segal and Spaeth (2002), for example, scholars of the U.S. Supreme Court have provided extensive evidence suggesting that

its justices decide cases largely on the basis of their personal ideologies, with the law mattering little. In response to this line of research, subsequent work has suggested that its boldest claims may be overstated, and that Supreme Court justices sometimes do have incentives to defer to precedent with which they disagree (e.g. Rasmussen 1994, Bueno de Mesquita and Stephenson 2002), and do so under some conditions (Richards and Kritzer 2002, Bartels 2009). Moreover, other courts in the U.S., such as the lower federal courts, are characterized by a stronger connection between law and judicial behavior (Zorn and Bowie 2010).

What this suggests is that there do exist conditions under which judges—even politically motivated ones—will defer to law and take on the important task of enforcing the pre-existing legal order. Because the rule of law is so important, it is vital that we understand how judges balance their individual preferences and their normative obligation to defend the rule of law. What incentives do judges respond to? Why do they defer to the law under some circumstances but not others?

Accounts of why independent judges would defer to pre-existing law can be placed into two broad categories—legalist and institutional. Legalist theories attribute judicial self-restraint to features of judges as individuals, such as high professionalism or deeply ingrained norms of appropriate behavior, that lead judges to place strong independent value on compliance with law. In this account judges faithfully uphold the law out of a sincere preference to do so, a preference strong enough to outweigh their own ideological leanings in all but the most extreme circumstances (Gibson 1978, Gillman 1996, Cross 1997, Benesh 2002). In this view, judges are not automatons who apply the law mechani-

cally, but neither are they purely ideological actors—they place independent value on the law and gain utility from legal fidelity. As a result, judges share similar goals and a common conception of how cases should be resolved, and work together as a team to achieve these goals as best they can (Kornhauser 1995).

Institutional theories, by contrast, explain judicial self-restraint as an outgrowth of what Howard (1981) has termed the 'group politics' of the judiciary. In this view, judges' interactions with one another within and across courts are important, and produce incentives that promote the rule of law. Institutional theories argue that judges obey law because of the potential for consequences if they do not. Posner (1995, 2008), for example, advances the claim that judges generally care deeply about their reputations and relationships with other judges, and that these concerns, though not material, can act as powerful constraints. Judges might also self-restrain out of a desire to avoid reversal by a higher court (Cameron, Segal and Songer 2000, Kastellec 2011) or to avoid creating legal inconsistencies that encourage more litigation and thus a higher workload (O'Hara 1993). In this view, judges frequently have fundamentally opposed preferences over how to decide cases, and legal consistency is a function of how well the judiciary is able to overcome internal disagreements and principal-agent problems.

This dissertation examines the question of whether independent judges obey the law for legalist or institutional reasons. In the project, I argue that even where judges are not accountable to external actors, the possibility of *internal* accountability—to their peers within the judiciary—encourages judges to defer to law rather than ideology. As such, I argue that the institutions that shape how judges interact—and the incentives that such

institutions create—are of central importance in understanding judicial behavior. Drawing on rich variation in internal processes across the U.S. Courts of Appeals, I show evidence that judges' institutional context has significant consequences for judicial fidelity to the law. Specifically, I provide evidence that the presence of institutions of oversight—those that make it easier for judges to hold one another accountable for legally inconsistent decisions—is associated with stronger adherence to precedent.

Though it rests on a subtle distinction, the question of whether judges respond to personal or institutional incentives is an important one with significant ramifications for our general understanding of courts and the rule of law. While in many contexts the answer to the question 'Do institutions matter?' is clearly yes, in the judicial setting this answer is not as obvious *ex ante*, precisely because judiciaries are often designed explicitly to free judges from institutional pressures and encourage sincere behavior. Though legalist and institutional arguments are not mutually exclusive, in that legalist preferences and institutional incentives may operate simultaneously and even reinforce one another, many argue that judges simply do not respond systematically to institutional considerations such as the possibility of reversal by a higher court (Klein and Hume 2003, Bowie and Songer 2009). If this is true, it has consequences for how we understand the foundations of the rule of law. If judges obey the law primarily because of sincere legalist preferences, then the rule of law rests on the character of individual judges and the extent to which they can resist the temptation to pursue ideological goals. If so, then politicized judicial selection (e.g. Binder and Maltzman 2002) may have especially problematic implications for the effectiveness of the courts, resulting in judges who are selected based on criteria other

than legal-mindedness. Moreover, if there is a relatively small pool of qualified legalist judges to choose from, then any expansion of the number of judicial seats in response to caseload growth may make it harder to staff the courts well and weaken the link between judicial behavior and law.

By contrast, if even self-interested ideological judges have instrumental reasons to protect the rule of law, legal decisions will be less arbitrary and more legitimate. If judges obey the law because of institutional incentives, these problems are not nearly so severe, and the rule of law is likely to be more robust. Indeed, in such a circumstance strategic behavior, rather than sincere, is more likely to produce normatively desirable outcomes. Further, if we can identify what types of institutions are most effective in creating incentives for independent judges to protect the rule of law, these lessons can be applied in other judicial contexts, providing leverage on new questions and potentially improving the design and performance of judicial institutions.

In addition to addressing these broad questions about judicial behavior and the rule of law, the project also examines the more specific question of how Courts of Appeals judges behave. Previous work on these courts has largely emphasized their subordinate role within the judicial hierarchy, examining questions such as when Courts of Appeals judges will obey Supreme Court precedent (Cameron, Segal and Songer 2000, Kastellec 2007). This prior work has to a significant degree omitted any treatment of individual circuits as independent institutions, focusing instead on this vertical relationship that the various Courts of Appeals share in common. However, the circuits are highly independent from one another and, because they have autonomy to set many of their own internal

rules, are not all the same. In the project, I describe the substantial variation that exists in how circuits have chosen to organize, and provide evidence that this variation has consequences for how effectively the circuits perform their functions. In short, I show that circuits matter. As a result, research on the Courts of Appeals that treats the circuits as interchangeable may be incomplete or even misleading, and the project's findings on this front suggest a variety of new directions for thinking about these courts, and how they relate to the Supreme Court.

Legal Consistency in the Courts of Appeals

For judges of the U.S. Courts of Appeals, who occupy the middle tier of the U.S. federal courts, applying legal rules consistently across the many cases they hear is both a central institutional mandate and a serious challenge. The Supreme Court lacks the capacity to oversee every decision made in the U.S. judiciary, viewing its role at the top of the judicial hierarchy as one of providing broad direction on major questions (Perry 1991). The Courts of Appeals are the *de facto* courts of last resort in most federal cases, operating with considerable autonomy and bearing responsibility for the authoritative resolution of multitudes of legal questions that do not attract the interest of the Supreme Court. As a result, the U.S. Courts of Appeals bear the overwhelming majority of the burden of seeing that the law is fairly and evenly applied on a case-by-case basis.

Maintaining the rule of law is a substantial challenge for the modern Courts of Appeals. In their original form, most circuits within the Courts of Appeals consisted of exactly three judges, each of whom heard every case. This made it straightforward for

these courts to maintain consistent, predictable circuit law and apply it the same way to every party before the court. Yet over time the number of cases in the federal courts has grown inexorably, necessitating expansion of the number of judges in each circuit and the adoption of the efficient but decentralized panel system, where three randomly selected judges hear each case. As a consequence of random selection, panels are often ideologically unrepresentative of the larger circuit. This means that in the aggregate, panel preferences are routinely in conflict with the law. For over 40 years, observers of the Courts of Appeals have expressed concern that this multiplicity of voices and possible panel combinations might erode the ability of the Courts of Appeals to issue rulings in a consistent fashion (Carrington 1969, Posner 1985, among voluminous others).

In this project, I explore the circuits' effectiveness in maintaining intracircuit consistency, or keeping their own three-judge panel decisions consistent with legally binding circuit law, as defined by their own prior rulings and Supreme Court precedent, in the face of these difficulties.[2] Because the maintenance of intracircuit consistency within a circuit is potentially quite challenging, the Courts of Appeals provide a natural and compelling setting for studying the question of why independent judges obey law. Circuit judges are highly independent. Further, they are independent not simply from extrajudicial influence, but also to a significant extent from influence within the federal judicial hierarchy. Judges in the federal courts are granted considerable autonomy, and are not subject to bu-

[2] While *inter*circuit consistency is also somewhat problematic for the rule of law, circuit judges, as a doctrinal matter, are obliged only to follow the law of their own circuit—as defined by their own rulings and by Supreme Court precedent—and not case law established by judges in other circuits. Moreover, some argue that intercircuit conflict is actually beneficial, because controversy helps rules to 'percolate,' giving the Supreme Court a better idea of their consequences before they act (Clark and Kastellec 2013). This argument is admittedly controversial, for a deeper discussion see Tiberi (1993).

reaucratic incentives such as merit pay or internal performance reviews. The most direct consequence that a Court of Appeals judge might face for a legally inconsistent decision is reversal by a higher court—either the Supreme Court or the judge's full circuit sitting *en banc*. Even this consequence, however, is quite rare in practice. Supreme Court review and *en banc* review are both discretionary, not mandatory, and occur infrequently. The Supreme Court currently reviews 75–80 cases per term. Some individual circuits routinely hear fewer than five *en banc* cases per year (Giles, Walker and Zorn 2006, Giles, Strayhorn and Peppers n.d.). These numbers are orders of magnitude below the tens of thousands of cases disposed of by circuit panels, who as a consequence nearly always have the final word.

Yet despite their considerable autonomy, it is widely agreed that the behavior of Courts of Appeals judges is substantially less influenced by ideology than behavior at the Supreme Court level (Gruhl 1980, Howard 1981, Songer and Sheehan 1990, Songer, Segal and Cameron 1994, Benesh 2002, Zorn and Bowie 2010). This suggests that the Courts of Appeals have been effective in maintaining intracircuit consistency even though the costs to judges of ideologically-motivated decisionmaking are seemingly small and the benefits potentially large. Indeed, the weakness and rarity of formal oversight procedures in the federal courts is the very reason why many claim that Courts of Appeals judges must obey the law at least in large part for reasons other than the strategic avoidance of *ex post* review (cf. Cross 1997, Benesh 2002, Bowie and Songer 2009, Zorn and Bowie 2010). Bowie and Songer (2009), for example, claim that circuit judges are largely unable to predict which of their cases the Supreme Court might consider worthy

of scrutiny, and as a result largely do not concern themselves with the Supreme Court's potential response when deciding cases. Similarly, Klein (2002) shows that Courts of Appeals panels do not attempt to anticipate the Supreme Court's preferences when deciding novel issues. Kornhauser (1995) argues that judges are best conceived of as a team with a common interest in deciding cases correctly, and that the inherent difficulty of applying complex case law to particular sets of facts—not ideological disagreement—is the main driver of legal inconsistency.

Others interpret this evidence very differently, and claim that though hierarchical review is indeed rare, this does not imply that it is ineffective. In this view, legal consistency in the federal courts is an equilibrium phenomenon, reflecting the effectiveness of institutions of principal-agent oversight. Cameron, Segal and Songer (2000), for example, argue that the Supreme Court's oversight procedures are remarkably efficient because the Court can combine prior information about panel ideology with information about the directionality of their decision to zero in on the most likely instances of lower court noncompliance (see also Clark 2009, extending this argument to *en banc* review). Thus a conservative Supreme Court might give particular scrutiny to liberal decisions handed down by liberal panels; such panels, knowing this, would be more likely to constrain themselves strategically (Westerland et al. 2010). Cameron (1993) and Kornhauser (1995) also offer a 'tournament' or 'cascading compliance' model in which a small amount of Supreme Court review can induce legal consistency over multiple lower courts, because each one regulates its behavior so as to avoid being the most extreme outlier—which then collapses to full compliance. Some argue that the efficiency of higher court oversight is aided by

the three-judge panel structure of the Courts of Appeals, which enables 'whistleblowing' behavior by a judge in the ideological minority on a panel. Such judges, if aligned with a potential reviewing court, can attempt—by writing a dissent—to signal to that court that a decision is an ideological outlier not consistent with precedent. Evidence of such behavior has been reported by Cross and Tiller (1998) and Kastellec (2007, 2011), though Hettinger, Lindquist and Martinek (2004, 2006) find evidence inconsistent with this account.

As the above makes clear, though most agree that the influence of ideology is substantially attenuated in the Courts of Appeals, there is no scholarly consensus as to why. Problematically, the two accounts of legal consistency detailed above make many observationally equivalent predictions. For example, each account expects judges to self-restrain most but not all of the time, pursuing ideological goals only in cases where they are especially salient to a judge. Each thus predicts an attenuated but modest relationship between ideology and behavior. While taking advantage of ideological differences across judges and courts may provide some leverage on this question (cf. Kastellec 2011, examining how behavior differs depending on whether or not judges are aligned with the Supreme Court), teasing out the relative influence of legalist versus institutional influences on judges is persistently difficult because the macro-level structural features of the federal judiciary that are largely thought to produce institutional incentives do not vary across circuits. This makes it impossible to assess the counterfactual, and examine whether judicial behavior differs depending on the presence or absence of particular institutions.

Yet though previous research has not taken advantage of it, the Courts of Appeals are actually an ideal setting for exactly this sort of counterfactual analysis. This is because though they are identically situated in the judicial hierarchy, the circuits do in fact vary a great deal in the internal, informal practices that define how they go about their day-to-day business. Moreover, as I will describe in more depth in what is to come, some of the dimensions on which circuit practices vary bear directly on the mechanism thought to create institutional constraints on the behavior of independent judges: the possibility of negative consequences for ideological decisionmaking such as reversal or loss of reputation among peers.[3]

Importantly, the relative effectiveness of institutional constraints depends not simply on the possibility of consequences but on the probability that they might occur. Just as the public cannot hold legislative actors accountable for evading judicial rulings that they do not know about or understand (Vanberg 2005), judges cannot hold one another accountable for legally inconsistent decisions in cases that they know little about or have not read. And, as the above discussion of the realities of Courts of Appeals caseload makes clear, there is a real risk that in the normal course of circuit business, many cases will be given little or no serious scrutiny beyond the panel stage.

In this chapter, I describe several informal institutions adopted by some, but not all, of the Courts of Appeals. These practices include a variety of approaches to screening and prioritizing cases, sharing and managing information, and overturning prior case law—practices which have developed separately within each of the individual circuit courts, in

[3]As I will discuss further, though these practices are not randomly assigned, they have been adopted somewhat idiosyncratically and do not appear to relate systematically to the political environments of the circuit courts, meaning that counterfactual analysis using cross-circuit comparisons can be informative.

some cases unofficially and behind the scenes. Because these practices have effects on things such as how informed circuit judges are about other judges' cases or how easy it is to overturn prior decisions, they affect the group politics of the individual circuit courts and may play an important role in incentivizing legal consistency.

To preview what is to come, in subsequent chapters I show evidence that these local institutions do have sizable relationships with levels of legal consistency in circuit decisionmaking, and that these effects are consistent with an institutional account of judicial choice—with, e.g., institutions that enhance internal accountability also encouraging greater adherence to precedent. This evidence shows that institutional constraints do play a significant role in explaining behavior in the Courts of Appeals, and suggests that circuit behavior is not simply a function of legalist judges behaving sincerely.

At the same time, this evidence suggests revisions to our understanding of how institutional constraints operate in the federal courts. In addition to providing evidence about the relative importance of institutional over legalist constraints, the project also suggests that formal oversight structures of the judicial hierarchy are not fully sufficient to explain circuit behavior. Though this project will not directly assess the question of whether local circuit institutions or macro-level hierarchical features of the judiciary are relatively more effective in promoting legal consistency in circuit decisionmaking, I do present evidence that local institutions have substantial impact. This is important because if formal oversight within the judicial hierarchy were fully constraining, there would be no room for local institutions to explain any variation in circuit performance. This suggests that critics who assert that certiorari and *en banc* review are of only weak to moderate importance

in explaining Courts of Appeals behavior might perhaps be right—but that this weakness is compensated for by the presence of internal institutions that also mitigate many consistency problems.

Further, while this project's main focus is to examine the relative power of legalist versus institutional explanations of judicial behavior, a second motivating idea behind it is to suggest that prior work's sole focus on structural features of the federal courts may be quite limiting, and that to understand Courts of Appeals behavior fully it is important to dig deeper and examine instead how judges regulate their own environment and solve their own problems. While theories that emphasize structural features of the judicial hierarchy are appealing in terms of parsimony, one element absent from this line of theorizing is any treatment of individual circuits as independent institutions. Circuits are more than loosely organized groups of potential panel judges. Judges in a circuit work closely with one another, developing long-term collegial relations, and may be more responsive to scrutiny by their immediate peers than scrutiny from a distant superior court (Edwards 2003). Each circuit constitutes a distinct body with its own identity and institutional continuity. Most importantly, panel decisions become circuit law. Legal inconsistency among panels has consequences that are felt at the circuit level, such as the creation of an incoherent body of precedent that confuses trial judges and encourages more appeals. As such, legal inconsistency is an organizational concern within the Courts of Appeals, which has motivated attention and innovation. As I detail below, the circuits have responded to the challenges of rising caseloads and decentralized decisionmaking by adopting a variety of institutions designed to improve their overall performance and promote legal consistency.

Judicial Reform

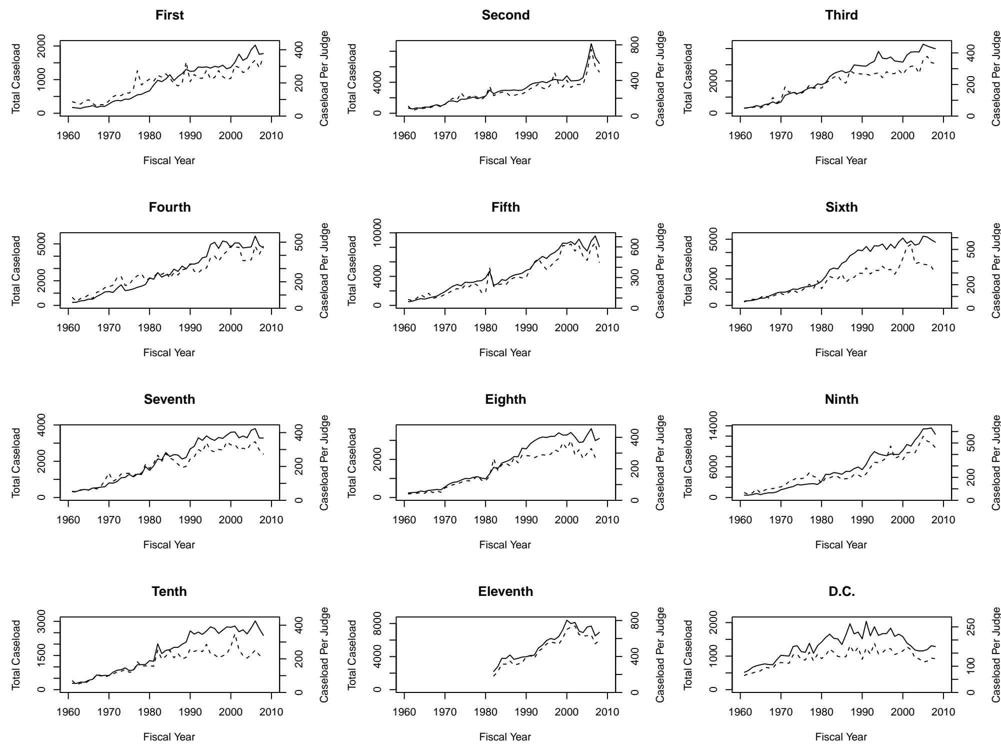
What prompts the Courts of Appeals to innovate, and adopt the diverse administrative reforms that are the focus of this project? The story of the Courts of Appeals is largely one of adaptation to caseload growth and the increased role of the federal judiciary. The Courts of Appeals were established under the Evarts Act of 1891, which created permanent judgeships at a third, intermediate tier of the federal court system and released Supreme Court justices from the duty of 'riding circuit,' or hearing trial and appellate cases in the country's various judicial districts (see George 1999, for a detailed historical discussion).[4] This act was initiated in response to complaints that the Supreme Court was overburdened with cases, and unable to clear its docket in a timely fashion (Federal Judicial Center 2013). The solution to this problem was the creation of the writ of certiorari, which enabled the Court some discretion to choose its cases, and placed a significant share of the workload burden in the federal courts on the newly created Courts of Appeals.[5]

Thus from the beginning the Courts of Appeals have been tasked to clear the bulk of federal court caseload—to provide litigants with an outlet for one guaranteed appeal of decisions at the district court level while freeing the nine justices of the Supreme Court from dealing with the many uninteresting or unmeritorious appeals that might otherwise clog their calendar. Since the Evarts Act, overall caseload in the federal courts has steadily grown larger and larger, placing more pressure on the Courts of Appeals' ability to process

[4]The Congress did not completely eliminate the *ad hoc* circuit courts until 1911, at which point the permanent Courts of Appeals were given sole ownership of their intermediate appellate role.

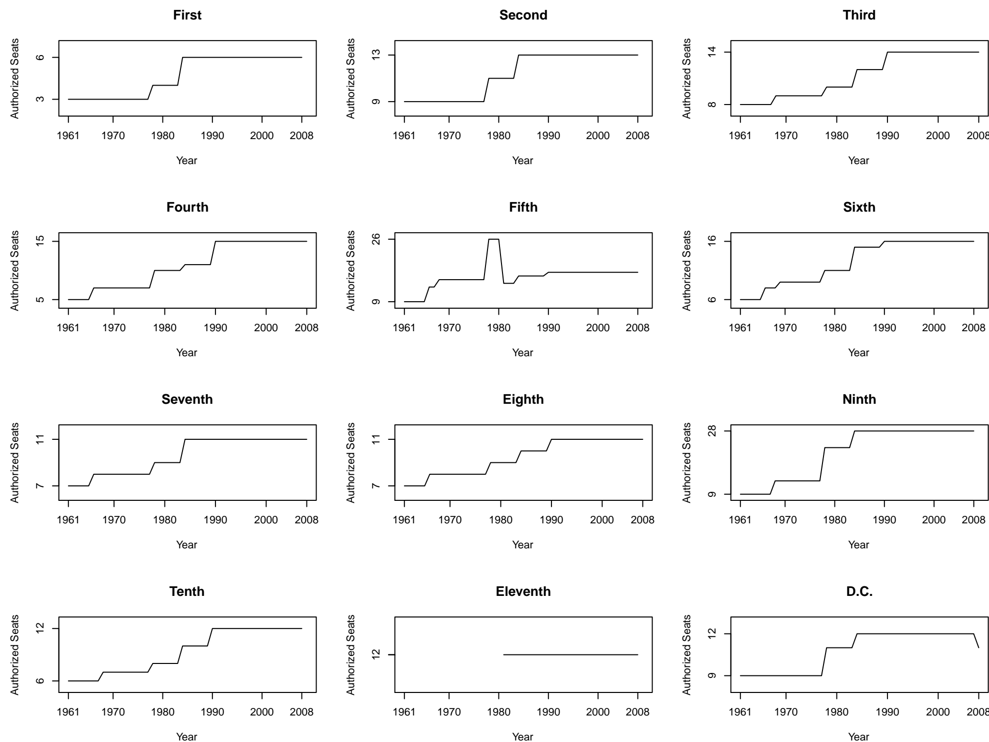
[5]The Supreme Court still retained many areas of mandatory jurisdiction despite the 1891 act; various subsequent bills, particularly two in 1925 and 1988, removed the remainder of this mandatory jurisdiction such that the Court now has nearly complete discretion over which cases it reviews (Rehnquist 2001).

Figure 1.1: Total and Per-Judge Caseload Trends, by Circuit



it. Figure 1.1 shows the dramatic trends over time in caseloads for each of the circuit courts. Total caseloads (the solid line) have not only grown substantially, but staffing of the bench has also not kept pace, resulting in per-judge caseloads (the dashed line) that have increased by similar proportions. Figure 1.2 shows the number of seats authorized by Congress for each circuit. Most circuits have had only a handful of seats added since the 1960s. Notable exceptions are the Ninth, which currently has by far the most authorized judgeships in the nation, and the Fifth, which was expanded considerably just before creation of the Eleventh circuit in 1981, which split the Fifth in two. However as the per-judge caseload data indicate, even in these circuits, growth in the number of judgeships

Figure 1.2: Authorized Seats, by Circuit



has not been sufficient to keep individual judges' caseload burdens steady, and as a result judicial resources have grown more and more stretched over time. As a result of these trends, many judicial reform efforts in the Courts of Appeals have been motivated simply by concerns of capacity or efficiency.

As an example, while the Evarts Act stipulated that each Court of Appeals would be made up of three judges, caseload growth would soon result in expansion in the number of appellate judgeships. In 1911 Congress established a fourth seat on some of the existing circuits, while retaining statutory language indicating that the Courts of Appeals should sit in threes—resulting in the current system of panel rotation (George 1999). Subsequent

caseload growth would result in piecemeal legislation further expanding the circuits, to the point that most now consist of between eleven and fifteen judicial seats. Other reform efforts within the Courts of Appeals also reflect efforts to dispose of cases more efficiently. Two institutions examined in depth in this project—case screening and selective publication—reflect efforts by the Courts of Appeals to find administrative solutions to the problem of large caseloads. For example, case screening, a time-saving procedure by which some cases are disposed of without oral argument, was initially developed on an experimental basis in the late 1960s by the Fifth Circuit—at the time the busiest in the nation—and quickly adopted by most remaining circuits after endorsement by the Judicial Conference of the United States (Langner and Flanders 1973, Haworth 1973). Another practice discussed below, the informal *en banc* procedure whereby three-judge panels may alter circuit precedent following a vote by the rest of the circuit, is similarly designed to save time, allowing the circuit to sidestep the slow-moving *en banc* process in some instances (Kanne 2008).

At the same time, some of the choices made by Congress and the Courts of Appeals in favor of greater case-processing efficiency have necessitated tradeoffs, with deleterious consequences for other institutional goals of the Courts of Appeals such as legal consistency and fairness. As a result some judicial reform efforts have been directed at attempting to mitigate the damage done by changes directed at the circuits' capacity or efficiency. For example, one side-effect of the expansion of the circuit courts beyond three judicial seats is the risk that case outcomes may differ depending upon panel composition, and may sometimes fail to reflect the viewpoint of a majority of judges on the circuit as

a whole. This risk caused some circuits to begin rehearing cases *en banc*, with all active judges on the circuit taking part, to permit the larger circuit to weigh in on important questions. This procedure, when initially adopted, was not directly authorized by statute but done *ad hoc* by some circuits before being endorsed by the Supreme Court in *Textile Mills Securities Corp. v. Commissioner* (1941) and subsequently by Congressional law (cf. *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.* 1953).

Some of the institutions discussed below also reflect these considerations. Some circuits temper their selective publication rules, which stipulate that judges may write some opinions more casually and designate them non-precedential, by requiring unanimous agreement among all three panel judges before this can be done. Though this rule allows judges to use their time more efficiently, there is some risk that panels may be tempted to use it too often, even in cases that consider novel legal issues. A unanimity rule may prevent some abuses of the procedure. Pre-filing circulation, wherein opinions are circulated to the full circuit for approval prior to official release, may also serve such a function, enabling judges to stay better informed about what their colleagues are doing in other cases. The D.C. Circuit, the earliest adopter of this procedure, has used it since shortly after it began hearing cases in divisions in 1938 (Groner 1941, *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.* 1953). Though historical records concerning the reasons for its adoption seemingly do not exist due to its age, it is likely that this procedure was adopted in response to this change, as a way of compensating for the fact that all judges would no longer take part in all cases.

In general, reform in the Courts of Appeals has most often occurred in response to

increasing caseload pressure. As noted, the Fifth spearheaded the creation of case screening in response to its own crowded docket. Another circuit that has made many active efforts at reform is the Ninth. Since 1981, when the Fifth was split in two with creation of the Eleventh Circuit, the Ninth has been the nation's largest Court of Appeals, both by caseload and number of authorized judgeships. Not coincidentally, the Ninth has also been the subject of persistent skepticism, with scholars and policymakers asking if it is too large to carry out its duties effectively (Hellman 1989, Becker 1998). The Ninth, in turn, has gone to great lengths to audit and improve its internal procedures. In the 1980s the Ninth carried out a massive, multi-year effort, the Ninth Circuit Innovations Project, designed to consider and implement various reforms (Cecil 1985). The Ninth's size has made them particularly interested in reforms that promote efficiency, such as case bundling, where cases on similar issues are paneled before the same judges, but led them to explicitly reject more time-consuming procedures such as pre-filing circulation of draft opinions (O'Scannlain 2004). By contrast less busy circuits have been more likely to adopt institutions such as the latter. Thus as a result of variation in their circumstances, such as differences in the extent of caseload pressure, variation in number of judges assigned to a circuit at different points in time, or other idiosyncrasies such as how geographically spread-out a circuits' boundaries are (cf. Cohen 2002), the circuit courts have developed very different approaches to internal administration.

Judicial Administration Through a Political Lens

Judicial reform efforts are often characterized by a distinct lack of discussion of the potential for ideological disagreements among judges about the law. Indeed, if one were to draw inferences about judicial behavior solely from judges' and judicial administrators' comments about the goals of legal reform, one would most likely conclude that the legalist model of Courts of Appeals decisionmaking is correct. For example, Judge Kanne (2008), describing the Seventh Circuit's informal *en banc* procedure, says nothing about its potential use in resolving ongoing disagreements between panels and the full court, instead emphasizing more technical matters such as the speed with which it allows the Seventh to respond if a precedent is rendered obsolete by a Supreme Court ruling.

At a casual glance these reform efforts are directed at seemingly minor administrative details that have little to do with the politics of the judiciary. In this project I argue that taking the nature of these judicial reforms at face value, and assuming them to be politically neutral, would be a mistake. As we know, institutions may serve functions other than those they are intended to serve, and may persist for reasons not foreseen at the time of their creation (March and Olsen 1984). Moreover, the examination of a set of institutions that seem, on their face, to only serve narrow legalist goals has potential to be very informative with respect to the question of whether legal or institutional constraints better explain judicial behavior. If the institutions I discuss below are indeed only neutral administrative reforms, then they should simply have the effects judges claim they do, improving the efficiency and performance of the circuit courts in a fashion unrelated to politics or ideology. If, on the other hand, they have consequences—perhaps unintended

ones—for the internal politics of the Courts of Appeals, then we might expect them to have very different consequences for observed behavior.

In the remainder of this chapter, I describe several internal institutions found in the U.S. Courts of Appeals and provide details of their operation. In the following chapter, I build on this descriptive material and make theoretical predictions about the likely impact of these institutions under a political model of the Courts of Appeals, in which judges seek to maximize the impact of their personal policy preferences, subject to institutional constraints.

I focus on the specific set of institutions that I do because each is present in some, but not all circuits. This permits comparison of circuits with and without various institutions, as described above. Thus I ignore institutions which do not vary across the circuits or which are present in only a single circuit, such as the Ninth Circuit's limited *en banc*, requiring the participation of only a subset of its judges for an *en banc* panel.[6]

Institutions in the Courts of Appeals

While political scientists often implicitly regard the Courts of Appeals as essentially a single institution (or else as 12 instances of the same basic institution), there is actually substantial variation in how they operate on a day-to-day basis. This goes beyond differences in collegiality or organizational culture which may influence how judges interact with one another (as suggested by Edwards 2003); these courts vary considerably even in

[6]While it would be possible to compare behavior in circuits with or without an institution in the latter case, analysis of institutions present in only one circuit would be at much greater risk of being confounded by unobserved circuit-level factors than is the case when looking at institutions shared by several circuits.

their internal rules and processes. Nor is this trivial variation—these courts have adopted substantially different strategies for managing their workload, sharing information, and maintaining consistency across cases.

The circuits do of course share many features in common. They are all bound by applicable statutes, primarily found in section 28 of the U.S. Code, defining their basic operation and place in the judicial hierarchy. These statutes stipulate that judges are to sit in panels of three, and establish the power of these courts to sit *en banc*.[7]

In addition the circuits are also bound by the Federal Rules of Appellate Procedure, which, while they are also located in Title 28, are actually promulgated by the Supreme Court under statutory authority and without need for congressional approval.[8] Much of these rules' function is to provide guidance and instructions to litigants in properly filing federal appeals; the rules contain extended discussion of matters as mundane as page limits and margin size on filed briefs.

More relevantly, the Federal Rules of Appellate Procedure also establish basic guidelines for determination of which cases are to be granted oral argument, and criteria for *en banc* consideration. The individual courts themselves have some control over the exact application of both of these sets of rules, however, as will be described below.

Beyond their basic shared features, the various circuits have adopted a variety of procedures designed to improve the efficiency with which they dispose of their cases, and to

[7]See also *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.* (1953), in which the Supreme Court granted wide latitude to the lower courts to set their own *en banc* standards, subject only to requirements of transparency and openness.

[8]Though the Supreme Court bears ultimate responsibility, the process of amending these rules typically involves considerable discussion and input from circuit and district judges, through the institution of the Judicial Conference of the United States.

enhance their own ability to issue consistent rulings. Some of these institutions are noted formally in the circuits' local appellate rules or internal operating procedures. Others are long-standing informal practices, which we know about only because of information provided by judges.

I will focus first on two broad categories of internal organization which relate to panel decisionmaking. First, rules which are used to sort cases by difficulty and level of importance, and second, rules which enhance the amount of information available to judges about their court's activities and its body of law. Following that, I will discuss *en banc* practices.

My information on internal practices comes from a variety of sources, including each court's Local Rules and Internal Operating Procedures, documents published by the Federal Judicial Center (McKenna 1993, McKenna, Hooper and Clark 2000, Hooper, Miletich and Levy 2011), published research, and a recent survey of Courts of Appeals generously shared by Todd Peppers (2009).

Screening and Selective Publication

As Cross (1997, pp. 286–7) notes, many judges express the view that the bulk of the business of the Courts of Appeals is made up of 'easy' cases, on which the law is so abundantly clear that all reasonable judges would reach the same conclusion. While 'hard' cases receive most of the attention (scholarly and otherwise) and make up the bulk of the business of the Supreme Court (see discussion in Segal and Spaeth 2002), the circuits' non-discretionary jurisdiction implies that they will be forced to deal with a large number

of non-meritorious claims.

Amusingly, Cross reports various scholars' and judges' off-hand guesses as to the proportion of cases which are 'easy' and finds estimates ranging from as low as 5% to as high as 90%. The understanding of what constitutes a 'hard' case obviously varies from person to person,[9] but that said, there can be little doubt that Courts of Appeals judges consider cases to have 'degrees of difficulty' and organize much of their day-to-day work around this fact.

By example, consider this description of the Ninth Circuit's practices by McKenna, Hooper and Clark (2000, p. 163):

> Case-management attorneys also assign a weight to each appeal. The weights—S, 3, 5, 7, and 10—reflect the complexity of each appeal and the amount of judge-time the staff attorney predicts will be spent on the matter. S-weight cases are cases in which the law is well settled and it appears that oral argument would not assist the decision process. Ten-weight cases are the most complex. The court's weighting and issue-tracking systems help to equalize the workload among panels and facilitate consistent disposition of similar issues.

The Ninth is not alone in this practice. All circuits have a case-sorting process. The primary outcome which depends on these processes is the choice of whether or not to grant a case oral argument.

[9] And for practically-minded judges, this understanding likely differs from the meaning used by legal theorists, who have devoted considerable time to the question of whether there exist indeterminate legal rules, such that there can exist no single 'correct' answer under the law. As a starting point see Dworkin (1975).

The Federal Rules of Appellate Procedure require oral argument to be allowed in all cases except those in which a panel of three judges agrees unanimously that the case is frivolous, is one in which the central issue has already been authoritatively resolved, or that oral argument would not help the court because the briefs and record are adequate.[10] Determination of the exact meaning of these criteria, and which judges will make the determination, is left to the Courts of Appeals. Only one circuit, the Second, routinely schedules oral argument for all cases (excepting appeals from incarcerated *pro se* litigants and some immigration appeals).

As these criteria might suggest, denial of oral argument is supposed to be reserved for the most routine of cases. As a result, cases which are not granted oral argument are typically given somewhat less consideration than orally argued cases. They are usually (and in some circuits always) disposed of by short summary orders, rather than full-length published opinions. This means that these cases are likely subject to extraordinarily little *ex post* scrutiny, either from the Supreme Court or from the full circuit.

The twelve circuits vary in oral argument on two main dimensions. First, whether this determination is made by random panels or by a separate screening panel, and second, the extent of involvement by the clerk of the court or staff attorneys in the screening process.

In all circuits, the three judges who are empowered to deny oral argument are then also immediately responsible for the disposition of non-argument cases. Some circuits (the First, Second, and Sixth) simply have their randomly-assigned argument panels also deal with a small number of non-argued cases when they meet; the rest have special screening panels for the purpose. The latter typically stand for long periods of time as a

[10]F.R.A.P. 34(a)(2).

single unit—at the most extreme (in the Fifth Circuit) for a full year.

Though the Federal Rules of Appellate Procedure require judges to make the final determination about argument status, many circuits rely heavily on non-judge staff to initially slot cases into 'tracks' according to difficulty. Indeed, only in the Third and Tenth Circuits do judges make the initial determination about argument status for all cases.[11] In other circuits the initial determination is made by staff attorneys or by the clerk's office, and ratified by either the screening panel or decision panel.

A related sorting procedure is the decision whether or not to publish an opinion in an argued case. A circuit's published opinions—that is, those which are printed in the Federal Reporter—are considered to speak for the full circuit and to constitute binding precedent for the circuit and its subordinate district courts.[12] Unpublished opinions do not have precedential weight and subsequent panels, and district courts, are free to (legitimately) ignore them.[13] This process is designed to allow judges to sort cases according to their level of importance and to avoid cluttering the case law with uninteresting opinions. It is relatively rare, though not unheard of, for unpublished opinions to receive *en banc* scrutiny or a certiorari grant.

As noted already, non-argued cases are rarely published. The circuits' non-argument rates track relatively closely with their overall publication rates (McKenna 1993), though with some variation. Some circuits publish most of their orally argued cases, others pub-

[11] Judges act as initial screeners in the Fifth for cases in some issue areas.

[12] Some circuits make further distinctions between unpublished opinions and memorandum opinions, but the practical importance of the two is the same—they are not printed in the Federal Reporter and are not precedential.

[13] Prior to the adoption of F.R.A.P. 32.1 in 2007, in fact, some circuits prohibited even citations to their own unpublished opinions. Circuits are no longer free to restrict citation in this manner. The rule change does not, however, grant precedential weight to unpublished opinions.

lish only a subset.

The circuits each have their own official criteria for which cases should merit publication. The broad strokes of these are very similar and largely concern the novelty of the case. Some are light on detail, such as the Third circuit's I.O.P. 5.3, which states only that a case which 'appears to have value only to the trial court or the parties' shall be given unpublished status. More common is an approach like that of the Fifth Circuit, which has a more specific, 6-item list of criteria (Fifth Cir. I.O.P. 47.5.1):

> Therefore, an opinion is published if it:
>
> (a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;
>
> (b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;
>
> (c) Explains, criticizes, or reviews the history of existing decisional or enacted law;
>
> (d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;
>
> (e) Concerns or discusses a factual or legal issue of significant public interest; or
>
> (f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.

Much more important than the formal criteria, though, are the practical ways in which the publication decision is made. Here the primary variation is in whether unanimity is required for a decision to be given non-precedential status. In some circuits all three panel judges must agree on this decision. A few circuits also have 'triggers' which guarantee publication, such as presence of a separate opinion, reversal of the trial court, or presence of a published trial opinion.

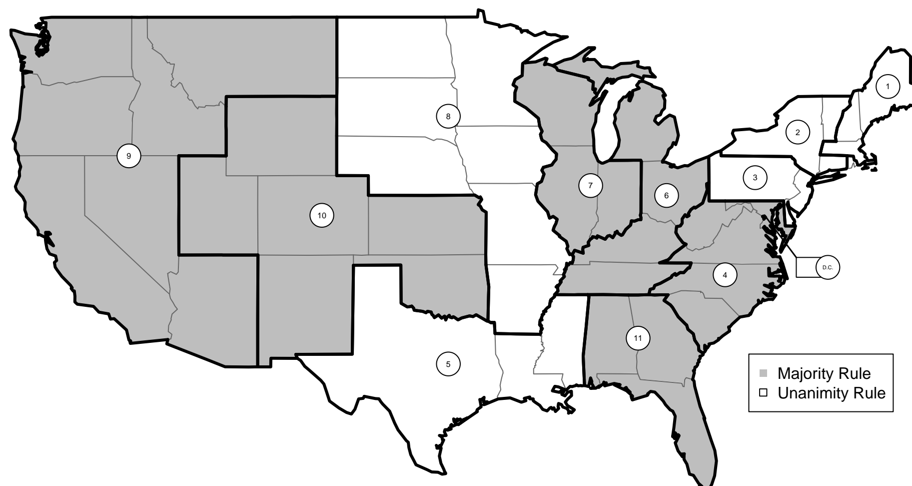
Figure 1.3 shows decision rules for publication status across circuits, broken down by whether the circuit requires unanimity to declare an opinion non-precedential, or merely agreement by a majority of panel judges. As can be seen, the First, Second, Third, Fifth, Eighth, and D.C. Circuits require unanimity to make a case non-precedential.[14] The Fourth, Sixth, Seventh, Ninth, Tenth and Eleventh require only a majority vote (Langner and Flanders 1973, McKenna, Hooper and Clark 2000). With respect to other publication triggers, the Second, Third, and Ninth publish all cases with separate opinions. The First, Sixth, Ninth and Tenth publish opinions which review a published opinion of another court. The Third, Fifth, Seventh and D.C. Circuits publish opinions which reverse a lower court or agency.[15]

Screening and publication practices have been subject to substantial criticism from judges and legal academics. Both Merritt and Brudney (2001) and Wasby (2001), for example, find evidence of considerable ideological influence in both the decision to send a case to the non-publication track as well as in decisionmaking in such cases themselves, suggesting that the above standards are not applied as neutrally as advertised.

[14] Additionally, in the Eighth Circuit the opinion author may unilaterally choose to publish his or her own opinions.

[15] The Seventh's rule applies only to reversals of published trial opinions or agency decisions.

Figure 1.3: Selective Publication Rules by Circuit



Baker (1994) argues that screening and publication rules have compromised certain values, such as transparency, but also concludes that it is inconceivable that the Courts of Appeals could have flourished without such reforms, owing to caseload growth and the enormous necessity of efficient decisionmaking in the modern court era. Indeed, the efficiency gains associated with these practices are the primary argument in their favor. By allowing judges to restrict sharply the time spent on routine, unimportant cases, it frees them up to devote more effort to crafting clearer, higher quality rules and to maintain consistency and coherence within the circuit's binding precedents more effectively (Kozinski and Reinhardt 2000).

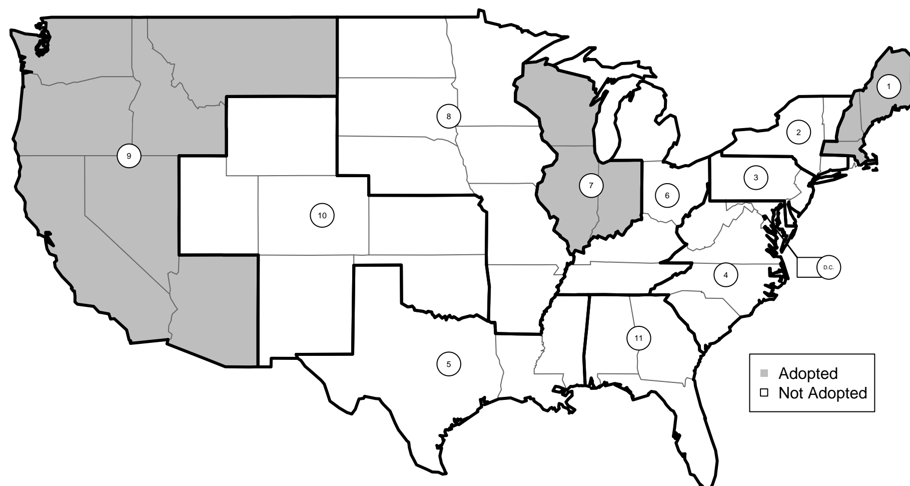
Case Bundling

Particularly on larger courts, it is not uncommon for a circuit to find itself in the awkward position of having handed down two contradictory panel decisions concurrently, due to a lack of coordination by panels. One avenue for resolving such instances, of course, is *en banc* rehearing (as described by Ginsburg and Falk 1991, p. 1024). However, because rehearing is costly and undesirable, some circuits have developed alternative procedures to attempt to prevent such occurrences. These methods involve issue tracking and case bundling. When a case is filed in a bundling circuit, it is coded by a staff attorney or clerk, who notes which issue (or issues) the case touches on. This information is then stored in an electronic database which judges and staff may access for research.

Five circuits, the First, Second, Fifth, Seventh, and Ninth, use some sort of issue-tracking process. Three of these, the First, Seventh, and Ninth, additionally use this information to attempt to schedule cases on similar issues before the same panel (Cecil 1985, McKenna, Hooper and Clark 2000), as shown in Figure 1.4. A given three-judge panel combination is typically scheduled together for a full day's oral arguments. On a bundling circuit, the panel may be assigned a selection of cases presenting substantially similar questions, instead of a hodgepodge. When cases cannot be bundled for some logistical reason, these three circuits also use the tracking information to notify panels when other cases raising similar issues are under consideration by a different panel at the same time.[16]

[16]The Second Circuit does not schedule cases by issue but does use tracking information to notify panels of concurrent cases. Central staff track only a subset of frequently-recurring issues in the Second. However, in all cases the presiding judge circulates a memo to the full court indicating the issues in play. The Fifth maintains an internal database of cases and issues but does not use the information for notification or bundling.

Figure 1.4: Case Bundling Adoption by Circuit



This practice can prevent the embarrassment associated with inconsistent decisions being handed down simultaneously. It may also, as Fitzpatrick (2008) notes, have the more subtle effect of allowing judges to delve more deeply into a specific legal issue instead of spreading their time across multiple unrelated questions. This may improve the overall quality and clarity of their decisionmaking on that single issue.

Pre-Filing Circulation

The Courts of Appeals vary substantially in how they collect information about recent rulings and disseminate it to judges. Because of their heavy caseload and the complexity

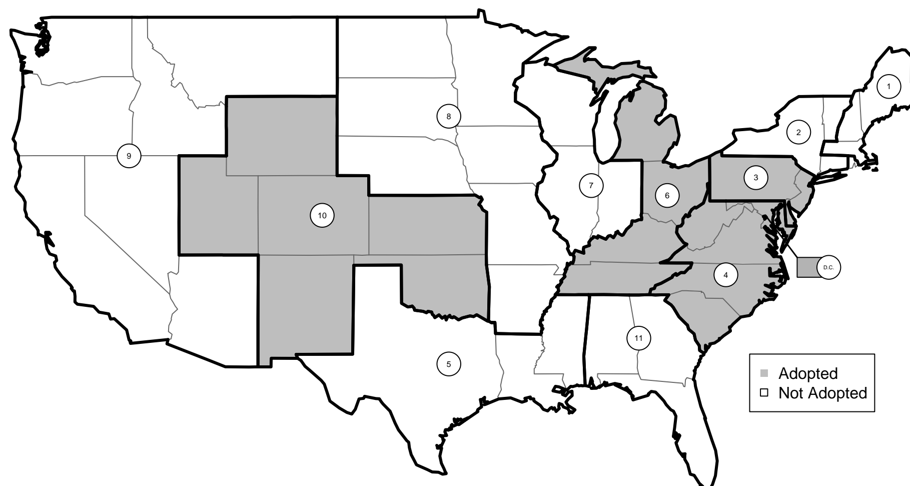
of federal law, the informational demands placed on judges are extreme. Judges may of course take individual initiative to stay informed—reading cases, devoting clerk resources to researching particular questions—and may as a group keep up to date through informal discussion. Some circuits, recognizing the difficulties associated with this unstructured option, have instead chosen to routinize this process in an interesting way.

Five of the twelve circuits use some form of routine, mandatory pre-filing circulation of opinions.[17] In these circuits, whenever any opinion is to be issued by a three-judge panel, a draft is first circulated to all other active non-panel judges on the circuit before being officially filed. This gives the other judges some amount of time, typically eight to ten days, to view and comment on the decision before it becomes a decision of the court. In extreme cases, the off-panel judges may use this window to request rehearing of the panel decision *en banc*. In the Third Circuit, for example, "circulation to non-panel active judges contains a request for notification if there is a desire for en banc consideration" (Third Cir. I.O.P. 5.5.4). More importantly, however, this practice also provides judges with the opportunity to read and raise concerns with draft opinions that may be important, but not sufficiently so to warrant a full *en banc* rehearing. As a result, potential mistakes can be pointed out and corrected without the expense of the *en banc* process. This is, in part, how the process is characterized in public comment by Third circuit judge Edward Becker (1998).

> In this way the judges read them before they are filed, and by email correspondence frequently point out problems with the circulating opinion in terms of

[17] A few other circuits retain the option of pre-filing circulation at the panel's discretion, or under special circumstances such as the informal *en banc*, discussed below.

Figure 1.5: Pre-Filing Circulation Adoption by Circuit



> the consistency and coherence of circuit law. This process often heads off problems, better caught before the opinion is filed.

As Judge Becker indicates, this practice provides judges with an informal method of making suggestions or critiques to proposed opinions prior to their publication. Hooper, Miletich and Levy (2011) describe the Fourth and Tenth Circuits' processes similarly, noting that draft opinions on the Fourth "are provided to the nonsitting judges, including the senior judges, and their comments are solicited" (p. 105), and that "during the 10-day prefiling circulation of opinions for publication in the Tenth Circuit, nonpanel judges may raise questions or suggest changes to the authoring judge" (p. 37). The Fourth Circuit also

requires all off-panel judges to acknowledge receipt of draft opinions in writing before they can be published (Fourth Cir. I.O.P. 36(a)).

Judge Becker goes on to discuss the other informational feature of pre-filing circulation: it provides a stronger incentive for judges to spend the time needed to read the output of the court.

> Most importantly, in this way, a judge can 'master' circuit law. (He or she could, of course, read all the slip opinions after they are filed, but there is no pressure to do so at that time.)

Because pre-filing circulation invites off-panel judges to participate, and provides panel judges with an opportunity to respond to critiques of their draft opinions before the decision is made public, it provides judges with stronger incentives to read and digest their colleagues opinions than is the case on circuits without it, where some judges indicate that they do not necessarily read filed opinions in a timely fashion upon their release (see O'Scannlain 2004). Moreover, as Judge Becker hints, on some circuits there may exist a degree of peer pressure to read opinions during this window that adds to this incentive. The ideal result would be judges who know their own circuit's law extremely well and who would thus be less likely to make mistakes in their application of it, and less likely to inadvertently introduce intracircuit inconsistency.

As Figure 1.5 indicates, the circuits which use this practice are the Third, Fourth, Sixth, Tenth, and D.C. Circuit Courts of Appeals. The scope of this practice varies somewhat by circuit. On the Third, Sixth, and Tenth Circuits, only to-be-published opinions

are circulated. On the Fourth, all opinions in orally argued cases are circulated. In the D.C. Circuit, opinions in all cases are circulated.

Informal *En Banc*

The central formal mechanism of oversight on the Courts of Appeals is *en banc* review by the full circuit.[18] Yet despite the seeming importance of the *en banc* option, actual *en banc* cases are quite rare, and indeed their frequency has been in decline since the 1980s. In 2008, only 33 cases were heard *en banc* in all twelve Courts of Appeals combined (cf. Giles, Strayhorn and Peppers n.d.). Many circuit judges view them as an enormous hassle, and as something which should be reserved only for the most unusual circumstances (Wald 1999). Because of the high costs and rarity of *en bancs*, several circuits have adopted a practice designed to allow the circuit to alter its own precedent without the need for convening the full court. This has been termed the mini-*en banc* (Bennett and Pembroke 1986), or informal *en banc* (Sloan 2009).

Though the exact details vary, this practice permits a three judge panel to overturn circuit law, but only after circulating the opinion to all non-panel judges and receiving their assent prior to filing. Circuits using this practice additionally require a footnote or statement in the panel opinion stipulating that it was circulated in this manner. The upshot is that panels may change the direction of existing circuit law with the approval of the full

[18]Only the Ninth, because of their size, sits *en banc* with fewer than its full complement of active judges. They use what they term a limited *en banc* procedure. Though all active judges vote on whether to grant the case *en banc* review, the actual *en banc* panel consists only of the chief judge, and ten others chosen at random (Ninth Cir. R. 35-3). Though the Ninth is the only circuit which uses this practice, the statute authorizing it (the 1978 Omnibus Judgeship Act) applies to all courts with more than 15 active judgeships. As a result, the Fifth and Sixth Circuits would also be authorized to use a limited *en banc*. These courts have not adopted such a practice.

court.[19] On circuits without the informal *en banc*, 'law of the circuit' doctrine applies and only the *en banc* court is empowered to expressly overturn prior circuit precedent. Thus, relative to circuits without the informal *en banc*, this institution subsidizes the *en banc* process, providing circuits with a cheap way to engage in a form of activity that ordinarily requires an exceptional expenditure of time.

Circuits vary in the degree of formality attached to this process. Only one circuit, the Seventh, has laid out the practice in their local rules (Seventh Cir. Rule 40(e)). In the D.C. Circuit the informal *en banc* procedure is known as an *Irons* footnote. This refers to the case *Irons v. Diamond* (D.C. Cir. 1981) in which the court first used the practice. Though it is not part of their local rules, the D.C. Circuit does publish a document describing the practice and its uses which is available to the public (*Policy Statement on* En Banc *Endorsement of Panel Decisions* 1996).[20]

The First, Second, and Tenth Circuits are also occasional users of the informal *en banc*, but as Sloan (2009) describes, their approach to it is less formalized. Indeed in the Second and Tenth, Sloan notes even the lack of a clear case establishing and justifying the use of the procedure—instead the earliest cases to use it simply do so with little discussion.[21] Figure 1.6 shows the locations of the circuits which routinely use this practice.

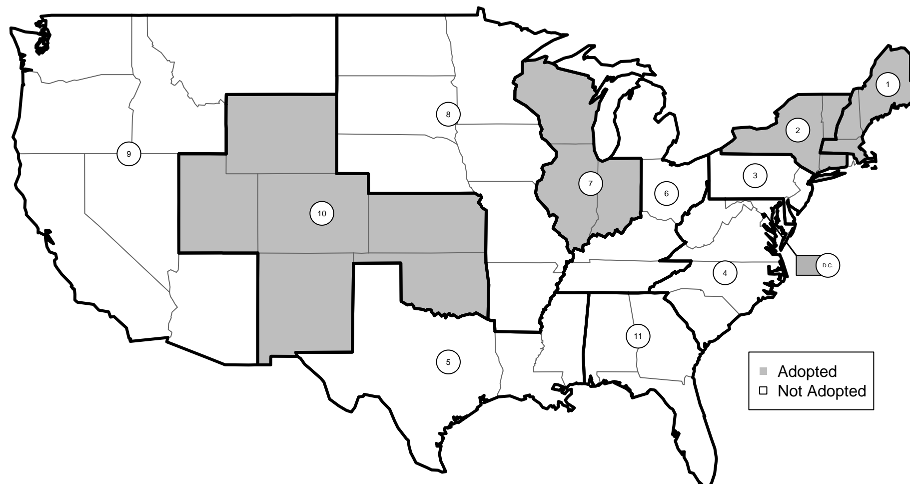
The circuits that use the informal *en banc* vary in the decision rule used in endorsing the panel opinion. The D.C. Circuit requires unanimity from all active judges. By all

[19]This is also interpreted to imply that cases which panels chose not to circulate cannot be read to have overturned circuit law. Several examples of language to this effect from Seventh Circuit cases are provided by Judge Kanne (2008).

[20]This document is only public as of 2008, but has been in use internally since at least 1996 (Sloan 2009).

[21]Sloan also notes instances of other circuits flirting with the idea of using the informal *en banc* before ultimately rejecting the practice.

Figure 1.6: Informal *En Banc* Adoption by Circuit



appearances, so does the Tenth Circuit.[22] By contrast the First and Seventh use majority rule, treating the vote the same way as a standard *en banc* poll. The Second's decision rule, based on the frequency of use of the institution, appears to be majority rule.

Because it is contrary to 'law of the circuit' doctrine in some respects, this practice is potentially controversial. Sloan is highly critical of it, arguing that the standards for its use are not clear and that it hides important legal change in footnotes. Because informal *en banc* circulation is at the panel's discretion, non-panel judges may sometimes believe that decisions should have been circulated when they were not. There is ample room for confusion as to whether a panel is altering circuit precedent, or merely adding to it—as

[22] Sloan finds no instances of non-unanimous use of the practice in Tenth Circuit decisions.

well as over whether circuit precedent has already been altered by intervening Supreme Court precedent, in which case 'law of the circuit' doctrine does not apply.[23]

Plan of the Project

Because the twelve circuits have only selectively adopted the above institutions, and because they vary so substantially in their operation, they present a ripe opportunity to examine the broad question of how and why institutional variation influences judicial behavior, and whether it can ultimately promote legal consistency in judicial decisionmaking. While the discussion above has been primarily descriptive, the larger point of this project is to examine whether internal institutions have political consequences, and whether they can tell us something deeper about judicial decisionmaking and judicial politics. In the next chapter, I expand on this discussion, developing a theoretical framework by which to understand the potential political consequences of these institutions. In doing so, I focus specifically on the ramifications of each institution for internal oversight within the Courts of Appeals—that is, the extent to which judges regulate and constrain other judges. This framework then provides a context within which to analyze each particular reform.

I then proceed to empirically test the predictions flowing from this theoretical framework. In Chapter 3, I compare competing predictions of this institutional theory and its major alternative, the legalist argument that reforms are simply neutral administrative improvements to a depoliticized judiciary. In Chapter 4, I present evidence that certain

[23]This latter confusion was the source of considerable dispute in *In re Sealed Case II* (D.C. Cir. 1999), where Judge Henderson, concurring in *en banc* rehearing, was highly critical of the original panel's decision partially overruling a prior case in light of Supreme Court precedent without circulating the opinion subject to *Irons*.

reforms are associated with greater constraints on ideological behavior, as anticipated by the institutional framework, using a novel dataset of citations among Courts of Appeals opinions. Finally, in Chapter 5 I sum up the broader implications of the study and present directions for future thinking about the Courts of Appeals and how they fit within the judicial hierarchy.

CHAPTER 2

SELF-POLICING ON COLLEGIAL COURTS

The institutions described in the previous chapter represent internally developed efforts to cope with the challenges faced by the U.S. Courts of Appeals as a result of their massive caseloads and decentralized structure. When judges and judicial administrators discuss their own internally conceived reforms, it is clear that they are concerned with the implications that such institutions have for intracircuit legal consistency. For example, Judge Becker (1998) notes that the Third Circuit's pre-filing circulation practice is intended to reduce problems with "...consistency and coherence of circuit law." Collins Fitzpatrick, current Circuit Executive for the Seventh Circuit, states the following about the reasons for adoption of issue tracking and bundling: "...I raised with Judge Swygert the idea of having appeals with similar legal issues argued before the same panel of judges. The idea was that it would help insure consistency of decisions" (Fitzpatrick 2008, p. 537). The D.C. Circuit's policy statement regarding use of their informal *en banc* procedure—locally known as an Irons footnote—states that one justification for its use is in "...resolv-

ing an apparent conflict in the prior decisions of panels of the court." (Policy Statement on *En Banc* Endorsement of Panel Decisions, D.C. Cir. 1996, p. 1). Both the degree of attention paid to legal consistency within the circuits and the development of institutions attempting to deal with it suggest that legal inconsistency is viewed by the Courts of Appeals as a circuit-level problem with circuit-level solutions.

Alone, however, such public statements from judges tell us little about the exact nature of the problems such institutions are intended to solve nor about which solutions are most effective. One possible perspective is that internal reforms are narrowly administrative, directed simply at improving the efficiency of decisionmaking on already depoliticized courts. An alternative view, and the one advanced in this project, is that internal organization matters to the extent it has consequences for what might be termed 'group politics' (cf. Howard 1981) in the Courts of Appeals—how intracircuit disagreements are resolved and how deviations from such resolutions are policed. In this view, the Courts of Appeals are inherently and deeply political, but capable of overcoming political differences and functioning as healthy institutions.

In this project, I argue that behavior in the Courts of Appeals is best understood in terms of institutional incentives. In this chapter, I lay the theoretical groundwork for empirically testing this claim by leveraging the institutional variation discussed in the previous chapter. The end goal of the chapter is to identify a set of theoretical predictions that discriminate between a state of the world in which judges respond to institutional incentives, and one in which legalist considerations dominate. This chapter will first provide a general framework for understanding this distinction, and then go on to engage

in a broader discussion of how various features of the Courts of Appeals setting and of particular institutions reforms can be understood within this framework.

In my discussion of institutional incentives, I argue that even ideological Courts of Appeals judges should be expected to possess a strong interest in internal control and attendant incentives to monitor one another's behavior. Yet though judges may possess such incentives, success in maintaining an effective system of constraints is not automatic. Judges' interest in collective self-policing exists in tension with a countervailing preference to conserve resources—time and effort—made scarce by the heavy workload of the Courts of Appeals. In settings where institutions are favorable, and judges possess more effective formal and informal means of influencing one another's behavior, individual judges will be more likely to participate in internal monitoring of their peers, resulting in greater legal consistency.

I argue that variation in the capacity and willingness of judges to engage in internal oversight and control of their own circuits' collective behavior is crucial to understanding behavior in the Courts of Appeals and these courts' role in the federal judiciary more broadly. Throughout the project, I argue that Courts of Appeals judges are political—in the sense that they have varying policy views that they would like to see imposed, but also proactive—meaning that they take a direct interest in the policy outputs and overall institutional performance of their courts and work to improve them. Though Courts of Appeals judges do not always agree among themselves what the law should be, they can often agree that legal inconsistency is undesirable and make an effort to overcome it. Internal reforms such as those discussed in the previous chapter, I argue, can provide

stronger incentives to participate in this type of regime, improving internal oversight and circuit performance. Below I discuss the specific institutions described in the previous chapter in light of this perspective, deriving expectations about which institutions should be anticipated to have effects on judges' incentives to monitor one another's behavior. This discussion will then allow institutional variation across the circuits to be leveraged to test whether this institutional model explains circuit behavior better than a legalist model.

The Broader Theoretical Context

Current scholarship on the Courts of Appeals largely focuses on examining whether judges' behavior is constrained or unconstrained, and by what mechanism(s) such constraints might operate, if indeed they do. The enduring puzzle of the Courts of Appeals is that their behavior appears to be substantially less ideological than that of the Supreme Court, such that personal ideology is less predictive of behavior, and legal factors such as the state of precedent on an issue play a more important role (e.g. Songer, Segal and Cameron 1994, Benesh 2002, Hansford and Spriggs 2006, Sunstein et al. 2006, Zorn and Bowie 2010, Westerland et al. 2010). There remains an active debate about how best to explain this finding.

Two alternative views of this puzzle are commonly advanced in the literature. In one view—the institutional or principal-agent account of Courts of Appeals behavior—circuit judges are less ideological because they are constrained by the possibility of subsequent review, whether by the Supreme Court or by the circuit *en banc*, and not free to vote ide-

ologically in every case (e.g. Cameron 1993, Cameron, Segal and Songer 2000, Kastellec 2007, 2011, Clark 2009). This perspective is fundamentally about oversight, examining hierarchical relations in the judiciary through the lens of principal-agent theory, and thus expects legal consistency in circuit decisionmaking to rise and fall with the relative effectiveness of mechanisms of monitoring and review. A major alternative view downplays the importance of oversight, instead attributing Courts of Appeals behavior to the strength of legalist norms regarding appropriate behavior by judges (e.g. Gibson 1978, Gillman 1996, Cross 1997, Benesh 2002). In this view circuit behavior should be largely independent of principal-agent considerations such as the likelihood of reversal, as judges should be expected to value compliance with legal norms over policy preferences in the vast majority of circumstances. Notably, the norms explanation suggests that a political model of judging is largely inappropriate when applied to the Courts of Appeals because value conflicts are of less importance than legal principles to circuit judges, particularly given that most Courts of Appeals cases are not of extraordinary policy importance (Cross 1997).

While the legalist perspective provides a relatively straightforward account of why policy-interested judges might behave non-ideologically, the institutional account of this puzzle is slightly more nuanced, depending heavily on an equilibrium logic. In the latter account, the threat of subsequent review acts as an omnipresent background variable that shapes day-to-day decisionmaking, deterring ideological voting and resulting in high levels of legal consistency. Critics of this hierarchy-centric view of the courts often claim that the conditions necessary for this equilibrium to hold are simply not present. For

instance, scholars have noted that the Supreme Court possesses extraordinarily weak formal sanctioning powers. Formal rebuke via reversal may occasionally be embarrassing for lower court judges but carries with it no actual material penalty such as loss of employment (Cross 1997, Klein and Hume 2003, Bowie and Songer 2009).[1] The deterrent effect stemming from reversal may be much weaker if lower court judges do not perceive it as having real consequences. Similarly, there is some evidence that the Supreme Court would not consider most Courts of Appeals cases worth their time regardless of the outcome. Perry (1991) finds consistent evidence that Supreme Court justices choose cases based on the importance and difficulty of the legal question presented, and only very rarely grant cert for the explicit purpose of reversing a defiant lower court judge. Giles, Walker and Zorn (2006) find evidence that *en banc* review is similarly driven largely by legal importance considerations. The implications of this fact are made clear by Bowie and Songer's (2009) reports of circuit judge assessments of the likelihood that individual cases could be heard by the Supreme Court, who express difficulty predicting precisely which cases the Court might take, but generally claim considerable confidence in predicting those which are not remotely likely to be reviewed. In the words of one judge quoted therein, "most of our cases clearly will not be reviewed, and we all know that" (Bowie and Songer 2009, p. 396).

The debate between legalist and institutional theories can be understood in very simple terms as a debate over the relative weight of different elements of the judicial utility function. Consider a judge whose ideological preferences conflict with precedent in a

[1] Some, e.g. Segal and Spaeth (2002), argue that frequent reversal may reduce judges' chances of subsequent appointment. However, Courts of Appeals judges do not generally agree with this assessment and consider their reversal record of little or no importance in such considerations (Bowie and Songer 2009).

given case. It is possible to view legalist and institutional theories in a common framework by conceiving of the judge's utility function as being composed of four parameters: b, the policy benefit to the judge of deciding preferentially; c_L, the legal cost, or the internal cost to the judge of violating his or her internalized values and breaking with precedent; c_I, the institutional cost, or the external cost associated with reversal or reputation loss that may follow from being seen breaking precedent; and p, the probability that institutional costs are actually imposed by a judges' peers or superiors. Let the judge's utility for compliance with precedent be normalized to 0, and his or her expected utility for deciding preferentially be $b - c_L - p(c_I)$.

Trivially, in this framework a judge will break precedent when the benefit is greater than the expected costs. What this simple exercise highlights, however, is the different way that each theoretical perspective thinks about the costs of preferential voting. In the legalist framework, the internalized personal cost, c_L, is thought to be very high due to judges' legalist preferences, while expected institutional costs, $p(c_I)$, are so low as to be irrelevant because formal sanctions within the federal courts are both rare and weak in effect (e.g. Cross 1997, 2007, Bowie and Songer 2009). By contrast, the institutional perspective asserts that institutional costs are the more important factor because the Supreme Court and circuit *en banc* courts possess effective methods of maximizing their threat to override errant panel decisions (Cameron, Segal and Songer 2000, Lax 2003, Kastellec 2007), while individual judges' legal costs are either very small or, at the least, not so large as to render institutional considerations irrelevant. The key distinction is that personalized legal costs for breaking precedent, c_L, arise from individual judges' values and

are thus always paid, while institutional costs, c_I, may or may not be relevant to a judge's choice depending upon whether institutional constraints are or are not effective.

There continues to be an active scholarly debate about which set of costs is most relevant to Courts of Appeals judges, and thus about whether oversight plays an important role in explaining Courts of Appeals behavior. One thing this debate has overlooked, however, is that formal review of cases via certiorari or *en banc* is not the only form that oversight can take in the federal courts. Alternative, informal channels of oversight can also have important effects on circuit judges' behavior, altering circuits' capacity to mete out consequences to their own judges for ideological decisionmaking. Moreover, alternative oversight mechanisms—in the form of some of the institutions discussed in the previous chapter—may promote legal consistency much more broadly than formal review mechanisms such as certiorari or *en banc* rehearing, by virtue of their extended reach. For example, the informal *en banc*, described previously, allows a three-judge panel to overturn a legal rule announced by an earlier panel if the circuit approves. Notably, this practice enables oversight to occur in the ordinary course of circuit business, without need for a costly *en banc* hearing. This empowers the circuit to correct problems that it might not otherwise consider serious enough to warrant a full *en banc*.

What this means is that p, the probability of institutional costs being felt by a judge, may vary substantially as a function of local circuit institutions. This (potential) variation drives this project's research design. When institutions are effective, and this probability is relatively high, judges are expected to follow the law under either model. However, when institutions are less effective, and this probability is low, the legalist and institu-

tional theories deliver very different expectations. Under legalist assumptions, legal costs remain high and judges still act as if constrained by law. Institutional theories, by contrast, expect legal costs to play a smaller role and thus anticipate ideological behavior from judges in such a circumstance. Thus if judicial behavior varies substantially as a function of the presence or absence of reforms that affect information and oversight, then this suggests both that institutional costs are important to judges and that judicial behavior depends on the likelihood that such costs are felt. Moreover, if the institutional story is correct we should observe the relationship between ideology and behavior to be conditional on institutional strength; legalist theories make no such prediction.

It makes sense to look for such effects among *internal* institutions and reforms for the simple reason that it is the circuits themselves who are best positioned to develop and engage in innovative institutional practices that push beyond the formal rules of the federal judicial hierarchy. With massive federal caseloads causing more and more strain on formal oversight channels, informal, less costly channels of oversight are likely to see greater use. The hierarchy literature has largely not concerned itself with the question of which high court's threat of formal review—the circuit *en banc* or the Supreme Court—exerts a stronger influence on panel behavior, correctly seeing these constraints as working in tandem or conditioning one another (Clark 2009, Kastellec 2011). Yet because the circuits are uniquely situated to develop informal alternatives that permit oversight while sidestepping formal review altogether, understanding their internal practices may be essential to answering the question of whether circuit behavior is substantially affected by the politics of oversight.

Incentives and Challenges on Decentralized Courts

The above discussion highlights the importance of theorizing specifically about internal oversight in the Courts of Appeals, as separate from vertical review. The Courts of Appeals, in contrast to both the Supreme Court and the federal district courts, use a decentralized structure where random three-judge panels hear every case. This means that unless circuit judges are highly ideologically homogeneous, panels will often be ideologically unrepresentative of the larger circuit, and the existence of a majority coalition on the circuit does not imply a controlling majority vote over the outcome of every panel decision. This decentralized structure presents a serious difficulty for the circuits' ability to perform the important function of maintaining the integrity of the rule of law in the federal courts. If most decisions simply reflect panel preferences, and are not constrained by precedent, then whether litigants win or lose depends on their luck in terms of which judges they are assigned, not on the substance of the law. This would undermine the courts' performance of their broader societal role to provide predictability and continuity in the law, so that actors in society can develop firm expectations about how disputes will be resolved (Llewellyn 1960, Landes and Posner 1975, Scalia 1989, North and Weingast 1989). The rule of law "provides some moorings so that men may trade and arrange their affairs with confidence" (Douglas 1949, p. 736), and if panel decisions are frequently in conflict with existing law, these moorings will be insecure.

The Courts of Appeals thus face an internal principal-agent problem which is largely alien to our understandings of other American courts, and particularly the Supreme Court, whose structure acts as the implicit basis of much general theorizing about judicial insti-

tutions. While there is much attention to internal *politics* on the Supreme Court—such as opinion assignment and bargaining over legal rules (e.g. Epstein and Knight 1998, Maltzman et al. 2000)—internal *oversight* is not necessary in that setting, because minority coalitions lack opportunities to independently influence policy.[2] By contrast the decentralized structure of the Courts of Appeals—a structure also found in 11 state supreme courts[3] and cross-nationally[4]—presents a unique set of challenges.

The largest and most obvious difference between internal oversight among peers and a more conventional principal-agent relationship is that in the latter case, there is a clear superior-subordinate relationship, while among peers, those engaging in oversight are also subject to it. This may dampen enthusiasm for such practices, in that judges risk finding themselves on the wrong end of peer scrutiny and subject to constraints they otherwise might not face. Even so, several features of the Courts of Appeals suggest that the benefits of effective internal constraints may often outweigh the costs.

One set of benefits in this vein is straightforwardly policy-centered. Judges may be members of a majority coalition on their courts, and may seek to impose control over judges in the minority. Because random selection ensures that a reasonably-sized ideological minority will control at least two of three panel slots with some regularity, such judges will have occasion to decide cases—and even establish binding law, in cases of first impression—in ways inconsistent with the majority's preferences. Such behavior imposes direct policy losses on majority judges and may provoke them to take steps to

[2]One exception is the assignment of single justices as Circuit Justices, responsible for stays and emergency orders arising from the various circuits.

[3]See http://www.ruf.rice.edu/~pbrace/statecourt/CodingRules.html.

[4]Many intermediate appellate courts sit in divisions as do some national high courts such as the Supreme Court of the United Kingdom and the Australian High Court.

prevent it.

Other incentives flow naturally from the Courts of Appeals' intermediate position in the judicial hierarchy. The combination of high caseloads and the circuits' supervisory authority over the U.S. district courts makes the costs of sincere, unrestrained voting by panels—and the attendant inconsistencies in overall decisionmaking—very serious. Such a situation could result in an extremely rapid churn of inconsistent decisions—perhaps even two irreconcilable decisions being handed down simultaneously—harming the a court's perception in the eyes of external audiences. Such inconsistencies can then provide cover for trial courts to vote ideologically, diminishing the Courts of Appeals' control over their subordinates. If no stable circuit court position exists on a legal question and outcomes are subject to random panel draws, individual trial judges will have available a variety of higher court precedents from which to justify a wide range of outcomes. If trial judges do not know what response to anticipate if their decisions are reviewed, they may consider themselves better off simply voting sincerely. This will inevitably lead to case outcomes that Courts of Appeals judges dislike, and will also inevitably inflate the circuits' caseload by increasing the number of cases appealed by litigants who are themselves uncertain about the law or willing to gamble on drawing a friendly panel.

Because these costs associated with legal inconsistency—in damage to the court's reputation, trial court uncertainty, and increased caseload—are a deadweight loss borne by all, judges may have incentives to work together to achieve consistency even at the expense of policy gains. The Courts of Appeals are non-hierarchical organizations whose overall performance depends upon how well each individual judge follows circuit law.

Because all judges share in many of the costs associated with individual deviations from legal precedent, this setting is analogous to other large-n collective action settings such as group production within a profit-sharing firm (FitzRoy and Kraft 1987) or management of common pool resources (Ostrom 1990). This setting might be thought of as an iterated prisoner's dilemma in which judges have short-run incentives to seek policy gains in individual cases, but do not pursue them so as to maintain a cooperative equilibrium over the long run (as in O'Hara 1993). Even where such incentives exist and cooperation is beneficial, however, the likelihood of such gains being realized can depend heavily on both peer-to-peer trust and on explicit monitoring of others' activities (e.g. Arrow 1974, Gibson, Williams and Ostrom 2005).

This means that if judges value the organizational benefits of legal consistency, they have incentives to engage in horizontal monitoring. Yet even given such incentives, actively working to maintain legal consistency via internal oversight presents serious practical challenges. Notably, this task is complicated by the fact that the circuits face a substantial caseload burden. Scholars have warned of a 'caseload crisis' in the Courts of Appeals since at least 1969 (Carrington 1969), and the workload of the federal courts has exploded in the intervening years such that most circuit judges now sit on 500–1000 panels per year.[5]

One implication of heavy workloads is that a critical resource—the time and energy of a circuit's judges—is left in short supply. The strain placed on judges by the unrelenting flow of cases through the Courts of Appeals means that more resources must be channeled

[5]Cf. Federal Court Management Statistics, Administrative Office of the U.S. Courts: http://www.uscourts.gov/. This statistic includes non-argued cases.

toward the practical activities associated with disposing of cases, and that fewer are free to devote to other activities a court may value but consider less essential to their mission (Baker 1994). As the previous chapter noted, two such activities—oral argument and full opinion drafting in all cases—have already been casualties of this tradeoff. Another likely consequence of this tightening is a diminishing willingness on the part of judges to engage in activities related to internal oversight. In short, though the Courts of Appeals decentralized structure gives judges something to gain from overseeing the activities of their colleagues, it also produces an incentive to be lax in doing so.

This countervailing incentive might have effects on either of two activities which are prerequisites for effective oversight. The first is enforcement, or the direct imposition of costs on those judges perceived as making biased decisions. The most obvious form enforcement activity might take is *en banc* review and reversal of inconsistent panel decisions. As Ginsburg and Falk (1991) note, *en banc* review is costly in that it sacrifices the efficiency gains created by the three-judge panel system, requiring the use of judicial time that could otherwise be devoted to hearing several panel decisions. *En banc* review is also inconvenient from a logistical standpoint, requiring all of a circuit's judges to meet in a central location at a coordinated time for oral argument. This may be exacerbated on circuits with more judges (Giles et al. 2007) or which are more geographically spread out (Cohen 2002). Under conditions of heavy workload, these efficiency and logistical costs will bite more deeply, potentially causing judges to be less and less willing to go to the trouble of reversing a panel decision via *en banc* even if it is clearly ideologically out of step with circuit law. Indeed, as Giles, Strayhorn and Peppers (n.d.) find, rising caseloads

are directly associated with reductions in a circuit's *en banc* activity.

Other, more subtle forms of enforcement activity may be crowded out by caseload pressures. Wasby (1987), for example, notes that via behind-the-scenes communication, judges sometimes confront colleagues with concerns about recently released decisions. While much of this communication is one-on-one, when such concerns are serious enough, a judge may sometimes send a written memo to all judges of the circuit questioning elements of an opinion. An action in this vein may bring an ideologically driven opinion to the attention of the full court, harming the authoring judge's reputation in the eyes of his or her colleagues. Subtle social pressures like this have been posited as a source of constraint on judicial behavior (Posner 1993, Miceli and Cosgel 1994); yet, as judges become individually busier, their willingness to invest effort in such communications may wane.

A second, related form of oversight activity that might be negatively affected by caseload strain is monitoring; that is, the gathering of information about decisions in the circuit and their implications. Decentralized circuit decisionmaking implies that judges are not personally involved in a majority of the business of their circuit and must go out of their way to learn about it. In a busy circuit, remaining informed about goings-on in the circuit is quite demanding. Judge O'Scannlain (2004) of the Ninth Circuit describes the difficulties of understanding the policy consequences of his circuit's decisions thusly:

> As it now stands, I read the full opinions of my court no earlier than the public does—and frequently later, which can lead to some unpleasant surprises. Even with our pre-publication report system, we do not get the full implica-

tions of what another panel is about to do.

As this indicates, when time is scarce a judge may read decisions of his or her circuit superficially, or not at all, upon their immediate release, choosing instead to defer closer readings until such time as the judge is responsible for a future case presenting a similar issue. Judges may find it difficult enough to keep up with their own work, much less that of others, and narrow the scope of their information gathering. They may read fewer slip opinions and opt to keep up to date with circuit law selectively rather than exhaustively, may delegate these tasks to clerks, or may rely more heavily on litigant fire-alarms. Given the complexity of many legal questions, judges who economize on information gathering will then be less likely to correctly identify inconsistent, ideologically motivated decisions when they occur.

Institutions and Oversight

The effect of resource scarcity on a court's capacity to self-police is clear. In the absence of quality information about instances of inconsistent decisionmaking and a willingness to act on that information once learned, constraints on ideologically motivated behavior are reduced or eliminated. Without a credible threat of some form of sanction for inconsistent decisionmaking, judges face fewer consequences for preference-driven behavior. This need not be a problem if, as the legalist perspective argues, political considerations are of reduced importance in the Courts of Appeals. If the institutional perspective is closer to the truth, however, the above might seem to suggest that internal oversight must be

largely ineffective in the large, overworked circuits of the present day, and that Courts of Appeals judges must often be free to pursue their own policy goals.

As the previous chapter discussed, however, many circuits have responded to their changing situation with innovation, developing alternative internal practices which may help to mitigate the challenges described above. Such practices may provide ways to mitigate resource scarcity and still maintain effective internal constraints.

Indeed, as suggested above, a major claim of this project is that legal consistency among Courts of Appeals judges should be much improved when mechanisms of internal oversight are active and effective, even if those mechanisms take unusual forms. Judges, I argue, should respond to institutional incentives. The above discussion shows, however, that on decentralized courts such incentives are complex and cut in two directions simultaneously. The nature of judges' response thus depends on whether the relative balance of costs and benefits is tilted toward their incentives to vote ideologically or toward their incentives to be members of a well-functioning judicial body and participate in the collective activities necessary to achieve it.

What this perspective implies is that understanding what behavior we should expect from circuit judges depends upon understanding the consequences of their varying institutional contexts, and what effect various internal practices have on the obstacles to internal oversight described above. If behavior in the Courts of Appeals is defined to a significant extent by judges' engagement in and response to internal oversight, then we should expect reforms to effectively promote legal consistency if and only if they help overcome these challenges and encourage judges to exert active effort to police circuit activity. Reforms

which improve a circuit's capacity for monitoring and enforcement should, in this view, deter ideological voting and improve circuit performance, while those that do not should be ineffectual.

Reforms and their Effects

How does this play out with respect to the specific institutions adopted by the Courts of Appeals? Recall that the previous chapter identified five putatively 'legal consistency' institutions. These are: 1) screening, where less difficult or less important cases are decided without oral argument, 2) selective publication, where routine opinions are given non-precedential unpublished status, 3) bundling, where cases dealing with similar issues are grouped so as to be heard by a single panel, 4) pre-filing circulation, in which draft opinions are circulated to the entire court for a short time prior to their release for comment, and 5) the informal *en banc*, whereby three-judge panels are empowered to overturn prior circuit law without convening a full *en banc*, but only subject to the approval of the full court.

The most obvious candidates for effective reforms are two which seem on their face to be specifically directed at improving collective oversight: pre-filing circulation and the informal *en banc*. Both institutions provide mechanisms, albeit very different ones, by which off-panel judges are empowered to audit panels' decisions without resort to a full *en banc* rehearing. Both reforms seem likely to increase the chances that judges making inconsistent decisions will be caught and sanctioned in some fashion.

Pre-filing circulation seems closely targeted to shore up the monitoring aspect of over-

sight, improving judges' access to information about off-panel decisionmaking. This reform creates both an obligation and an incentive to stay current on circuit activity. One aspect of this institution's workings, as indicated by Judge Becker (1998) of the Third Circuit, is that it may create a shared norm of participation in which judges are expected to read and contribute to discussion of off-panel cases, facing social pressure if they do not.

This reform also creates a positive incentive for such behavior, in that it allows off-panel judges much more potential to influence policy on the court, relative to circuits without it. Because it allows decisions to be amended without any public record, the presence of a grace period prior to public release of an opinion should make panel judges much more receptive to criticism and comment than they might be after committing to a ruling. While decisions can be amended post-publication, large revisions such as wholesale changes in interpretation are potentially embarrassing and less likely to be made. The pre-publication window enables more room for such alterations—even, at the extreme, those that imply changes in the case disposition—if off-panel criticism is severe enough to warrant them. Such matters are then kept among the judges themselves and do not bubble over into public perceptions of the court. As such, this institution enhances judges' informational environment and also promotes informal communication among judges similar to that described by Wasby (1987). This in turn bolsters the reputational consequences of ideological voting, making it less attractive.

The informal *en banc*, too, should enhance internal oversight. This institution, however, operates slightly differently, in that it drastically reduces the costs associated with

punishment of deviations from circuit preferences. The informal *en banc* allows a three-judge panel to overturn a prior interpretation of circuit law after seeking approval from the rest of the circuit. In circuits without this institution, 'law of the circuit' doctrine prohibits such overrulings unless done by the court *en banc*. This reform enables enforcement to occur without resort to such exceptional measures, allowing a circuit to impose reversal costs on its judges in the ordinary course of business. Notably, this reform even allows deviations to be caught and sanctioned substantially after the fact. Even if judges economize on monitoring and are not broadly well-informed about off-panel activity, they (or their clerks) can be expected to identify relevant case law when presented with a similar issue, such that a circuit's judges can detect deviations during the normal course of business as well. This should enhance deterrence.

Importantly, however, this institution varies in its operation among the circuits that employ it. Some permit a panel to overrule a precedent subject to agreement by a majority of the circuit's active judges, while others only permit panel overrulings when the circuit is unanimously in favor of them. This is a highly consequential difference. In circuits with a majority-rule informal *en banc*, the threat of reversal for a decision out-of-step with that majority is substantially more credible than in those with a unanimity rule. In the latter case, an ideological minority could, if so motivated, block use of the institution, preventing any of its gains. The implication is that the oversight effects of the informal *en banc* should be most strongly felt in circuits which adopt a majority decision rule, and should be much reduced if not eliminated in those using a unanimity rule.

Other circuit reforms are not so directly targeted at oversight. Two other institutions—

screening and selective publication rules—are primarily designed to improve efficiency on the circuits and to promote better allocation of resources. Do these institutions help overcome obstacles to internal oversight?

In one respect, screening and selective publication rules both seem to push in the wrong direction. Under both regimes, decisions sent to the lower-effort track are rendered with shorter, less thorough opinions which may (legitimately) omit key details apparent to the parties but not to outside observers (Kozinski and Reinhardt 2000). Identifying whether such cases are inconsistent with circuit law is thus much more costly than for equivalent published cases with full opinions, providing outside judges with much less incentive to monitor such decisions. Moreover, even if they do, the threat of direct review in such cases is more remote. Screened and unpublished decisions are less likely to draw the interest of the *en banc* court, as, while there may be some risk of 'rogue' panels hiding important cases within the screening docket, the presumption is that cases shunted to that decision mode present dull, routine questions unworthy of the full court's attention. In this way screening and publication rules work against both the incentive to monitor and the incentive to impose punishment, at least with respect to oversight of decisions that are diverted to those tracks. As a result, the temptation to engage in ideological behavior in the screened and non-published cases may be much higher.

This perverse incentive is exacerbated by variations in selective publication standards. Some circuits require all three judges on a panel to agree to 'unpublish' a case, while others permit it with the approval of only a majority. To the extent that panelists may use this practice to hide inconsistent decisions in the mass of unpublished cases, this incentive

is enhanced on those circuits where only two judges need agree.

At the same time, however, both of these reforms improve the overall efficiency of a circuit, freeing up more judge time than would be available in their absence. The resources saved by these reforms can then be made available for oversight activity. As such, while these institutions may create perverse incentives with respect to the screened and non-published cases, they may also somewhat improve a circuit's ability to oversee its fully published cases, all else equal. The net effect may be to improve oversight in a circuit's most important cases, but to enormously reduce it in its more routine and numerous cases. Because these effects cut both ways, there is not a clear direction of effect, but one that may depend on what aspect of a circuit's output is under examination.

The final possible consistency-promoting reform is case bundling, in which a circuit groups cases presenting similar issues and schedules them to be heard by the same panel of judges. This institution seems to have very little connection to either oversight or judicial resources more broadly. Usefully, it prevents panels from contradicting one another in concurrent cases where the left hand does not know what the right hand is doing. However, this short-run gain seems to be the limit of its impact. Bundling merely reallocates the assignment of an already determined pool of cases, and does not conserve resources as, e.g., screening. Bundling of cases also has no impact on the cost of review, as it does not create any alternative methods of sanctioning or incentivize the use of existing ones in any obvious way.

If anything, bundling may slightly encourage ideological voting by enhancing a panel's temptation to coordinate across multiple decisions. As Cameron (1993) lays out, one

possible mechanism inducing panel consistency is competition among multiple panels to avoid review—even with a principal with sharply limited review, multiple panels may each seek to avoid reaching the most out-of-step decision so as to avoid being singled out for reversal. Bundling, by allowing coordination over multiple cases dealing with a single issue, may undermine this mechanism, to the extent it is even active in practice. That said, this is a somewhat modest and unclear mechanism of effect,[6] and the most likely scenario is simply that bundling, by virtue of its lack of connection to any oversight incentives, largely has no effect on behavior.

Institutions as Neutral Improvements

The above discussion provides predictions about the likely effects of these circuit institutions, if indeed circuit judges respond systematically to variation in their oversight environment that affects the probability of personal consequences following from ideological decisionmaking. Yet some scholars remain skeptical that oversight and peer scrutiny within the judiciary has much influence over how judges decide cases. If these scholars are correct, and Courts of Appeals behavior is instead largely attributable to judges' strongly ingrained legalist values, then legal consistency in the circuit courts is not a function of the factors described above.

Usefully, variation in the adoption of internal reforms by the various circuits provides leverage for discriminating between these two accounts. This discrimination may take

[6] Cameron's 'cascading compliance' argument has never been empirically tested. It must also be mentioned that even circuits without bundling generally schedule the same three-judge combination to a full day of hearings, allowing coordination across multiple cases even when cases do not necessarily implicate similar questions (McKenna, Hooper and Clark 2000).

two forms. First, the institutional and legalist models may make different predictions about the aggregate effect of a given reform on legal consistency in a circuit. If the institutional model expects a reform to reduce legal consistency, while the legalist model expects the opposite, then this provides a clear way to assess which theory of judicial motivation has more explanatory power. Second, the institutional and legalist models make different predictions about the mechanisms by which local reforms might operate. In the institutional story, reforms are expected to alter the incentives for ideological behavior; as such, this explanation predicts different reforms to imply differences in how ideological variables relate to judicial outcomes. In the legalist story, because the impact of ideology is already dampened by virtue of judges strong legalist preferences—their high legal costs—reforms do not alter judicial behavior through this ideological pathway. Instead, if they matter at all, they should operate through pathways of effect such as improved efficiency, information, or legal clarity. As Kornhauser (1995) argues in elaborating the team model of judicial decisionmaking, courts make mistakes because the law is complex and difficult. If reforms do not alter ideological incentives because these incentives are largely unimportant, then they will instead have effects on these more technical aspects of judges' environments.

Indeed, when viewing the reforms under study from this latter perspective, we would expect each one discussed herein to have a straightforward positive effect on legal consistency. As the previous chapter discussed, each relates to various aspects of the circuits' administrative efficiency. Screening and publication rules, for example, are designed to economize on judges' time, allowing them to allocate more time to difficult cases that

may merit more serious thought and consideration, and less time to trivial cases where the law is clear and the correct outcome obvious. Pre-filing circulation, as claimed by Judge Becker (1998), provides judges with more information about circuit precedent, making them less likely to rule inconsistently out of ignorance of a prior decision. Case bundling allows judges to delve deeply into an issue and do more thorough research, and assures consistency in those cases that are bundled, because a single panel will decide them according to a common standard. The informal *en banc* allows a circuit to maintain coherence in its case law with much greater efficiency, resulting in clearer precedents that are more likely to be implemented accurately.

Summary

In this chapter, I have laid out a theory of how principal-agent incentives might operate within circuit courts, as opposed to across levels of the judicial hierarchy. I claim that conceiving of Courts of Appeals judges as political actors does not simply imply that they are single-mindedly devoting to maximizing their ability to vote ideologically. Instead, because circuit judges derive various forms of policy value from membership on a smoothly functioning, legally consistent circuit, politically-minded judges have reasons to contribute to effective regimes of internal oversight and control.

I have engaged in this theoretical discussion of incentives for internal monitoring with the goal of deriving expectations about how each of the institutions in Chapter 1 might relate to these incentives, and alter the oversight environments within which judges act. Because internal oversight takes time and effort, there may be settings where the costs

of oversight outweight its benefits, resulting in an environment where judges do not hold one another accountable and in which ideological voting can flourish. One possible way out of this dilemma is the use of alternative institutions that make oversight easier or more effective, and reinforce judges' incentives to engage in it. When the institutions introduced in Chapter 1 are viewed from this perspective, various expectations about the political effects of each institution are implied. Especially notable are two internal reforms which seem designed to increase the influence of off-panel judges over normal three-judge panel decisionmaking, providing off-panel judges with better avenues for critique and even reversal of inconsistent opinions. These institutions, pre-filing circulation and the informal *en banc* should thus make oversight more common and thereby produce greater constraints on panel decisionmaking, ultimately promoting legal consistency in a circuit. Other institutions described in the previous chapter, such as screening or case bundling, may render a circuit more efficient in its allocation of time or improve coordination across panels, but do not as significantly involve the full circuit in day-to-day affairs. These institutions do not substantially change the environment within which three-judge panels operate, and as such are not expected to fundamentally reshape the constraints panels feel, and indeed may in some cases make oversight more difficult, such as by allowing judges to place cases into lower-scrutiny decision modes.

Some of the expected effects of internal reforms that stem from this oversight-centered theoretical perspective differ from those anticipated by a legal model perspective, providing leverage for comparing these predictions. The latter account implies that judicial reforms should be neutral administrative improvements, with each institution acting to

Table 2.1: Expected Effects on Legal Consistency, by Reform and Theory

Reform	Institutional	Legal
Screening	−/+	+
Publication (majority rule)	−/+	+
Publication (unanimity rule)	−/+	+
Case Bundling	=/−	+
Pre-filing Circulation	+	+
Informal *en banc* (majority rule)	+	+
Informal *en banc* (unanimity rule)	=/+	+

improve legal consistency in the circuits to at least some degree. Table 2.1 indicates the directional predictions about each institution's impact on legal consistency, according to each of the two theories under consideration; in addition, only the institutional theory expects these effects to relate to judicial ideology. This framework thus provides a variety of avenues for exploring whether there exists empirical evidence of the oversight-centered view of the Courts of Appeals elaborated in this chapter.

In Chapter 3, I examine the distinctions between the directional expectations in Table 2.1, examining whether the relationships between circuit reforms and levels of *en banc* activity in the circuits are more consistent with the institutional or legalist predictions.[7] Building on this analysis, which favors the institutional theory, Chapter 4 will examine whether reforms' effects are related to ideological variables on the circuits. Chapter 4 also shows evidence consistent with the institutional theory, demonstrating that some institutions have powerful effects on the strength of the connection between judges' ideologies

[7] Because the expected effects of screening and publication rules under the institutional theory are nuanced, and may work in both directions simultaneously, there is some risk that these expectations, in the aggregate, may not discriminate as well as might be preferred because all reforms but bundling might be expected to improve consistency under either theory. As the next chapter's results will indicate, however, this is not a problem and the impact of screening and publications rules on legal consistency is only consistent with the institutional model, at least with respect to the dependent variable I adopt there.

and their propensity to follow precedent.

CHAPTER 3

BETTER OVERSIGHT OR BETTER JUDGING? INTERNAL REFORMS AND *EN BANC* REVIEW

In the previous chapter, I argue that legal consistency in the Courts of Appeals should be viewed as fundamentally a political problem. Judges hold diverse viewpoints and sometimes have vastly different preferences about what the law should look like and how cases should be decided. Because of the collective nature of their task and various benefits associated with legal consistency in the aggregate, Courts of Appeals judges also have reasons to work to overcome politics and achieve internally consistent decisionmaking, but face the challenge that collective self-monitoring is costly and difficult. From this point of view, the circuits' relative performance in maintaining legal consistency should be a function of how well they overcome challenges to self-monitoring and develop an effective system of internal constraints. Internal reforms can promote better overall behavior, but only if they work to enhance judges' incentives to engage in collective self-policing.

In this chapter, I test this hypothesis directly alongside the most serious alternative account of internal reforms' effects in the U.S. Courts of Appeals: the hypothesis that reforms may act simply as politically neutral improvements to the administrative efficiency of the circuits. From this perspective, which permeates reform debates within the judiciary, Congress, and associated institutions such as the Administrative Office of Courts (e.g. Carrington 1969, Langner and Flanders 1973, Baker 1994, *Commission on Structural Alternatives for the Federal Courts of Appeals* 1998, McKenna, Hooper and Clark 2000), legal inconsistency arises not because judges are politically motivated but because even judges acting in good faith will often make mistakes and misapply the law. In this view internal reforms should merely act to improve the overall quality of appellate judging in ways that have nothing to do with ideology. This view takes for granted elements of the norms argument discussed in the previous chapter; here, judges are largely constrained by respect for law and motivated to do their job as well as possible, and merely need to be given tools which empower them to do so.

This view, the legalist perspective, shares a great deal in common with the 'team' model of judging advanced by Kornhauser (1995). In the team model, judges share a common conception of what the law is—resolution of disagreements, political or otherwise, is considered a solved problem—and seek to maximize the number of 'correct' dispositions generated by the legal system as a whole. The primary obstacle to this maximization, put simply, is that judging is difficult. Facts may not be clear in individual cases, or language may be ambiguous in statutes or precedents, such that judges can not always be certain what disposition is correct. Judges lack perfect information about the

law, and may behave inconsistently as a result.

En Banc Activity

In this chapter, I test the legalist and institutional theories of judicial behavior head to head using data on the frequency of *en banc* rehearings in the Courts of Appeals. *En banc* activity has two features which make it a very attractive dependent variable for this purpose. First, the *en banc* hearing is a process which is explicitly designed to promote legal consistency within circuits. F.R.A.P. Rule 35(a), defining when federal appeals courts may hear *en banc* cases, explicitly states that *en banc* review is to be used in cases of "exceptional importance" or when "necessary to secure or maintain uniformity of the court's decisions."

Second and more importantly, prior research on *en banc* review has shown that the Courts of Appeals use it for both legal and political ends (Giles, Walker and Zorn 2006, Giles et al. 2007). Courts may use it to correct good faith misapplications and clarify unclear doctrines, or may also use it to upbraid an ideological minority which is attempting to pull circuit law in its preferred direction. Because both *en banc* review and internal reforms serve the same ultimate institutional function of regulating legal inconsistency, any effects that internal reforms have on overall patterns of legal consistency should also alter a circuit's relative need to engage in formal *en banc* review.

Circuits that are rife with ideological conflicts, with inconsistent panel decisions occurring frequently, will have many opportunities to engage in *en banc* rehearings and should engage in more than do ideologically harmonious circuits. Similarly, circuits

whose judges, for whatever reason, make many good-faith errors will also have higher demand for *en banc* rehearing than circuits whose judges are more precise in their application of the law. To the extent that internal reforms condition a circuit's underlying level of conflict or error rate, this should then be felt in that circuit's level of *en banc* review. For instance, an institution which reduces panels' incentives to vote ideologically should have the effect of reducing the amount of ideological auditing the *en banc* court needs to engage in. Moreover, because *en banc* hearings are used to regulate both politically neutral and politically charged instances of legal inconsistency, this variable allows us to observe both pathways of effect. Where individual institutions diverge in their anticipated effects—e.g., if an institution is expected to improve legal consistency under the team model but undermine it in the oversight model—this allows for a discriminating test between the two broader theories.

In the remainder of this chapter's discussion, then, higher levels of *en banc* activity will act as a proxy that indicates higher levels of legal *inconsistency*. This is because circuits with greater difficulty maintaining internal consistency will have a greater demand for *en banc* review, and vice versa. When large numbers of *en banc* reviews are happening, this indicates problems with legal consistency at the panel level which require cleaning up. Circuits which are better able to maintain consistency via various mechanisms at the panel level will have less need for *en banc* review.

Conflict, Error, and Institutions

The institutional and legal theories begin from different first principles, and diverge substantially with respect to the story they tell about the central problem tending to produce legal inconsistency in circuit decisionmaking. In the institutional model, the primary obstacle to legal consistency is *conflict* among judges about the appropriate content of legal rules and disposition of cases. Judges differ in their ideological or legal viewpoints and seek to reach very different ends in the cases they hear. In this model, most inconsistency is conflict-driven, caused by ideological divergence and the weakness of mechanisms of oversight in the judiciary, such that out-of-step rulings are not deterred.

By contrast the legalist theory implies that inconsistency is a function of judicial *error*—good faith misapplications of law which occur due to limited resources and information. Here, as laid out explicitly by Kornhauser (1995) in the team model, judges share a conception of 'correctness' in the law but imperfectly observe it and sometimes misstep. As such, most inconsistency should be error-driven, caused by legal complexity, time constraints, and similar imperfections in the smooth operation of the legal system.

The expected effects of circuits' local institutions on *en banc* activity largely follows from the previous chapter's discussion of the expected effects under each account, with some subtleties. Recall that there are five basic institutions, though two, selective publication rules and the informal *en banc* vary importantly across the circuits in whether they use a majority or unanimity decision rule. Because the latter distinctions are theoretically expected to be consequential, it makes sense to break out each version of those institutions. As such, this chapter will consider the impact of seven total reforms: screen-

ing, majority and unanimity publication rules, case bundling, pre-filing circulation, and majority and unanimity informal *en banc* rules.

As argued in Chapter 2, pre-filing circulation and the majority rule informal *en banc*, as the two institutions most directly connected to oversight incentives, should be anticipated to reduce conflict-driven inconsistency and thus reduce a circuit's demand for formal oversight. Thus the expected effects of these institutions on net *en banc* activity are negative. The unanimity rule informal *en banc* may have a similar effect, but because the unanimity rule presents a higher bar for panels to overcome if attempting to sanction ideological decisions via this mechanism, this effect may be weaker or nonexistent. Thus the unanimous informal *en banc* should have either a negative or no effect on *en banc*s. Case bundling should largely be ineffectual with respect to oversight, with a slight chance that it might, by allowing better panel coordination, induce increases in conflict-driven inconsistency. As such, the expected effect of bundling on *en banc* activity is either neutral or positive.

Screening and publication rules present a difficult case in terms of determining expectations. This is because the effects of each may run in both directions simultaneously. Each, by freeing up resources that could be used for potential monitoring of panels by the *en banc* court, may result in better deterrence of ideological panel behavior and reduced opportunities for *en banc* review. Alternatively, however, they may also allow judges to pursue their policy goals more freely in the screened and non-published cases. While *en banc* review of published decisions is more common that review of screened and non-published ones, the latter has not been unheard of. This is particularly true during the

early-to-mid 1980s, when, several years after the introduction of screening and selective publication practices, the circuits begin to clear significant portions of their docket via these modes (Giles, Strayhorn and Peppers n.d.).[1] It is difficult to say whether *en banc* activity should be reduced due to better deterrence of ideological activity in the published cases, or increased due to heightened ideological activity in the screened and non-published cases, with occasional audits by the full court.[2] The anticipated direction of effect depends upon which of these two influences on *en banc* incidence is larger, which is not clear.

This ambiguity in expectations is slightly problematic, but does not make it impossible to learn something useful by looking at these reforms. This is because though the prediction under an institutional model is somewhat unclear, the legalist theory predicts that these institutions will reduce a circuit's error rate and reduce its demand for *en banc*s. If screening and publication rules also have the effect of reducing *en banc*s, this will, admittedly, not discriminate between the legal and institutional models. However, if these reforms increase *en banc*s, this will be inconsistent with the legalist account and only consistent with the institutional model, a theoretically informative result. As such, in the tests below I will anticipate a positive relationship between screening and publication rules and *en banc* incidence—simply because this is the potentially discriminating prediction. Moreover, if publication rules work in this direction—resulting in more *en banc* rehearings due to heightened ideological voting and auditing—this effect should be

[1] See, for example, *Mims v. Shapp* (3rd Cir. 1983), *United States v. O'Grady* (2nd Cir. 1984), and *United States v. Ginsburg* (7th Cir. 1985), all *en banc* rehearings of unpublished or summary decisions.

[2] A systematic examination of the frequency of *en banc* review of screened and non-published cases awaits the construction of a comprehensive dataset of *en banc* cases.

Table 3.1: Expected Effects on *En Banc* Activity, by Reform and Theory

Reform	Institutional	Legal
Screening	+	−
Publication (majority rule)	+	−
Publication (unanimity rule)	+	−
Case Bundling	=/+	−
Pre-filing Circulation	−	−
Informal *en banc* (majority rule)	−	−
Informal *en banc* (unanimity rule)	=/−	−

stronger for the majority-rule version than the unanimity-rule version, because there will be more situations where two judges are willing to vote inconsistently with circuit law in a case than are three.

By comparison, the legalist model anticipates all of the reforms under study to improve some aspect of circuit performance that would tend to reduce error-driven inconsistency to at least some degree, by allowing judges to allocate their time more efficiently, consider difficult cases more carefully, or to maintain a clearer and more coherent body of circuit precedent. In short, from the legalist perspective, each of these reforms should be expected to reduce a circuit's error rate, and thus the need for full *en banc* rehearings, reducing their overall likelihood.

Table 3.1 summarizes the above discussion, showing the expected effects of each institution on *en banc* activity under each theory's assumptions. Usefully, the institutional and legal theories diverge in their expectations over some reforms. This provides a jumping-off point for empirical testing and direct comparison of the relative explanatory power of each model.

Sample and Coding

To test the hypotheses implicit in Table 3.1, I operationalize *en banc* activity in the simplest way possible: as a count of the number of *en banc* cases that each circuit hears each year. This gives a simple, easily understandable measure of the overall quantity of review activity in each Court of Appeals.[3] Figure 3.1 shows the number of *en banc* hearings per year in each circuit. As can be seen, there is significant variation both over time and across circuits. Some circuits, such as the Second, have never held many *en banc* rehearings, while others such as the Fifth and Ninth have at times heard a relatively large number. Over time, some circuits have experienced brief spikes in *en banc* activity, and in general *en banc* levels exhibit a downward trend in more recent years.

Because the unit of analysis is the circuit-year, this necessitates the use of aggregate measures for independent variables relating to circuit characteristics.[4] Many of my sampling choices are made with this fact in mind. The sample consists of every circuit-year from 1961 until 2006. The start and end dates are chosen based on the availability of ideal point estimates for every Courts of Appeals judge. Prior to 1961 there are still a substantial number of judges serving who were appointed early enough that they do not have Giles, Hettinger and Peppers (2001) scores.[5]

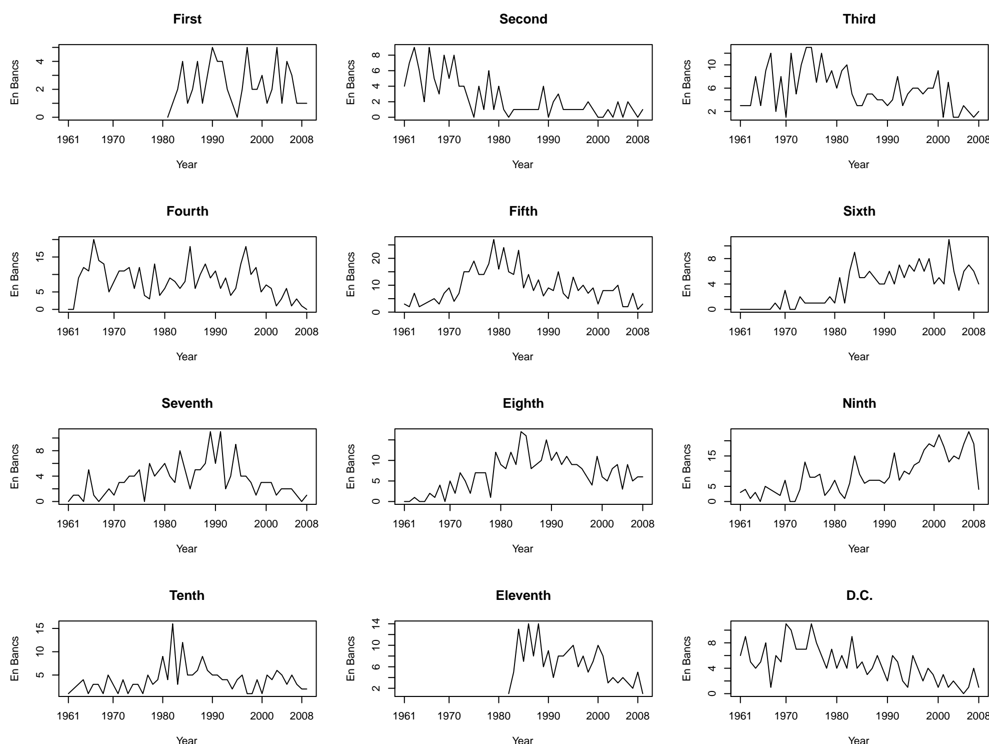
In the multiple regression models below, I include two control variables—circuit size

[3]Data on these *en banc* counts were generously provided by Micheal Giles.

[4]Most of my summary variables are drawn from a dataset of circuit composition which is itself generated from the Auburn careers data (Zuk, Barrow and Gryski 2004), updated with more recent data from the Federal Judicial Center. My master dataset contains observations for each month, with indicators of which judges are present for that month, along with their ideology scores. From this dataset I can easily generate aggregate variables by circuit-month or circuit-year, such as ideological polarization.

[5]The final such judge actually retires in 1964—I have chosen to include an additional three years of data in my sample, at the cost of the very slight degree of inaccuracy present in summary data for this judge's circuit (the Fifth) during that time.

Figure 3.1: *En Banc* Cases Per Year, by Circuit



and per-judge caseload. To permit easy merging with Administrative Office of Courts data relating to caseload, fiscal years are used instead of calendar years.[6] Note also that two circuits, the First and Eleventh, only enter the sample in 1981. In the case of the First, they did not expand past three members until this year, and thus did not sit *en banc* prior to it.[7] The Eleventh only came into existence in 1981 after being split from the Fifth (for a discussion of the politics of the creation of the Eleventh Circuit, see Barrow and Walker 1988).

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[6]The fiscal year of the Courts of Appeals currently runs from October to September. Prior to 1991, the interval was instead from July to June. This has been accounted for in the data.

[7]The circuit's number of authorized seats was actually increased beyond three in 1978, but it was three years before a fourth judge was actually appointed to the court.

Coding of the internal institutions themselves is based on which circuits have adopted each institution, as well as their dates of adoption. This information is summarized in Table 3.2. The listed year indicates the start year for the institution in my data. Those institutions which were in place prior to the first year of my sample are listed as starting in 1961. Institutions are coded as zero if there is no year entry in a given cell, or if the year falls before the start year. They are coded one beginning in that start year and thereafter, with one exception noted below.

The circuits began adopting screening rules in the late 1960s. Note that by 'screening', I specifically mean institutions which allow some proportion of counseled[8] cases to be decided without oral argument. The pioneer circuit here was the Fifth, which enacted screening rules in December of 1968, in an effort to keep up with their growing caseload. This date falls in fiscal year 1969. While exact start dates for the remaining circuits are difficult to track down in some cases, it is clear that all of the circuits had adopted screening practices no later than 1973 (Langner and Flanders 1973, Haworth 1973), excepting the Second which has never done so. For this reason I have coded the Fifth as beginning in 1969 and the remainder of the circuits as beginning in 1970. While this date may be off by a year or two in some cases, this inaccuracy should impact no more than a handful of observations. Of special note is that according to Goldman (1990) the Ninth initially adopted screening in 1970, but out of concern for fairness to litigants removed it in 1972 for criminal cases and 1974 for civil cases before then reintroducing the practice in September of 1981 due to caseload pressures. I choose to code the Ninth as not having

[8]The circuits generally do not consider holding oral argument in *pro se* cases—which overwhelmingly are filed by incarcerated prisoners—because of the logistical problems associated with allowing these parties to appear before the court.

Table 3.2: Reforms and Start Dates

	1	2	3	4	5	6
Oral Argument Screening	1970		1970	1970	1969	1970
Publication (majority rule)				1973		1973
Publication (unanimity rule)	1973	1973	1973		1973	
Case Bundling	1990					
Pre-filing Circulation			<1961	<1961		<1961
Informal *en banc* (majority rule)	1992	1979				
Informal *en banc* (unanimity rule)						

	7	8	9	10	11	D.C.
Oral Argument Screening	1970	1970	1970[1]	1970	1981	1970
Publication (majority rule)	1973		1973	1973	1981	
Publication (unanimity rule)		1973				1973
Case Bundling	1972		1980			
Pre-filing Circulation				<1961		<1961
Informal *en banc* (majority rule)	1976					
Informal *en banc* (unanimity rule)				1984		1981

[1]Removed from 1974–1981.

screening practices in place during the time when no cases were screened, which covers fiscal years 1974–1981.

Langner and Flanders also note that publication practices were introduced in parallel by all of the circuits in the same year: 1973. The adoption of limited publication standards was initiated in late 1972 by the Judicial Conference of the United States, which requested that all of the circuits implement such standards by January 1, 1973—though the details of the precise standards for publication and their administration were left to the individual circuits. I have thus coded publication practices as beginning in 1973.

The practice of pre-filing circulation appears to have been in place in those circuits which use it for the entire range of my sample, with one possible exception. Of all the institutions, it is the oldest and, consequently, the most difficult to pin down precise start

dates for. Nonetheless, the D.C. Circuit's practice dates at least to 1941, and seems to have been adopted upon the circuit's adoption of the practice of hearing cases in divisions.[9] It is mentioned and recommended by Justice Frankfurter (concurring) in *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.* (1953), noting that the practice was discussed by Chief Justice Groner of the D.C. Circuit in testimony before the Senate in 1941 (Groner 1941). The Third's practice has existed since at least 1953, being made reference to by Maris (1953) in a discussion of the Third's *en banc* practices. The practice was also in place for the Sixth and Tenth Circuits no later than 1962, as the practice is noted for each of those circuits by Labovitz (1962) in an early examination of several circuits' *en banc* procedures. The Fourth is the most difficult case. It was first expanded beyond three authorized seats in 1961, just at the start of my sample, and almost certainly adopted the practice subsequent to this expansion. In Todd Peppers' survey, the Circuit Executive of the Fourth stated in 2009 that the pre-filing circulation practice had been in place for at least 40 years. This suggests that the practice was adopted at some point during the 1960s, perhaps relatively soon after the expansion of the circuit. Though I do not know for certain, it seems plausible that this practice was adopted concurrently with the expansion of the circuit. Given this I am reasonably comfortable coding this practice as beginning in 1961 for the Fourth Circuit as well—even if it is slightly inaccurate, the effect on any inferences should be minor.[10]

[9]The D.C. Circuit was expanded to more than three judges in 1930 but did not begin assigning cases to three-judge panels until 1938, instead sitting as a full court (Ginsburg and Falk 1991).

[10]If I recode the Fourth's pre-filing circulation practice to instead begin in 1970, the results below shift to show a modest negative relationship between it and *en banc* activity, a result more consistent with the expectations of both models than that reported. This recoding does not alter the results for any institutions besides pre-filing circulation.

Case bundling procedures were introduced in the Seventh Circuit in 1972 at the suggestion of the Circuit Executive, in an effort to improve consistency of decisions (Fitzpatrick 2008). The Ninth adopted this practice for similar reasons during the Ninth Circuit Innovations Project, a comprehensive overhaul of the Ninth's administrative practices which took place from 1980–1982 (Cecil 1985). I have coded the start date as 1980. I have been unable to find any definitive information about the First Circuit's bundling practice, though it was in place no later than 2000 (McKenna, Hooper and Clark 2000). I have coded it as beginning in 1990, the halfway point between this date and the year in which the First expanded beyond three judges. This should minimize the number of incorrectly coded years, but is at best an imperfect solution.[11]

Dates on the informal *en banc* procedures are taken from Sloan's (2009) discussion. I use the dates for which Sloan indicates that the practice was firmly established, either because of official adoption of a rule, or because of prevalent and routine use of it. In some instances this is slightly later than the date of the first case mentioning the practice.

I will now present analysis of the above data. I begin by examining the effect that each internal institution has on the overall level of *en banc* review; this gives some preliminary evidence as to whether either the conflict or error models fit basic patterns in the data. Following that, I will present a slightly more sophisticated test designed to tease apart the independent effects of internal institutions on conflict- and error-based inconsistency.

[11] Omitting the First from the analysis does not substantially alter any of the results presented below.

Activity Levels

If the institutions described in this paper primarily matter because of their influence on error, then all else equal, those circuits which have adopted them should make fewer mistakes in panel cases and thus have reduced demand for *en banc* review. By contrast, if the institutions matter because they influence conflict on the Courts of Appeals, the effects on *en banc* review should be mixed, with some specific institutions making review more likely and others making it less likely.

A simple, bivariate look at the mean number of *en banc*s in the presence and absence of each institution reveals some interesting things. This data is given in Table 3.3. Each row represents one internal institution, coded as above. The cell entries in each column give the average number of *en banc*s for circuit-years with or without each institution. I have also included the derived anticipated effects on conflict- and error-based inconsistency, from Table 3.1, for easy comparison. The table also gives the two-tailed significance level from a two-sample differences in means test, comparing the means with and without each individual institution.[12]

Of note is that the apparent impact of each institution on the levels of *en banc* activity appear to track much more closely with the conflict-related expectations than with the error-related ones. Circuit-years which have those institutions anticipated to potentially worsen conflict—screening, publication rules, and bundling—also have higher average amounts of *en banc* review. This indicates that circuits with those institutions have had on average a heightened need to engage in *en banc*s.

[12]Note that the *en banc* levels with and without each institution, weighted by the prevalence of the institution, average to 5.7 for each row—the overall mean number of *en banc*s per circuit-year in the sample.

Table 3.3: Mean *En Banc* Activity Levels, By Reform

Reform	Absent	Present	Difference	Institutional	Legal
Screening	3.4	6.5	3.1**	+	−
Publication (maj.)	5.2	6.4	1.2**	+	−
Publication (unan.)	5.6	5.8	0.2	+	−
Case Bundling	5.5	6.3	0.8**	=/+	−
Pre-filing Circulation	5.9	5.3	-0.6	−	−
Informal *en banc* (maj.)	6.2	2.7	-3.5**	−	−
Informal *en banc* (unan.)	5.8	4.0	-1.8	=/−	−

Significance levels : † : 10% $*$: 5% $**$: 1%

Circuit-years with institutions which were anticipated to relieve conflict exhibit less *en banc* activity. Though only some of these differences are statistically significant, the predictions of the conflict expectations are met for every single institution. This is, by contrast, not true for the error-related expectations. In the latter case, every institution was expected to reduce intracircuit conflict and thus reduce the need for *en banc*s; a pattern like this is clearly not evident in this first cut at the data. What this indicates is that the institutional model of the impact of these institutions on *en banc* levels seems to provide a better initial fit to the data than the legal model.

This finding remains when examining a multiple regression model, in which the independent effects of each institution can be assessed simultaneously. My specification choices in this regression flow from two features of the data. First, because the dependent variable is a count with many values at or near zero, OLS is inappropriate. Second, because I have panel data, with many circuit-years per circuit, pooling all observations is inappropriate due to the risk of bias caused by unobserved circuit-level heterogeneity.

As a result I estimate the models below using an overdispersed Poisson regression

with varying intercepts by circuit. The models are estimated using the `lmer` command in R, contained in the package `lme4`. Modeling the data as Poisson-distributed deals directly with its count nature, and as Gelman and Hill (2007) argue, most if not all Poisson regressions should account for overdispersion—variance greater than the mean—because most real-world data are in fact overdispersed.[13] I include modeled varying intercepts by circuit to allow for differences in circuits' baseline rates of *en banc*, and prevent such differences from biasing my estimates of the reforms' effects. This is important because circuits may vary significantly in their willingness to grant *en banc* as a function of not only predictable factors such as caseload or circuit size, but unobservable ones such as circuit culture or collegiality. I use modeled intercepts (random effects) rather than unmodeled (fixed effects) for two reasons. First, various authors have noted that modeled intercepts are substantially more efficient and are more likely to recover correct parameter values when sample sizes are relatively small (Bafumi and Gelman 2006, Gelman and Hill 2007, Clark and Linzer n.d.). Second, though most of the reforms I discuss vary within circuit over my sample, one, pre-filing circulation, does not and is constant within circuits. This makes it impossible to estimate a fixed effects model.

The most important caveat with this specification is that it has potential to be biased if there is a correlation between the lower-level variables—e.g. the reforms—and the higher-level intercepts. This might happen if, for instance, circuits with especially high (or low) *en banc* activity are systematically more likely to adopt some institutions. This

[13] Gelman and Hill focus on Bayesian methods for estimating overdispersed Poisson models. However, it is possible to estimate an overdispersed model using maximum likelihood by estimating varying intercepts for an observation-level factor, which I have done here. Replication of the models below using Bayesian techniques results in substantively identical results.

Table 3.4: Varying-Intercepts Poisson Regression Estimates of Effect of Reforms on *En Banc* Cases per Circuit-Year

	Estimate (s.e.)
(Intercept)	1.00**
	(0.23)
Circuit Size	0.02
	(0.32)
Workload (hundreds)	-0.09
	(0.32)
Size × Workload	0.004
	(0.006)
Screening	0.42**
	(0.13)
Publication (majority rule)	0.40**
	(0.15)
Publication (unanimity rule)	0.13
	(0.13)
Case Bundling	0.41*
	(0.19)
Pre-filing Circulation	0.005
	(0.21)
Informal *en banc* (majority rule)	-0.72**
	(0.17)
Informal *en banc* (unanimity rule)	-0.51**
	(0.14)
† = .10, * = .05, ** = .01	N = 511

is, on its face, a reasonable possibility. However, as I discuss below, following the initial presentation of the results, there is little evidence that such bias is present here.

Table 3.4 indicates the estimated effects of each institution on *en banc* activity. In addition, I include controls for each circuit's number of active judges, its caseload in thousands of cases, and the interaction of these two variables.

As can be seen, these results match the comparisons-of-means results fairly closely. With the exception of pre-filing circulation, this model suggests that each institution's

effect is in the direction predicted by the ideological model. Thus the presence or absence of certain institutions influences circuits' *en banc* auditing behavior in a way that is consistent with the theory that these institutions are mitigating or exacerbating intracircuit ideological conflict, in the ways described above. When institutions which should be expected to reduce conflict are present, circuits seem to have less need to review their own cases, and vice versa. This provides some initial evidence that these institutions are shaping ideological incentives.

Interaction Model

The above test provides no obvious evidence of any error-reduction effects; the results are much more consistent with a conflict-centered account. This does not mean that such effects are absent, however; it may be the case that both effects are operative, but that the presence of the conflict-related effects is drowning out the others. In this section I will present a model which attempts to isolate the independent effects of error-reduction on the granting of *en banc* review, and examine this possibility.

I accomplish this by leveraging the multiple motivations that may give rise to *en banc* review. In general the existing literature (cf. Giles, Walker and Zorn 2006, Giles et al. 2007) gives three possible motivations for the *en banc* panel: to audit ideological outlier panels, to correct mistakes resulting from unclear law, and to speak with the authority of the full circuit on cases of particular importance or novelty. This is not to say that the circuit always reviews a case for one and only one of these reasons, just that these are the dimensions on which they are evaluating the benefits of review.

My strategy is to identify conditions under which, all else equal, it is particularly unlikely that a given *en banc* review occurs for ideological reasons. If, for instance, a circuit is perfectly ideologically harmonious, then we would know that any variation in their *en banc* activity is explained entirely by the error-correction and case-importance factors—if an institution is associated with differences in the amount of *en banc* review on a court with no ideological conflict, then this reflects its effects on the other two motivations for review.

To measure ideological harmony, I use a simple measure of circuit polarization, generated by taking the standard deviation of GHP ideal points for each circuit-year. I then interact this measure with each institution's dummy variable. The conditional effect of each institution on *en banc* activity when polarization is zero, then, gives their impact in the absence of any contribution from ideological conflict—in other words, it is the combined impact of the error-correction and case-importance motives on *en banc* review.

Further, it is possible to simply ignore the case-importance element, because it can only cause attenuation bias. It is quite plausible that there might be a substitution effect in this process—i.e., if a circuit has no need to review for one reason, it substitutes extra review activity on some other dimension up to some reasonable capacity limit. However, if this is happening, it would have the effect of pushing the difference in *en banc* levels with and without the institution towards zero, not in the other direction.[14]

[14]Admittedly, this is not entirely obvious. Consider a setting with zero polarization and in which, if there were no case-importance reviews, an internal institution would have the effect of reducing the total number of cases worth *en banc*ing to correct an error from 10 to 5. If there is no capacity limit and case-importance is completely uncorrelated with the other categories, then these numbers might increase to, say, 15 and 10. If these is a capacity limit of 10, and case-importance reviews are engaged in if other types are not necessary, then this would instead change the numbers to 10 and 10.

Imagining a Conflict-Free Court

I again begin by presenting some simple comparisons of means. Table 3.5 shows the impact of Courts of Appeals' institutions when ideological polarization is below its median. In two cases there are very few observations with low polarization and a given institution present; for those two—case bundling and the unanimous informal *en banc* I have instead used the 75th percentile. Here the idea is to examine courts with relatively low levels of ideological conflict; in that setting the institutions' effects can be attributed to their impact on circuits' error-proneness.

As the table indicates, these results are not generally consistent with the expected signs, which were anticipated to be entirely negative. Of the seven, only three of these institutions show a negative effect on *en banc* review for less polarized courts. Notably, these numbers and the directions of effect continue to look like the overall means; they are not showing any movement toward the negative side, which would be evidence of error-reducing effects. This lack of any shift toward the expectations of the error story provides further evidence that an error-reduction theory of these institutions simply does not explain variation in the data.

The picture is similarly unsupportive of the error-related expectations in a regression context. I now extend the logic above to a multiple regression model where which each institution is separately interacted with polarization. This model is, as above, an overdispersed Poisson model with circuit-level varying intercepts, controlling for circuit size and workload. This is a 'kitchen-sink' model, with every variable and its interaction included—a large number of parameters, especially considering the sample size of 511.

Table 3.5: Mean *En Banc* Activity Levels, By Reform, for Polarization ≤ .33 (sample median)

Reform	Absent	Present	Difference	Legal
Screening	3.5	7.7	4.2**	–
Publication (majority rule)	5.7	6.9*	1.2*	–
Publication (unanimity rule)	5.5	6.8	1.3†	–
Case Bundling[1]	5.8	7.9	2.1**	–
Pre-filing Circulation	6.4	5.5	-0.9†	–
Informal *en banc* (majority rule)	6.5	1.3	-4.2**	–
Informal *en banc* (unanimity rule)[1]	6.1	3.5	-2.6†	–

Significance levels : † : 10% $*$: 5% $**$: 1%

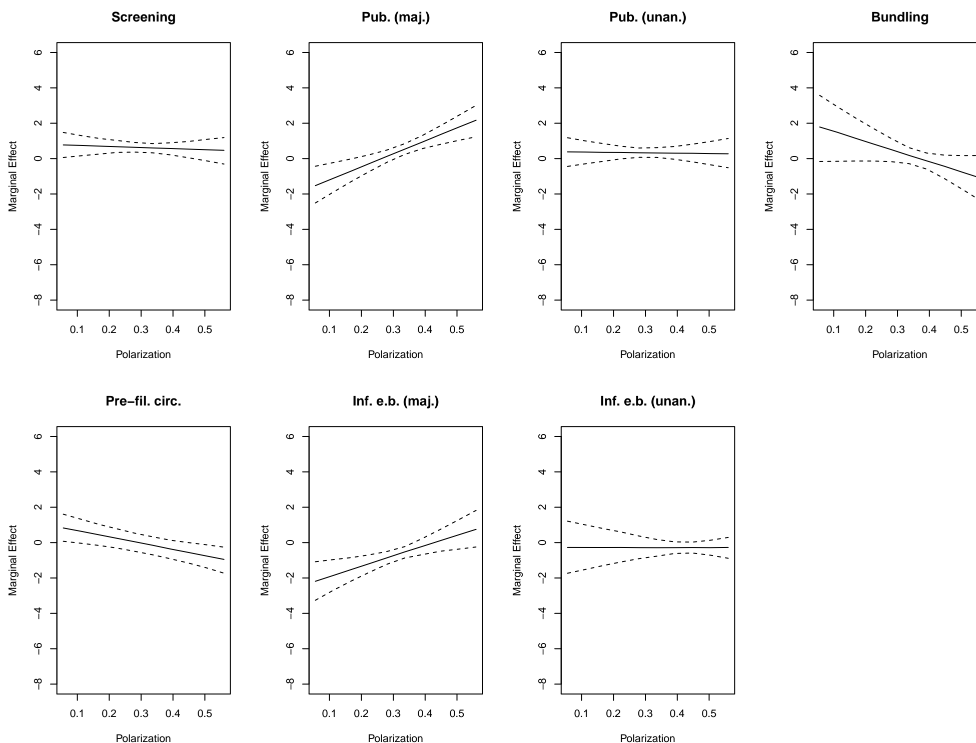
[1]75th percentile used

However, these relationships are very similar if I test each institution in this way one-by-one in its own model—e.g., running a model with the two controls plus screening, polarization, their interaction, and nothing else.

Instead of reporting model coefficients, Figure 3.2 shows visually the marginal effect of each institution on *en banc* activity, across the range of circuit polarization. A full table of model coefficients is reported in an Appendix at the end of this chapter. Of interest in Figure 3.2 is the marginal effect when polarization is equal to zero. At this value, the circuits are as conflict-free as possible. Thus, the conditional effects of each reform at this level of polarization give the isolated effect of each one on error.

In the aggregate this model does not provide evidence that is especially consistent with expectations from the legalist account. Were these institutions working to reduce error, we would observe all or most with negative marginal effects when polarization is at zero. Yet fewer than half of the estimated marginal effects are in this predicted direction, even ignoring their variation. In addition there some institutions appear to have large

Figure 3.2: Marginal Impact of Reforms, from Varying-Intercepts Poisson Regression, across Range of Polarization



effects in the opposite direction from that predicted by the error-reduction expectations. Considering both the comparisons of means and the regression model, there is not an obvious, across the board link between the presence of institutions and the anticipated effects on error when polarization is low.

In sum the basic, non-interaction model of *en banc* activity provides a very close match between its estimates and the expected relationships between institutions and ideological conflict. Attempting to isolate the independent effects on error, by examining reforms' effects when polarization was low, however, was not successful and showed little or no evidence of any systematic error-reduction impact from these institutions. In

total, this analysis provides stronger evidence that institutions influence the relative frequency of legal inconsistency caused by ideological conflict than of that caused by judicial error. Though this test does not provide direct evidence of constraints operating on panel behavior, it does provide indirect evidence highly consistent with the institutional theory of judicial choice, and with the internal oversight model of circuit behavior developed in the previous chapter. It also provides evidence inconsistent with an ideologically neutral perspective on internal reforms.

Conclusion

In this chapter, I examine the effects of a number of institutions which the Courts of Appeals have adopted in order to help maintain uniformity and consistency in the application of federal law. Examining the effects of these institutions on levels of *en banc* review, I find little evidence that these internal reforms affect legal consistency via the legal model mechanism of error-reduction.

There are a number of reasons why this might be the case. It could be that my test does not have the ability to pick up these effects; this is entirely possible considering I am focusing on *en banc* grants, which are fairly rare and may not be commonly used simply for correcting good-faith misapplications of law which are limited to particular cases and of little larger legal consequence. It is also possible that the Courts of Appeals, which are comprised of judges near the top of their profession, are already very good at preventing inconsistency-inducing mistakes even without these institutions; their effects would then be quite small and could be overwhelmed by random noise. For these reasons,

it is probably dangerous to conclude that internal institutions have not had any neutral effects in preventing oversights and inaccuracies.

That said, this chapter shows evidence consistent with the view that institutional variation in the Courts of Appeals has political consequences. Consistent with prior literature (Giles, Walker and Zorn 2006), the evidence shows that *en banc* rehearing is substantially politicized. Moreover, the institutional context in individual Courts of Appeals—in terms of their patterns of adoption of internal reforms—seems to influence the actual use of this political tool a great deal. This evidence is consistent with a model in which the incidence of ideological panel voting depends upon the level of constraint imposed by informal oversight practices.

Thus while judges and judicial administrators often downplay the importance of politics in the Courts of Appeals, and reforms are often evaluated according to neutral criteria such as how efficiently judges manage their caseload (e.g. Cecil 1985, Baker 1994, *Commission on Structural Alternatives for the Federal Courts of Appeals* 1998, McKenna, Hooper and Clark 2000), this evidence shows that it is very difficult to divorce institutional change from its political consequences. In the next chapter, I explore these political consequences more closely, examining to what extent oversight constraints are actually felt in day-to-day panel behavior.

Appendix

Table 3.6: Varying-Intercepts Poisson Regression Estimates of Effect of Reforms on *En Banc* Cases per Circuit-Year, Conditioned on Circuit Polarization

	Estimate (s.e.)	(s.e.)
(Intercept)	1.00**	(0.39)
Circuit Size	0.01	(0.02)
Workload (hundreds)	-0.18*	(0.09)
Size × Workload	0.007	(0.006)
Polarization	-0.14	(1.13)
Screening	0.82†	(0.45)
Publication (maj.)	-1.93**	(0.62)
Publication (unan.)	0.39	(0.49)
Bundling	2.13†	(1.15)
Pre-filing Circ.	1.03*	(0.45)
Informal *en banc* (maj.)	-2.53**	(0.65)
Informal *en banc* (unan.)	-0.27	(0.86)
Polarization × Screening	-0.67	(1.43)
Polarization × Publication (maj.)	7.34**	(1.82)
Polarization × Publication (unan.)	-0.16	(1.57)
Polarization × Bundling	-3.55**	(1.18)
Polarization × Pre-filing Circ.	-5.78†	(3.12)
Polarization × Informal *en banc* (maj.)	-5.98**	(1.97)
Polarization × Informal *en banc* (unan.)	-0.003	(1.99)
† = .10, * = .05, ** = .01	N = 511	

CHAPTER 4

INSTITUTIONS, IDEOLOGY, AND PRECEDENT

In the previous chapter, I established that an institutional account of circuit reforms' effects works well to explain variation in *en banc* activity across the Courts of Appeals. Most importantly, the previous chapter showed evidence that this account, which emphasizes the importance of internal oversight in the Courts of Appeals, provides a much better fit to the data than its most obvious and serious alternative: the argument that internal institutions amount to nothing more than politically-neutral administrative reforms. Patterns in the circuits' *en banc* behavior provide little or no evidence consistent with the latter view.

The previous chapter provides suggestive evidence that the political consequences of institutional variation may be important for understanding broader patterns of behavior in the Courts of Appeals. However, a major disadvantage of the previous chapter's analysis is that *en banc* review—though useful in allowing both theories to be tested side-by-side—is relatively rare and somewhat remote from day-to-day panel behavior. As a result,

though the previous chapter's evidence is consistent with the institutional account, it can at best provide an indirect picture of institutions' effects on panel decisionmaking writ large.

In this chapter I attempt to connect institutions to legal consistency more concretely, and more directly test the institutional theory of judicial behavior elaborated in Chapter 2, by examining case-level data about how and when judges cite precedent. Do local institutions affect how likely judges are to follow the law? Building on the last chapter's results, I examine this question with more granularity, looking at outcomes at the panel level rather than in the aggregate. I do so using an original dataset of citations among Courts of Appeals cases, providing direct evidence of how institutions impose constraints on day-to-day behavior in the Courts of Appeals. This evidence is strongly consistent with the theoretical claims made in Chapter 2, showing that the presence of those institutions which solve oversight problems results in a substantially attenuated linkage between ideology and judicial behavior.

I examine these linkages in the context of one of the most normatively important questions in the study of law and courts; namely, the question of when judges will respect the doctrine of *stare decisis*, which demands judges set aside their own preferences and defer to existing case law. Justice Byron White, in dissent in the case *Thornburgh v. American College of Obstetricians & Gynecologists* (1986), argues forcefully that *stare decisis* is "essential if case-by-case decisionmaking is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable

results" (474 U.S., at 786). Respect for precedent protects the legitimacy of the courts and, most importantly, provides the stability and continuity necessary for individuals to arrange their private affairs with confidence. Below, I examine conditions under which judges are more likely to follow precedent, and highlight the importance of oversight institutions to the maintenance of strong *stare decisis*.

Judicial Citations and Ideological Behavior

As political scientists studying the courts have moved away from analyzing votes, and towards analyzing legal rules and the content of judicial opinions, the analysis of judicial citations has become increasingly popular. Judicial citations have been used to study a variety of questions, such as which cases are most important (Fowler et al. 2007), or which judges rank as most prestigious (Choi and Gulati 2004).

The question I focus on in this chapter is to what extent judges use citations for ideological reasons. Legal citations are used for many reasons, but one of the most important is their justificatory function (cf. Posner 2000). Because judges are expected to base their decisions on existing law, citations to precedent which seem to support a judge's reasoning in a given case serve to legitimize the outcome of that case. In a world where judges craft opinions in pursuit of political goals, we would expect ideological similarity between a judge and the author of a potential citation to strongly predict the tendency to cite it positively.[1] If a judge is staking out a policy position in an opinion, it makes sense

[1] As Hansford and Spriggs (2006) note, there exist both positive and negative citations. A judge may cite a case in the course of criticizing it. Expectations regarding ideological distance would be reversed for negative citations.

that he or she is more likely to rely on previous authority which stakes out a similar position than that which takes a contrary one—especially if there are many potential citations among which to choose.

When judges behave ideologically, they should thus be more likely to cite positively judges who are ideologically similar to themselves than those who are very different. Hansford and Spriggs (2006) find strong evidence of this proposition at the Supreme Court level. Clark and Lauderdale (2010, 2012) also find evidence that Supreme Court justices' citation choices are influenced by ideology, and are informative as to the ideological placement of the Court's opinions. Landes, Lessig and Solimine (1998) and Choi and Gulati (2007), examining this question at the Courts of Appeals level, find mixed evidence, with the former finding no ideological effect and the latter the opposite. Both studies, however, treat all citations as having the same polarity, which may miscategorize citations that are negative or that are peripheral to a case's central issue. Both studies also use the party of the appointing president to measure ideology, a limiting choice given that measures are available that place judges on a continuous scale.

In this chapter, I show that Courts of Appeals institutions condition the extent to which judges use citations ideologically. My data are drawn from the same source as Hansford and Spriggs's—Shepard's Citations—and use continuous measures of ideology, allowing for a more nuanced test. As will be seen, though, the mixed evidence found in prior work is not solely a function of research design choices; the *average* relationship between ideology and citation propensity, pooling across all of the circuits, is not incredibly strong. However, this conceals considerable variation among the circuits. As I will show in this

chapter, ideology predicts behavior strongly in some circuits, and hardly at all in others—as a function of which internal reforms circuits make use of—and as a result, treating the circuits as interchangeable and not accounting for their institutional variation may result in misleading conclusions.

Citations and Institutions

Throughout this project, I argue that the extent to which judges behave ideologically is to a large degree a function of the constraints within which they operate. Consistent with principal-agent theories of judicial politics, I expect judges to pursue their own policy preferences in many circumstances, but to rein in such behavior and follow legal dictates when provided with an incentive to do so (Cameron, Segal and Songer 2000, Lax 2003, Kastellec 2007, Clark 2009). One key incentive, I argue, is the possibility of punishment associated with being caught making ideologically-motivated decisions that are inconsistent with precedent. Judges can thus be deterred from ideological voting, and incentivized toward *stare decisis*, when they perceive oversight of their actions as likely. Two internal reforms adopted by some of the circuit courts—pre-filing circulation and the informal *en banc*—promote oversight activity within circuits and thus should improve deterrence, attenuating the impact of ideology on behavior.

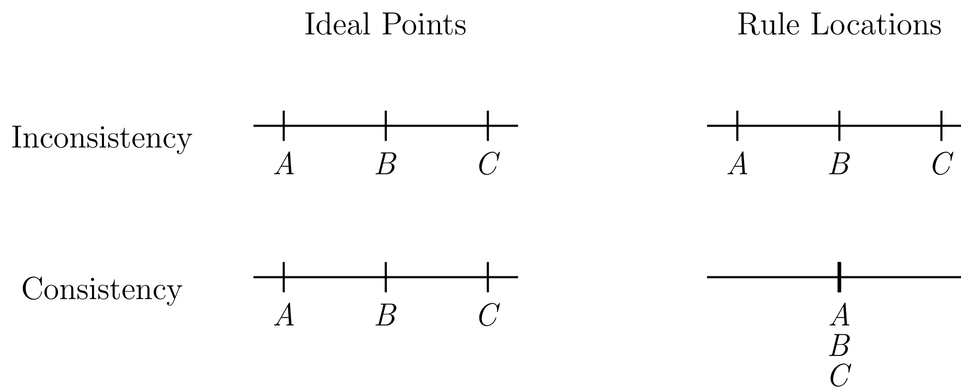
This chapter's analysis is designed to look for evidence of a conditional effect—variation in the extent to which ideological distance predicts citation behavior. The ultimate goal is to infer whether these particular informal institutions in the Courts of Appeals improve legal consistency.

In a perfectly legally consistent setting with perfect adherence to *stare decisis*, judges make all decisions according to the same set of rules; the identity of the particular judge should be uncorrelated with the outcome. Correspondingly, any other attributes of individual judges—such as ideology—should also be uncorrelated with outcomes. As the setting deviates from this ideal, and judges become more likely to make decisions ideologically, these correlations increase. Thus one way to assess relative legal consistency across different courts is to examine the relative impact of ideological variables on decisionmaking.

Within the specific context of judicial citations, the key explanatory variable is ideological distance. Ordinarily, we would expect judges to cite opinions written by their ideological allies more often than their opposites. Thus in courts with little legal consistency, positive citation frequency should be strongly (negatively) predicted by ideological distance; in other words, judges should be much more likely to cite cases decided by judges closer to their ideal points than by judges farther away. In courts with strong legal consistency, distance's effect should be closer to zero. Consider Figure 4.1.

Each line in the figure represents a unidimensional fact space. The left column represents judges' policy preferences—the rules they would most prefer to implement—and the right column represents the rules that they actually implement when deciding cases. The patterns in the first row assume perfectly ideological judicial behavior, in which each judge simply votes their personal preferences. The implemented rules are not consistent with one another. By contrast the second row assumes perfectly non-ideological behavior, in which judges have some set of incentives which cause them to set aside their ideolog-

Figure 4.1: Judicial Positions and Rule Positions Under Inconsistency and Consistency
Under inconsistency, judge *A* is more likely to cite rule *B* than rule *C*, while under consistency, citations to either should be equally likely.



ical preferences and vote according to a common rule. When this happens each judge's implemented rule is the same, despite their differing preferences.

Judges cite other opinions, not other judges, and thus they are choosing from the menu of options available on the right-hand side of the figure. If we assume that judges in either setting are more likely to cite opinions which declare rules proximal to the position they choose to adopt in their own opinions, then citation choices can discriminate between these two possible worlds. In the first, where implemented rules closely hew to individual preferences, preference divergence should be a strong predictor of propensity to cite—judges should be much less likely to positively cite the opinions of other judges who are ideologically distant. In the second world, however, every opinion is equally ideologically distant from any given judge, and thus ideological distance should be unrelated to judges'

citation propensities.

Applying this logic to Courts of Appeals institutions, then, we should expect oversight institutions, if operating as expected, to attenuate the extent to which increased ideological distance reduces the likelihood of a positive citation. In other words, the effect of ideological distance on citations should be conditional on the institutions present in a particular circuit. Other things equal, a circuit which has adopted, e.g., pre-filing circulation, should exhibit a weaker relationship between ideological distance and citation propensity than a circuit without this institution.

Unlike in the previous chapter, where I anticipated some institutions to have different directions of effect with respect to *en banc* activity in the circuits, in this chapter I am instead looking at whether or not institutions condition the effect of ideology. Under the institutional model, there should be a substantial difference in the relationship between ideology and citation behavior between circuits with effective oversight institutions and those without; under the legalist model we should not observe such differences. Because only the institutional model makes this prediction, the question of interest concerns whether these conditioning relationships exist at all.

Because my sample is limited to published cases, and because they do not vary sufficiently across the circuits within the years of my sample, which begins in 1986, I omit screening and publication rules from this chapter's analysis. As a result, I test the above expectation for each of the remaining four institutions. These are pre-filing circulation, case bundling, and the majority- and unanimity-rule informal *en banc* procedures. Table 4.1 provides an reminder of which of these institutions are located in which circuits.

Table 4.1: Reforms in Each Circuit

	1	2	3	4	5	6	7	8	9	10	11	D.C.
Case Bundling	X						X		X			
Pre-filing Circ.			X	X		X				X		X
Informal *en banc* (majority)	X	X					X					
Informal *en banc* (unanimity)										X		X

Table 4.2 gives the predicted direction of effect of each institution for this chapter's test. Relative to the previous chapter the signs are reversed; this is because of differences in the operationalization of each test. Here, the baseline relationship between positive citation and ideological distance is expected to be negative, because judges should be more likely to cite ideologically similar opinions. Oversight institutions should attenuate this relationship, making it less negative. This results in a positive expected sign.

Measurement, Data and Sample

To test these hypotheses, I use a novel dataset of citations among Courts of Appeals opinions created from Shepard's Citations, a legal citator service which tracks the presence of citations from one case to another, and, more importantly, the polarity of those citations. Shepard's codes citations as falling into any of a number of descriptive categories such as 'Followed', 'Cited', 'Criticized', etc. Hansford and Spriggs (2006) examined the validity and reliability of Shepard's data as a measure of judicial treatment of case law, and found it to perform well.

As Hansford and Spriggs note, the Shepard's categories can be usefully divided into three broad subsets—positive, negative, and neutral. A single code, 'Followed', indicates

Table 4.2: Expected Conditioning Effects on Negative Relationship Between Ideological Distance and Propensity to Follow Precedent, by Reform

Institution	Conditioning Effect
Case Bundling	$=/-$
Pre-filing Circulation	$+$
Informal *en banc* (majority rule)	$+$
Informal *en banc* (unanimity rule)	$=/+$

positive citation. This code indicates that the authoring judge explicitly stated his or her reliance on a previous opinion as controlling precedent. Negative citation treatments are categorized more finely, and include the codes 'Distinguished', 'Limited', 'Questioned', 'Criticized', and 'Overruled'. Finally, Shepard's indicates neutral citations, by far the most common, with the code 'Cited'.

Of the varieties of citation, those with the positive 'Followed' code provide the best measure of which precedents judges adopt as justification for their reasoning in deciding cases. Spriggs and Hansford (2000), in a study of the validity of Shepard's citations, recommend that researches focus only on citations with an explicit positive or negative polarity. There is because there is considerable heterogeneity in the neutral citations; Shepard's makes no distinction between those which are discussed in detail and those which are simple string cites, included in a list of several tangentially relevant cases without comment. By contrast, 'Followed' cites reflect an opinion author's deliberate choice to make a precedent central to his or her reasoning, and reflect the best measure of meaningful citation, of the sort that might be constrained by *stare decisis* considerations.

Because I am interested in examining the effect of ideological distance between panels on whether or not judges positively cite particular precedents, I adopt a dyadic structure

for the data. In other words, an observation consists of a pair of cases. My dependent variable, then, is a dummy-variable indicator of whether a 'Followed' citation occurred from one case to the other in each dyad.

One challenge in dealing with dyadic data is in choosing a set of plausible candidate cases from which to form dyads. Creating every possible dyad from among a wide swath of cases risks diluting the data with an enormous number of zeroes. In the study of international conflict it is common to limit analysis to what are termed 'politically relevant' dyads (Russett and Oneal 2001). This excludes pairs of countries which are extremely unlikely to go to war with one another, such as Finland and Fiji. The benefits of this restriction are twofold: first, potential bias from the inclusion of so many zero outcomes is sidestepped, and second, the data-collection process is made substantially more efficient.[2]

Much the same situation arises in the analysis of judicial citations. Cases which do not implicate remotely similar areas of law are unlikely to be connected via citation. Thus in collecting my citation data I use a similar approach, limiting my analysis to 'legally relevant' dyads. These consist of dyads in which the two cases share a common legal issue such that one might plausibly cite the other. In addition, because I am attempting to explain intracircuit legal consistency, I limit the set of dyads to only those in which both the potential citing and cited case come from the same circuit.

My direct operationalization of 'legal relevance' is to use only dyads of Courts of Appeals cases which cite a common Supreme Court precedent. I collected the data by first selecting a random sample of 200 Supreme Court cases from 1986–2007. I then

[2]Random sampling could seemingly also solve both problems but when the outcome of interest is relatively unlikely to be seen for an arbitrary dyad, the sample size demands eliminate these potential gains.

Shepardized each of these cases, identifying the Courts of Appeals cases which cited them. Dyads were then formed among these cases. Further, in an effort to keep the number of dyads manageable, I created dyads between only those intracircuit cases which occurred within three years of one another. Because it has been shown that older cases are considerably less likely to be cited than more recent ones (Hansford and Spriggs 2006), dyads many years apart are much more likely to be legally irrelevant to one another, and would only inflate the number of zeroes in the data.

After forming the dyads, I Shepardized each Court of Appeals case identified at the previous step, and used that information to code whether the more recent case in a given dyad cited the older one, and if so, in what fashion. Finally, I dropped all dyads containing isolate cases (those which neither give nor receive a citation of any variety to another case from the same circuit). This results in a total of 47,116 dyads containing 7,018 unique Courts of Appeals cases.

Dyadic data naturally casts a wide net, and has a high rate of null outcomes; nonetheless, among all dyads, the procedure results in a total citation rate of 15.3% when including all forms of citation (positive, negative, neutral). "Followed" outcomes are less common, because only a subset of any case's citations can be substantial enough to earn that designation. Even so, 1,131 instances of positive citation were identified, for a baseline rate of 2.5%.[3]

Because not all Supreme Court cases are equally important, some cases are cited relatively infrequently by the lower courts. Supreme Court cases which are not cited, or which are cited sparsely enough that none of the citing cases cite one another, contain no

[3]Negative citations occurred at a rate of 0.7%.

non-isolate dyads and are dropped. In the end, 156 out of the original 200 Supreme Court cases sampled contribute observations to the final dataset.

The median number of dyads per Supreme Court case is 42. Though most Supreme Court cases produce a modest number of citing dyads, there is a long tail on the distribution of citations. Ten of the Supreme Court cases resulted in over 1,000 dyads, with the largest producing 8,756. Of the 47,116 total dyads, the ten largest Supreme Court cases are responsible for 68%. The large contribution of a relatively small number of Supreme Court cases to the total N suggests a degree of caution; below, I perform sensitivity analysis to show that the results below are not attributable solely to the presence of the few heavily cited Supreme Court precedents in the sample—as these may potentially be unrepresentative of the larger population.

To measure the ideology of the judges involved in each case, I downloaded the written opinion from each Courts of Appeals case in the sample, and extracted the identities of the judges deciding each case using automated tools.[4] After identifying panel judges, common-space ideology scores (Epstein et al. 2007) were used to calculate a median ideal point for the panel associated with each case. An ideological distance measure was generated by taking the absolute value of the difference between panel ideal points for the two cases in each dyad.

[4]I began with a comprehensive database of written opinions from the Federal Reporter available at http://bulk.resource.org. I then wrote a script in Perl to search every opinion's preliminary text—which identifies the panel—for the name of every judge in the relevant circuit. This produced a list of which cases individual judges were involved in, which was then matched to my sample. This procedure was very effective, identifying the sitting judges of both cases for 96.5% of the dyads in the dataset. The most notable limitation of this procedure is that it does not identify non-circuit judges, such as district judges sitting by designation. In such cases I take the median not including those judges, that is, the median of those panel judges who were identified. The practical effect of this should be a small degree of random measurement error, and thus some downward bias on the estimated effects below.

Table 4.3: Descriptive Statistics

Variable	Minimum	Maximum	Mean	Std. Dev
Age of Early Case	0	3	1.48	1.03
Age of S.Ct. Case	0	22	3.92	3.77
Total Caseload (thousands)	0.49	6.50	2.72	1.58
Times Prev. Followed	0	8	0.15	0.54
Ideological Distance	0	1.09	0.26	0.24

Finally, I include a few control variables, each of which are relatively straightforward to measure. These include the age of the Supreme Court case common to each dyad, the number of years separating the early and late case in each dyad, the aggregate number of times the early case in each dyad has been followed by other circuit cases,[5] the circuit-year's total caseload in the citing year,[6] and whether the early case was an *en banc* decision.[7] Descriptive statistics for all non-dummy variables used below are given in Table 4.3. In addition, a histogram of *Ideological Distance*, a central independent variable of interest, is given in Figure 4.2.

Analysis

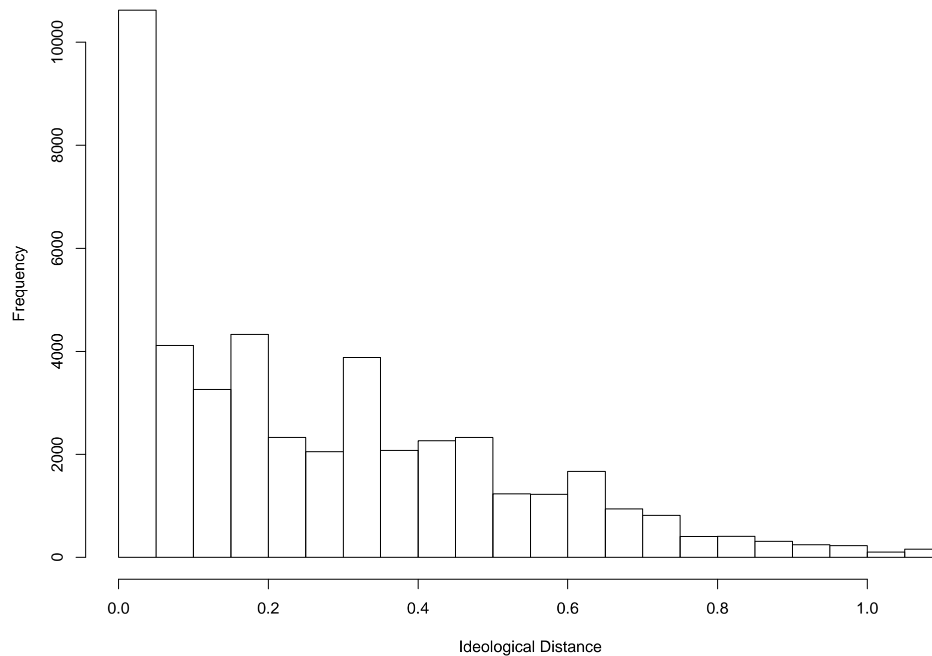
I now examine whether circuit institutions condition the relationship between two panels' *Ideological Distance* and the probability of a positive citation. Before turning to the regression results, it is worth noting the unconditional relationship between these two

[5]This is somewhat similar to the 'vitality' variable used by Hansford and Spriggs (2006).

[6]Other measures of circuit workload or size, such as per-judge caseload or the number of active judges, perform similarly.

[7]I have estimated the models below with alternate controls, including the number of judges per circuit, per-judge caseload, negative citation history, and network size (the number of dyads per Supreme Court decision). These variables have no meaningful effect on the results.

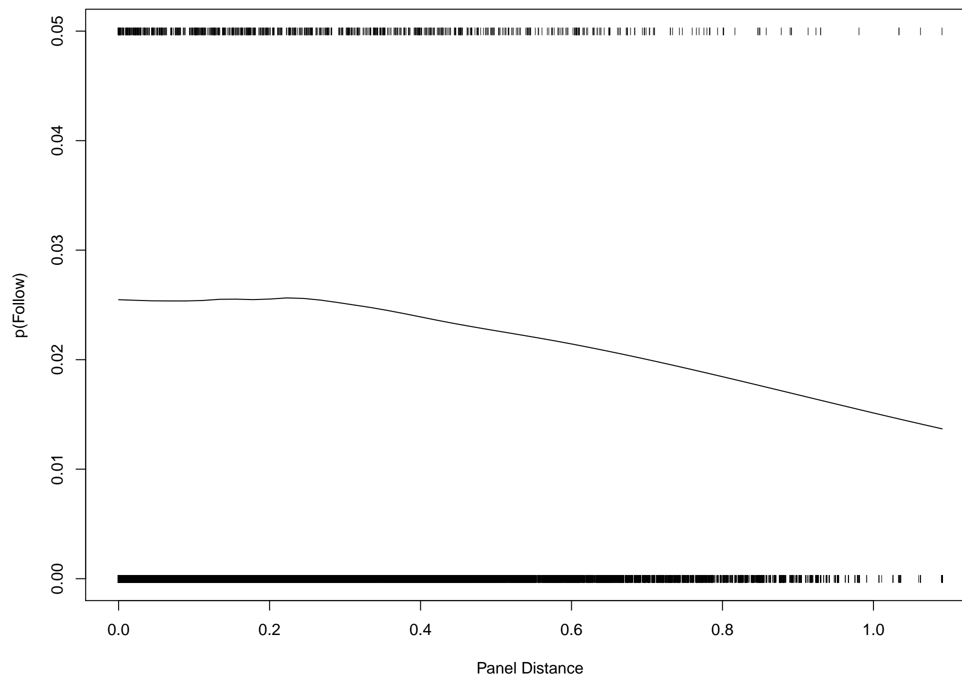
Figure 4.2: Histogram, Ideological Distance within Dyads



variables. Figure 4.3 shows the estimated probability of a positive citation across the range of panel distance, as given by a non-parametric Lowess smoother, when pooling all of the circuits together. As can be seen, the probability of a positive citation is highest when panels have very similar ideology scores. Once panel distance grows past roughly 0.2, the probability of a positive cite tails off steadily and is smallest for those dyads containing the most ideologically different panels.

How do circuit institutions condition this relationship? To answer this question I model this relationship more directly. The data take on a hierarchical structure, with dyads nested within circuits. Because circuits vary in many ways not captured by my institutional variables or other simple measures, my modeling strategy must take into ac-

Figure 4.3: Estimated Probability of Followed Cite, by Panel Distance, from Lowess Smoother



count potential unobserved circuit-level heterogeneity in both the baseline frequency of citation and the extent to which ideology predicts behavior. For this reason I test the expectations from Table 4.2 using a multilevel random coefficients model. This specification has varying intercepts by circuit, varying slopes by circuit on the estimated effect of *Ideological Distance*, and cross-level interactions between each institutional dummy and the variable *Ideological Distance*.

At the dyad level, the key independent variable is *Ideological Distance*; this variable's effect is allowed to vary by circuit, and variation in its effect is predicted by the top-level variables. At the circuit level, the key predictors are the four circuit institutions dis-

cussed above. The model also includes cross-level interactions between the circuit-level predictors and *Ideological Distance*, which indicate the extent to which each institution conditions the relationship between distance and positive citation. I model this equation using a binomial distribution with logit link.[8]

The estimation results are given in Table 4.4.[9] The primary results are shown in the first column. As a result of the cross-level interaction, the estimate for the variable *Ideological Distance* gives the effect of distance on propensity to follow precedent in those circuits which have none of the four institutions listed above. These are the Fifth, Eighth, and Eleventh circuits. As expected, in the circuits with no consistency-promoting institutions, the effect of ideological distance is negative and statistically significant.

The coefficients on the cross-level interaction variables show the difference between the baseline effect of distance and the effect given each particular institution. For the oversight institutions, the model provides evidence strongly consistent with expectations. Estimates for *Distance* × *Pre-filing Circulation* and *Distance* × *Majority-Rule Informal* En Banc are positive and significant.

Figure 4.4 graphically illustrates the strong conditioning impact of each of the two oversight institutions. The Figure shows the predicted effect of *Ideological Distance* across its range, conditional on the presence of pre-filing circulation or the majority-rule informal *en banc*, respectively. Each are shown in comparison with the impact of distance

[8]The model is estimated with maximum likelihood using the `lmer` command in R.

[9]The results given are based on uncentered data. It is often advised in hierarchical modeling to center all variables prior to estimation, to increase the efficiency with which intercepts are estimated (Gelman and Hill 2007). Here, however, most of the density of the key independent variable *Ideological Distance* already falls near its (natural) zero, because it is generated via an absolute value transformation. The centered model is thus arguably less efficient than the raw score model; I report the latter in the text. The results from the grand-mean centered model are substantively very similar. The most notable difference is that the effect of *Ideological Distance* is somewhat smaller in magnitude.

Table 4.4: Hierarchical Logit Model Estimates of Probability of Positive Citation Occurring in Dyad

	Full Model	Excluding Largest Dyads
	Estimate (s.e.)	Estimate (s.e.)
(Intercept)	-3.90**	-3.58**
	(0.28)	(0.35)
Ideological Distance	-0.75**	-1.05*
	(0.28)	(0.48)
Distance×Bundling	-0.05	0.41
	(0.39)	(0.63)
Distance×Pre-filing Circ.	0.89**	1.56*
	(0.43)	(0.67)
Distance×Maj. Informal *En Banc*	0.74†	1.12†
	(0.39)	(0.63)
Distance×Unan. Informal *En Banc*	-0.47	-0.71
	(0.45)	(0.63)
Bundling	-0.35	-0.57
	(0.28)	(0.35)
Pre-filing Circ.	-0.003	-0.37
	(0.28)	(0.36)
Maj. Informal *En Banc*	0.25	0.15
	(0.32)	(0.39)
Unan. Informal *En Banc*	0.08	0.29
	(0.34)	(0.42)
Age of Early Case	-0.10**	-0.05
	(0.03)	(0.04)
Age of S.Ct. Case	0.03**	0.02†
	(0.01)	(0.01)
En Banc Cited	0.67**	0.49*
	(0.14)	(0.22)
Times Prev. Followed	0.38**	0.63**
	(0.04)	(0.10)
Total Caseload (thousands)	0.11†	0.14†
	(0.06)	(0.08)
† = .10, * = .05, ** = .01	N = 44704	N = 14111

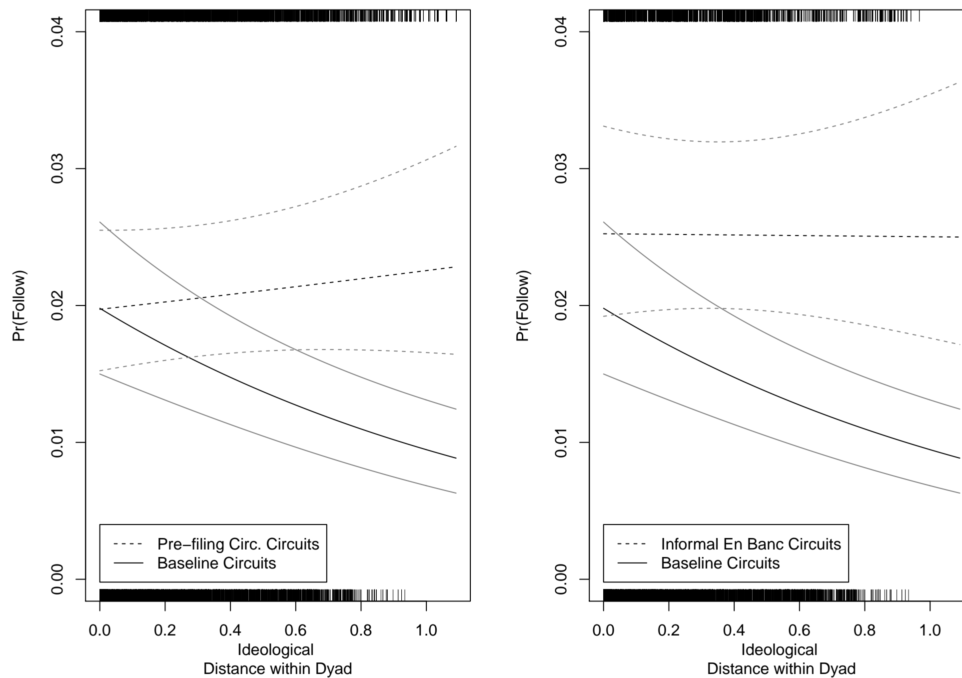
in the baseline circuits which do not possess any of the four institutions included in the model. The plots are generated using the full model in the first column of Table 4.4, and

also show a rug indicating the density of *Ideological Distance* in the circuits with each institution (top) and those with none (bottom).

The Figure illustrates stark differences across institutional contexts in how judges use citations. In the baseline circuits, the ideological distance between two panels is strongly negatively associated with the likelihood that one will cite the other, indicating ideologically-motivated use of precedent. In such circuits, comparing a dyad where both panels share the same ideal point to one where their distance is at its maximum, the probability of a follow drops from 1.9% to 0.9%, a proportional decline of 55%. In other words, a dyad of two cases both authored by panels with the same ideal point is more than twice as likely to contain a positive cite than a dyad with one panel from each extreme of the ideological spectrum. The results presented here show, however, that in circuits with either of the two oversight institutions, this ideological bias is eliminated entirely. In a circuit with pre-filing circulation or the informal *en banc*, where off-panel judges are given additional tools by which to influence panel behavior, ideology does not predict how judges cite precedent. As argued above, this pattern is consistent with broader patterns of decisionmaking in which judges are not simply writing their preferences into law and echoing the rules which happen to be placed most proximal to themselves, but instead constraining their behavior and following agreed-upon legal understandings.

The remaining two institutions, as largely expected, do not appear to have any substantial effect on circuits judges' deference to *stare decisis*. Case bundling appears not to condition the effect of ideological distance. Judges in circuits with bundling cite just as ideologically as those with no institutions, but bundling does not appear to be making the

Figure 4.4: Predicted Effect of Ideological Distance on Probability of Followed Citation, Conditional on Presence or Absence of Oversight Institutions



matter worse. Slightly surprising is that the apparent effect of the unanimous informal *en banc* is insignificant. This contradicts the finding from the previous chapter that the unanimous informal *en banc* somewhat reduced ideological conflict. The unanimous informal *en banc* may thus occasionally substitute for a full *en banc*, but not truly increase the credibility of any threat of punishment that might induce better panel behavior in the aggregate.

The second column of Table 4.4 shows the results of a sensitivity analysis, in which the dyads contributed by the ten most-cited Supreme Court cases are removed from the

sample.[10] As can be seen, the results are very similar to those from the main model.[11] Ideological distance still strongly negatively predicts positive citation, and this effect is still attenuated by pre-filing circulation and the majority informal *en banc*. The latter effect falls slightly outside of statistical significance due to the reduced sample size, but remains similar in magnitude. This provides some evidence that the long tail of the sampling procedure described above is not unduly influencing the results. That is, even though some individual Supreme Court precedents contribute large number of dyads to the total sample, the results are substantively similar after their exclusion, even with a dramatically reduced sample size. These overall results thus provide robust evidence suggesting that these institutions do in fact bolster the effectiveness of internal oversight within their circuits.

As a second sensitivity analysis I performed a randomization test, as recommended by Lax and Rader (2010). Because I am estimating a hierarchical model with four top-level predictors and only twelve groups, there is some risk that the model's uncertainty estimates may be overconfident, particularly for the cross-level interactions (Stegmueller forthcoming). To explore this possibility, I ran Monte Carlo simulations using a specification identical to the one above, except substituting four random institutions (top-level dummy variables) for the real-world ones, where the circuits participating in each are

[10]The ten most-cited Supreme Court cases among those sampled are, in descending order of times cited: *Neitzke v. Williams* (1989), *Bowen v. Georgetown University Hospital* (1988), *Chapman v. United States* (1991), *Bousley v. United States* (1998), *Sandin v. Conner* (1995), *Kumho Tire v. Carmichael* (1998), *Sacramento v. Lewis* (1998), *Kyles v. Whitley* (1995), *Harris v. Forklift Systems* (1993), and *Shepard v. United States* (2005). The topics of these cases are relatively diverse. As one might expect, some deal with criminal procedure matters that are often the subject of appeal. Others concern frequently-arising questions in civil litigation, such as standards for expert witness testimony and workplace sexual harassment.

[11]In addition to the sensitivity analysis reported in the text, I have also examined models without inclusion of any *en banc* cases as well as models in which all dyads with distance of zero are removed. In neither case are results substantively different from those presented.

chosen arbitrarily.[12] The results of the randomization test suggest that the model standard errors are not systematically biased. In 100 simulation draws, giving 400 estimates of cross-level interaction coefficients, only 7, or 1.75%, were estimated to be statistically significant at the 0.05 level. This strongly suggests that the model's uncertainty estimates are essentially accurate, and that the inferences drawn above can be trusted.

Finally, note that two factors relating to the presence or absence of these institutions suggest that results in this chapter are likely not attributable to endogeneity or reverse causality. First, each has been in place for many years. In the case of pre-filing circulation, the circuits using this practice have been doing so since the 1960s at the very latest; the informal *en banc* is a more recent innovation but has been in place since the 1970s or early 1980s in most cases. Because there is so much time between institutional adoption and the sample years under analysis, the underlying unobserved circuit characteristics that may have precipitated institutional adoption 40–50 years ago have had so much time to change that—apart from circuit size, discussed below—they should be largely uncorrelated with such circuit characteristics in this sample, particularly for its later years. Second, as the first chapter discussed, circuit judges tend not to view judicial reform in ideological terms, and engage in reform for what they perceive as neutral administrative purposes. As a result, while these institutions may *persist* due to their effectiveness in altering judges' ideological incentives, it is unlikely that they were directly adopted for such reasons, and thus should likely not be endogenously related to levels of ideological conflict on a circuit. While these factors by no means rule out all possible threats to inference, they do suggest

[12]Each random institution is assigned to a number of circuits that is equal to the number present in each of the four real-world reforms examined.

that it is reasonable to take the above results at face value and attribute these effects to the presence of oversight reforms in circuits.

Circuit Workload and Oversight Constraints

The above provides evidence strongly consistent with the theory laid out in Chapter 2, that circuit institutions which bolster off-panel judges' influence over decisionmaking produce more legally consistent outcomes by virtue of creating more effective constraints on judge behavior. Yet a key element of this theory is the argument that institutional innovations are helpful—and perhaps necessary—because on busy, overworked circuits, judges will tend to carefully preserve their free time rather than taking individual initiative to invest in oversight activities of the sort encouraged by internal reforms.

Are oversight institutions directly responsible for more constrained behavior, or are they merely correlated with circuit size, with smaller circuits simply better able to achieve legal consistency? At a glance, this is a possibility, as the two oversight institutions are both present primarily in circuits which are smaller than average. According to data from the U.S. Administrative Office of Courts, in 2008 the circuits with pre-filing circulation terminated an average of roughly 1,900 cases, as opposed to 2,900 in those which do not have the institution. Similarly, those circuits with the majority-rule informal *en banc* hear around 1,800 cases while the remainder heard roughly 2,700.

While these raw caseload numbers may be somewhat counterbalanced by the larger number of judges present in busier circuits, from the perspective on an individual judge considering whether to spend his or her time auditing colleagues' decisions, the actual

count of those decisions is of some importance. On a larger circuit, with more cases and more judges, there is simply more potential oversight activity. A described in Chapter 2, this higher burden may create more serious barriers to such activity, undermining a circuit's ability to police itself.

A natural question, then, might be whether circuit workload itself, rather than the presence of absence of particular reforms, is actually driving the results shown above. That is, it may be that the findings above are epiphenomenal, reflecting that reforms are present in settings where there are already favorable conditions for internal oversight because of lessened workloads.

The empirical strategy of this chapter can easily accommodate a test of this alternative hypothesis. Suppose that circuit size is the most important determinant of judges' willingness to monitor their colleagues, rather than the presence or absence of oversight reforms. If this is true, then it implies that behavioral constraints should be conditional on the circuit's overall workload, much as shown above with respect to institutional variations. On circuits with modest total caseloads, judges should be more likely to engage in oversight, producing more constraints and better legal consistency. Thus the negative relationship between ideological distance and citation propensity should be lower in magnitude for low-workload circuits, and (equivalently) become more negative as a circuit's total workload increases.

Table 4.5: Hierarchical Logit Model Estimates of Probability of Positive Citation Occurring in Dyad, Conditioning on Circuit Caseload

	Without Oversight Institutions	With Oversight Institutions
	Estimate (s.e.)	Estimate (s.e.)
(Intercept)	-3.87**	-3.85**
	(0.18)	(0.31)
Ideological Distance	-0.12	-1.16**
	(0.26)	(0.56)
Distance×Total Caseload (thousands)	-0.08	0.10
	(0.09)	(0.13)
Distance×Pre-filing Circ.		0.85*
		(0.43)
Distance×Maj. Informal *En Banc*		0.94*
		(0.47)
Pre-filing Circ.		0.06
		(0.27)
Maj. Informal *En Banc*		0.02
		(0.31)
Age of Early Case	-0.10**	-0.10**
	(0.03)	(0.03)
Age of S.Ct. Case	0.03**	0.03**
	(0.01)	(0.01)
En Banc Cited	0.67**	0.67**
	(0.14)	(0.14)
Times Prev. Followed	0.38**	0.38**
	(0.04)	(0.04)
Total Caseload (thousands)	0.09†	0.08
	(0.05)	(0.07)
† = .10, * = .05, ** = .01	N = 44704	N = 44704

To test for this possibility, I run a hierarchical model very similar to those above, with varying intercepts and slopes (for *Ideological Distance*) by circuit. Table 4.5 presents two sets of results with alternative specifications. In the first column is given a model in which all institutional top-level variables are removed, and included is an interaction

between circuit workload and panel distance. I measure circuit workload using the total number of cases (in thousands) terminated by a circuit in the earliest year of the dyad.[13]

Note that the interaction between *Ideological Distance* and *Total Caseload* is not statistically significant. That said, its sign is in the correct direction. Moreover, the marginal effect of *Ideological Distance* on follow propensity when workload is very high—taking on a value equivalent to 6,500 cases, near the sample maximum—is -0.66. This marginal effect is quite similar in magnitude to the marginal effect of panel distance in earlier models in this chapter in those circuits with no internal institutions. The standard error of this estimated marginal effect produces a p-value of just 0.22, meaning that this may simply be noise, but may also indicate a pathway of effect that is present but relatively weak.

Note also that in the second column of results from Table 4.5, the two oversight institutions and their interactions with panel distance are added back to the model from the first column, and the net result is that even this modest evidence of a negative conditional effect associated with circuit size is eliminated. When these two potential explanations are put side-by-side in a model, the institutional dummies seem to overwhelm any effects of workload.

This suggests that oversight reforms themselves have substantial stand-alone effects, and do not owe their effectiveness to the simple fact that they are present in circuits with lower workloads. This should not be taken to mean that workload is unrelated to a circuit's willingness to make use of a particular internal reform. Indeed, as Wasby (1979) notes, the Ninth Circuit—noted for its considerable size relative to other circuits—has at various points contemplated adopting pre-filing circulation, rejecting such a plan because

[13] Alternative measures, such as a circuit's number of active judges, produce substantively similar results.

the considerable number of cases judges would then be responsible for reading would impose prohibitive costs (see also comments by Judge O'Scannlain 2004, indicating the Ninth's reluctance to adopt such a reform).

What this evidence does suggest, however, is that these internal institutions have independent consequences beyond simply alleviating the workload associated with oversight. They seem to matter in and of themselves, rather than simply acting as indicators of underlying conditions for effective oversight. Because pre-filing circulation and the informal *en banc* involve off-panel judges in circuit decisionmaking, they may to a significant degree legitimate it and routinize such participation, resulting in stronger constraints than might be present even on a lightly burdened circuit without such institutions. These institutions may change the character of particular circuits away from the baseline model in which the court is more or less a rotating set of collegial three-judge panels, and toward a model in which it is more like a single collegial court in which judges perceive some responsibility for all the court's cases.

How Ideological are the Courts of Appeals?

At the simplest level, this chapter examines whether and under what conditions Courts of Appeals judges write opinions—and, in doing so, use judicial citations—to pursue ideological goals. This specific question is of growing interest in the literature, owing to the obvious opportunities it presents to expand our understanding of more fundamental debates in judicial politics concerning whether Courts of Appeals judges operate under outside constraints on their decisionmaking (Cameron, Segal and Songer 2000, Kastellec

2011, Westerland et al. 2010), behave largely according to sincere attitudinal preferences (Hettinger, Lindquist and Martinek 2006), or self-restrain as a result of sincerely held legalist preferences (Cross 1997).

The central finding above—that oversight institutions strongly condition the impact of ideology—substantially informs this broader debate in a number of ways. The results of this chapter provide perhaps the most direct evidence to date of the deterrent effect that oversight and the threat of penalties for ideological behavior can actually have on day-to-day decisionmaking by circuit judges. While this chapter does not directly examine the relative importance of internal oversight reforms in comparison to threats of formal oversight by full *en banc* courts or the Supreme Court, the substantial degree to which the connection between ideology and citation is severed in the presence of oversight institutions suggests that some strategic constraints on circuit judges may take hold even in cases where formal oversight is unlikely.

These results also inform the empirical landscape within which this debate occurs in a subtle but very important fashion. In particular, it shows sharp evidence that cross-circuit variation in ideological incentives and behavior is non-trivial. Many analyses of the Courts of Appeals treat the twelve circuits as interchangeable, assuming that because their formal institutions are largely identical, they must be subject to largely similar incentives and exhibit similar behavior. Yet because the circuits do vary so much, pooling them all together can cause researchers to draw extremely misleading conclusions.

For a simple illustration of why this is so, consider Table 4.6. The table shows the results of a model which fails to take into account cross-circuit variation in internal in-

Table 4.6: Hierarchical Logit Model Estimates of Probability of Positive Citation Occurring in Dyad, Excluding Reform Variables

	Estimate (s.e.)
(Intercept)	-3.83**
	(0.17)
Age of Early Case	-0.10**
	(0.03)
Age of S.Ct. Case	0.03**
	(0.01)
En Banc Cited	0.67**
	(0.14)
Times Prev. Followed	0.38**
	(0.04)
Ideological Distance	-0.31*
	(0.14)
Total Caseload (thousands)	0.08
	(0.05)
† = .10, * = .05, ** = .01	N = 44704

stitutions. The model shown in Table 4.6 is, as above, a multilevel model, but is much simpler in its structure, omitting the top-level predictors and cross-level interactions. The model retains the varying intercepts and varying slopes (for the *Ideological Distance* variable), as before—thus, it is simply a random coefficients model without any top-level fixed effects.

Without taking into account internal institutions, the estimated effect of ideological distance on positive citation remains significant, but drops in magnitude by a factor of more than one-half relative to the effect size reported in Table 4.4 above for the circuits with no internal reforms. Naturally, this is because this estimate averages the effect from some circuits which exhibit a very weak relationship between ideological distance and citation behavior, and others which exhibit a strong one. The impact on the predicted

probability of a positive cite is attendantly much weaker; holding all else at zero the most extreme possible change, from the minimum to maximum ideological distance, alters the probability of a positive cite from 2.1% to 1.5%. This is a proportional decrease of only 26%.

While this is not a trivial difference, in the absence of any other evidence one might conclude from it, as much of the literature claims, that ideology has only a modest impact on Courts of Appeals behavior. Yet, in comparison to the previous model, which does take into account internal institutions, it is clear that this conclusion is not merited. Comparison of model fit suggests that this model, without any conditioning on reform variables, is a worse model of the data than the one that specified such relationships. The AIC for the model with no reform dummies is 10020, compared to a much lower (better-fitting) 8892 for the full model reported in Table 4.4. More importantly, the full model reveals substantial cross-circuit differences. Ideology is a stronger predictor of citation tendencies in some circuits, but is of little importance in those with effective oversight institutions. As such, it is not surprising that prior work, which generally averages across all of the circuit courts, has found only weak evidence of a relationship between ideology and citation (Landes, Lessig and Solimine 1998, Choi and Gulati 2007) or other behavior such as voting or dissent (e.g. Sunstein, Schkade and Ellman 2004, Hettinger, Lindquist and Martinek 2006).

Discussion

The above suggests that the various circuits operate fundamentally differently from one another, as a function of the extent to which they have effective procedures for internal policing. The finding that some circuits self-police effectively has considerable implications for many broader questions in judicial politics, and ramifications for how we think about other processes within the Courts of Appeals and in the judicial hierarchy.

This chapter suggests that many instances of panel inconsistency are deterred by informal avenues of oversight. What this means is that traditional models of *formal* oversight (e.g. Cameron, Segal and Songer 2000), though missing an important piece of the puzzle, may actually be much more realistic than commonly thought by their critics. This picture is suggestive of a world where, because the circuits prevent many panel deviations via various local practices, the Supreme Court need not apply its very limited review resources to the staggeringly outsized task of assuring doctrinal compliance in 60,000 Courts of Appeals cases per year. Instead, and consistent with what we know about certiorari, the Court can limit its attention to those cases it considers most important (Perry 1991). An implication is that the Supreme Court would then worry more about patterns in circuit law than about particular panel decisions. Lindquist, Haire and Songer (2007), notably, find evidence of just this sort of review strategy by the Court, in which institutional features of the circuits loom large in the Court's consideration, and panel characteristics are somewhat incidental.

Where many panel deviations are deterred informally, various strategic models which assume a baseline level of ideological behavior may not apply, or may operate slightly

differently. One example is theories about the use of 'whistleblowing' dissents to alert the *en banc* court about noncompliance (Cross and Tiller 1998, Kastellec 2007), which may operate somewhat differently in the presence of informal institutions. It is possible, for example, that whistleblowing may not be necessary on courts with pre-filing circulation, where off-panel judges are more attentive. The implications for such theories are not obvious, suggesting the opening up of fruitful avenues for furthering our understanding of such processes.

The apparently large influence of internal reforms also suggests that more attention be paid to internal microfoundations of the rule of law, as opposed to external ones. Judicial institutions in particular are typically designed to insulate judges from outside pressures. While judicial independence is typically thought of as freedom from interference by actors in other branches of government (Larkins 1996), its effects are also felt true within the judicial hierarchy, where the Supreme Court's formal powers extend only to review of cases and not to material punishment of disfavored lower court judges. Given the difficulties outside actors face in attempting to influence behavior on most courts, internal dynamics may be of considerable importance more generally. The internal reforms discussed above do not exhaust the set of interesting and potentially consequential internal dynamics. There are a large range of behaviors which are not so variable across the circuits or which are largely invisible to outside researchers, such as intra-judge communication and court culture (Wasby 1987, Cohen 2002), but which may substantially influence legal consistency in the circuits.

CHAPTER 5
INSTITUTIONS AND LAW

The U.S. Courts of Appeals face considerable challenges. Because they have the final say in nearly all their cases, they bear near-total *de facto* responsibility for the integrity of the rule of law in the federal courts. Yet the organization of the Courts of Appeals works in many ways to undermine their ability to apply the law consistently. Though the Courts of Appeals are expected to maintain uniform, predictable decisionmaking, their typical mode of operation is highly decentralized. The three-judge panel system causes vast diversity in judicial attitudes and understandings of the law across cases within a circuit, creating a tension between organizational form and function. Moreover, this problem is exacerbated by seemingly unrelenting growth in federal court caseloads, which encourage judges to make even more use of the efficient but disorganized panel system and less use of centralized methods of control such as *en banc* review.

In spite of this tension, scholarly assessments of the performance of the Courts of Appeals consistently find that the circuit courts do a relatively good job at maintaining

legal consistency. Moreover, in comparison to the Supreme Court, where decisionmaking is heavily predicted by personal ideology (Segal and Spaeth 2002), circuit decisionmaking seems constrained by law to a remarkable degree given the decentralized nature of these courts and the significant degree of autonomy this gives panels (Howard 1981, Songer, Segal and Cameron 1994, Zorn and Bowie 2010, Westerland et al. 2010). For political scientists, who have long recognized that judges can often be thought of as political actors who will pursue their own policy goals unless given reason to do otherwise, this fact represents a serious puzzle.

In this dissertation, I have addressed this puzzle head on, and provided an answer to the question of why highly independent circuit judges obey the law. The answer to this question has two components. First, I provide evidence that circuit judges obey the law because the institutions within which they are embedded provide them with incentives to. Among scholars who study judicial politics, and the Courts of Appeals in particular, there remains an active debate about the relative importance of institutions versus law. Some view Courts of Appeals performance as a success story about well-designed institutional constraints, which work efficiently and effectively to solve principal-agent problems in the federal courts (Cameron 1993, Cameron, Segal and Songer 2000, Kastellec 2007, 2011, Westerland et al. 2010). Others claim that the institutions of the federal courts are remarkably weak, and that Courts of Appeals behavior is better explained as a function of strong professionalization and internalized norms, and is attributable to strong legalist tendencies in the judges appointed to these courts (Gillman 1996, Cross 1997, Benesh 2002, Kornhauser 1995, Posner 2008, Bowie and Songer 2009). Though these arguments

need not be mutually exclusive—individuals holding values that match an organization's mission can certainly bolster the effectiveness of that organization's institutional rules—there remains a strong thread within the literature which claims that judicial values and socialization are in and of themselves sufficient to explain the rule of law in the federal courts, and that judicial institutions are of little importance. I report evidence strongly inconsistent with such a claim.

Second, while I provide evidence consistent with institutional explanations of judicial behavior, and inconsistent with legalist ones, I also depart from existing institutional theories, and suggest a very different story about *which* institutions can help us best understand Courts of Appeals judging. Unlike past work, which focuses heavily on the formal structures of the federal courts, namely certiorari and *en banc* review, I look instead at a variety of internal reforms adopted by the Courts of Appeals to solve certain administrative problems. Though some of these procedures seemingly involve rather minor details, in the dissertation I argue and provide evidence that some of these practices have significant consequences for the oversight environment within circuit courts—and for how judges behave.

My choice to switch focus away from system-level institutions to these circuit-level internal reforms stems from two purposes. Because they vary across circuits (unlike the structural features of the judiciary), they permit comparison of settings with and without particular institutions. Thus their study brings with it research design advantages. This switch in focus represents more than a research design convenience, however. It also represents an effort to take the Courts of Appeals more seriously as independent institutions.

As Chapter 4 showed, treating the circuits as identical can be very misleading. Assuming that judges in all circuits behave in much the same way may often be wrong, and when it is, estimating an average effect across the circuits can lead to incorrect inferences about important questions such as the relationship between ideology and behavior.

Moreover, as I argue in Chapter 2, the organizational goals of the circuit courts are more complex than is sometimes acknowledged. Much research on the Courts of Appeals, particularly formal-theoretic work, is prone to characterizing circuit judges as agents in a principal-agent relationship, either with the Supreme Court or with their circuit's *en banc* court. While this approach to studying the Courts of Appeals has proven fruitful, it represents an oversimplification. Even if—as this project suggests is appropriate—we begin from the first principle that Courts of Appeals judges have strong ideological preferences, this does not imply that they are solely interested in maximizing their ideological influence at the expense of all other considerations. Ideological circuit judges have a variety of instrumental reasons to value legal consistency. Pervasive legal inconsistency can harm the legitimacy of the courts and can cause confusion for trial court judges, resulting in more litigation and more appellate caseload.

What this project suggests is that though some incentives push circuit judges toward legal consistency, it is also important to recognize that judges' own preferences are strong and they may often be tempted to pursue them. The small potential for a future loss of legitimacy may pale in comparison to the temptation to see one's own view of the law win out in a particular case. Indeed, in the circuits which have none of the reforms found in this project to be effective, this is in fact what we often see. However, what this project

also shows is that in circuits where judges are more likely to be held accountable for such decisions by their peers, because of the presence of oversight-enhancing reforms, judges are more likely to uphold the rule of law.

At the same time, the project does not imply that short-term ideological goals are the only things that judges value. If this were true, there would be little incentive for judges to engage in the internal oversight that is apparently enhanced by some circuits' local institutions. Speculatively, what the project's results may suggest is that organizational goals such as the maintenance of aggregate legal consistency in a circuit at large may in fact be exceptionally important to Courts of Appeals judges—indeed this may be why informal oversight institutions are so effective. A small but important literature in judicial politics has explored the idea that judicial deference to the rule of law may be self-enforcing, because the long-run benefits of fidelity to law—in increased legitimacy, judicial prestige, reduced workload, and clarified expectations—are more valuable than the short-run gains to a judge of pursuing their preferences in a single case (O'Hara 1993, Rasmussen 1994, Bueno de Mesquita and Stephenson 2002).

Though one might reasonably take these arguments to imply that institutions may not be necessary to incentivize judges to protect the rule of law, this would be misleading. As we know from purely theoretical work on long-run games, it is very difficult to sustain cooperation when monitoring is impossible or imperfect (e.g. Bendor, Kramer and Stout 1991). When players have a difficult time observing whether others are defecting from a cooperative arrangement, such arrangements are much more likely to fall apart. In the Courts of Appeals, where many legal questions are complex and nuanced, workloads are

crushing, and judicial time is scarce, this sort of monitoring is potentially very difficult. Yet it may be precisely because judges do value long-run legal consistency that we observe relatively modest changes to circuits' oversight environments producing significant effects on behavior. While all judges surely understand well the long-term benefits of adherence to the rule of law, it is those in circuits that are best equipped to collectively police themselves who seem best able to overcome the occasional short-run temptations to pursue legally inconsistent policy goals, and to favor the long-run benefits of a stable and predictable legal order.

Directions for Future Research

The project makes these direct contributions to our understanding of judicial politics, and also opens up a variety of new avenues for further research on the U.S. federal courts and judicial institutions more generally. One line of inquiry concerns what implications this project has for other institutional approaches to studying the Courts of Appeals. In particular, this project stands apart from research that examines the effect of the judicial hierarchy, and particularly work looking at the relationship between the various Courts of Appeals and the Supreme Court. This project has implications for how we might think about those relationships as well.

One line of research in this vein suggests the importance of panel composition, in combination with the ideological preferences of hierarchical superiors. Cameron, Segal and Songer (2000) argue that the Supreme Court can review lower courts very efficiently because it knows information about their ideological leanings and about the directionality

of case outcomes. Thus if a conservative Supreme Court sees a liberal panel make a liberal decision, this may signal noncompliance, while if a liberal panel makes a conservative decision, it is much more likely the decision accords with the Court's wishes. However, this logic, and the strength of the connection between panel-decisional characteristics and Supreme Court review, may be attenuated for circuits with consistency-promoting institutions. Where many legal consistency problems are avoided because judges face potential within-circuit consequences, rather than because of the anticipated response of the Supreme Court, the signals the Court receives about compliance may be much weaker, and the Court may adopt a somewhat different review strategy. Indeed, this may suggest that the Court reviews some circuits on a panel-by-panel basis, because it is aware that the circuit does poorly at maintaining internal consistency, while reviewing other circuits as if panel decisions reflect the circuit's overall views.

As Clark (2009) argues, a auditing logic similar to that of Cameron, Segal and Songer (2000) applies to *en banc* review by circuits. Yet here in particular, circuits are likely to be quite well aware of how well they maintain internal consistency absent the *en banc* process. In those circuits without oversight reforms, *en banc* review may be the only serious check on panel decisionmaking, and thus be used primarily as a device for ideological auditing. In circuits with effective informal oversight tools, *en banc* review may not be used for ideological purposes as frequently. While it may be a last resort when informal channels of oversight break down, in such settings it might be used more often for purposes such as authoritatively resolving particularly important issues.

The conditioning effect of local reforms may also extend to arguments about whistle-

blowing behavior by minority panel judges (Cross and Tiller 1998, Kastellec 2007, 2011). Whistleblowing occurs when a panel majority has preferences opposed to (depending on the particularly of the theory) Supreme Court or circuit ideology, but contains one judge who does share such ideology. For example, given a conservative Supreme Court, there is potential for whistleblowing on a panel with two Democratic appointees and one Republican. This line of theorizing, which has been one of the most fruitful efforts to consider institutional incentives in the federal courts, suggests that the presence of such a whistleblower—and the potential that they might write a dissent, signaling to the higher court that a case is worthy of scrutiny—may constrain the behavior of the panel majority. Where judges must consider not just the threat of vertical review, but also the potential for informal oversight within their circuit, such effects may work differently.

Another major set of questions opened up by this project concerns its implications for the Supreme Court's power within the federal judiciary. What both existing institutional theories and legalist theories agree on is that circuit judges are highly responsive to the Supreme Court. Legalist theories, of course, attribute this to judges' respect for the Court's authority. Institutional theories attribute it to the power of the judicial hierarchy and the ability of the Court to incentivize compliance with its decisions. When considering the findings of this project, however, which emphasize the importance of circuit-level factors and the scrutiny of judges' immediate peers, the centrality of the Supreme Court is not so clear.

Chapter 4's results, which highlight the substantial impact of circuits' local institutions on the incidence of ideological judging, raise the question of whether circuit judges

are more responsive to circuit preferences than to Supreme Court precedent. While the research design of this project does not directly speak to this point, one interpretation of these findings is that circuit judges are obeying circuit law—which may or may not coincide with Supreme Court precedent. If informal circuit reforms exert strong influence, but the Supreme Court's formal oversight institutions exert weak ones, as some claim (e.g. Bowie and Songer 2009), then circuit law may often stake out positions different from what the Court might like, and the circuits may operate with considerable autonomy and be only moderately responsive to the Court—even while maintaining legal consistency within their own boundaries. This would mean that the Supreme Court, though it would of course retain 'soft' power based on authority and persuasion much as in other areas of public life (Hall 2010), actually has very little command and control power with respect to the federal courts. This would be a significant implication, and thus this line of theorizing, building from the dissertation's findings, could be a very productive one.

The project also highlights the importance of internal decisionmaking structures for behavior, even within judicial institutions, which often have more casual and less routinized processes than institutions such as legislatures. This suggests that scholars might want to consider the internal workings of other decentralized courts, and examine whether they have adopted procedures that may enhance or undermine legal consistency. While all Supreme Court justices participate in every case (excepting recusals and the like), many national high courts, such as the newly-created Supreme Court of the United Kingdom or the High Court of Australia, sit in divisions for some of their cases. In settings where high courts are decentralized, the incentives to maintain legal consistency are even stronger, be-

cause there is no ultimate body above them to clean up conflicts and provide authoritative resolutions. What processes do decentralized high courts use to maintain consistency in decisionmaking? Do they resemble those chosen by the Courts of Appeals, or do they take on a different character? Such questions could also be examined at the U.S. state court level, where several state supreme courts also sit in divisions. In addition, many intermediate appellate courts, both in the U.S. states and abroad, have a decentralized structure like the Courts of Appeals. What institutions have such courts adopted to cope with their challenges? Are there other informal innovations that have proven highly effective? Answering such questions could provide new ideas for judicial reformers as they contemplate the future of the Courts of Appeals.

Conclusion

This dissertation began with the question of why independent judges follow the law. The U.S. Courts of Appeals, whose judges are highly independent from political pressure and seemingly even from influence within the judiciary itself, provide an extremely interesting setting in which to examine this question. This project finds that in spite of their considerable autonomy, circuit judges are responsive to oversight by their peers. When potential scrutiny of their decisions by other judges is more probable, judges are more likely to follow precedent and uphold the rule of law.

The project finds evidence inconsistent with the argument that judges have such deeply ingrained legalist preferences that they are rarely tempted to pursue their own ideological preferences at the expense of the law. Yet in spite of this finding, the project tells an op-

timistic story about the Courts of Appeals, one where judges work together to protect the rule of law, and where the collective enterprise of judging can be greater than the sum of its parts. The project shows that judicial organization matters, and that it is possible for judges to work together to overcome the challenges they face and to safeguard the rule of law.

The findings of the project do not mean that judges do not understand and respect the benefits of adherence to law. Quite the contrary, the reforms examined herein should only be effective if the opposite is true, and circuit judges are motivated to pay attention to what other judges are doing with an eye toward improving the overall performance of their courts and maintaining legal consistency. Yet the project also suggests a more realistic view of the consequences of this judicial motivation. When panels are too isolated, and judges are too disconnected from accountability to their peers, there is a natural temptation to pursue short-run ideological goals. When judges work together, and work within institutions that create more points of contact between panels and the full circuit, judges are better guardians of the rule of law.

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