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THE PERVASIVE INFLUENCE OF POLITICAL COMPOSITION ON CIRCUIT COURT DECISIONS

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ABSTRACT

Using a novel and massive dataset of about 650,000 circuit court decisions, this paper empirically investigates the significance of the political affiliations of circuit court judges, as proxied by the party of the appointing president.

The analysis shows that these affiliations can help predict circuit court decisions in case categories that together represent more than 90% of all circuit court cases. The association between political affiliation and outcomes is thus pervasive in the vast universe of circuit court decisions, and it is not limited to the ideologically salient cases on which previous research has focused.

In particular, I find an association between political affiliations and outcomes in each of six categories of cases between parties that could be perceived by judges to have unequal power. In each of these categories, the more Democratic judges a panel has, the higher the odds of a panel decision siding with the seemingly weaker party.

Furthermore, political affiliation is also associated with outcomes in the large set of civil cases between parties that seemingly are of equal power. In these cases, the more Democratic judges on the panel, the lower the odds of a panel deferring to the lower-court decision.

The paper resolves the long-standing debate on the extent to which the political affiliations are associated with decisions in the circuit courts of appeals. I conclude by discussing the implications, both for understanding the evolving body of circuit court decisions and for assessing the rules and arrangements that govern such courts.

Keywords: federal courts, circuit courts, courts of appeals, federal district courts, judicial decisions, political appointment of judges, political disparity, criminal law, prisoner law, immigration law, litigation between haves and have-nots, litigation between individuals and institutions, deference to lower-court decisions.

JEL Classification: D72, J15, J16, K41, K42.

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THE PERVASIVE INFLUENCE OF POLITICAL COMPOSITION ON CIRCUIT COURT DECISIONS

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I. INTRODUCTION

Using a massive, novel dataset of circuit court cases since 1985, this Article investigates the extent to which the political affiliations of circuit court judges can help predict case outcomes. My analysis shows that political composition can help predict outcomes in a vastly larger universe of cases than has been previously thought.

It is widely believed that whether Supreme Court Justices were appointed by a Democratic or a Republican president can help predict their decisions in the small number of cases, often involving ideologically controversial issues, that the Court considers each year. But what about the federal circuit courts of appeals, which decide each year a vast number of cases that do not seem ideologically controversial? When, and to what extent, do the decisions of circuit court judges who are appointed by Democratic presidents ("Democratic judges") and those appointed by Republican presidents ("Republican judges") systematically differ? This question has been the subject of a long-standing and heated debate.

The "traditional" view is probably best represented by a series of articles written by two former chief judges of the D.C. Circuit, Harry Edwards[1] and Patricia Wald.[2] These judges conceded that political affiliations are often associated with judicial decisions at the Supreme Court, but they maintained that this was largely *not* the case at the circuit courts.[3] They forcefully expressed the view that the political affiliation of circuit court judges is

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[1] *See* Harry T. Edwards, *Public Misperceptions concerning the Politics of Judging Some Myths about the DC Circuit*, 56 U. COLO. L. REV. 619 (1985) [hereinafter Edwards, *Public Misperceptions*]; Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837 (1991) [hereinafter Edwards, *The Judicial Function*]; Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998) [hereinafter Edwards, *Collegiality and Decision Making*]; Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) [hereinafter Edwards, *Effects of Collegiality on Decision Making*]; Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).

[2] *See* Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 645 (1994) [hereinafter Wald, *Regulation at Risk*]; Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995) [hereinafter Wald, *Judicial Writings*]; Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235 (1999) [hereinafter Wald, *Response to Tiller and Cross*].

[3] *See* Edwards, *The Judicial Function*, *supra* note 1, at 851 (conceding that "a Justice's ideology may be influential in decisionmaking" but holding that "[t]he same is not true at the courts of appeals," in which ideology rarely has "any bearing on the work of a court of appeals judge.")

irrelevant to the outcomes of most circuit court cases.

Their position was based on their view of the nature of cases commonly decided by the circuit courts, and of the processes through which circuit court panel decisions are made.[4] In their view, circuit court judges "are meaningfully constrained in their decision-making;"[5] they "strive, most often successfully, to decide cases in accord with the law rather than with their own ideological or partisan preferences;"[6] and "it is the law—and not the personal politics of individual judges—that controls judicial decision-making in most cases resolved by the courts of appeal."[7]

By contrast, a "legal realist" view on the subject has been developed, based partly on empirical research, by a number of prominent legal and political science scholars. As early as 1990, political science Professors Donald Songer and Sue Davis documented the existence of "party effects" in a set of cases involving the First Amendment, civil rights, labor relations, and criminal appeals.[8] A well-known 1997 article by Professor Richard Revesz documented similar effects in cases reviewing decisions by the Environmental Protection Agency.[9] In addition, an influential 2004 work by Professor Cass Sunstein and several co-authors identified party effects in certain sets of cases on "ideologically controversial issues"—such as abortion, affirmative action, capital punishment, and sex discrimination.[10] Subsequent work, much of it building on datasets put together by these early authors, confirmed this pattern of party effects in various categories of cases

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[4] *See, e.g.*, Edwards & Livermore, *supra* note 1, at 1904 ("The [Supreme] Court hears only a limited number of cases each year, and many of those involve high profile, controversial, and difficult legal issues. In contrast, the intermediate courts of appeals only occasionally deal with very high profile issues . . . [and] hear far more cases each year than does the Supreme Court.")

[5] *See* Edwards, *The Judicial Function*, *supra* note 1, at 837.

[6] *See* Id., at 838.

[7] *See* Edwards, *Public Misperceptions*, *supra* note 1, at 620. Judge Wald stated that "[w]e are neither Democratic judges nor Republican judges . . . but, simply, United States judges." *See* Wald, *Response to Tiller and Cross*, *supra* note 2, at 240.

[8] *See* Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955-1986*, 43 W. POL. Q. 317 (1990).

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

[10] *See* Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) [hereinafter Sunstein et al., *Ideological Voting*]; CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) [hereinafter SUNSTEIN ET AL., ARE JUDGES POLITICAL?]. Another early and influential article that empirically studies the impact of political affiliations on circuit court decisions is Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship Essay, and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

that are ideologically controversial or salient.[11]

Although these scholars argued that there is evidence that the political composition of circuit court panels can predict outcomes in some specific sets of cases, they mostly left unanswered the question of how broad and widespread the influence of political composition is. In their 2004 article, Sunstein and his co-authors stressed that their findings were "limited to domains where ideology would be expected to play a larger role" and that "outside of such domains, Republican and Democratic appointees are far less likely to differ."[12]

Indeed, Sunstein and his co-authors reasoned that the absence of party effects in several of the sets of ideologically controversial cases they studied emphasized "the limited nature of [these] effects" and that the forces of "professional discipline and legal consensus" can preclude such effects from showing up in many legal areas.[13] These authors remained agnostic on whether party effects might be present in "apparently non-ideological cases involving, for example, bankruptcy, torts, and civil procedure," and they viewed answering this question as an important challenge for future work.[14]

In this study, I seek to meet this challenge. My ability to do so is

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[11] *See*, *e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) (showing such effects in a set of cases applying the Chevron doctrine); FRANK B. CROSS, DECISION MAKING IN THE US COURTS OF APPEALS (2007) [hereinafter CROSS, DECISION MAKING IN THE US COURTS OF APPEALS]; William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775 (2009). The view that political affiliations are associated with judicial decisions is related to the more general "attitudinal" view that judicial decisions reflect the policy preferences and attitudes of judges. For a general discussion of the attitudinal model, see Frank B. Cross, *Political Science and the New Legal Realism*, 92 Nw. U. L. REV. 251 (1997).

[12] Sunstein et al., *Ideological Voting*, *supra* note 10, at 306–07.

[13] *See id*. at 307, 337.

[14] For the empirical literature, see*, e.g.,* Sunstein et al., *Ideological Voting*, *supra* note 10; SUNSTEIN ET AL., ARE JUDGES POLITICAL? *supra* note 10; Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299 (2004); Adam B. Cox & Thomas J. Milles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008); Pat K. Chew & Robert E. Kelley, *Myth of the Colorblind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); Christina Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010); Mathew Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 J. EMPIRICAL LEGAL STUD. 574 (2010). For broad discussions of the subject and the literature, see LEE EPSTEIN, WILLIAM M. LANDES & RICHARD POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013) and Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSP. 97 (2021) [hereinafter Bonica & Sen, *Estimating Judicial Ideology*].

facilitated by the novel dataset I have compiled, which is much larger and more comprehensive than the datasets used by earlier work on the subject. Prior empirical work has focused largely on limited sets of cases that involved ideologically salient issues and that had a published opinion. For example, Professor Songer and his co-authors compiled and used a sample of about 22,000 such cases,[15] and the Sunstein study used a sample of about 5,000 such cases.[16] Most subsequent empirical studies have reused these datasets, updated versions of these datasets, or similarly small samples of published cases.[17]

By contrast, my dataset includes about 670,000 cases from the period 1985–2020. This dataset encompasses all the varied types of cases that are considered by the circuit courts, including cases that are not ideologically salient and cases without a published opinion.

Using this dataset, I investigate whether significant party effects are present in the vast universe of circuit court cases outside the set of published cases on ideologically salient topics. There are several reasons to expect

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[15] For a description of this dataset, see Donald R. Songer, *The United States Courts of Appeals Database* (2008), http://www.songerproject.org/data.html. The database, which was subsequently expanded by Kuersten and Haire, includes a sample of about 22,000 published cases during the long period of 1925–2002, with cases randomly selected from all the circuit courts. *See* Ashlyn K. Kuersten & Susan B. Haire, *Update to the Appeals Courts Database 1997–2002*, SONGER PROJECT (2011), http://www.songerproject.org/data.html.

[16] For a description of this dataset, see Sunstein et al., *Ideological Voting*, *supra* note 10.

[17] Studies using such small samples include, for example, Boyd, Epstein, & Martin, *supra* note 14; Lee Epstein, William M. Landes & Richard Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011) [hereinafter Epstein, Landes & Posner, *Why (and When) Judges Dissent*]; Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 183 (2013) [hereinafter Kastellec, *Racial Diversity*]; Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37 (2015); Maya Sen, *Is Justice Really Blind? Race and Appellate Review in U.S. Courts*, 44 J. LEGAL STUD. 187 (2015); John Szmer, Donald R. Songer & Jennifer Bowie, *Party Capability and the US Courts of Appeals: Understanding Why the "Haves" Win*, 4 J.L. & CTS. 65 (2016); and Susanne Schorpp & Rebecca Reid, *The differential effect of war on liberal and conservative judges on the U.S. Courts of Appeals*, 5 J.L. & CTS. 1 (2017).

Recent exceptions to this use of small samples are the studies by Keith Carlson, Michael A. Livermore & Daniel N. Rockmore, *The Problem of Data Bias in the Pool of Published U.S. Appellate Court Opinions*, 17 J. EMPIRICAL LEGAL STUD. 224 (2020); Marco Battaglini, Jorgen M. Harris & Eleonora Patacchini, *Interactions with Powerful Female Colleagues Promote Diversity in Hiring*, 41 J. LAB. ECON. 589 (2023); and Elliott Ash, Daniel L. Chen & Arianna Ornaghi, *Gender Attitudes in the Judiciary: Evidence from U.S. Circuit Courts*, 16 AM. ECON. J.: APPLIED ECON. 314 (2024). However, each of these studies focuses on different questions from the ones explored in this paper. Furthermore, the sample of circuit court cases used in my study is significantly larger than any that has been used by any of these studies.

Democratic and Republican judges to systematically differ in such cases. Among other things, cases that are not ideologically salient might still involve some ideological dimensions; Democratic and Republican judges could systematically differ in their attitude toward various types of parties and circumstances; and Democratic and Republican judges might differ in their approach to the judicial process, including in their views about the appropriate level of deference due lower-court decisions. Democratic and Republican judges might even systematically differ in their personality traits and characteristics.[18]

I find that the evidence supports the hypothesis that the political affiliations of panel judges can help predict outcomes in a broad set of cases that together represent over 90% of circuit court decisions. The association between political affiliation and outcomes is thus far more pervasive than has been recognized by prior research. To the best of my knowledge, this Article is the first to identify and characterize such a pervasive role of party effects throughout the large universe of circuit court cases.

A substantial part of my analysis focuses on how political affiliation can help predict outcomes in six categories of cases in which one of the parties has characteristics that could lead judges to perceive it as being in a weaker position than the other party. These six categories add up to about half a million cases. I hypothesize that Democratic judges and Republican judges systematically differ in their tendency to side with the seemingly weaker party, and I find evidence supporting this hypothesis in each of the identified six categories of cases.

One noteworthy category of cases involves civil litigation between individuals and institutions. In many such cases, though by no means all, the individual party could be perceived by judges to be the weaker party. My analysis shows that panels with more Democratic judges are more likely than those with more Republican judges to reach a decision that favors the individual party.

This novel finding is related to, but quite different from, the finding in the

[18] There is a substantial body of research supporting the existence of such differences in personality traits and characteristics. For studies providing such evidence, see, *e.g.*, Brad Verhulst, Lindon J. Eaves & Peter K. Hatemi, *Correlation not Causation: The Relationship between Personality Traits and Political Ideologies*, 56 AM. J. POL. SCI. 34 (2012); Jeffery J. Mondak et al., *Personality and Civic Engagement: An Integrative Framework for the Study of Trait Effects on Political Behavior*, 104 AM. POL. SCI. REV. 85 (2010); Kimmo Eriksson, *Republicans Value Agency, Democrats Value Communion*, 81 SOC. PSYCH. Q. 173 (2018); Kaye D. Sweetser, *Partisan Personality: The Psychological Differences Between Democrats and Republicans, and Independents Somewhere in Between*, 58 AM. BEHAV. SCIENTIST 1183 (2014).

iconic 1974 study by Marc Galanter, "Why the 'Haves' Come Out Ahead."[19] Galanter found, and I find as well, that individuals are overall less likely than institutions to be successful in litigation. My focus, however, is not on the general odds of pro-individual outcomes but rather on how these odds are affected by a panel's political composition. Whereas individuals do less well than institutions in all panel types, I show, individuals are still relatively more successful in panels with more Democratic judges.

Other noteworthy categories of cases involving parties of seemingly unequal power involve cases in which individuals who appear to be in a weak or vulnerable situation—such as criminal defendants, prisoners, and immigrants—litigate against governmental entities or officials. I find that in the categories of criminal appeals, immigration appeals, and prisoner litigation, increasing the number of Democrats on a circuit court panel raises the odds of an outcome favoring the weak party.

The association between Democratic judges and "Pro-weak" outcomes that I identify is not only highly statistically significant but also meaningful in magnitude. To illustrate, for the six case categories as a whole, switching from an all-Republican panel to an all-Democratic panel is associated with an increase of 55% in the baseline odds of a Pro-weak outcome. Thus, the odds of a Pro-weak outcome would very much depend on the "luck of the draw"—that is, the political composition produced by the random assignment of judges to the panel.

Furthermore, after partitioning the universe of cases in a number of natural ways, I find that the above strong results are not driven by or limited to certain subsets of cases. The identified association is present in both cases that are ideologically salient and those that are not; in both cases with and without published opinions; and in both cases with and without an oral hearing. Furthermore, these patterns are present in all different circuits and during the tenure of each of the presidents serving in the examined period. Indeed, my investigation of different subsets does not identify any significant subset of cases in which having more Democratic judges on the panel does not increase the odds of a Pro-weak outcome.

Going beyond the six categories of cases in which judges could view one of the parties as weaker, I also identify an association between political affiliations and outcomes in cases between parties that seem to be of equal power. In particular, I find such an association in civil litigation between two institutional private parties and civil cases between two individuals. For such cases, I hypothesize that having more Democratic judges on the panel

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

increases the odds of the panel intervening in, rather than deferring to, the district court decision.

This "Less-Deference" hypothesis is due to the possibility that Democratic and Republican judges might attach different weights to the costs and benefits of reducing deference to lower-court decisions. Relative to Republican judges, Democratic judges might attach greater weight to the "costs" of leaving in place "mistakes" in individual lower-court decisions, or they might attach lower weight to the resource-saving efficiency gains from deference to district court decisions, or both. Testing the Less-Deference hypothesis, I find that the outcomes of civil litigation cases between parties that appear to be of equal power are consistent with this hypothesis.

Having documented the pervasive role that political composition plays, I proceed to explain how my analysis undermines the arguments put forward in the series of articles by Judges Edwards and Wald in support of the view that political affiliations are mostly irrelevant for circuit court decisions.[20] I explain why key arguments made in these articles are incorrect. I also show that my analysis and findings are not vulnerable to any of the methodological objections raised by the judges in reference to prior empirical studies.

In addition to demonstrating the pervasive role of panels' political composition, my analysis sheds new light on inter-panel dynamics. I show that a lone Republican judge on a panel with two Democratic judges has a stronger "moderating" effect on the panel majority than does a lone Democrat on a panel with two Republican judges. I also discuss the possible reasons for, and implications of, this asymmetry between Democratic and Republican judges.

My analysis concludes with a discussion of the implications. In particular, I discuss the implications of my analysis and findings for (i) understanding the body of circuit court decisions in a wide range of legal areas and how it is expected to evolve in the future; (ii) assessing the effects of existing and alternative rules regarding the Senate's exercise of its "advise and consent" role and the assignment of judges to circuit court panels; and (iii) extending and developing my analysis to further improve our ability to use political affiliations to predict case outcomes.

Before proceeding, I would like to stress that, although I find systematic differences between the decisions of Democratic and Republican judges, my analysis does not take a normative view on whether one of the approaches is in some way better. For example, while I find that Democratic judges are more likely to side with the weaker party in litigation, the data do not tell us, and I take no view on, whether Democratic judges are too protective of such

[20] *See* sources noted in *supra* notes 1–2.

parties, Republican judges are insufficiently protective, or both. My contribution is merely to show how the two types of judges systematically differ in their decisions.

It is also worth stressing that my results do not imply that political affiliations fully determine outcomes or enable a prediction of panel outcomes with certainty. Circuit court decisions are undoubtedly likely to be influenced substantially by legal dimensions (such as relevant legal rules and precedents) and by the factual conclusions reached by the lower court. Therefore, these decisions mostly cannot be predicted with certainty in advance. Political affiliations are shown by my analysis not to *determine* outcomes but merely to *influence* them. Thus, whereas knowing a panel's political composition does not enable us to predict with certainty the panel's decisions, knowing this composition can significantly help assess the odds of particular outcomes.

The remainder of the paper is organized as follows: Part II discusses the institutional background. Part III discusses the construction of my dataset and reports summary statistics. Parts IV–VI present my empirical analysis. Part VII engages with the Edwards-Wald work, and Part VIII analyzes inter-panel dynamics. Finally, Part IX discusses conclusions and implications. The Appendix includes a number of supplementary tables.

II. INSTITUTIONAL BACKGROUND

A. The Federal Courts of Appeals

The U.S. federal court system has three main levels. The first level consists of the federal district courts. As of the end of 2020, there were 620 active district court judges and 479 senior district court judges, who held trials in ninety-four districts and made decisions in about 420,000 cases during 2020. Cases brought to the district courts are heard by a single judge, and they may or may not have a jury. Each final ruling by a district court can be appealed to the court of appeals in the federal judicial circuit in which the district court is located.[21]

The second level, whose decisions are the focus of this Article, is that of the circuit courts, which are the federal courts of appeals. The ninety-four district courts are organized into twelve regional circuits. In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in certain types of cases. As of the end of 2020, 180 active and 120 senior circuit court judges served in the circuit courts, and these judges

[21] In rare cases, the appeal may be brought directly to the U.S. Supreme Court.

decided about 50,000 cases during 2020.

The great majority of cases heard by circuit courts are appeals of district court decisions. In addition, circuit courts hear some cases that represent appeals of decisions by special federal trial courts, such as the Tax Court, immigration courts, patent courts, or bankruptcy courts, as well as a relatively small number of cases for which the circuit courts have original jurisdiction, such as habeas corpus cases. In the large dataset of circuit court cases that I compiled, appeals of district court decisions in civil and criminal cases represent about 55% and 30% of the cases, respectively; appeals of decisions by federal administrative courts and federal bankruptcy courts represent about 11% and 2% of the cases, respectively; and original jurisdiction cases represent about 2%.

The third level consists of the U.S. Supreme Court, the highest court of the land. Cases in the Supreme Court are mostly appeals of decisions by the circuit courts that the Supreme Court elects to review. The Supreme Court considers only several dozen cases each year, meaning that only a minuscule fraction of cases considered by the circuit courts reach the Supreme Court. In 2020, for example, the Supreme Court issued decisions in about seventy cases, whereas the circuit courts issued decisions in tens of thousands of cases.

Because the Supreme Court makes decisions in only a tiny fraction of federal cases and might not consider a case on a given legal topic for a substantial number of years, the large body of judicial decisions made by the circuit courts each year indisputably plays a major role in shaping the doctrines of federal law. In the words of Professors Adam Bonica and Maya Sen in their recent survey, circuit court decisions represent a major part of the "bread and butter" of the federal court system.[22]

B. Federal Judges

All federal judges are selected by the U.S. president and confirmed by the Senate. This is the case both for judges on the courts of appeals and for the judges on the federal district courts. Federal judges are nominated for life and are rarely removed by impeachment. Federal judges thus generally serve until they resign, retire, or pass away.

In circuit courts and district courts alike, most judges are "active judges," a term that refers to judges who are serving on a full-time basis. When the age and tenure of judges retiring from full-time service satisfy certain

[22] *See* Bonica & Sen, *Estimating Judicial Ideology*, *supra* note 14.

conditions, known as the "Rule of 80,"[23] the judges may, and often do, take "senior status" and continue to hear cases on a part-time basis. Senior judges have a lighter load and some flexibility in managing their workload, but they have the same responsibilities as active judges when hearing a case.

Judges who take senior status create a vacancy on the court that can be filled. After the number of active circuit court judges stopped expanding around 1990, the federal courts sought to encourage long-serving judges to take senior status in order to increase the number of judges who can hear cases. Among other things, judges taking senior status are eligible to maintain their chambers and staff and enjoy considerable financial benefits as long as they maintain a workload of at least 25% of an active judge's workload.[24]

Many studies in the literature assume, for the purposes of analysis, that all federal judges are "affiliated" with the political party of the president who nominated them.[25] This assumption is based on the belief that presidents prefer to nominate candidates whose views, inclinations, and affiliations align at least somewhat with members of the president's party. The widespread use of the nominating president's party as a proxy for a judge's political affiliation has been attributed to the simplicity of this measure,[26] as well as to the evidence that this measure provides a strong predictor of the decisions of Supreme Court Justices across a variety of subject matters.[27]

Following this approach of the literature, I use the term "Republican judges" to refer to judges nominated by a Republican president, and "Democratic judges" to refer to judges nominated by a Democratic president. During the study period, serving circuit court and district court judges in the

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[23] The "Rule of 80" is the commonly used shorthand for the age and service requirement for a judge to assume senior status, as set forth in Title 28 of the US. Code, Section 371(c). To satisfy the Rule of 80, a judge retiring from active service must satisfy three conditions: (i) the judge is sixty-five or older; (ii) the judge has served at least ten years; and (iii) the sum of the judge's age and the judge's years of service exceeds eighty.

[24] For a discussion of the benefits offered to judges taking senior status, see Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227 (2021).

[25] For such studies, see e.g., Stuart S. Nagel, *Political party affiliation and Judges' decisions*, 55 AM. POL. SCI. REV. 843 (1961); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995); Chew & Kelley, *supra* note 14; Cox & Miles, *supra* note 14; Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, 11 AM. ECON. J.: ECON. POLICY. 160 (2019); Allen Huang, Kai Wai Hui & Reeyarn Zhiyang Li, *Federal judge ideology: a new measure of ex ante litigation risk*, 57 J. ACCT. RSCH. 431 (2019); Chelsea Lie, *Judge Political Affiliation and Impacts of Corporate Environmental Litigation*, 64 J. CORP. FIN. 1 (2020).

[26] *See* Bonica & Sen, *Estimating Judicial Ideology*, *supra* note 14.

[27] For an early study providing such evidence, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

data were nominated by one of the thirteen presidents from Franklin D. Roosevelt through Donald J. Trump.

Although this method of classifying the ideological attitudes of federal judges seems to be the most common, alternative measures for judicial ideology have been put forward by some studies in the literature.[28] Future work could use such measures to obtain more accurate measures of ideological attitudes and then to refine the results obtained by this study.

C. Circuit Court Panels

Unlike in the district courts, where most cases are heard by one district court judge, most circuit court cases are heard by a panel of three judges. In a very small number of cases, which are excluded from my analysis, cases are heard *en banc*—i.e., reviewed by all active judges in the specific circuit. Three-member panels consist of active and senior judges. In a small number of cases, the panel also includes a visiting judge from another circuit or from a district court, who is assigned temporarily to a specific case or for a specific period of time.

The working premise used by numerous empirical studies in the literature on circuit courts is that judges are randomly assigned to panels and that cases are also randomly assigned to panels.[29] Indeed, several empirical studies have examined this random-assignment assumption and found it to be empirically valid.[30] Two recent studies identify several technical factors (e.g., time

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[28] *See*, *e.g.*, Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 82 AM. POL. SCI. REV. 557 (1989); KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997); Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RSCH. Q. 623 (2001); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002); Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 J. LEGAL STUD. 113 (2015); Adam Bonica & Maya Sen, *A Common-Space Scaling of the American Judiciary and Legal Profession*, 25 POL. ANALYSIS 114 (2017).

[29] Examples of such studies include Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving America Justice*, 99 COLUM. L. REV. 215 (1999); Sunstein et al., *Ideological Voting*, *supra* note 10; Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193 (2009); Epstein, Landes & Posner, *Why (and When) Judges Dissent*, *supra* note 17; Jonathan P. Kastellec, *Hierarchical and collegial politics on the U.S. Courts of Appeals*, 72 J. POL. 345 (2011) [hereinafter Kastellec, *Hierarchical and collegial politics*]; and Daniel L. Chen & Jasmin Sethi, *Insiders, Outsiders, and Involuntary Unemployment: Sexual harassment Exacerbates Gender Inequality* (TSE Working Paper No. 16-687, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2928781; and Battaglini, Harris & Patacchini, *supra* note 17.

[30] These studies include Joshua B. Fischman, *Estimating Preferences of Circuit Judges:*

commitments of judges) that could cause deviations from a strictly randomized process.[31] But even these two studies conclude that any such deviations are small and independent of the dimensions on which researchers focus, and that random assignment is thus an adequate working premise for causal inference. In their recent survey, Professors Bonica and Sen state that this assumption is "extremely useful for scholars" and support its use.[32]

Following the general reliance by the literature on the working premise of random assignment, I also use this working premise for my analysis.

D. The Appeal Process and Publication Decisions

In civil cases heard by the federal district courts, either party may initiate an appeal of the district court's decision. In criminal cases, the criminal defendant may appeal a conviction, but the government may not appeal an acquittal; in the case of a conviction, however, both sides may appeal the sentencing decision. Parties in appeals may not introduce new evidence, and circuit court panels make their decisions based on the trial court's record. The burden of showing that a legal error affected the district court's decision is borne by the appellant. A substantial majority of appeals are decided solely on the basis of the written briefs submitted by the parties, with only a small minority decided following an oral argument held after the submission of written briefs. The panel issues a written decision, which in many cases is accompanied by an opinion explaining the court's reasoning.

The panel's decision is determined by a majority rule. The great majority of cases are decided 3-0, with all three members of the panel joining the decision of the panel. A minority of cases are decided 2-1, with one member of the panel opposing the panel's decision.

A Model of Consensus Voting, 54 J.L. & ECON. 781 (2011); Marin K. Levy & Adam S. Chilton, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015); Marin K. Levy, *Panel Assignment in the Federal Court of Appeal*, 103 CORNELL L. REV. 65 (2017); and Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018). For example, the study by Fischman, *supra*, at 793, concludes that "the characteristics of the cases assigned to a particular panel [are] independent of the [preferences] of the judges on that panel."

[31] *See* Chilton & Levy, *supra* note 30; Levy, *supra* note 30. Other such technical factors include the need to accommodate vacation schedules, to space judicial assignments so that no judge has several week-long sittings in a row, to honor the scheduling preferences of senior judges (whose services provide much-needed support), and to honor recusals for disqualification, health, or other valid reasons. Since there is no single federal rule governing the subject, each circuit has adopted its own practices for forming panels.

[32] *See* Bonica & Sen, *Estimating Judicial Ideology*, *supra* note 14, at 106.

In addition to deciding the dispute between the litigants, the panel elects whether to "publish" the opinion—that is, whether to have it included in the *Federal Reporter*.[33] Prior to 1960, almost all cases decided by the circuit courts were published. However, in response to a growing caseload, the Judicial Conference of the United States decided in 1964 that circuit courts should publish only opinions that are of general precedential value.[34] In a subsequent 1972 decision, the Conference required each circuit court to develop a publication plan.[35]

Consequently, only a minority of decisions made during the four decades examined by my study were published. During this period, the circuit courts experienced a significant increase in their caseloads, which resulted in more unpublished cases. In my dataset, the percentage of unpublished cases—that is, cases without an opinion published in the *Federal Reporter*—steadily decreased from about 51% in 1985 to about 22% in 2000, landing at around 15% by the end of the study period.

Many empirical studies of circuit court decisions have examined only published cases.[36] Furthermore, only published cases are included in the standard datasets—those of Sunstein et al. and of the Songer Project—on which much of the literature has relied.[37] However, the literature has argued, and even presented some evidence, that published cases are likely to be unrepresentative of all cases.[38] Thus, a significant advantage of the dataset

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[33] *See The Federal Reporter*, West Publishing Co. The *Federal Reporter* is a case law reporter that contains decisions from the US circuit courts of appeals and the US Court of Federal Claims. It started in 1880 and includes full official texts for all decisions considered to have precedential values. The *Federal Reporter* is also available electronically and can be found at https://openjurist.org and in Westlaw.

[34] Reports of the Proceedings of the Judicial Conference of the United States: 1964 Annual Report of the Director of the Administrative Office of the Unites States Courts 11 (1965).

[35] Reports of the Proceedings of the Judicial Conference of the United States: 1972 Annual Report of the Director of the Administrative Office of the Unites States Courts 33 (1973).

[36] *See, e.g.*, Boyd, Epstein, & Martin, *supra* note 14; Kastellec, *Racial Diversity*, *supra* note 17. Indeed, a subsequent study, see Joshua B. Fischman, *Interpreting Circuit Court Voting Patterns: A Social Interactions Framework*, 31 J.L. ECON. & ORG. 808 (2015) [hereinafter Fischman, *Interpreting Circuit Court Voting Patterns*], reports that a majority of the studies in the literature exclude unpublished cases.

[37] *See* sources in *supra* notes 15–16.

[38] *See, e.g.*, Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990); Edwards & Livermore, *supra* note 1; Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213 (2009); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want: An Analysis of Publications, Citations, and Reversals*, 28

that I have put together for this study is that it includes the unpublished cases that represent a majority of circuit court decisions.

III. CONSTRUCTING THE DATASET

A. Data Sources

To obtain the data used in this study, I combined data from three main datasets. The first source was PACER (Public Access to Court Electronic Records), an electronic public access service for U.S. federal court documents, managed by the Administrative Office of the United States Courts.[39] PACER contains detailed information on a large fraction of cases considered by U.S. federal courts. For this study, I used the data that PACER provides on circuit court decisions. The PACER dataset provides rich information, including, among other things, docket number, circuit, district court, dates, outcome, case type, whether the case was published, whether there was a dissenting or concurring opinion, and whether there was an *en banc* decision.

The second source was LexisNexis, a database provided by the information and analytics company RELX.[40] The last data source that I used was the "Biographical Directory of Article III Federal Judges," which is provided by the Federal Judicial Center (FJC).[41] The FJC dataset provides basic biographical information for all past and current federal court judges.

When I merged the PACER and LexisNexis datasets, the cases appearing in PACER that I was unable to match with data from LexisNexis were largely ones in which the appeal had been terminated on procedural grounds, such as late filing, and for which PACER also did not have any information on the decision. For the cases for which PACER reported decisions, I was able to

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J.L. ECON. & ORG. 518 (2012); Fischman, *Interpreting Circuit Court Voting Patterns*, *supra* note 36; Ben Grunwald, *Strategic Publication*, 92 TUL. L. REV. 745 (2018); Carlson, Livermore & Rockmore, *supra* note 17. Indeed, as early as 1990, Songer stated that focusing only on published opinions ". . . no longer makes sense as a strategy for answering many of the questions that public law scholars have typically asked." *See* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules versus Empirical Reality*, 73 JUDICATURE 307 (1990).

[39] For the website of the PACER database, see https://pacer.uscourts.gov/.

[40] Individuals with access to the standard LexisNexis service are able to get access to the information about each specific case by entering the citation or the case name. For this study, I was able to obtain the LexisNexis data in bulk form.

[41] *See* https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export.

merge about 85% of these cases with LexisNexis data. My dataset thus includes a large majority of cases whose decisions were reported by PACER.

I excluded several sets of cases from my dataset: (i) *en banc* cases that do not have three-member panels; (ii) cases that were not terminated on the merits; and (iii) cases from the federal circuit for which PACER does not have information. Altogether, after the above exclusions, I was left with about 780,000 cases during the study period of 1985–2020. For about 670,000 of these cases, I was able to identify the three members of the panel and their characteristics. This dataset of about 670,000 cases provides the basis for my empirical investigation.

B. Coding Ideologically Salient Cases

In their influential 2004 study, Sunstein and his co-authors directed the attention of researchers to cases that can be viewed as "ideologically controversial" or "ideologically salient," and they put forward a protocol for identifying such cases.[42] As a basis for this protocol, the authors of this study identified fourteen legal topics that should be regarded as ideological because they involve issues that are saliently ideological.[43] A case was classified as involving a given topic if the opinion of the case included specified keywords or cited key Supreme Court opinions on the issue. Using this protocol, Sunstein and his co-authors and colleagues identified about 5,000 published cases as ideologically controversial, and the sample they combined was subsequently used by many other studies.

I built on the above protocol and made some updates to produce an "Updated Sunstein Protocol." Because my sample includes a large number of cases (both published and unpublished) from a long period of time, my implementation of the protocol of Sunstein and his co-authors produced a much larger number of ideological cases than the number of ideological cases included in the sample compiled by these authors and employed by many subsequent studies. I also further expanded, in two ways, the set of cases classified as ideological. First, for many of the legal topics classified as ideological by Sunstein and his co-authors, I identified additional cases on

[42] *See* Sunstein et al., *Ideological Voting*, *supra* note 10.

[43] *Id*. These topics are abortion, capital punishment, the Americans with Disabilities Act, criminal appeals against the United States, takings, the Contracts Clause, affirmative action, Title VII race discrimination, cases brought by African American plaintiffs, sex discrimination, campaign finance, sexual harassment, cases in which plaintiffs sought to pierce the corporate veil, industry challenges to environmental regulations, and federalism challenges to congressional enactments under the Commerce Clause.

these topics by searching for citations to major cases on these topics (in addition to any such citations used by Sunstein et al.).[44]

In addition, I added two legal topics that are ideologically contested—LGBTQ and the Second Amendment. I identified cases on these two legal topics using a search for key terms and citations to major decisions on these topics.[45]

C. Democratic and Republican Judges

The dataset I constructed includes information for about 480 individual circuit court judges, including large numbers of both Democratic and Republican judges, who made decisions during the period I examined. Table 1 reports the number of circuit court judges and the percentage of which are Republican or Democrat, at the beginning of each half-decade during the study period. The first three columns provide this information for active

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[44] In particular, I added searches in opinions for citations to the following cases: To identify additional cases for the category of abortion, I searched for citations to Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood v. Casey, 505 U.S. 833 (1992), and Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016). To identify additional cases for the category of capital punishment, I searched for citations to Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 153 (1976), McCleskey v. Kemp, 481 U.S. 279 (1987), and Roper v. Simmons, 543 U.S. 551 (2005). To identify additional cases for the category of takings, I searched for citations to Dolan v. City of Tigard, 512 U.S. 374 (1994). To identify additional cases for the category of the Contracts Clause, I searched for citations to Energy Rsrvs. Grp. v. Kan. Light & Power Co., 459 U.S. 400 (1983), and General Motors Corp. v. Romein, 503 U.S. 181 (1992). To identify additional cases for the category of affirmative action, I searched for citations to Gratz v. Bollinger, 539 U.S. 244 (2003), Grutter v. Bollinger, 539 U.S. 306 (2003), and Fisher v. Univ. of Tex., 570 U.S. 297 (2013). To identify additional cases for the category of campaign finance, I searched for citations to Davis v. Federal Election Comm'n, 554 U.S. 724 (2008), Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010), and McCutcheon v. Federal Election Comm'n, 572 U.S. 185 (2014). To identify additional cases for the category of Commerce Clause, I searched for citations to United States v. Morrison, 529 U.S. 598 (2000), Gonzales v. Raich, 545 U.S. 1 (2005), and Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[45] For cases on LGBTQ-related issues, I searched in the text of opinions for the terms "sexual orientation," "same-sex," "gay," "lesbian," "transgender," or "bisexual" and for citations to Romer v. Evans, 517 U.S. 620 (1996), Lawrence v. Texas, 539 U.S. 558 (2003), United States v. Windsor, 549 Fed. 630 (2013), or Obergefell v. Hodges, 576 U.S. 644 (2015).

For Second Amendment cases, I search in the texts of opinions for the terms "Second Amendment" and "right to keep and bear arms" and for citations to District of Columbia v. Heller, 554 U.S 570 (2008) and McDonald v. City of Chicago, 561 U.S. 742 (2010).

judges, and the last three columns provide this information for senior judges. As the Table shows, whereas the number of active circuit court judges increased by only 12.5% from 1985 through 2020,[46] the number of judges with senior status almost doubled during this period.

As Table 1 also indicates, there has been significant fluctuation in the political composition of circuit court judges over time. Among active judges, the percentage of Republicans stood at 53% in 1985, rose to 69% by 1990, declined to 49% by 2000, and ended the study period at 55%. As for the fraction of circuit court judges who are senior judges, it trended upward from 52% in 1985 to 67% in 2020.

Table 1: Political Composition of the Circuit Courts

Selected	Active Judges			Senior Judges			
Years	Count	%Rep	%Dem	Count	%Rep	%Dem	Total
1985	160	53%	47%	62	52%	48%	222
1990	163	69%	31%	76	49%	51%	239
1995	168	66%	34%	91	46%	54%	259
2000	154	49%	51%	101	60%	40%	255
2005	166	58%	42%	107	64%	36%	273
2010	165	55%	45%	115	68%	32%	280
2015	169	45%	55%	112	63%	37%	281
2020	180	55%	45%	120	67%	33%	300

IV. Litigation between Parties of Unequal Power

A. The Pro-Weak Hypothesis

The first hypothesis that I would like to put forward focuses on cases for which information in my dataset indicates that the parties could have been perceived by judges to have unequal power. Below, I identify six sets of cases in which this seems to be the case.

I hypothesize that in cases with seemingly unequal parties, Democratic

[46] For a count of the number of federal appellate judgeships and when they were added, see Chronological History of Authorized Judgeships – Court of Appeals, https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals.

judges are more likely than Republican judges to side with the seemingly weaker party. To begin, in some litigation between parties that seem to be of unequal power, Democratic judges might be more likely to support substantive legal positions that are favorable to the weaker party—such as a broader definition of contractual unconscionability, a broader definition of the rights of immigrants, or a broader definition of prisoners' rights.

Furthermore, Democratic judges might be more likely than Republican judges to view the litigation process as being structurally biased against weak parties. As a result, Democratic judges might be more concerned about the possibility that the lower-court decision was too favorable to the strong party due to the litigation-related disadvantages of the weak party.

Galanter's seminal 1974 article provided an iconic statement of the concern that litigation is structurally biased against weak parties.[47] Democratic judges might be more likely than Republican judges to have such a concern. Although my hypothesis is thus somewhat related to Galanter's hypothesis, the two are quite different. Galanter's hypothesis, for which he found some evidence in circuit court decisions, was that weaker parties had in general lower odds of obtaining a favorable outcome. By contrast, my hypothesis is that—whereas the odds of a favorable outcome for the weaker party might be lower in circuit court cases in general, regardless of the panel's political composition—these odds are *relatively* lower the smaller the number of Democratic judges on the panel.

Third, Democratic judges might be more likely than Republican judges to feel sympathy or compassion for the weaker party. Such sympathy or compassion might lead Democratic judges to have a stronger preference, relative to Republican judges, for outcomes that are favorable to the weaker party.

B. Categories of Cases with Seemingly Unequal Parties

To test the Pro-weak hypothesis, I identify six large sets of cases in which the parties had some characteristics included in my dataset that could lead judges to perceive the parties as having unequal power. Four of these sets of cases involve litigation between governmental bodies and individuals who appear to be in a vulnerable and weak position, such as criminal defendants, immigrants, and prisoners.

The first set of cases involves *litigation between criminal defendants and the government*. My dataset includes about 200,000 appeals of district court decisions in criminal trials. In these cases, the criminal defendant is the

[47] *See* Galanter, *supra* note 19; MARC GALANTER, WHY THE HAVES COME OUT AHEAD: THE CLASSIC AND NEW OBSERVATION (2014).

seemingly weaker party.

The second set of cases involves *litigation between prisoners and prison authorities*. My dataset includes about 125,000 cases in which prisoners serving a jail sentence litigate against public officials regarding prison conditions and other matters. In these cases, I classify prisoners as being the seemingly weaker party.

The third set of cases involves *litigation between immigrants and immigration authorities*. My dataset includes about 57,000 appeals of cases between immigrants and immigration agencies. In these cases, I classify immigrants as the seemingly weaker party.

The fourth and relatively small set of cases is that of *original jurisdiction cases*. In these cases, which number about 12,000 in my dataset, the circuit courts have original jurisdiction rather than hear appeals of lower-court decisions. The cases involve habeas corpus, mandamus, and other petitions against public officials. In these cases, I classify the petitioners (many of whom are individuals who are under arrest but not yet convicted) as the seemingly weaker party.

In addition to the above four sets of cases, I identified two considerable sets of *civil litigation* between parties that could be perceived to be of unequal power. One set of such cases involves *civil litigation between individuals and institutional parties*. An individual litigating against an institutional party could be perceived by judges as being the weaker party due to having fewer resources or less expertise or experience with respect to litigation.

To identify such cases, I started with all the cases labeled by PACER as "Civil, Private." I then searched among the names of private litigants for terms that are associated with institutional parties, such as "Company," "Corp," or "Bank."[48] A party whose name included any such term was defined as the "institutional party," and a party whose name did not include such terms was defined as the "non-institutional party." Altogether, using this procedure identified about 103,000 cases of litigation between an individual and an institutional party.

The other set of civil cases involves *civil litigation between private parties and the U.S. government.* These cases are identified by PACER as "Civil, US," and my dataset includes about 56,000 of them. I classify the private parties as the seemingly weaker party because they often have fewer resources.

To be sure, this might well not be the case in the small minority of cases

[48] Other terms for which I searched include association, department, institution, hospital, university, church, business, services, and utilities.

in which the private party is a large company (say, Google or Walmart). Future work might thus seek to identify such cases and reclassify them. In the meantime, however, it is important to note that using private party status as a noisy proxy for being the weaker party is likely to lead to my results understating the results that would be obtained if this minority of cases were examined separately.

Table 2 displays the six categories of cases with parties of unequal power that I identified. Altogether, the six categories of cases contain about 550,000 cases—over 80% of my dataset of circuit court cases. Below in this Part, I examine, for each of these categories individually and for them collectively, whether case outcomes are consistent with the Pro-weak hypothesis.

Table 2: Categories of Cases with Parties of Unequal Power

Types of Cases	Parties
Criminal, Prisoners, Immigrants, and Original Jurisdiction Litigation	
Criminal (200K)	Criminal Defendants vs. Government
Prisoners (125K)	Prisoners vs. Government
Immigrants (57K)	Immigrants vs. Government Entities
Original Jurisdiction (12K)	Individuals vs. Public Officials
Civil Litigation	
Civil, U.S. (56K)	Private Parties vs. the U.S.
Civil, Private (130K)	Individual vs. Institutional Entities*

*Institutions were identified through a computerized search for keywords.

C. Political Composition and Pro-weak Rates

For each of the cases with parties that seem to have unequal power, I first defined the Pro-weak outcome—that is, the outcome that is relatively more favorable to the weaker party. Identifying the Pro-weak outcome in these cases requires distinguishing between cases in which the appeal was initiated by the weaker party and cases in which it was initiated by the stronger party.

When the weaker party initiates the appeal of a lower-court decision, allowing the decision to stand is presumably disfavored by the weaker party. In such cases, I define the outcome as Pro-weak if the panel decides to reverse, reverse in part, or remand the decision for reconsideration by the lower court.

By contrast, when the stronger party initiates the appeal, allowing the decision to stand would presumably be favorable to the weaker party. Therefore, in such cases, I define the outcome as Pro-weak if the panel allows

the lower-court decision to stand as is—that is, if the panel does not decide to reverse, reverse in part, or remand the lower-court decision. Finally, for original jurisdiction cases, in which the party submitting the petition is classified as the weaker party, I classify the outcome as Pro-weak if the circuit court panel grants the petition.

Formally, I define the variable Reversal to be equal to 1 if the outcome (as reported by PACER) is a reversal, partial reversal, or remand of the decision. Based on the above discussion, the variable Pro-weak is then defined as follows: If the appeal was initiated by the weaker party, the variable is equal to the variable Reversal; and if the appeal was initiated by the stronger party, the variable Pro-weak is equal to 1 if the variable Reversal is 0 and equal to 0 otherwise. For original jurisdiction cases, the variable Pro-weak is equal to 1 if the panel granted the motion, and 0 otherwise. Table 3 summarizes the specification of the variables.

Table 3: Defining Pro-weak Outcomes

Party Initiating the Appeal	Decision	
	Reversal	Non-Reversal
Weaker	Pro-weak=1	Pro-weak=0
Stronger	Pro-weak=0	Pro-weak=1

Table 4 provides summary statistics for each of the six categories of cases on the fraction of Pro-weak outcomes by the political composition of the panel. I use *RRR* to denote a panel that consists of three Republican judges, *RRD* to denote a panel with one Democratic judge and two Republican judges, *RDD* to denote a panel with two Democratic judges and one Republican judge, and *DDD* to denote a panel with three Democratic judges.

Table 4: Pro-weak Outcomes – Summary Statistics

Type of Case	(1) No. of Cases	(2) *RRR*	(3) *RRD*	(4) *RDD*	(5) *DDD*	% Increase in Pro-weak by Switch from *DDD* to *RRR*
Criminal Appeals	199K	0.11	0.12	0.14	0.16	50%
Prisoner Litigation	125K	0.14	0.14	0.14	0.17	29%
Immigrant Litigation	57K	0.10	0.11	0.15	0.20	100%
Civil Cases: Individuals vs. Institutions	102K	0.25	0.27	0.29	0.33	30%
Civil Cases: Private Parties vs. U.S.	56K	0.18	0.20	0.22	0.27	50%
Original Jurisdiction	12K	0.07	0.07	0.06	0.08	10%
All	553K	0.15	0.16	0.17	0.20	40%

Table 4 indicates that the six categories of litigation between seemingly unequal parties vary considerably in the fraction of cases with Pro-weak outcomes. Most importantly for our purposes, however, is that for each of the six categories, the fraction of cases with Pro-weak outcomes is higher for panels with more Democratic judges than for panels with more Republican judges. For example, moving from the group of *RRR* panels to the group of *DDD* panels, the fraction of Pro-weak outcomes increases by as much as 100% for immigrant cases and by as much as 50% for criminal appeals and civil cases between private parties and the U.S. government.

The above summary statistics are consistent with the hypothesis that panels with more Democratic judges are more likely to produce a Pro-weak outcome. However, these results are merely suggestive, as they do not control for various variables that might affect the odds of a Pro-weak outcome. I therefore turn to examining the subject more systematically using a regression analysis.

D. Regression Analysis

For each of the six categories of cases, I run a regression in which the dependent variable is Pro-weak. There are three independent variables of chief interest, all of which relate to the political composition of the three-judge panel. In particular, I used the following three dummy variables: *RRD*,

which is equal to 1 if the panel has one Democratic judge and two Republican judges, and 0 otherwise; *RDD*, which is equal to 1 if the panel has two Democratic judges and one Republican judge, and 0 otherwise; and *DDD*, which is equal to 1 if the panel has three Democratic judges and no Republican judges, and 0 otherwise.

I also included other independent variables as controls. Because gender and race have received attention as potentially affecting judicial decisions,[49] I included the following two variables: At Least One Woman is a dummy variable that is equal to 1 if the panel includes at least one woman, and 0 otherwise; and At Least One Minority is a dummy variable that is equal to 1 if the panel has at least one minority (i.e., non-white) judge, and 0 otherwise. In addition, I used as a control the Panel (Mean) Tenure, which is the mean of the tenure of the three panel members. I also included fixed effects for each combination of a circuit and a year during the period ($Circuit \times Year$ fixed effects), which control for specific changes that happened in a specific circuit in a specific year. Finally, I included fixed effects for the Type of Appeal (as defined by PACER) and for the specific district that issued the decision that is appealed.[50]

It is worth noting some basic statistics for the various independent variables in my analysis. In my dataset:

- About 16% of the cases were reversed, reversed in part, or remanded to the lower court.
- About 20% of the cases had an *RRR* panel, about 40% had an *RRD* panel, about 30% had an *RDD* panel, and the remaining cases (about 10%) had a *DDD* panel.
- About 49% of cases had a panel with no women, about 40% of the

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[49] *See, e.g.*, Boyd, Epstein & Martin, *supra* note 14; Kastellec, *Racial Diversity supra* note 17.

[50] For civil cases, I also included dummies reflecting the nature of the suit filed (using the categories formed by PACER using the first two digits of the Nature of Suit variable). For criminal cases, I also included dummies representing the statutory offense charged against the criminal defendant (using the categories formed by PACER using the first two digits of the Criminal Offense Code variable).

Formally, I use the following ordinary least squares regression model:

(1) $Pro\_weak_{pctdia} = \beta_1 RRD_{pct} + \beta_2 RDD_{pct} + \beta_3 DDD_{pct} + \beta_4 Panel\_Includes\_Women_{pti} + \beta_5 Panel\_Includes\_Minority_{pti} + \beta_6 Panel(Mean)Tenure_{pti} + c \times t + \mu a + \delta d + \epsilon_{pctdia}$

In the subscript letters *p* stands for panel, *c* stands for circuit, *t* stands for year, *d* stands for district court, *i* for the case, and a for the appeal type. Standard errors are clustered by $Circuit \times Year$.

cases had a panel with exactly one woman, about 10% had a panel with two women, and about 1% had a panel with three women.

- About 64% of the cases had a panel without any minority judges, about 31% of the cases had a panel with one minority judge, about 5% of cases had a panel with two minority judges, and only a few cases had a panel with three minority judges.
- Judges hearing cases had, on average, a tenure of about sixteen years (with a standard deviation of sixteen years).

Each of the columns of Table 5 below reports the results of running the above key regression separately for each one of the six categories. The seventh and last column reports the results of running the regression for the set of all cases combined.

The results in all of the columns of Table 5 are largely consistent with the Pro-weak hypothesis. The coefficients of *RRD*, *RDD*, and *DDD* are positive in all twenty-one instances in the seven regressions. Furthermore, these coefficients are s*tatistically significant in all of the twenty-one instances*, with a significance level of 1% in eighteen of these instances, 5% in two instances, and 10% in one instance.

Table 5: The Determinants of Pro-weak Outcomes

Model:	Criminal Appeals (1)	Prisoner Litigation (2)	Immigration Litigation (3)	Civil Private (4)	Civil US (5)	Original Proceedings (6)	All Cases (7)
RRD	0.007**	0.011***	0.025***	0.019***	0.015***	0.014*	0.012***
	(0.003)	(0.003)	(0.006)	(0.004)	(0.005)	(0.008)	(0.002)
RDD	0.025***	0.024***	0.066***	0.053***	0.045***	0.019**	0.035***
	(0.004)	(0.004)	(0.007)	(0.005)	(0.007)	(0.009)	(0.003)
DDD	0.048***	0.056***	0.122***	0.097***	0.093***	0.027***	0.071***
	(0.005)	(0.006)	(0.015)	(0.008)	(0.010)	(0.010)	(0.005)
At least one Women	-0.006**	-0.003	0.011*	-0.002	-0.005	-0.006	-0.003
	(0.002)	(0.003)	(0.006)	(0.003)	(0.005)	(0.005)	(0.002)
At least one Minority	0.000	-0.002	-0.014***	-0.002	-0.008*	-0.008	-0.004**
	(0.003)	(0.003)	(0.005)	(0.004)	(0.004)	(0.006)	(0.002)
Panel (Mean) Tenure	0.001***	0.001***	0.001	0.001***	0.001***	-0.001	0.001***
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.001)	(0.000)
Mean FE	0.10	0.12	0.07	0.23	0.16	0.07	0.13
Observations	199,790	125,496	57,268	103,120	56,185	12,201	562,335
Adjusted R^2	0.044	0.041	0.038	0.037	0.044	0.207	0.052

Notes: Standard errors are in parenthesis and are clustered by Circuit×Year. All regressions include Circuit×Year, District, Appeal Type, Nature of the suit (for Civil cases), and Offense Type (for Criminal cases) fixed effects. Stars denote the level of statistical significance t $p < 0.15$ * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

While the association between political composition and Pro-weak

outcomes is highly statistically significant, the question remains as to what the magnitude of the effects is. Table 6 below therefore analyzes the coefficients in Table 5 to calculate the magnitude of the effects of (i) increasing the number of Democratic judges on the panel on (ii) the odds of a Pro-weak outcome relative to the baseline of such odds.

The first column of Table 6 provides the baseline Pro-weak odds, which refer to the odds in a panel with three Republican judges.[51] The last three columns provide the percentage increase in the odds of a Pro-weak outcome from increasing the number of Democratic judges by 1, 2, and 3 as compared to the baseline Pro-weak odds in a panel with 0 Democratic judges.

Table 6: Magnitude of Effects on the Odds of Pro-weak Outcome

	RRR Baseline (1)	Switch to *RRD* (2)	Switch to *RDD* (3)	Switch to *DDD* (4)
Criminal Appeals	0.10	7%	25%	47%
Prisoner Litigation	0.12	9%	21%	48%
Immigration Litigation	0.07	35%	93%	171%
Civil Private	0.23	8%	23%	42%
Civil U.S.	0.16	9%	28%	58%
Original Jurisdiction	0.07	19%	25%	37%
All Cases	0.13	9%	26%	53%

As Table 6 indicates, increasing the number of Democratic judges on the panel is associated with a substantial increase in the baseline odds of a Pro-weak outcome. In particular, for the six categories of cases combined, switching from an *RRR* panel to a *DDD* panel is associated with a 53% increase in the baseline odds of a Pro-weak outcome (an increase from 0.13 to 0.2). Furthermore, for each of the six categories, a switch from an *RRR* panel to an *RDD* panel is associated with an increase of no less than 39% in the baseline odds of a Pro-weak outcome.

Thus, for parties in the large sample of about 550,000 cases of litigation between parties that could be perceived to have unequal power, the odds of a Pro-weak outcome very much depend on the political affiliations of the

[51] These odds are equal to the coefficients of the constants in the regressions in Table 5.

judges randomly assigned to the case. That is, the odds of a Pro-weak outcome are substantially dependent on the "luck of the draw."

E. Pro-weak or Pro-reversal?

A substantial majority of the cases with parties that are of seemingly unequal power are appeals by the seemingly weak party. In these cases, the Pro-weak outcome is a reversal. Thus, it might be asked whether the pattern I identify could be fully driven by a "Pro-reversal" tendency of Democratic judges rather than a Pro-weak tendency. To examine this question, I carry out below a separate analysis for appeals initiated by the weaker party and appeals initiated by the stronger party.

Among the six categories of cases with parties of seemingly unequal power, three of these categories—(a) criminal appeals, (b) civil cases between institutional and non-institutional parties, and (c) civil cases between the U.S. government and private parties—include a significant number of appeals by both the weak party and the strong party. I divide the cases in each of these three categories into a subset of cases initiated by the weaker party and a subset of cases initiated by the stronger party. For each of the resulting six subsets of cases, I run a regression that is similar to the key regression from Table 5, except that I use the dependent variable Reversal instead of the dependent variable Pro-weak.[52]

The results are reported in Table 7 below. Columns (1), (3), and (5) report the results for the cases initiated by the weaker party in each of the categories (a)–(c). In these three columns, the coefficients of *RRD*, *RDD*, and *DDD* are all positive, and they are significant at the 1% level in eight out of the nine instances, and significant at the 5% level in one. Because Reversal is the Pro-weak outcome whenever the appeal is initiated by the weaker party, these findings are consistent with both a Pro-weak tendency and a Pro-reversal tendency of Democratic judges. Therefore, Columns (1), (3), and (5) do not enable me to rule out the possibility that the results are fully driven by a Pro-reversal tendency and thus do not reflect any Pro-weak tendency.

Columns (2), (4), and (6) of Table 7, however, enable us to disentangle

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[52] Thus, formally, the specification of the regression is as follows:

$$\begin{aligned} Reversal_{pctdia} &= \beta_1\, RRD_{pct} + \beta_2\, RDD_{pct} + \beta_3\, DDD_{pct} \\ &+ \beta_4 Panel\_Includes\_Women_{pti} \\ &+ \beta_5 Panel\_Includes\_Minority_{pti} \\ &+ \beta_6 Panel(Mean)Tenure_{pti} + c \times t + \mu a + \delta d \\ &+ \epsilon pctdia \end{aligned}$$

the Pro-weak and Pro-reversal hypotheses for the considered sample of cases. These three columns provide the results of the regression for the cases initiated by the stronger party in each of the categories (a)–(c). In Columns (2) and (4) of categories (a) and (b), the coefficients of *RRD*, *RDD*, and *DDD* are all negative and in the opposite sign from the one obtained when the weaker party initiated the appeal, and they are significant at the 1% level in four of the instances, and significant at the 5% level in one of the instances. In Column (6), covering category (c), the coefficients on the political composition of the panel are small and all insignificant, which is still quite different from what we obtained in Column (5) for cases in category (c), in which the weaker party was the one who initiated the appeal.

Table 7: Pro-weak or Pro-reversal?

Dependent Variable: Reversal

Model:	Criminal Defendant (1)	Criminal Government (2)	Civil Non-Institution (3)	Civil Institution (4)	Civil Private (5)	Civil US (6)
RRD	0.006**	-0.020	0.015***	-0.031***	0.018***	0.010
	(0.003)	(0.018)	(0.004)	(0.010)	(0.005)	(0.025)
RDD	0.024***	-0.077***	0.050***	-0.050***	0.051***	0.027
	(0.004)	(0.024)	(0.005)	(0.012)	(0.007)	(0.027)
DDD	0.047***	-0.103***	0.090***	-0.094***	0.097***	-0.025
	(0.005)	(0.039)	(0.009)	(0.015)	(0.010)	(0.039)
At least one Woman	-0.005**	0.008	0.001	0.003	-0.007*	-0.003
	(0.002)	(0.018)	(0.004)	(0.007)	(0.004)	(0.018)
At least one Minority	0.000	0.018	-0.006*	-0.014*	-0.008*	0.016
	(0.003)	(0.020)	(0.004)	(0.009)	(0.004)	(0.020)
Panel (Mean) Tenure	0.001***	0.000	0.001***	0.001	0.001***	-0.002
	(0.000)	(0.002)	(0.000)	(0.001)	(0.000)	(0.002)
Mean FE	0.10	0.66	0.15	0.42	0.15	0.62
Observations	195,274	4,516	83,472	19,648	52,076	4,109
Adjusted R^2	0.042	0.162	0.039	0.021	0.049	0.040

Notes: Standard errors are in parenthesis and are clustered by Circuit×Year. All regressions include Circuit×Year, District, Appeal Type, Nature of the suit (for Civil cases), and Offense Type (for Criminal cases) fixed effects. Stars denote the level of statistical significance t $p < 0.15$ * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

As Table 7 indicates, when the appeal is initiated by the stronger party, Reversal is the outcome that disfavors the weaker party. Therefore, the negative coefficients in Columns (2) and (4) are consistent with the Pro-weak hypothesis. However, these results are inconsistent with a Pro-reversal hypothesis. If the identified pattern were fully driven by a Pro-reversal tendency of Democratic judges, then one would expect the results in Columns

(2), (4), and (6) to be similar to those in Columns (1), (3), and (5). But this is not the case. The results in Columns (2), (4), and (6) are quite different than, and in Columns (2) and (4) are in the opposite direction of, the results in Columns (1), (3), and (5). Taken as a whole, the results in Table 7 cannot be fully explained by the existence of a Pro-weak tendency of Democratic judges, and they thus indicate that Democratic judges have a Pro-weak tendency as the Pro-weak hypothesis suggests.[53]

It should be stressed that whereas the results of Table 7 indicate that a Pro-weak tendency of Democratic judges is present, they do not rule out the possibility that Democratic judges also have a Pro-reversal tendency; these results only rule out the possibility that a Pro-reversal tendency is alone at work without the presence of a Pro-weak tendency. Thus, the possibility that Democratic judges also have a Pro-reversal tendency remains on the table, and in Part VI I will provide evidence of its being at work in the set of civil cases between parties that are of seemingly equal power.

V. PARTITIONING THE UNIVERSE OF CASES

To further investigate the breadth of the documented association between political affiliations and outcomes, I proceed to partition the universe of cases analyzed in the preceding Part in a number of ways. Each time, I examine whether the partitioning produces a subset of cases in which an association between political affiliations and outcomes is not present. In particular, I partition the universe of cases in five ways: (i) first, for civil cases, into cases that are ideologically salient and those that are not; (ii) second, into cases with and without a published opinion; (iii) third, into cases that have and do not have an oral hearing; (iv) fourth, by circuit, into separate subsets for cases from each of the circuits; and (v) fifth, by period, into separate subsets of cases based on the terms of the presidents that served during my sample period. As detailed below, I find that the documented association is present and statistically significant in *each* of the many subsets resulting from the above partitions.

A. Partitioning by Ideological Salience

Because of the literature's focus on ideologically salient cases,[54] I begin

[53] Whereas I do not find support for a Pro-reversal tendency in the sample of cases between parties that are of seemingly unequal power, I do find evidence for such a tendency in the sample of civil cases between private parties of seemingly equal power examined in Part VII below.

[54] *See, e.g.*, sources in *supra* notes 7–9.

with a partition based on the ideological saliency of cases. Some of the categories of cases that I classified as involving litigation between sides of unequal power—such as those involving immigrants or prisoners—have not been classified as ideologically salient by prior work but could arguably be classified as such. Therefore, for the partition based on ideological saliency, I focus on civil litigation cases, which prior work has viewed as including both cases that are ideologically salient and those that are not. Sunstein and his co-authors, for example, noted several types of civil cases that they viewed as ideologically salient (such as cases on employment discrimination) and several examples of types of civil cases that they viewed as not ideologically salient (such as civil procedure or tort cases).[55]

Starting with the approximately 160,000 civil cases between parties that are of unequal power in my dataset, I used the Updated Sunstein Protocol described in Part III.C to search for cases involving an ideologically salient subject. I identified about 47,000 such cases (about 29% of total cases), which left me with about 112,000 cases that are not ideologically salient.

I then reran the key regression of Table 5 separately for the cases that are ideologically salient and the cases that are not. The first two columns of Table 8 below report the results.

As these two columns indicate, for *both* sets of cases, like in Table 5, the coefficients of *RRD*, *RDD*, and *DDD* are all *positive*, and *most are highly statistically significant.* Furthermore, the coefficients indicate that the odds of a Pro-weak outcome rise as the number of Democratic judges increases. Thus, the association between having more Democratic judges and Pro-weak outcomes is clearly present *also in cases that are not ideologically salient*.

[55] *See* Sunstein et al., *Ideological Voting*, *supra* note 10.

Table 8: Partition by Ideological Salience and Publication

Dependent Variable: Proweak

Model:	Non-Ideological Salient (1)	Ideological Salient (2)	Unublished Cases (3)	Published Cases (4)
RRD	0.015***	0.022***	0.006***	0.024***
	(0.004)	(0.006)	(0.002)	(0.004)
RDD	0.047***	0.055***	0.021***	0.069***
	(0.005)	(0.007)	(0.003)	(0.005)
DDD	0.089***	0.106***	0.047***	0.130***
	(0.007)	(0.012)	(0.005)	(0.008)
At least one Women	-0.004	-0.003	0.000	-0.007*
	(0.003)	(0.005)	(0.002)	(0.004)
At least one Minority	-0.005*	-0.002	-0.002	-0.004
	(0.003)	(0.005)	(0.002)	(0.004)
Panel (Mean) Tenure	0.001***	0.001***	0.000	0.001***
	(0.000)	(0.000)	(0.000)	(0.000)
Mean FE	0.08	0.26	0.08	0.26
Observations	112,056	47,249	429,799	124,261
Adjusted R^2	0.042	0.042	0.037	0.052

Notes: Standard errors are in parenthesis and are clustered by Circuit×Year. All regressions include Circuit×Year, District, Appeal Type, Nature of the suit (for Civil cases), and Offense Type (for Criminal cases) fixed effects. Stars denote the level of statistical significance t $p < 0.15$ * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

Furthermore, the first two rows of Table 9 below report, separately for the set of civil cases that are ideologically salient and the set of civil cases that are not, the *magnitude* of the effect that having more Democrats on a panel has on the odds of a Pro-weak outcome. The magnitudes are calculated in the same way that was done for Table 6. As the first and second rows of Table 9 indicate, the baseline odds of a Pro-weak outcome under an RRR panel are roughly the same *for both sets*. In addition, the magnitude of the percentage increase in the baseline odds resulting from raising the number of Democratic judges on the panel is again roughly similar for *both sets*; in particular, a switch from an RRR panel to a DDD panel is associated with an increase in the odds of a Pro-weak outcome by 44% and 47% for the set of cases that are ideologically salient and the set of cases that are not, respectively.

Table 9: Magnitude of Effects on Pro-weak Odds after Partition

	RRR Baseline (1)	Switch to *RRD* (2)	Switch to *RDD* (3)	Switch to *DDD* (4)
Non-Ideologically Salient	0.20	7%	24%	44%
Ideologically Salient	0.23	10%	24%	47%
Unpublished	0.10	6%	21%	47%
Published	0.29	8%	24%	45%

The results reported in this Part indicate that a focus on an ideologically salient subject is not the only reason why Democratic and Republican judges might approach or react to a case differently. Even if the legal area in which a case falls is not ideologically salient, Democratic and Republican judges might (i) approach or react differently to various doctrinal dimensions of the case that involve ideological issues, even if not salient ones; (ii) approach or react differently to the nature of the parties and the circumstances of the case, such as whether the case is between an individual and an institution that could be perceived to be of unequal power; and (iii) be influenced in their consideration of the case by personality traits or characteristics on which Democratic and Republican judges systematically differ.[56]

B. Partition by Publication

Cases that go unpublished—that is, cases that are not selected by the panel for inclusion in the *Federal Reporter*—have for a long time been viewed as different from those that are published.[57] Published cases are more likely than unpublished ones to receive greater attention from subsequent circuit court decisions and from those who follow the decisions of the federal courts. Circuit court judges, therefore, might attach more importance to having their preferred outcomes in a published case than to having such an outcome in an unpublished case.

For these reasons, prior empirical work focused on published cases has been criticized as being based on a subset of cases that is unrepresentative of the entire universe of cases.[58] Therefore, it is natural to investigate whether the results I obtain are driven by and limited to published cases. To this end,

[56] *See* sources cited in *supra* note 17.
[57] *See* sources cited in *supra* note 37.
[58] *See* the articles by judges Edwards and Wald cited in *supra* notes 1–2.

I divide the large universe of cases of litigation between parties that are of seemingly unequal power into a set of about 124,000 published cases (about 22% of the universe of cases) and a set of about 430,000 unpublished cases (about 78% of the universe of cases).

I then rerun the key regression of Table 5 separately for each of the two sets. The third and fourth columns of Table 8 above report the results. As was the case earlier, in both columns, and thus for both sets of cases, the coefficients of *RRD*, *RDD*, and *DDD* are all *positive*, and they indicate that the odds of a Pro-weak outcome rise as the number of Democratic judges increases. Thus, the association between having more Democratic judges and Pro-weak outcomes is clearly present *both in published cases and in unpublished cases*.

The third and fourth rows of Table 9 report results regarding the magnitude of the effect of increasing the number of Democratic judges on the panel for published and unpublished cases. The magnitudes are again calculated in the same way as for Table 6. As the Table indicates, the baseline odds of a Pro-weak outcome are substantially higher for published cases (0.29) than for unpublished cases. However, the magnitude of the percentage increase in the baseline odds resulting from raising the number of Democratic judges on the panel is again roughly similar for *both sets.* Specifically, a switch from an RRR panel to a DDD panel is associated with an increase in the odds of a Pro-weak outcome by 47% and 45% for the set of unpublished cases and the set of published cases, respectively.

Finally, I also partition the universe by *both* whether the case is ideologically salient and whether the case is published. This double partition produces four subsets: (i) cases that are ideologically salient and published; (ii) cases that are ideologically salient but not published; (iii) cases that are published but not ideologically salient; and (iv) cases that are neither ideologically salient nor published. I ran the key regression of Table 5 separately for each of these four subsets, and Table A1 in the Appendix reports the results. The results indicate that the identified association between political affiliations and outcomes is present in *each* of the four subsets, including the subset of cases that are neither ideologically salient nor published. The results in the Table also indicate that the percentage increase in the baseline odds of a Pro-weak outcome resulting from increasing the number of Democratic judges on the panel is of roughly similar magnitude for each of the four subsets.

C. Partition by Existence of Oral Hearing, Circuit, and Period

Cases in which the panel chooses to hold oral argument may be more complex, more consequential, or involve more issues on which there might

be disagreement. Therefore, it might be suggested that the patterns I find are driven by and limited to such cases. To address this question, I divide the large set of litigation cases between parties that are of seemingly unequal power into two subsets: cases without oral argument (about 66%) and cases with oral argument (about 34%). I then rerun the key regression of Table 5 separately for each of these two subsets.

Another question that might be asked is whether the association between political affiliation and outcomes is driven by and limited to certain circuits. To examine this question, I run the key regression of Table 5 separately for the cases coming from each of the twelve circuits in my dataset.

Finally, it might be asked whether, given that my period encompasses thirty-five years, the results are driven by or limited to parts of this long period. I therefore also divide the universe of cases into groups of cases in five different time periods, each covering the presidency of one or more presidents: (i) 1985–1992 (presidencies of Ronald Reagan and G.H.W. Bush); (ii) 1993–2000 (presidency of Bill Clinton); (iii) 2001–2008 (presidency of G.W. Bush); (iv) 2009–2016 (presidency of Barack Obama); and (v) 2017–2020 (presidency of Donald Trump). I rerun the key regression separately for each of these groups of cases.

The results of all the above regressions are displayed in Tables A2, A3, and A4 of the Appendix. The results indicate the considerable breadth of the documented association between political affiliation and case outcomes. They show that such an association is present (i) in both cases with oral argument and cases without; (ii) in the cases coming from each of the twelve circuits in my dataset; and (iii) in cases from each of the time subperiods I examine.

VI. Litigation between Parties of Seemingly Equal Power

The analysis of Parts IV and V has focused on the large set of cases between parties that are of seemingly unequal power. To further investigate the full scope of cases for which political affiliations can help predict outcomes, I now turn to a large set of cases for which I did not identify a dimension that could lead judges to perceive the parties as having unequal power.

Recall that among the approximately 186,000 civil cases between private parties in my sample, I classified about 103,000 cases as being between an individual and an institutional entity. This leaves a group of about 80,000 civil cases that are either between two individuals or between two institutional entities. Below I put forward a hypothesis that could enable using political affiliations to help predict outcomes in this set of about 80,000 cases.

A. The Less-Deference Hypothesis

For the cases examined in this Part, the Pro-weak hypothesis is of course inapplicable. For these cases, I hypothesize that Democratic judges are more likely than Republican judges to intervene in lower-court decisions rather than defer to such decisions. I refer to this hypothesis as the "Less-Deference" hypothesis.

To understand the grounds for developing this hypothesis, consider how circuit court judges could approach the question of the extent to which it is desirable to intervene in lower-court decisions rather than defer to such decisions. Setting the desirable level of deference involves a trade-off. On the one hand, increased willingness to intervene whenever an error is detected in a lower-court decision could provide the benefit of increasing the odds that the outcome would be "correct"—and the risk of an error would be reduced—in each individual case. On the other hand, increased deference to lower-court decisions could produce efficiency benefits from resource savings.

Democratic and Republican judges may well differ in their approach to this trade-off. As to the benefits of intervention, Democratic judges might attach more weight to the benefits of securing correct outcomes in each and every individual case, whereas Republican judges might be more likely to view errors in individual cases as canceling each other out and thus not representing a significant social concern. Furthermore, as to the costs of willingness to intervene, Democratic judges are likely to attach less weight to the efficiency and resource-saving benefits of deference to lower-court decisions.

Accordingly, I hypothesize that in civil litigation between parties that appear to have equal power, panels with more Democratic appointees should be expected to be associated with higher odds of reversing the lower-court decisions. Below I test this Less-Deference hypothesis.[59]

[59] Professor Revesz conjectured that Republican judges might be more inclined than Democratic judges to defer to lower-court decisions, but he did not find evidence in support of this conjecture in his small sample of administrative law cases. *See* Revesz, *supra* note 9, at 1729.

B. Testing the Less-Deference Hypothesis

To test this hypothesis, I run regressions in which the dependent variable is Reversal, a dummy that is equal to 1 if the lower-court decision is not allowed to stand as is (i.e., it is reversed wholly or in part or remanded) and to 0 otherwise. The independent variables in these regressions are the same as in the key regression of Table 5.

Table 10 below reports the results. In particular, it presents the results of regressions run, first, on the category of all civil cases between parties that are of seemingly equal power (Column 1); second, separately for the subset of cases that are ideologically salient and the subset of cases that are not ideologically salient (Columns 2 and 3); and, finally, separately for the subset of cases that are published and the subset of unpublished cases.

The results are consistent with the Less-Deference hypothesis. For the set of all civil cases between parties of seemingly equal power (Column 1), the coefficients of *RRD*, *RDD*, and *DDD* are all positive, and they go up in value as each additional Democratic judge is added to the panel. Furthermore, the coefficients of *RDD* and *DDD* are statistically significant, with *DDD* being significant at the 99% level. The results for the specified subsets are less sharp, but they still overall align with the Less-Deference hypothesis, with the coefficient of DDD being positive and statistically significant in each of the Columns (2)–(5).

The results are thus consistent with the Less-Deference hypothesis: In civil litigation cases between parties of seemingly equal power, panels with more Democratic judges are less likely to defer to lower-court decisions.

Table 10: Testing the Less-Deference Hypothesis

Dependent Variable: Reversal

Model:	All Cases (1)	Non-Ideological (2)	Ideological (3)	Unpublished (4)	Published (5)
RRD	0.004	0.009*	-0.011	-0.004	0.003
	(0.005)	(0.005)	(0.009)	(0.005)	(0.007)
RDD	0.021***	0.023***	0.012	0.003	0.022**
	(0.006)	(0.006)	(0.010)	(0.005)	(0.009)
DDD	0.052***	0.051***	0.056***	0.036***	0.037***
	(0.008)	(0.008)	(0.015)	(0.007)	(0.013)
At least one Women	-0.007*	-0.007	-0.008	0.002	-0.002
	(0.004)	(0.004)	(0.008)	(0.004)	(0.007)
At least one Minority	-0.006	-0.013***	0.009	0.000	-0.008
	(0.004)	(0.004)	(0.008)	(0.004)	(0.007)
Panel (Mean) Tenure	0.000	0.000	0.002**	-0.001**	0.000
	(0.000)	(0.000)	(0.001)	(0.000)	(0.001)
Mean FE	0.24	0.22	0.29	0.15	0.42
Observations	78,870	58,706	20,164	48,085	30,785
Adjusted R^2	0.035	0.041	0.036	0.030	0.033

Notes: Standard errors are in parenthesis and are clustered by Circuit×Year. All regressions include Circuit×Year, District, Appeal Type, Nature of the suit (for Civil cases), and Offense Type (for Criminal cases) fixed effects. Stars denote the level of statistical significance t $p < 0.15$ * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

VII. The Edwards-Wald View That Political Affiliations Are Mostly Irrelevant

As noted in the Introduction, a series of articles by former Chief Judges of the D.C. Circuit Harry Edwards and Patricia Wald argued forcefully that circuit court decisions are largely unrelated to the political affiliations of panel members. This Part considers the implications of my findings for the validity of various key arguments put forward by Edwards and Wald. I begin by showing how the evidence undermines a major Edwards-Wald argument that is based on the ubiquity of unanimous circuit court decisions. I then turn to explaining that my analysis and findings are robust to all the methodological objections raised by Edwards and Wald.

A. The Unanimous Decisions Argument

A key point made by the Edwards-Wald is based on the observation that the great majority of circuit court decisions are 3-0 unanimous decisions;

Edwards, for example stressed that "[t]he vast majority of case dispositions involve unanimous decisions."[60] On the Edwards-Wald view, the common arrival at a unanimous decision is a decisive indication that, in the great majority of circuit court cases, all judges are expected to reach the same decision because the professional application of the laws would lead all judges to the same decision: "[T]he lack of dissenting opinions shows, Edwards reasons in a co-authored article, that judges appointed by both Democrats and Republicans usually can, and do, agree on the requirements of the law, without regarding to their political and ideological leanings."[61]

To examine the strength of this argument, I focus on the set of circuit court cases in my dataset with a unanimous decision: 92% of published decisions, and 99% of unpublished decisions, are unanimous. Altogether, in my dataset, about 630,000 cases, or about 97% of all cases, are unanimous. Of these cases, the parties in about 78,000 cases are of seemingly equal power, and the parties in about 550,000 cases are of seemingly unequal power.

Are all these cases ones in which, as Judges Edwards and Wald propose, all judges, regardless of political affiliation or other differences, can largely be expected to reach the same decision? To investigate this question, I rerun the analysis in Part IV with respect to cases between parties that are of seemingly unequal power, and the analysis in Part VI regarding cases between parties that are of seemingly equal power, but only for the cases in each category that have unanimous decisions.

Table 11 below reports my results. In particular, the first and second columns report the results of rerunning the regression of Table 5 on the subset of cases with parties of seemingly unequal power that result in unanimous decisions. The third and the fourth columns report the results of rerunning the regression of Table 5 on the subset of cases with parties of seemingly equal power that result in unanimous decisions. Columns (1) and (3) rerun the regression for unpublished and published cases, whereas Columns (2) and (4) rerun the regression only for the published cases (a dissent appears in about 8–9% of published cases and in about 1–2% of unpublished cases).

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[60] *See, e.g.*, Edwards, *The Judicial Function*, *supra* note 1, at 856. *See also* Edwards & Livermore, *supra* note 1, at 1899 ("after careful analysis of the relevant legal materials, thoughtful deliberations more often than not lead to a unanimous judgment.").

[61] Edwards & Livermore, *supra* note 1, at 1944.

Table 11: Unanimous Decisions

Dependent Variables:	Proweak		Reversal	
	Unpublished and Published w/o Dissent	Published w/o Dissent	Unpublished and Published w/o Dissent	Published w/o Dissent
Model:	(1)	(2)	(3)	(4)
RRD	0.012***	0.027***	0.002	0.001
	(0.002)	(0.004)	(0.005)	(0.007)
RDD	0.033***	0.067***	0.019***	0.021**
	(0.003)	(0.005)	(0.005)	(0.009)
DDD	0.073***	0.138***	0.057***	0.041***
	(0.005)	(0.009)	(0.008)	(0.014)
At least one Women	-0.003*	-0.008**	-0.008**	-0.004
	(0.002)	(0.004)	(0.004)	(0.007)
At least one Minority	-0.005***	-0.008**	-0.007*	-0.008
	(0.002)	(0.004)	(0.004)	(0.008)
Panel (Mean) Tenure	0.001***	0.001**	0.000	0.000
	(0.000)	(0.000)	(0.000)	(0.001)
Mean FE	0.13	0.28	0.23	0.40
Observations	538,728	113,574	75,256	28,050
Adjusted R^2	0.053	0.055	0.037	0.033

Notes: Standard errors are in parenthesis and are clustered by Circuit×Year. All regressions include Circuit×Year, District, Appeal Type, Nature of the suit (for Civil cases), and Offense Type (for Criminal cases) fixed effects. Stars denote the level of statistical significance t $p < 0.15$ * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

The results displayed in Table 11 undermine the Edwards-Wald argument that was based on the ubiquity of unanimous decisions. In both the first and the second columns—which cover the sets of cases with parties of unequal power that have unanimous decisions—the coefficients of *RRD*, *RDD*, and *DDD* are all positive, go up with any increase in the number of Democratic judges on the panel, and are all 99% statistically significant.

A similar pattern is obtained for the unanimous decisions of cases with parties of equal power. For these cases, the coefficients of *RRD*, *RDD*, and *DDD* are all positive and increasing with the number of Democratic judges. Furthermore, the coefficients for *RDD* and *DDD* are statistically significant at the 99% level.

The results thus indicate that in each of the two sets of cases with unanimous decisions, the nature of the decision unanimously adopted

significantly depends on the number of Democratic judges on the panel. These results undermine the Edwards-Wald argument that the presence of a unanimous decision in a case implies that the case is one on which all circuit court judges, regardless of political affiliation, should be expected to reach the same decision. To the contrary, the results clearly indicate that this is not the case.

In the two sets of cases covered by the regressions of Table 11, the decisions of the panel—whether it is *RRR*, *RRD*, *RDD*, or *DDD*—are all unanimous. However, the unanimous decisions reached by *RRR*, *RRD*, *RDD*, and *DDD* panels systematically differ from one another. This indicates that the outcomes of cases with unanimous decisions are associated with, rather than mostly unrelated to, the political composition of the panel.

B. The Methodological Objections

In their rejection of the conclusions of empirical studies on circuit courts, Edwards and Wald argue that the conclusions cannot be relied on due to methodological problems with the studies.[62] Below I consider the four most significant objections raised, and I explain why my analysis and findings are robust to these objections.

First, it has been argued that the conclusions of prior empirical work are unreliable because "the sample [used by such work] is very small."[63] However, whereas some notable empirical studies were indeed based on a small sample,[64] this is not the case with respect to this study. Rather than rely on a limited sample, this study uses a massive dataset that includes most of the different types of circuit court cases during a thirty-five-year period.

Second, it has been argued that the samples used by prior empirical work were not only small but unrepresentative due to their "failure to take account of 'unpublished' decisions issued by the federal court[s] of appeals,"[65] which represent a majority of circuit cases. In particular, it has been argued that unpublished cases represent "instances . . . when partisan decision-making seem[s] particular unlikely" and that "[t]he omission of unpublished decisions almost surely skews results in favor of finding greater influence from extralegal factors."[66] "The failure to consider [unpublished cases],"

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[62] The methodological objections are most fully developed and detailed in the article co-authored with Professor Livermore that pays close attention to the empirical work. *See* Edwards & Livermore, *supra* note 1.

[63] *See* Wald, *Response to Tiller and Cross*, *supra* note 2, at 244.

[64] *See, e.g.*, Sunstein et al., *Ideological Voting*, *supra* note 10.

[65] For discussion of this objection, see Wald, *Response to Tiller and Cross*, *supra* note 2, at 246–47.

[66] *See* Edwards & Livermore, *supra* note 1, at 1899.

concluded Edwards, "is a glaring mistake."[67] However, my study is not subject to this criticism because unpublished cases are fully represented in my dataset.

Third, it has been argued that using the party of the nominating president as a "proxy" for political affiliation and inclinations is "very crude."[68] However, to the extent that a crude proxy provides a noisy measure of political inclinations, the regression analysis understates the magnitude and statistical significance of the results, and the results can be expected to be stronger if a more accurate proxy were obtained and used. Furthermore, a finding that the party of the nominating president can help predict outcomes in many categories of circuit court cases should be of considerable interest, regardless of what this variable exactly measures and how crudely it does so.

Fourth, it has been argued that prior empirical work did not control for case factors that are likely to influence outcomes and that empirical work on the subject is flawed and unreliable as long as it does not account "for the most important determinants of appellate decision-making[, which are] (1) the case records on appeal, (2) the applicable law, (3) controlling precedent, and (4) judicial deliberations."[69] It is true that adding such variables to the variables of each case used in my analysis would likely further improve the ability to predict case outcomes. However, because cases are randomly assigned to panels, the fact that the empirical analysis does not include such variables as controls does not cast doubt on its findings with respect to the association between the party of the nominating president and case outcomes.

To be sure, outcomes are likely to be affected by the strength of the legal grounding of, say, a criminal appeal. However, because of the random assignment of cases, the strength of the legal basis for a criminal appeal is not systematically different for appeals considered by *RRR*, *RRD*, *RDD*, and *DDD* panels. And when omitted variables are not correlated with the variable of interest—here, the political composition of circuit court panels—this omission does not cast doubt on the reliability of the finding that this variable of interest is associated with the dependent variable of case outcome.[70]

VIII. LONE REPUBLICANS VS. LONE DEMOCRATS

There is a substantial literature in political science, social psychology,

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[67] *See* Edwards, *Collegiality and Decision Making*, *supra* note 1, at 1343.

[68] See Edwards & Livermore, *supra* note 1. *See also* Wald, *Response to Tiller and Cross, supra* note 2, at 239 (questioning the use of the party of the nominating president as a proxy for political inclinations)

[69] *See* Edwards & Livermore, *supra* note 1, at 1899.

[70] For an explanation of this general result by a well-known econometrics textbook, see, for example, WILLIAM H. GREENE, ECONOMETRIC ANALYSIS, chapter 4 (8th ed. 2018).

and sociology on peer effects—that is, how the views and decisions of individuals acting within a team or a group are influenced by the views and decisions of others in the team or group.[71] It is thus natural to examine whether judges on circuit court panels are subject to such peer effects.

Consider a mixed-party panel with two judges appointed by a president from one of the major parties and a "lone" judge nominated by a president from the other major party. Prior work has suggested that the views and decisions of one or both of the two judges might be influenced, and in particular moderated, by the views and decisions of the lone judge.[72] In particular, the two judges who are affiliated with the same major party might be *persuaded* by the lone judge during the penal deliberations, might seek to *accommodate* the views of the lone judge due to considerations of collegiality, or might *be deterred* by the prospect that the lone judge will write a critical dissenting opinion in the event that they do not moderate their positions.

Prior work has suggested that the outcome of a mixed-party panel might be moderated by the presence of a lone judge from the major party who is in the minority of the panel. However, this prior work has paid little attention to the possibility of a systematic difference between Republican judges and Democratic judges.[73] As I show below, the findings of this study show that there is an asymmetry between the extent to which Democratic and Republican majorities on a panel are influenced by the presence of a lone panel member affiliated with the other party.

To consider this subject first for the universe of cases with parties that are of seemingly unequal power, let us look back at Table 4, which reports summary statistics on the fraction of Pro-weak outcomes in groups of panels

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[71] For several studies from this large literature, see, e.g., Charles F. Manski, *Identification of Endogenous Social Effects: The Reflection Problem*, 60 REV. ECON. STUD. 531 (1993); Bramoullé Yann, Habiba Djebbari & Bernard Fortin, *Peer Effects in Networks: A Survey*, 12 ANN. REV. ECON., 603 (2020); Thöni Christian & Simon Gächter, *Peer effects and social preferences in voluntary cooperation: A theoretical and experimental analysis*, 48 J. ECON. PSYCH. 72 (2015).

[72] For studies engaging with the question of "peer effects" in circuit court panels and suggesting the existence of the effects such as those listed below in this paragraph, see Revesz, *supra* note 9; Sunstein et al., *Ideological Voting*, *supra* note 10; Landes & Posner, *supra* note 11; Emerson H. Tiller, *The Law and Positive Political Theory of Panel Effects*, 44 J. LEG. STUD. s35 (2015); CROSS, DECISION MAKING IN THE US COURTSOF APPEALS, *supra* note 11; Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319 (2009).

[73] An exception is the consideration of this subject in two articles by political scientist Jonathan Kastellec; see Kastellec, *Hierarchical and collegial politics*, *supra* note 29; and Jonathan P. Kastellec, *Panel Composition and Voting on the U.S. Courts of Appeals over Time*, 64 POL. RSCH. Q. 377 (2011).

with different political compositions. As the Table indicates, moving from the *RRR* group to the *RRD* group—that is, switching from a pure-Republican panel to a majority-Republican panel with a lone Democrat—increases the percentage of Pro-weak outcomes from 15% to 16%. By contrast, moving from *DDD* to *RDD*—that is, switching from a pure-Democratic panel to a majority-Democratic panel with a lone Republican—decreases the percentage of Pro-weak outcomes from 20% to 17%.

Thus, majority-Republican panels with a lone Democratic judge produce nearly the same fraction of Pro-weak outcomes as pure-Republican panels. By contrast, the 17% Pro-weak odds of majority-Democrat panels with a lone Republican judge are farther away from the 20% Pro-weak odds of pure-Democratic panels. Thus, a Republican majority produces Pro-weak odds closer to the odds of pure-Republican panels than the odds produced by a Democratic majority are to the Pro-weak odds of pure-Democratic panels. In other words, a lone Republican on a panel tends to moderate or constrain a Democratic majority more than a lone Democrat tends to moderate or constrain a Republican majority.

To examine the subject more rigorously, I conducted a series of statistical tests (F-tests) on the results in Table 5 and Table 10. The former Table reports, for the set of cases with parties that are of seemingly unequal power and various subsets, the results of regressions with a Pro-weak outcome as the dependent variable and panel composition as explanatory variables. The latter Table reports, for the set of civil cases between parties that are of seemingly equal power and various subsets, the results of regressions with *Reversal* as the dependent variable and panel political composition as explanatory variables.

For each of the regressions in the above Tables, an F-test examined the statistical confidence with which it can be stated that (i) the magnitude of the effect of moving from *RDD* to *DDD* is higher than (ii) the magnitude of the effect of moving from *RRR* to *RRD*. Table 12 below reports the results. The results indicate that (i) is higher than (ii) at the 99% significance level both for the set of all cases between parties that are of seemingly unequal power and for the set of all civil cases between parties that are of seemingly equal power, with the exception of published cases (where it is positive but not statistically significant). Furthermore, (i) is also higher than (ii) at the 99% significance level for the great majority of the specified subsets.

Table 12: Lone Republican vs. Lone Democrat

	F Stat (1)	P Value (2)
Parties of Unequal Power: *Pro-weak*		
Criminal	7.76	0.01
Prisoners	11.88	0.00
Immigrants	6.81	0.01
Civil Private	8.93	0.00
Civil US	9.39	0.00
Original Jurisdiction	0.67	0.63
All Cases	23.32	0.00
Parties of Equal Power: *Reversal*		
Non-Ideological	4.19	0.06
Ideological	11.23	0.00
Unpublished	16.04	0.00
Published	1.32	0.40
All Cases	9.93	0.00

What are the reasons for the identified pattern of lone Republican judges having a stronger moderating and constraining effect on Democratic-majority panels than the effect that lone Democratic judges have on Republican-majority panels? It might be that, compared with a Republican majority facing a lone Democrat, a Democratic majority is more likely to be open to being persuaded by a Republican panel member, more likely to be willing to accommodate such a Republican judge due to collegiality considerations, or more likely to be concerned about the prospect of the Republican judge electing to write a critical dissent. Answering this question is left to future work. For now, we should recognize the identified asymmetry in effects, and I will take it into account in my discussion of implications in the subsequent Part.

IX. GOING FORWARD

In this concluding Part, I briefly review my findings and describe the picture emerging from them. I also discuss the implications of my findings for future research, for understanding the significance of the president's power to nominate circuit court judges, and for assessing current rules and potential reforms.

A. The Emerging Picture

By compiling and analyzing a novel, massive dataset of circuit court decisions, I am able to shed new light on the long-standing debate over the extent to which circuit court judges' political affiliations can help predict their decisions. In particular, I have established that the political composition of circuit court panels is associated with outcomes in a much broader range of legal areas than has been suggested by previous research. This association is pervasive, encompassing a wide array of case categories that together represent over 90% of circuit court cases.

First and foremost, I have shown that panel political composition helps explain outcomes in each of the six categories of cases in which the parties are of seemingly unequal power. These categories include civil cases between individual and institutional entities, civil cases between private parties and the government, criminal appeals, prisoner litigation, and immigrant litigation. In addition, I have shown that panel political composition helps explain outcomes in civil cases between private parties that are of seemingly equal power.

By partitioning the universe of cases in various natural ways, I have not been able to identify any subset of cases in which judges' political affiliations are *not* associated with case outcomes. Judges' political affiliations help predict outcomes (i) both in cases that are ideologically salient and in cases that are not, (ii) both in published and in unpublished cases, (iii) in cases with and without an oral argument, (iv) within each circuit court considered separately, and (v) during the presidency of each of the presidents serving in the period I examined.

My findings provide a solid basis for rejecting the view developed by former D.C. Circuit Chief Judges Edwards and Wald that judges' political affiliations are mostly irrelevant to circuit court decisions. In contrast to the Edwards-Wald view, the numerous cases with unanimous decisions do not represent instances in which all Democratic and Republican judges agree; to the contrary, these cases are instances in which panels with different political compositions produce systematically different outcomes. Furthermore, I have shown that my findings are robust to the methodological objections that Edward and Wald raised with respect to prior empirical work.

B. Toward a Fuller Appreciation of Circuit Court Decisions

This study can provide a good starting point for additional empirical work. Although my analysis identified several ways in which judges' political affiliations can help explain outcomes in a wide range of case

categories, there are good reasons to expect that additional work could further advance our ability to predict and understand circuit court decisions.

To start, my analysis used the party of each judge's nominating president as a proxy for that judge's political inclinations. Critics have argued that this standard proxy is crude or at least noisy,[74] and I agree with this characterization. Still, I have shown that even a noisy measure of judges' political inclinations helps predict outcomes; it seems likely, therefore, that using refined and less noisy measures would further improve our ability to predict case outcomes using judges' political inclinations.

There are several directions that future work could pursue if it were to redo my analysis using finer measures of political affiliation. My analysis characterized as Democratic or Republican judges those who were nominated by *any* Democratic or Republican president, respectively. However, one could use variables that measure the extent to which each Republican president was conservative and the extent to which each Democratic president was liberal, and then employ those variables as a proxy for the political inclination of judges nominated by any given president.

In addition, a president that serves alongside a Senate controlled by the opposite major party is more constrained in nominating decisions, and the analysis could distinguish and treat differently judges who were nominated when such constraints were and were not present. The analysis could also incorporate information about the extent to which a given judge's confirmation was (or was not) resisted by the nominating president's opposing party.[75]

Furthermore, my analysis uses very simple and coarse proxies for characterizing case categories as being between parties with seemingly equal or unequal power. Again, even using these simple and coarse measures, I obtained significant results in a broad range of case categories. By collecting additional information and classifying cases more precisely, we could expect to obtain stronger results and improved predictions.

To illustrate, in all litigations between an individual and an institutional entity, I classified the individual as being the weaker party. However, in a case between an individual billionaire and a small local bank, for example, the individual would probably not be perceived by judges as the weaker litigant. Also, recall that in all cases in which private parties litigated against the U.S. government, I classified the private party as the weaker side. However, when the private party is, say, a giant corporation, this private party would again be unlikely to be perceived by judges as the weaker side.

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[74] *See, e.g.*, sources cited *supra* note **Error! Bookmark not defined.**.

[75] Information that is relevant to this variable includes the number of senators, if any, who voted against the judge's confirmation.

Thus, collecting and incorporating more information about the characteristics of cases and parties would enable a more accurate identification of the sets of cases in which parties are likely to be perceived by judges as being of unequal power and, for each such set, a more accurate identification of the party that is likely to be so perceived. Once such information is collected and incorporated, applying the analytical framework used in this study would produce an even more comprehensive and accurate mapping of the association between judges' political inclinations and case outcomes.

C. The President's Appointment Power

Article II of the Constitution vests in the president the power to appoint judges with the advice and consent of the Senate.[76] This role of the president has received a great deal of attention in connection with the appointment of Supreme Court Justices. This Article's findings, however, indicate that the president's power to appoint circuit court judges deserves considerable attention as well.

The precedents produced by circuit court decisions play a major role in shaping the doctrines of federal law. Although the Supreme Court can have the last word on any question, the Court issues only several dozen decisions each year and engages with many legal subjects either rarely or sometimes not at all. Supreme Court precedents thus leave numerous significant legal questions open for the circuit courts to decide. Furthermore, beyond their precedential value, circuit court decisions have a direct effect on a massive number of individual cases each and every year; my dataset suggests that in 2020 the circuit courts determined the outcome of about 20,000 individual cases.

Each president appoints many circuit court judges, and these judges often continue to serve for many years after the president departs. Thus, any presidential election should be expected to have a large and enduring effect on the political composition of circuit court panels. To the extent that political composition affects circuit court decisions only in limited categories of ideologically salient issues, as previous research has suggested, the effect of each presidential election on circuit court decisions should be expected to be limited to these case categories. However, given my findings regarding the breadth and significance of the association between political composition and case outcomes, it is necessary to recognize that the result of any presidential election is likely to have broad and significant effects on circuit court

[76] U.S. CONST. art. II, § 2, cl. 2.

decisions for years to come.

To illustrate this point, consider the 2000 election between George W. Bush and Al Gore. After winning an extremely close election in 2000, Bush went on to win a second term in 2004. During his two terms in office, Bush appointed a total of sixty-two circuit court judges, and, as of the end of 2020, thirty-three of them still served as active circuit court judges and sixteen of them served as senior judges with a reduced load. Searching through my dataset, I find that about half of the cases decided during the period 2001–2020 had a "Bush-affected panel"—that is, a panel that included one or more judges appointed by President George W. Bush.

Let us consider a hypothetical scenario in which, instead of Bush, Gore won the 2000 election and subsequently the 2004 election. Let us also assume that, in this scenario, Gore would have filled all the circuit court vacancies filled by Bush (and only those vacancies). In this hypothetical scenario, in all of the Bush-affected panels, the number of Democratic judges would have increased (and the number of Republican judges correspondingly declined) by one or more.

Using the results of the regressions displayed in Tables 5 and 10, I estimated how a switch to the above Gore scenario would have affected circuit court decisions during the twenty-year period between 2001 and 2020. In particular, I estimated the expected increases in (i) the number of Pro-weak outcomes in case categories with parties of seemingly unequal power and (ii) the number of reversals of lower-court opinions in civil cases with parties that were of seemingly equal power. Table 13 below reports the results of this exercise.

Table 13: Hypothetical Scenario of Gore Winning in 2000

Type of Appeal	Type of Change	Number of Cases
	Increase in *Pro-weak* Outcomes for:	
Criminal Appeals	Criminal Defendants	2,454
Prisoners Litigation	Prisoners	1,069
Immigrants vs. Immigrants Authorities	Immigrants	1,477
Civil Cases: Individuals vs. Institutions	Individuals	2,481
Civil Cases: Private Parties vs. the US	Private Parties	1,150
Original Jurisdiction Cases	Petitioners	152
Civil Litigation: Cases with Parties of Seemingly Equal Power	Increase in *Reversal* Outcomes	1,239
Total		10,022

As the Table indicates, I estimated that a Gore presidency would have changed the outcome of about 10,000 cases during the twenty years following the 2000 election. These changes would have included (i) about 2,500 improved outcomes for individuals in civil litigation against institutional parties; (ii) about 1,100 improved outcomes for private parties in their civil litigation against the government; (iii) about 2,500 improved outcomes for criminal defendants in criminal appeals; (iv) about 1,500 improved outcomes for immigrants in immigrations appeals; (v) about 1,100 improved outcomes for prisoners in prisoner litigation; and (vi) about 1,200 additional reversals of lower-court decisions.

Furthermore, my dataset indicates that about 19% of the cases decided by Bush-affected panels produced an opinion that was considered to have precedential value and was therefore published. Therefore, the above estimated changes in case outcomes would likely have moved the body of circuit court precedent in directions favorable to relatively weak litigants in a broad range of legal areas.

The effects of presidential elections on the Supreme Court have long received much attention from commentators, as well as from the candidates themselves, voters, and the media.[77] The above discussion indicates that much attention should also be given to the effects of each presidential election on subsequent circuit court decisions. Whether a Democrat or a Republican is elected to the presidency, as I have shown, can have a broad and long-lasting effect on the subsequent evolution of federal law doctrines and on the resolution of a massive number of individual cases.

D. Assessing Rules and Potential Reforms

Finally, while a meaningful presidential role in the appointment of circuit court decisions is prescribed by the Constitution, the association between political composition and circuit court outcomes also partly depends on the rules and arrangements governing the confirmation process and the operation of circuit courts. My analysis can help inform an assessment of these rules

[77] During the 2020 presidential campaign, for example, President Trump sought to get credit from voters for nominating three conservative judges to the Supreme Court, and President Biden strongly criticized these nominations. For examples of such statements, see *Remarks by President Trump on Judicial Appointments*, WHITEHOUSE.GOV (Sept. 9, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-judicial-appointments/; Domenico Montanaro, *Biden Responds to Trump Court Pick: 'Health Care Is on the Ballot,'* NPR (Sept. 26, 2020, 7:19 PM), https://www.npr.org/sections/supreme-court-nomination/2020/09/26/917322888/biden-responds-to-trump-court-pick-health-care-is-on-the-ballot.

and arrangements or changes thereto. Below, I illustrate this point by commenting in turn on a 2013 change to the Senate filibuster rules and on a proposed change in circuit court operations that has long been debated.

1. Filibuster Rules for Judicial Confirmations

The president's appointment power is constrained by the "Advice and Consent" role of the Senate, which requires Senate confirmation of each judicial appointment.[78] The extent to which this constraint is meaningful depends on the Senate's norms and rules governing such confirmations. These norms and rules determine the extent to which the party not in control of the White House has the power to block confirmations or to influence nominations. A significant power to do so would be expected to weaken the link between the political inclinations of confirmed judges and the party of the appointing president.

Among other things, the influence of the party not in control of the White House on judicial appointments depends on the filibuster rules.[79] The Senate may proceed to vote on the confirmation of a circuit court judge only if the requisite number of senators is willing to vote to end debate.

Until November 2013, the requisite number was sixty, three-fifths of the number of senators. Under this rule, in the common situation in which the party not in control of the White House still had more than forty senators, those senators collectively had the power to block the appointment of any candidate for a circuit court judgeship. Such a power provided the president with strong incentives to give substantial weight to the preferences and views of at least some of the opposing party's senators. Accordingly, the sixty-senators filibuster rule operated to weaken the link between the political inclinations of confirmed judges and the party of the appointing president, and thereby to reduce the difference in political inclinations between judges appointed by Republican and Democratic presidents.

In November 2013, the filibuster rules were changed to require only a bare majority of senators to end debate and proceed to a vote on confirming a candidate for a circuit court judgeship. This change substantially narrowed the range of situations in which the senators of the party not in control of the White House collectively have the power to block the confirmation of a

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[78] U.S. CONST. art. II, § 2, cl. 2.

[79] For a comprehensive discussion of the filibuster rules in connection with judicial appointments, and of changes in these rules discussed below, see generally Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L. J. 1645 (2015).

circuit court judge. After the change, whenever the president's party has a bare majority in the Senate, the party's senators are able to ensure confirmation.

The argument for decreasing the filibuster threshold for circuit court confirmations was to reduce the likelihood of a deadlock that would prevent the filling of circuit court vacancies. If both the president and the party not in control of the White House are unwilling to compromise, a deadlock might ensue. However, the reduction of the threshold for ending debate also weakened the ability of the party not in control of the White House to block presidential nominations of candidates who are viewed as partisan or to substantially discourage their nomination in the first place.

Thus, by strengthening the president's power to appoint circuit court judges without necessarily giving weight to the view of the party not in control of the White House in many situations, the change in the filibuster rules likely strengthened the link between the political inclinations of confirmed circuit court judges and the president's party. This in turn could be expected to strengthen the association, which I have shown to be pervasive and significant, between the party of the appointing president and case outcomes.

2. Mixed Panels

Finally, I want to discuss the implications of my findings for an assessment of a long-standing and well-known proposal, which was first put forward by Professors Emerson Tiller and Frank Cross.[80] Under this proposal, the arrangements governing the assignment of judges to circuit court panels would be refined to increase the use of mixed-party panels or even to require their use.[81]

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[80] *See* Tiller & Cross, *supra* note 29. For an article responding to and criticizing the Tiller & Cross proposal, see Wald, *Response to Tiller and Cross*, *supra* note 2.

[81] This approach is similar in its nature and spirit to the approach used to determine the composition of many of the commissions that lead federal administrative agencies. By statute, these commissions are required to have a mixed composition, with no more than a bare majority of their members being allowed to come from a single political party. *See, e.g.*, 15 U.S.C. § 78d(a) ("There is hereby established a Securities and Exchange Commission . . . to be composed of five commissioners . . . . Not more than three of such commissioners shall be members of the same political party . . . ."); 47 U.S.C. § 154(b)(5) (similar for the Federal Communications Commission).

One way to implement the proposal in forming any given panel would be by (i) first, choosing at random two judges for the panel; (ii) second, if these two randomly drawn judges happen to be a Democratic judge and a Republican judge, choosing the third panel member at random from the pool of all remaining judges; and (iii) third, if the first two judges randomly drawn for the panel are affiliated with the same party, choosing the third panel

In a subsequent policy analysis of potential associations between political affiliations and circuit case decisions, Professors Cass Sunstein and Thomas Miles opined that "there is a great deal to be said on behalf of panels of mixed composition."[82] According to their view, "[i]f DDD and RRR are the most serious problem, then that problem would appear to be solved by ensuring against unified panels."[83] Essentially, by eliminating DDD and RRR panels, the difference in political composition among panels would decrease, and this would reduce the potential severity of the association between political composition and case outcomes.

Sunstein and Miles identified some practical and symbolic problems with the implementation of this proposal. For them, the critical question was a practical one—whether the severity of the association between judges' political associations and circuit court decisions is sufficiently substantial to warrant such intervention. In this respect, my findings regarding the breadth and strength of the association between political associations and circuit court decisions strengthen the argument for the proposal.

However, my findings also point to a potentially problematic aspect of the proposal that its proponents have not recognized. These proponents have been motivated by a desire to eliminate RRR and DDD panels, reducing the extent to which groups of panels with different political compositions differ systematically in outcomes, and thereby reducing the extent to which case outcomes depend on the "luck of the draw." Although implementing the proposal would indeed have this effect, my findings indicate that such implementation would also have an additional and unintended effect.

My analysis indicates that, in addition to reducing the extent to which panels differ in political composition, implementing the proposal would also tilt outcomes in the direction associated with pure-Republican panels. This is due to my findings in Part VIII regarding the asymmetric effects of lone Republicans and lone Democrats on circuit court panels.

These findings indicate that the differences in Pro-weak and Pro-reversal odds between RRD and RRR panels are significantly smaller than the differences in those odds between RDD and DDD panels. Thus, the effects of eliminating the same number of RRR panels and DDD panels are not symmetric and should not be expected to cancel each other out. To the contrary, replacing a given number of RRR panels with RRD panels would push outcomes away from those associated with RRR panels to a smaller extent than replacing the same number of DDD panels with RDD panels would push outcomes away from those associated with DDD panels.

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member at random from the pool of remaining judges who are affiliated with the other party.

[82] *See* Sunstein & Miles, *supra* note 29, at 2227–28.

[83] *Id*.

Thus, my findings regarding the asymmetric effect of lone Republican judges and lone Democratic judges imply that the long-standing proposal to mandate mixed panels would also have an asymmetric effect. Implementing such a proposal would not have a neutral effect on the average odds of Pro-weak or Pro-reversal outcomes. Rather, it would move outcomes toward those associated with Republican judges. This analysis should be taken into account in any future analysis of the mixed-panels proposal. This analysis also illustrates how the empirical findings of this study can generally inform discussions of any policy proposal in this area.

Table A1: Determinants of *Proweak* Outcomes - When Cases are Partitioned by both Ideologically Saliency and Publication Status

Model:	Non-Ideological & Unpublished (1)	Non-Ideological & Published (2)	Ideological & Unpublished (3)	Ideological & Published (4)
RRD	0.005**	0.006*	0.023***	0.026***
	(0.002)	(0.004)	(0.006)	(0.005)
RDD	0.019***	0.023***	0.065***	0.075***
	(0.003)	(0.004)	(0.007)	(0.007)
DDD	0.041***	0.058***	0.124***	0.135***
	(0.004)	(0.008)	(0.011)	(0.011)
At least one Woman	-0.001	0.002	-0.009	-0.007
	(0.002)	(0.002)	(0.005)	(0.005)
At least one Minority	-0.001	-0.004*	-0.006	-0.004
	(0.002)	(0.002)	(0.005)	(0.005)
Panel (Mean) Tenure	0.000	0.000*	0.001*	0.001**
	(0.000)	(0.000)	(0.000)	(0.000)
Mean FE	0.11	0.09	0.31	0.27
Observations	254,681	175,118	56,918	67,343
Adjusted R^2	0.029	0.036	0.034	0.054

Notes: Standard errors are in parenthesis and are clustered by Circuit×Year. All regressions include Circuit×Year, District, Appeal Type, Nature of the suit (for Civil cases), and Offense Type (for Criminal cases) fixed effects. Stars denote the level of statistical significance t $p < 0.15$ * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

Table A2: Determinants of *Proweak* Outcomes - When Cases are Partitioned by Oral Hearing

Model:	W/o Oral Hearing (1)	w/ Oral Hearing (2)
RRD	0.008***	0.016***
	(0.002)	(0.003)
RDD	0.020***	0.050***
	(0.003)	(0.004)
DDD	0.042***	0.099***
	(0.005)	(0.006)
At least one Woman	-0.001	-0.006**
	(0.001)	(0.003)
At least one Minority	-0.001	-0.003
	(0.002)	(0.003)
Panel (Mean) Tenure	0.000***	0.001**
	(0.000)	(0.000)
Mean FE	0.08	0.26
Observations	365,620	188,440
Adjusted R^2	0.035	0.044

Notes: Standard errors are in parenthesis and are clustered by Circuit×Year. All regressions include Circuit×Year, District, Appeal Type, Nature of the suit (for Civil cases), and Offense Type (for Criminal cases) fixed effects. Stars denote the level of statistical significance t $p < 0.15$ * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

Table A3: Determinants of *Proweak* - When Cases are Partitioned by Circuits

Model:	First (1)	Second (2)	Third (3)	Fourth (4)	Fifth (5)	Sixth (6)	Seven (7)	Eight (8)	Ninth (9)	Ten (10)	Eleventh (11)	DC (12)
RRD	0.042***	−0.004	−0.006	0.004	0.002	0.014***	0.013*	0.042***	0.029***	0.017**	0.016*	0.028***
	(0.011)	(0.009)	(0.007)	(0.005)	(0.006)	(0.005)	(0.007)	(0.008)	(0.006)	(0.008)	(0.009)	(0.010)
RRD	0.057***	0.013	0.001	0.013*	0.008	0.043***	0.029**	0.092***	0.074***	0.039***	0.028**	0.079***
	(0.014)	(0.012)	(0.008)	(0.006)	(0.009)	(0.006)	(0.012)	(0.011)	(0.007)	(0.008)	(0.012)	(0.014)
DDD	0.116***	0.038**	0.026	0.050***	0.042***	0.094***	0.068	0.094***	0.117***	0.067***	0.033**	0.107***
	(0.028)	(0.014)	(0.018)	(0.008)	(0.015)	(0.010)	(0.043)	(0.028)	(0.010)	(0.014)	(0.016)	(0.023)
At least one Woman	−0.040***	0.008*	−0.010*	−0.005*	−0.004	−0.002	0.034***	−0.047***	0.007	−0.016***	−0.012**	−0.011
	(0.012)	(0.005)	(0.005)	(0.003)	(0.004)	(0.005)	(0.008)	(0.011)	(0.005)	(0.006)	(0.006)	(0.011)
At least one Minority	0.0003	−0.006	0.007	−0.001	0.007	0.008**	−0.008	−0.014**	−0.018***	0.007	−0.010	0.002
	(0.010)	(0.005)	(0.005)	(0.004)	(0.004)	(0.004)	(0.011)	(0.007)	(0.005)	(0.005)	(0.008)	(0.011)
Panel (Mean) Tenure	0.002**	0.0001	0.001**	0.0002	0.001**	−0.001**	−0.0002	0.003***	0.0005	0.002***	0.0001	0.002
	(0.001)	(0.0004)	(0.001)	(0.0004)	(0.0005)	(0.0003)	(0.001)	(0.001)	(0.0004)	(0.001)	(0.0004)	(0.002)
Mean FE	0.2083	0.1948	0.1668	0.098	0.1509	0.1748	0.2003	0.1538	0.1843	0.1698	0.1565	0.1997
Observations	11,713	35,333	37,674	70,925	76,624	51,589	29,863	34,568	115,311	30,545	47,383	12,532
Adjusted R^2	0.048	0.063	0.055	0.048	0.075	0.043	0.036	0.062	0.045	0.045	0.064	0.068

Notes: Robust Standard errors are in parenthesis. All regressions include Year, District, Appeal Type, Nature of the suit (for Civil cases), and Offense Type (for Criminal cases) fixed effects. Stars denote the level of statistical significance t $p < 0.15$ * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.

Table A4: Determinants of *Proweak* - When Cases are Partitioned by Periods

Model:	Regan & GHW Bush (1)	Clinton (2)	GW Bush (3)	Obama (4)	Trump (5)
RRD	0.012**	0.015***	0.014**	0.005	0.022***
	(0.006)	(0.004)	(0.006)	(0.004)	(0.007)
RDD	0.040***	0.040***	0.038***	0.025***	0.040***
	(0.008)	(0.006)	(0.008)	(0.005)	(0.009)
DDD	0.080***	0.084***	0.084***	0.056***	0.065***
	(0.012)	(0.011)	(0.012)	(0.009)	(0.010)
At least one Woman	-0.009	-0.008**	-0.001	0.002	-0.004
	(0.006)	(0.004)	(0.003)	(0.003)	(0.005)
At least one Minority	-0.014***	-0.009**	-0.005	-0.001	0.008
	(0.005)	(0.004)	(0.004)	(0.004)	(0.006)
Panel (Mean) Tenure	0.002***	0.002***	0.001***	0.000	-0.001
	(0.000)	(0.000)	(0.000)	(0.000)	(0.001)
Mean FE	0.190	0.120	0.120	0.120	0.130
Observations	66,856	131,849	141,920	160,855	52,580
Adjusted R^2	0.073	0.045	0.044	0.056	0.051

Notes: Standard errors are in parenthesis and are clustered by Circuit×Year. All regressions include Circuit×Year, District, Appeal Type, Nature of the suit (for Civil cases), and Offense Type (for Criminal cases) fixed effects. Stars denote the level of statistical significance t $p < 0.15$ * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.