COLLOQUY

A MODEST PROPOSAL FOR IMPROVING AMERICAN JUSTICE

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In this piece, Professors Tiller and Cross suggest that the federal justice system could be improved by limiting the practice of randomly assigning circuit court judges to panels and by acknowledging the partisan component of judging. Complete random assignment, they argue, creates political imbalance on panels when three judges from the same political orientation are chosen. In those situations, judges may feel less constrained in closely following established legal doctrines when doing so conflicts with their policy preferences. Tiller and Cross propose that no more than two members on each panel be selected from the same political party (as determined by the political party of each judge's appointing President). The presence of a minority judge on the panel constrains the political behavior of the majority and enhances the credibility of the judging enterprise. The practical implications of implementing the proposal are also discussed.

The United States system of justice could be markedly improved by eliminating the practice of randomly assigning circuit court judges to panels and by acknowledging the partisan component of judging. The random assignment of judges to circuit court panels often produces ideologically unbalanced panels with either three Democratic or three Republican appointees controlling the outcome. Such imbalances often lead to case outcomes that reflect partisan interests. Indeed, there is now evidence that when a circuit court panel is unified with like-minded partisans (3-0 panels of Democratic or Republican appointees), ideological voting is quite pronounced, with neutral precedent often manipulated or ignored altogether.[1]

The partisan ideological component of judging is widely considered improper. Federal judges are not elected, and their life tenure makes them unaccountable to the people. Ideologically-based decisionmaking belongs to the other branches. When judges act ideologically, it "threatens the values of self-determination, accountability and representational-

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1. See Frank B. Cross & Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 Yale L.J. 2155, 2168–72 (1998).

ism that provide core notions of American political theory."[2] While it is naive to expect to expunge all ideological discretion from the law, our democracy counsels that such discretion should be reduced insofar as possible.

To address this weakness in our federal judicial system, we propose a requirement that every three-member circuit court panel be politically split, with each containing judges appointed by both Republican and Democratic Presidents. In short, there would be no panels where all three members were the appointees of a single party. Every panel would have one judge whose partisanship differs from the other two, thereby offering a political check on partisan decisionmaking by the majority. As we show below, this proposal would reduce ideologically extreme outcomes, enhance the role of stare decisis, and improve the horizontal equity of the federal justice system.

I. Random Assignment on Circuit Courts

Federal law does not specify a particular method for assigning circuit court judges to cases.[3] Over time, however, the random assignment of federal appellate judges to panels has become a "hallmark" of the system.[4] By rule or practice, new cases are assigned randomly to three-judge panels.[5] Random assignment was adopted for two primary reasons. First, the system prevented the use of intracircuit judge-shopping by litigants and protected public confidence in the fairness of the system.[6] Second,

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2. Martin H. Redish, Taking a Stroll Through Jurassic Park: Neutral Principles and the Originalist-Minimalist Fallacy in Constitutional Interpretation, 88 Nw. U. L. Rev. 165, 166 (1993).

3. See 28 U.S.C. § 46 (1994) (providing for three-judge panels but not specifying assignment). The Supreme Court has interpreted this authority as enabling an individual circuit to determine how it will arrange its calendar and distribute case assignments. See Western Pac. R.R. Corp. et al. v. Western Pac. R.R. Co., 345 U.S. 247, 257–258 (1953).

4. See Joseph W. Bellacosa, Judging Cases v. Courting Public Opinion, 65 Fordham L. Rev. 2381, 2390 (1997) (describing random assignment as "hallmark" of courts of appeals); Jonathan R. Macey, Judicial Preferences, Public Choice, and the Rules of Procedure, 23 J. Legal Stud. 627, 630 (1994) (finding random assignment to be a central characteristic of federal judicial procedure).

5. See, e.g., 3rd Cir. Internal Operating Proc. 1.1 (stating that "fully briefed cases are randomly assigned . . . to a three-judge panel"); 4th Cir. Internal Operating Proc. 34.1 (providing for use of a "computer program designed to achieve total random selection"); 9th Cir. Rules, Intro. E(4) (stating that the "only exception to the rule of random assignment of cases to panels is that a case heard by the court on a prior appeal may be set before the same panel upon a later appeal"); Chicago Council of Lawyers, Evaluation of the United States Court of Appeals for the Seventh Circuit, 43 DePaul L. Rev. 673, 705 (1994) (noting that the "Seventh Circuit's official policy is to assign judges to panels at random").

6. See United States v. Mavroules, 798 F. Supp. 61, 61 (D. Mass. 1992) (noting that random assignment "prevents judge shopping by any party, thereby enhancing public confidence in the assignment process").

the procedure "ensures an equitable distribution of the case load" among members of the court.[7]

While both reasons for random assignment are sound, the practice contains an unstated assumption that all judges act with reasonably equivalent motives—in particular, to apply the law in a fair-minded way. Indeed, judges are presumed to apply the law to the facts in a neutral manner and to resolve the case through reasoned decisionmaking.[8] This is the traditional formalist vision of the law, and judges typically maintain that this vision is an accurate reflection of their decisionmaking.[9]

Considerable evidence now demonstrates that the partisan identity of judges matters and that many decisions are substantially affected or essentially decided according to judicial ideology. Law professors have periodically recognized this fact, through schools of thought such as Legal Realism or Critical Legal Studies, and the academy today does not subscribe to Langdellian formalism. Moreover, political science researchers have produced compelling evidence of the ideological component of judging. While much of this research focuses on the Supreme Court,[10] there is ample evidence of the ideological effect at both the circuit and district court levels as well.[11] While these judges do not ignore the law outright, their interpretations are often heavily colored by their politics. To the extent then that ideology is important, judges are not roughly

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7. See id.

8. See generally Frank B. Cross, Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance, 92 Nw. U. L. Rev. 251, 255–64 (1997) (reviewing traditional legal model of judicial decisionmaking). In this model, the judge is viewed as "one who objectively and impersonally decides cases by logically deducing the correct resolution from a definite and consistent body of legal rules." John Hasnas, Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument, 45 Duke L.J. 84, 87 (1995). This is the classic law of "neutral principles." See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959).

9. See, e.g., Robert A. Carp & Ronald Stidham, Judicial Process in America 301 (1996) (reporting that "[m]ost judges would sooner admit to grand larceny than confess a political interest or motivation") (quoting Donald Dale Jackson, Judges 18 (1974)); Harry T. Edwards, Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit, 56 U. Colo. L. Rev. 619, 620 (1985) (claiming that "it is the law—and not the personal politics of individual judges—that controls judicial decisionmaking in most cases resolved by the court of appeals").

10. See Cross, supra note 8, at 285 (discussing extensive focus of political scientists on Supreme Court decisionmaking).

11. See, e.g., Richard J. Pierce, Jr., Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking, 1988 Duke L.J. 300, 303–07 (lamenting ideological decisionmaking on the D.C. Circuit); Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1770–71 (1997) (reporting ideological effects of D.C. Circuit decisionmaking on environmental regulation); Laura A. Smith, Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication, 61 Geo. Wash. L. Rev. 1548, 1613 (1993) (same); Donald R. Songer, The Circuit Courts of Appeals, *in* The American Courts: A Critical Assessment 35, 42–43 (John B. Gates & Charles A. Johnson eds., 1991) (quantifying ideological decisionmaking at circuit court level).

equivalent, and the judge assignment process may have a considerable effect on the outcome of the case.

II. The Politics of Judicial Decisionmaking

Through a confluence of forces, the federal judiciary has become susceptible to partisan influences that reflect themselves in case outcomes. Some of this partisan influence is of presidential and congressional design; some results from the behavior of the judges themselves. We briefly consider each below.

A. *Partisan Appointments to the Courts*

Empirical studies of the judicial appointment process show that partisan politics takes place in the selection of nominees for the federal bench. Whether for patronage or policy purposes, Presidents overwhelmingly select judicial appointees from their own political party. The same-party appointment rate for U.S. presidents from 1869–1992 is 93.5% for the federal district courts and 92.2% for the federal circuit courts.[12] Even President Carter, who set up an independent process for judicial nominations, had a same-party appointment rate of 85.4%.[13] Such systematic behavior has at times resulted in large swings in the partisan make-up of the federal judiciary. Franklin Roosevelt's long tenure in office, for example, resulted in a dramatic change in the partisan make-up of federal courts. Only 22% of the district and circuit court judgeships were held by Democratic appointees when he came to office; when he left, nearly 70% of these seats were held by Democratic appointees.[14] Moreover, the political effects of judicial selection survive even the repudiation of a party at the polls. There is a considerable lag before a new Administration can appoint a significant number of new judges. It took Eisenhower a full eight years to erase the majority margin of Democrats appointed by Roosevelt and Truman.[15]

In short, Presidents nominate judges based on partisanship, and, over time, this selection scheme can result in a judiciary predominantly of one mind with the president. Furthermore, the appointment process is used to project and prolong political power far beyond a President's term of office.

B. *Political Expansion of the Judiciary*

In addition to replacing vacated judgeships with like-minded partisans, the President often acts in concert with Congress to enhance judicial change through the expansion of the judiciary (creation of new

12. See Deborah J. Barrow et al., The Federal Judiciary and Institutional Change 15 (1996).

13. See id. at 81.

14. See id. at 62.

15. See id.

judgeships). There is now evidence that the decision to create new judgeships is driven by partisan concerns rather than merely caseload pressures upon the courts. In a recent study, de Figueiredo and Tiller examined congressional decisions to expand the federal circuit courts and found that both the timing and size of circuit court expansion were driven by politics.[16] In particular, that study hypothesized that if partisans wanted to control the federal judiciary, they could do so by increasing the number of available appointments through an expansion in the size of the judiciary.[17] But to ensure that like-minded partisans would be appointed, Congress (especially the House, which has no power over confirmation) would be more inclined to expand the circuit courts during periods of unified government (House, Senate, and President all dominated by the same party) than during divided government (where the legislature and the President may be at odds over the partisanship of the appointees).[18] Moreover, the size of these expansions (the number of judgeships actually authorized) should be larger during periods of unified government than divided government.[19] Table 1 summarizes the study's data on the timing of circuit court expansions.

TABLE 1: TIMING OF CIRCUIT COURT EXPANSIONS, 1869–1990
(61 CONGRESSIONAL TWO-YEAR TERMS)

Period of Government	Expansion	No Expansion	Totals
Unified	21	15	36
Divided	4	21	25
Totals	25	36	61

Table 1 reveals that during thirty-six periods of unified government, Congress expanded the size of the circuit courts twenty-one times (58%). During the twenty-five periods of divided government, Congress expanded the judiciary only four times (16%). Moreover, the expansion increases were larger during unified government. This difference between unified government and divided government supports the hypothesis that politics was driving the decision to expand the circuit courts.[20] Using a probit analysis, the study also found that an increasing caseload on the circuit courts had no significant effect on whether Congress

16. See John M. de Figueiredo & Emerson H. Tiller, Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary, 39 J.L. & Econ. 435, 458–59 (1996).

17. See id. at 435–36.

18. This challenges the claim that divided government is just as likely to succeed in passing legislation as unified government. See David R. Mayhew, Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–1990, at 177–78 (1991). In the case of the judiciary, Congress is more likely to pass legislation expanding the size of the judiciary under a politically aligned House, Senate and President than under divided government.

19. See de Figueiredo & Tiller, supra note 16, at 439.

20. See id. at 451–52.

passed legislation to expand the size of the federal circuit courts. The timing of expansion was driven primarily by politics.[21] Once again, elected officials use the judiciary in order to perpetuate their power even after the elected officials themselves must leave office.

C. *Strategic Retirements by Federal Judges*

Federal judges are not passive participants in the court-packing attempts of Congress and the President. Indeed, they often facilitate the efforts of Presidents and Congress to fill the bench with like-minded partisans by strategically timing their departure from the bench. Simply put, judges tend to retire during a same-party administration to enable partisan replacement. A recent study by Spriggs and Wahlback examined voluntary judge departures from the U.S. Courts of Appeals for the years 1893 through 1991.[22] That study found that although nonpolitical factors such as age, salary base, and workload all affected retirement and resignation rates, political factors did as well. Using various statistical techniques to measure for significance, the study found that Republican-appointed judges were much more likely to retire or resign under a Republican President (1.6 departures per year) than under a Democratic President (0.5 departures per year) and that Democratic-appointed judges were much more likely to retire or resign during a Democratic presidency (1.5 departures per year) than during a Republican presidency (0.5 departures per year).[23] Similarly, the study found that, at least for Democrats, the judges were also more likely to retire under a Senate controlled by the same party.[24] In short, federal circuit judges can perpetuate partisan control of a judicial slot by strategically retiring during a same-party presidency.

D. *Partisan Decisionmaking by Federal Judges*

In addition to the partisan structure and selection mechanisms mentioned above, the actual voting patterns of federal judges confirm the effects of partisanship on judicial decisionmaking. Empirical studies now show two significant results. First, judicial policy choices (case outcomes) reflect the partisanship of the judges making the decision. This pattern exists over numerous areas of law, including civil rights and civil liberties,

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21. Caseload pressure did matter, however, in determining how many judgeships to add once it was determined that there would be an expansion. But unified government also mattered in this decision as Congress was more likely to inflate the number of new judgeships when it was aligned with the president than when it was not. See id. at 457–58.

22. See James F. Spriggs & Paul J. Wahlbeck, Calling it Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991, 48 Pol. Res. Q. 573 (1995).

23. See id. at 588. The average retirement rate for all judges during the period analyzed was 1.3 per year.

24. See id. at 589.

the environment, crime, and economic issues, with Democratic judges typically voting the liberal position and Republicans the conservative.[25]

Consider, for example, a recent study by Schultz and Petterson examining the voting patterns of Democrat and Republican judges in certain sex discrimination cases for the years 1967–1989.[26] They coded the individual votes of judges in sex and race discrimination cases involving the lack of interest defense and found that Democrats were more likely to reject the defense (thus being more sympathetic to plaintiffs claiming discrimination) than were Republicans.[27] See Table 2 below. The results were significant whether the partisanship of the judges was measured by their own party membership or the party membership of the appointing president.[28] In fact, these numbers may actually understate the partisan nature of judicial decisionmaking since they include the votes of minority judges from split panels, where such judges may just join the majority for lack of power.

A second way in which judges achieve partisan outcomes in a case is more subtle. It occurs when judges have multiple grounds (instruments) upon which to make a case decision. These judicial instruments can

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25. Judicial values have typically been determined through political party affiliation. See, e.g., Robert A. Carp & C.K. Rowland, Policymaking and Politics in the Federal District Courts 51–83 (1983) (identifying the appointing president as an important predictor of federal judges' decisions, particularly in civil rights and civil liberties cases); Malcolm M. Feeley, Another Look at the "Party Variable" in Judicial Decision-Making: An Analysis of the Michigan Supreme Court, 4 Polity 91, 93 (1971) (describing party affiliation as "a crude, but . . . effective, background indicator of judges' values because it indicates a collection of likeminded persons . . . , is an important socializing institution, and is an important reference group for people active in public affairs"); Sheldon Goldman, Voting Behavior on the United States Courts of Appeals Revisited, 69 Am. Pol. Sci. Rev. 491, 501–03 (1975) (finding that judge's political party was an important background variable in civil liberties and criminal cases); Stuart S. Nagel, Judicial Backgrounds and Criminal Cases, 53 J. Crim. L. Criminology & Police Sci. 333, 334–35 (1962) (finding that political party was an important predictor of state and federal supreme court judges' decisions in criminal cases); 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, 322–23 (1990) (giving evidence that Democratic judges have more liberal voting records than Republican judges); C. Neal Tate, Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978, 75 Am. Pol. Sci. Rev. 355, 362–63 (1981) (suggesting that the appointing president and the partisan affiliation of the judge is a good predictor of a justice's voting record on civil liberty and economic issues); see also Robert A. Carp et al., The Voting Behavior of Judges Appointed by President Bush, 76 Judicature 298, 302 (1993) (finding Bush appointees to be quite conservative); Jon Gottschall, Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution, 70 Judicature 48, 51–54 (1986) (reporting conservative decisionmaking of Reagan appointees).

26. See Vicki Schultz & Stephen Petterson, Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. Chi. L. Rev. 1073 (1992).

27. See id. at 1171.

28. See id. at 1172 n.257. For party of the appointing president, the p-value equaled .04. For the judge's own party, the p-value equaled .005. Both results meet traditional standards of statistical significance.

TABLE 2: PERCENTAGE OF JUDICIAL DECISIONS IN FAVOR OF PLAINTIFFS IN SEX AND RACE DISCRIMINATION CASES, BY JUDGES' POLITICAL AFFILIATIONS

Political Party	Judicial Partisanship (Appointing President)	Judicial Partisanship (Judge's Own Party)
Republican	50% (22/44)	38.7% (12/31)
Democrat	70.8% (34/48)	70.8% (34/48)

often be manipulated to achieve partisan outcomes. Two recent studies suggest that federal appellate judges, in order to achieve desired policy outcomes, manipulate judicial decision instruments (statutory interpretation and process review, in particular) when reviewing agency policies. In one study, Smith and Tiller examined all published circuit court decisions from 1981 through 1992 in which an Environmental Protection Agency decision was reversed.[29] That study investigated whether appellate court panels were more likely to choose a process-based reversal of agency policy over a statutory interpretation reversal when "protecting" the reversal from higher court review.[30] The logic is that lower court decisions bound up in factual minutia and process concerns are less likely to draw the attention of higher courts (the full circuit en banc and the Supreme Court), and are thus less likely to be overturned. If such is the case, one would expect to see Democratic circuit court panels using process instruments at a higher rate when reversing the EPA for being too lax (pro-development) than when reversing the EPA for being too strict (pro-environment). Similarly, one would expect to see Republican circuit court panels using process instruments at a higher rate when reversing the EPA for being too strict than when reversing the EPA for being too lax.[31]

The study's findings confirmed this effect. It found that Democratic-controlled panels used process instruments in 59% (10 of 17) of cases in which they overruled the EPA for being too lax (pro-development), but in only 39% (7 of 18) of the cases in which they overruled the EPA for being too strict (pro-environment). When Republicans reversed the EPA for being pro-development, process instruments were used only 32% of the time (6 of 19). But in the 35 instances where Republicans reversed the EPA for being pro-environment, process instruments were used 63% of the time (22 of 35), almost twice the rate at which they were used when

29. See Joseph L. Smith & Emerson H. Tiller, The Strategy of Judging: Evidence From Administrative Law (1998) (working paper, University of Texas at Austin) (on file with the *Columbia Law Review*).

30. Because most litigants raise both statutory and process challenges, and because judges need only reverse on one ground to overturn the agency, there is an opportunity for judges to be selective in the grounds they choose for reversal.

31. This proposition rests on the assumption that, in general, Democrats are more willing to protect the environment at the expense of development than are Republicans. See Smith & Tiller, supra note 29, at 11.

reversing the EPA for being pro-development.[32] In short, it appeared as if appellate court judges would switch to process as a ground for reversal if they wanted such reversal to withstand higher court scrutiny.[33]

A related study by Revesz largely confirms this result.[34] Revesz examined the individual votes of circuit court judges reviewing the Environmental Protection Agency. In six selected periods from the mid-1980s through the early 1990s, Revesz found support for the claim that judges engaged in selective deference.[35] More specifically, Revesz found that Republican judges were less likely than Democratic judges to defer to the EPA when industry challenged EPA policy and that Democrats were less likely to defer to the EPA when environmentalists challenged that agency.[36] More interesting, Revesz found that selective (partisan) deference was more likely to occur in process challenges than in statutory interpretation challenges.[37] Table 3 below reproduces the results with respect to industry challenges for the six periods considered.[38] For statutory interpretation challenges by industry litigants, the reversal vote rates for Republican and Democratic judges were not statistically different for any period. But for process challenges by industry, the rates were statistically different in nearly every period, with Republicans voting to reverse at much higher rates than Democrats.[39] Revesz interpreted this to mean that process challenges by litigants gave Republican judges latitude to exercise their policy preferences because process decisions by lower courts, due to their fact-bound nature, are less likely to be reviewed by higher courts.[40]

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32. See id. at 15.

33. In the Smith and Tiller study of 252 cases affirming and reversing the EPA on the merits, statutory interpretation was discussed in 79% (198 of 252) of the written opinions and process discussed in 65% (164 of 252) of the written opinions. In 44% of all decisions both statutory interpretation and process were discussed. If we also believe that the arguments made in litigants' briefs are often not discussed in the courts' written opinions, and if we believe that the courts have the latitude to raise or interpret challenges freely (especially the process challenge), then the claim that judges have considerable choice in decision instruments appears sound. See id. at 14 n.28.

34. See Revesz, supra note 11, at 1747–50.

35. Revesz did not find similarly for periods during the 1970s. He attributes this to the fact that Democrats and Republicans were not as ideologically divided over environmental regulation during the 1970s. Politicians on both sides of the aisle were attempting to claim credit for environmentalism. See id. at 1747.

36. See id. at 1754–55.

37. See id. at 1749.

38. The percentage totals represent the proportion of individual judge votes to reverse to the total number of cases raising the type of challenge (statutory interpretation or process).

39. See id. at 1748–51. The p-values for all but one period under process review were .04 or less, thereby reaching conventional standards of significance.

40. Revesz did not claim that judges were necessarily making choices between process and statutory interpretation. Given that most litigants raise both claims, however, selective choice between instruments can be assumed.

TABLE 3: PERCENTAGE OF REVERSAL VOTES ON STATUTORY INTERPRETATION AND PROCESS GROUNDS WHEN INDUSTRY CHALLENGED EPA POLICY (PERIODS FROM MID-1980S THROUGH EARLY 1990S)

	Industry Challenges EPA Statutory Interpretation		Industry Challenges EPA Process	
Period	Republican Judges Reversing	Democrat Judges Reversing	Republican Judges Reversing	Democrat Judges Reversing
24	10%	11%	59%	27%
25	8%	12%	58%	33%
29	8%	6%	62%	30%
30	6%	6%	60%	37%
33	7%	3%	61%	33%
34	6%	3%	58%	39%

To sum up, we now have evidence that partisan ideology often influences judicial case decisions on a variety of issues. We also have evidence suggesting that judges exercise these partisan preferences through judicial decisionmaking instruments. Federal appellate judges, for example, routinely choose the process instrument over statutory interpretation in reversing administrative agencies as a way to insulate their favored decisions from further review by higher courts. Moreover, there is considerable evidence that partisan influences are at work in the creation of judgeships, the appointment of candidates to these judgeships, and the retirement of partisans from the bench. In short, the case that partisan political forces permeate the federal judicial system is easily made.

III. THE FAILURE OF SUBSTANTIVE REFORM

As the effects of partisan ideology on judging are increasingly recognized, there is a corresponding recognition that such effects should be limited. Efforts to restrain the ideological component of judicial decisionmaking have typically focused upon reform of the substantive law, either statutory or as set down by Supreme Court opinions.[41] Some, including Justice Scalia, have argued for the creation of rules, rather than principles or balancing tests, in order to constrain discretion.[42] Scalia has likewise embraced the "plain meaning" approach to statutory interpreta-

41. See, e.g., Sidney A. Shapiro & Richard E. Levy, Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions, 44 Duke L.J. 1051, 1073–78 (1995) (arguing for a more determinate statutory standard for judicial review).

42. See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989) (arguing for clear rules that constrain judicial discretion); see also T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 972–95 (1987) (criticizing balancing tests as manipulable); Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 57 (1992) (suggesting that rules offer decisionmakers "less discretion than do standards").

tion as a means to limit judicial discretion.[43] Yet these approaches have not been demonstrated as effective and are, at best, hypotheses. Given the indeterminacy of statutory language and multiple precedent, these proposals do not even appear to be particularly promising hypotheses.[44] Scalia's "plain meaning" textualism may not even constrain Scalia himself.[45]

A recent article by Shapiro and Levy demonstrates the tendency of scholars to search for substantive constraints.[46] The authors suggest that ideological outcome orientation is pervasive in administrative law and attribute this fact to indeterminacy in the law.[47] While they originally felt that Supreme Court precedents (*State Farm*[48] and *Chevron*[49]) had added determinacy to the law, they were disappointed by subsequent circuit court results.[50] Shapiro and Levy suggested that the judiciary's conflicting incentives (leisure, respect, and policy preferences) make it institutionally incapable of producing determinate doctrines that restrain judges' discretion.[51] They proposed specific statutory language for the Administrative Procedure Act (APA)[52] that they believe would restrain judges from exercising their ideology in reviewing agency decisions.[53]

The ability to design such constraining determinacy is unclear, however. Commentators on Shapiro and Levy's draft language for the APA concluded that the reformulated language itself retained considerable in-

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43. See William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 656 (1990) (describing Scalia's belief that textualism curtails "opportunities for judicial lawmaking by limiting the tools available to judges seeking to escape plain statutory meaning").

44. See James G. Wilson, Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum, 27 Ariz. St. L.J. 773, 786 (1995) (finding "no direct correlation" between application of rules tests and extent of judicial activism).

45. See Stephen A. Plass, The Illusion and Allure of Textualism, 40 Vill. L. Rev. 93 (1995) (contending that Scalia departs from textualism in his decisions when the practice leads to a liberal outcome).

46. See Shapiro & Levy, supra note 41.

47. See id. at 1059 (declaring that the "extent to which craft will constrain the pursuit of outcome orientation is related to the determinacy of the craft norms").

48. See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

49. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

50. See Shapiro & Levy, supra note 41, at 1066–68.

51. See id. at 1054–629.

52. 5 U.S.C. § 706 (1994).

53. See Shapiro & Levy, supra note 41, at 1073–76. The authors seek to "avoid . . . the use of open-ended scope of review standards" and instead require "specific inquiries." Id. at 1074. For example, the authors would permit vacating an agency action if it "has not offered a valid policy explanation for its decision because: (1) it relied on policy concerns that were precluded by statute; or (2) entirely failed to consider an important aspect of the problem . . . ." Id.

determinacy in application.[54] But even if substantive determinacy were somehow achievable, there remains the question of its realizability in the real world. Establishing determinacy throughout the many areas of the law would be an enormous undertaking and quite disruptive in the short term at least. Moreover, the substantive response to ideological discretion could also produce material disadvantages for the state of the law if too constraining. An approach that relies centrally on eliminating legal flexibility cannot account for circumstances when such flexibility would be desirable.[55] For instance, a legal rule that "defendants always prevail" would eliminate much ideological discretion but hardly seems desirable. Moreover, when the need for flexibility becomes apparent, judges will likely create exceptions to the rules, which reopens the door to easier ideological judgment and destroys the value of substantive reform efforts.

Thus, the effectiveness of substantive reform is dubious. Language is inescapably indeterminate.[56] There are no talismanic words that can constrain interpreters. By manipulating the guiding language or reinterpreting the facts to which the language applies, skilled appellate judges can escape the efforts of legislators or the Supreme Court to linguistically bind them.[57] In sum, substantive law reform may offer some measure of additional constraint but is unlikely on its own to eliminate ideological decisionmaking.

IV. The Practical Merits of Reforming Judge-Panel Assignments

In this Part, we examine the frequency of partisan dominance (3-0 partisan majorities) on federal circuit court panels and the benefits of requiring split partisan assignments. If the likelihood of one party dominance on judicial panels were small, then upsetting a well-established practice of random assignment would not be worth the disruption to the courts' stable and accepted organizational practices. We show, however, that one-party dominance on panels occurs at a surprisingly high rate. We also show that such dominance accentuates partisan decisionmaking and that splitting the panels along partisan lines would curb such excesses.[58]

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54. See Ronald M. Levin, Judicial Review and the Uncertain Appeal of Certainty on Appeal, 44 Duke L.J. 1081, 1096–97 (1995); Richard J. Pierce, Jr., Legislative Reform of Judicial Review of Agency Actions, 44 Duke L.J. 1110, 1129–31 (1995).

55. See Sullivan, supra note 42, at 90 (observing that "to the extent rules work to constrain discretion as they are supposed to, they are too inflexible and resistant to evolution over time").

56. See, e.g., Sanford Levinson, Law as Literature, 60 Tex. L. Rev. 373, 393–94 (1982) (discussing lack of intrinsic meaning of language); Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 823–26 (1983) (arguing that language is context dependent and search for governing neutral principles is futile).

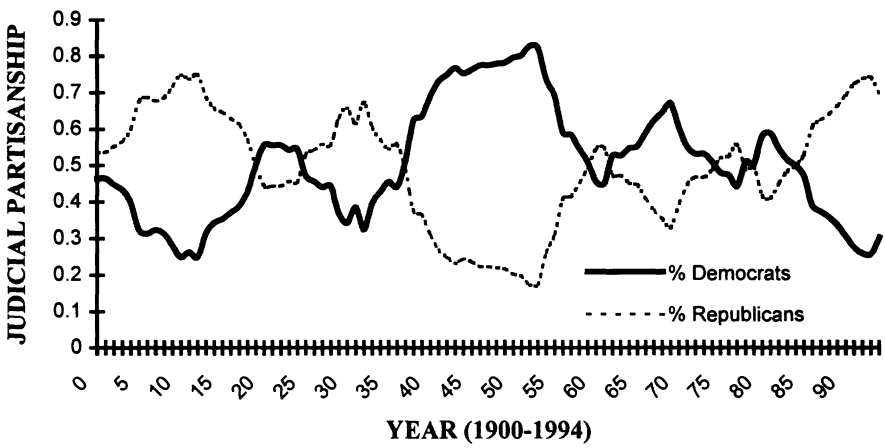
57. See Sullivan, supra note 42, at 90 (noting that many, including Justice Stevens, are "deeply skeptical that rules work" to bind judges).

58. See Cross and Tiller, supra note 1, at 2169–74.

A. *Fluctuating Imbalances in Panel Partisanship*

The likelihood of getting an ideologically extreme panel fluctuates with the changing partisan make-up of the federal circuit judiciary as a whole. Over time, the partisan make-up of this collective unit has swayed between Democrat and Republican majorities. During certain periods, these majorities have been overwhelmingly large.[59] See Figure 1 below. Consider the Roosevelt-Truman years. By the end of President Truman's term, nearly 83% of the federal circuit judiciary was Democratic appointed. Under the random assignment rule, the chance of getting a politically split panel would have been a mere 42%. The chance of getting a unified partisan panel made up of three Democrats would have been 57%, well over half of all cases. Compare that with the chance of getting a panel of three Republicans—about 1 in 200. More recently, the Reagan-Bush presidencies produced a conservative federal judiciary with nearly 74% of the judgeships filled with Republican appointees. Under the random assignment rule, the chance of getting a politically split panel in 1992 would have been 58%. The chance of getting a unified partisan panel made up of three Republicans would have been 41%. Compare that with the chance of getting a panel of three Democrats—about 1 in 100.

FIGURE 1: PARTISAN MAKE-UP OF THE FEDERAL CIRCUIT COURTS, 1900–1994



The partisan panel imbalances can be even more pronounced in individual circuits. Consider the final year of the Bush presidency (1992). Table 4 below shows the make-up and likelihood of drawing a unified partisan panel for several circuit courts.[60] The chances of getting a uni-

59. See Gary Zuk et al., Construction of a Multi-User Database on the Attributes of U.S. Courts of Appeals Judges, 1891–1992 (1993).

60. See id.

fied Republican panel (ranging from approximately 54% to 77%) is substantially greater than even getting a split panel with just one Democrat. This is the type of partisan imbalance that can occur through the random assignment process that will most likely lead to partisan-ideological excess. To sum up, the possibility of major partisan imbalances—the type

TABLE 4: LIKELIHOOD OF UNIFIED AND SPLIT PANELS ON SELECTED CIRCUIT COURTS, 1992

Circuit	Number of Republicans	Number of Democrats	Chance of Unified (3-0) Republican Panel	Chance of Partisan Split (2-1) Panel
1st	6	1	0.572	0.428
2nd	11	1	0.75	0.25
3rd	10	1	0.727	0.273
5th	12	1	0.769	0.231
8th	10	2	0.545	0.455

that yields a unified 3-person partisan majority—is not trivial. These imbalances occur regularly under the current system of random assignments.

B. *Benefits of Split Partisan Assignment of Judges to Circuit Court Panels*

Recognizing the ideological component of judging and assigning panels with reference to the party of the appointing President would offer major advantages. First, the proposal would reduce the ideological component in judicial decisionmaking and enhance adherence to neutral precedent. Second, the proposal would increase the stability and predictability of judicial decisions and, in the process, improve the horizontal equity of the process. These internal improvements would elevate the status of law in society, enhancing respect for decisions and the efficiency of private ordering.

1. *Reducing the Partisan-Ideological Component of Judicial Decisionmaking.* — To this point, we have assumed that a split panel will actually reduce ideological voting by the majority. There are good theoretical reasons to believe this is true. First, not all Republicans share the same level of conservatism and not all Democrats share the same level of liberalism. The minority partisan member may be able to forge a more centrist outcome with the weaker ideologue from the majority party coalition, thereby moderating against extreme partisan outcomes. Put differently, the median member of a split panel is more likely to be centrist and less ideological than the median member of a unified panel. This would suggest a more deliberative outcome, even if it were based on policy preferences rather than rule of law.

The second way a partisan split may reduce ideological voting is by providing a built-in monitor over partisan excess. The idea here is that if the partisan majority members were to manipulate or ignore doctrine,

the minority member would expose them through a dissent. The minority member can confront the majority members with their disobedience to precedent, persuading or shaming them into compliance. If judges care about their reputations, or about being overturned on appeal, they would attempt to stay within the confines of doctrine to avoid meritorious dissenting opinions.

We recently tested this second hypothesis.[61] We considered whether the constraining effects of doctrines (*Chevron* deference, in particular) were embedded in a richer political context. We suggested that if the "honest" application of *Chevron* would produce an outcome the judges would not like (i.e., deferring to the agency would produce a result inconsistent with the court's ideological preferences), it would be routinely ignored if the panel judges hearing the case were unified in policy preferences (in our analysis, all judges from the same partisan orientation—that is, three Democrats or three Republicans on the panel).[62] When, however, there is an ideological or partisan split in the panel make-up (for example, two Democrats and one Republican, or vice versa), we argued that the dynamics of doctrine and decisionmaking change.[63] More specifically, if *Chevron* deference works against the majority, the minority member would be able to force the majority (through threat of dissent or exposure) to follow the doctrine (something a 3-0 majority would not be compelled to do). We called this a "whistleblower" theory as the minority member can blow the whistle on the majority's unprincipled manipulation of doctrine (thereby enhancing exposure and the risk of a higher court reversal or perhaps damage to reputation of the panel majority).[64]

We tested this whistleblower theory by examining the D.C. Circuit's review of agency decisions for the years 1991 through 1995 where statutory interpretation was an issue.[65] We considered the basic thrust of the *Chevron* doctrine to be deference towards agency decisions.[66] Figure 2 below shows the rates of *Chevron* deference based on the composition of the judicial panel and the benefits of *Chevron* deference to the panel in achieving policy preferences.[67]

As Figure 2 illustrates, politically unified panels (3-0 Republican or 3-0 Democratic panels) on the D.C. Circuit deferred to agencies only 33% of the time when *Chevron* deference would have produced an out-

61. See Cross and Tiller, supra note 1, at 2169–74.

62. See id. at 2171.

63. See id.

64. See id. at 2159.

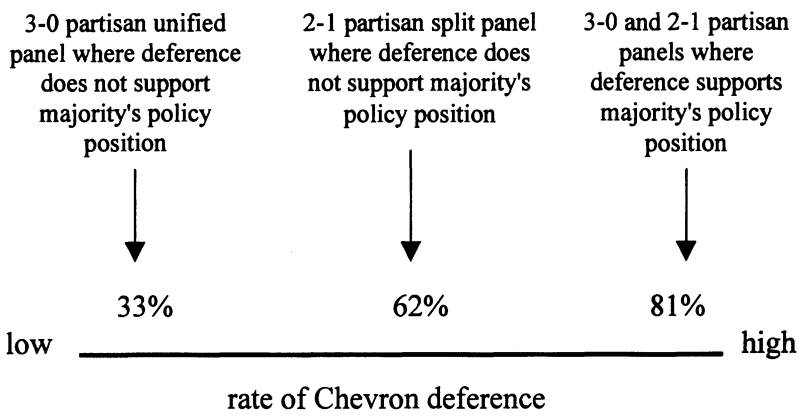
65. See id. at 2168–72.

66. We coded judges by party of appointing president. We coded agency outcomes by challenging litigant, using common categories from political science for liberal and conservative rating (e.g., businesses and industry groups generally coded as conservative; environmentalists and individuals coded as liberal). See id. at 2168.

67. We made the assumption that when compared with each other, on average Democrats are more liberal and Republicans more conservative in their policy preferences, an assumption backed by considerable empirical research. See id. at 2168.

come inconsistent with the presumed partisan preferences of the panel. When *Chevron* deference worked in favor of the presumed partisan preferences of the panel majority, those panels (both unified and divided) engaged in *Chevron* deference 81% of the time. Politically divided panels (2-1 Democratic, for example) acted somewhat differently, however, from

FIGURE 2: RATE THAT *CHEVRON* DOCTRINE WAS FOLLOWED



their unified counterparts (3-0 Democratic, for example) when *Chevron* deference would have produced an outcome inconsistent with the presumed partisan preferences of the divided panel. This is the whistleblower scenario. In those cases, *Chevron* deference shoots up to 62% (compared to 33% for unified panels in a similar situation).[68] The presence of a minority judge who has doctrine on her side forces the majority to follow doctrine more often than the majority would otherwise like to do. In short, a split panel helps to ensure that partisan manipulation is kept in check.

2. *Stability, Horizontal Equity, and Efficiency.* — Economists have long emphasized the importance of stability to the law.[69] For private parties to order their affairs in compliance with the law, they must be able to understand what the law requires. As adherence to precedent increases, so do predictability and stability in the law.[70] This effect promotes both the equity and the efficiency of a legal system.

Increasing stability, predictability, and respect for precedent in the law contributes to economic efficiency. Without predictability, parties

68. We found the outcome to be statistically significant. See id. at 2172.

69. See, e.g., Pietro Trimarchi, Commercial Impracticability in Contract Law: An Economic Analysis, 11 Int'l Rev. L. & Econ. 63, 81–82 (1991) (describing how efficiency requires predictability); John Elofson, Note, The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests, 30 Colum. J.L. & Soc. Probs. 1, 23–27 (1996) (analyzing economic effects of unpredictability).

70. For a general survey of benefits from stare decisis, see Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 7–9 (1997).

cannot adjust their behavior to the law's dictates. Former Justice Powell emphasized the importance of stare decisis in establishing a "predictable set of rules on which citizens may rely in shaping their behavior."[71] Defendants, for example, cannot internalize the costs of liability through risk prevention if they cannot predict the nature of legal requirements.[72] Random assignment produces such unpredictable results. Once the identity of the panel is known, of course, the outcome may be predictable. But efficient private ordering typically must occur before litigation arises and certainly before a panel is assigned.

Greater stability and reliance on stare decisis will also enhance the equity of the law. The outcome of a legal claim should not depend on the luck of the draw in panel assignment. Horizontal equity demands that similar cases be resolved the same way, insofar as humanly possible. Under a fair system, similarly situated individuals would be subject to the same legal consequences.[73] Karl Llewellyn found a "universal sense of justice" in a rule that all "are properly to be treated alike in like circumstances."[74] Without consistency in the law, its application will be considered "arbitrary, and consequently unjust or unfair."[75] When the outcome of cases is highly contingent upon whether a panel is politically unified or split, the arbitrariness is apparent.

The presence of ideological decisionmaking also permits manipulation of the law by those factions that are best informed and have the greatest resources to devote to litigation. A national trade association may, for example, choose to bring a case in the circuit with the most favorable ideological make-up.[76] Or the group might settle cases with

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71. Lewis F. Powell, Jr., Stare Decisis and Judicial Restraint, 47 Wash. & Lee L. Rev. 281, 286 (1990); see also Richard J. Pierce, Jr., Reconciling *Chevron* and Stare Decisis, 85 Geo. L.J. 2225, 2237–48 (1997) (discussing equitable and pragmatic benefits of adherence to precedent).

72. See James S. Seevers, Jr., Note, NOAA's New Natural Resource Damage Assessment Scheme: It's Not About Collecting Money, 53 Wash. & Lee L. Rev. 1513, 1550 (1996) (explaining how "[i]ncreased uncertainty thwarts the goals of economic efficiency by removing predictability from damage figures and hindering the ability of potential polluters to internalize their cost of risk avoidance").

73. See, e.g., Jed I. Bergman, Note, Putting Precedent in its Place: Stare Decisis and Federal Predictions of State Law, 96 Colum. L. Rev. 969, 985 (1996) (noting that "[t]he use of precedent also serves to ensure fairness in the judicial system by treating cases that present similar facts similarly"); James C. Rehnquist, Note, The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court, 66 B.U. L. Rev. 345, 347 (1986) (noting that "[a]dherence to precedent ensures that like cases will be treated alike, and that similarly situated individuals are subject to the same legal consequences").

74. Karl N. Llewellyn, Case Law, 3 Encyclopaedia of the Social Sciences 249 (Edwin R.A. Seligman ed., 1930).

75. Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 596 (1987).

76. This practice can occur under our proposal as well. But our rule reduces the influence of the forum shopping manipulation, because the trade association could at best hope for a 2-1 favorable panel with a whistleblower. In the present system, the group might obtain a 3-0 favorable panel and a highly favorable ruling. Under the present

unfavorable panels, continuing to roll the dice with new actions until a highly favorable panel is obtained.[77] For example, an industry group brought a series of challenges to OSHA's standard-setting program in different circuits and ultimately prevailed once a favorable panel was found.[78]

Increased adherence to neutral principles facilitated by split partisan panel assignments will also contribute to the courts' standing in society. Some might fear that the express acknowledgment of political influences in case assignment could undermine respect for the neutrality of judges. This fear, though, rests on delusion. When judges *are* making ideologically influenced decisions, a myth of neutrality can be sustained for only so long. Far better to acknowledge the role of ideology, if doing so reduces its effect. Moreover, individual decisions of a court may be more respected if they cannot be readily dismissed as political (as in the case of an unsplit panel's ruling).[79]

V. Implementing the Proposal

The use of split partisan arrangements has good precedent in the American political system. Congress has organized itself into partisan split panels called congressional committees. These committees, the center of congressional power, are arranged such that members of both major political parties have substantial representation.[80] As with judicial panels, these are non-constitutional organizational arrangements that allow Congress to complete its job efficiently as there is more legislation that can be managed in subgroups than can be done by the House or Senate chamber as a whole. But partisan checks are critical in ensuring against ideological excess. Minority members can expose committee misdeeds and help set the legislative agenda in a more balanced manner.

Independent regulatory commissions such as the Surface Transportation Board (formerly ICC), the National Transportation Safety Board, the Securities and Exchange Commission, the Nuclear Regulatory Commission, and others are also designed to limit partisan excess through the use of split partisan arrangements. Congress designed these regulatory commissions as quasi-judicial institutions to be filled with ex-

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system experienced litigants "are usually keenly aware of the political leanings of the judges before whom they appear." Christopher E. Smith, Courts and Public Policy 14 (1993).

77. For a discussion of the ability of large groups to manipulate litigation in order to create favorable precedents, see Paul H. Rubin, Common Law and Statute Law, 11 J. Legal Stud. 205, 211–19 (1982).

78. See Jeremy Rabkin, Judicial Compulsions 222–23 (1989).

79. See, e.g., Richard A. Posner, The Problems of Jurisprudence 82 (1990) (noting that adherence to precedent makes "judicial decisions more acceptable to the lay public").

80. See generally Barry R. Weingast & William J. Marshall, The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets, 96 J. Pol. Econ. 132, 143 (1988).

perts.[81] Nonetheless, partisan checks are designed into the structure itself to protect against ideological excess by one party. The typical structure of these commissions requires that "no more than a simple majority of the members may come from any one political party."[82]

Our proposal for the federal circuit courts is simple to enact. First, there is no need for a congressional enactment to allow such an arrangement. The internal organization of the circuit courts has been left to the judiciary itself.[83] Each circuit can on its own initiate this proposal. Second, there are various ways to select a split panel, while retaining the basic benefits of randomness. For example, when assigning three-judge panels to cases, the court clerk would first divide the circuit members by appointing president. The clerk would then randomly select one representative from each party and assign those judges to the case. Then all the judges who were not selected would be placed together, irrespective of party, and the third judge would be randomly selected from this group. The result would be all split panels, with the ratio of majority party panels dependent on the ratio within the circuit as a whole.

Finally, one might imagine a problem arising when less than one-third of a circuit court's judges come from one of the parties. If partisan splits were to be maintained, judges from the minority party would have to take up a larger number of cases in order to assure split panels. This problem could be resolved by using senior status judges from that party, or by having district court judges of that party sit by designation.[84] The circuit courts already use a substantial number of judges sitting by designation. Nearly 40% of all appellate panels have at least one visiting judge.[85] In 1997, for example, panels of the 179 regular circuit court judges were supplemented by 190 active district court judges, 87 senior appellate court judges, and 133 senior district court judges.[86] This broad

81. See Daniel J. Gifford, Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure, 66 Notre Dame L. Rev. 965, 975–90 (1991) (discussing the history of independent regulatory agencies and noting that these commissions primarily used adjudication—a judicial function—rather than rulemaking).

82. Staff of Senate Comm. on Gov't Operations, 95th Cong., 1st Sess., Study on Federal Regulation: The Regulatory Appointments Process 2 (Comm. Print 1977).

83. See supra notes 3–5 and accompanying text.

84. The use of transferring judges to sit by designation is congressionally authorized. See 28 U.S.C. § 292(a) (1993) (authorizing district court judges to sit on appellate courts); 28 U.S.C. § 291(a) (1993) (authorizing circuit court judges to sit on other circuits).

85. See Samuel Estreicher, Conserving the Federal Judiciary for a Conservative Agenda?, 84 Mich. L. Rev. 569, 573 n.12 (1986) (finding that 35% of panels in 1985 contained a visiting judge); Richard B. Saphire & Michael E. Solimine, Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals, 28 U. Mich. J.L. Reform 351, 364–66 (1995) (reporting that 30–40% of panels contain visiting judges). The circuits have historically varied considerably in their use of district judges sitting by designation, ranging from 0% (D.C. Circuit) to 36% (Sixth Circuit) from 1991–1992. See Saphire & Solimine, supra, at 366–67.

86. See Judith Resnik, Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals (April 24, 1998) (on file with the *Columbia Law Review*).

use of visiting judges should enable implementation of our proposal without the need for an increase in judges sitting by designation.

CONCLUSION

The principle of the "rule of law" is central to American democracy. Legal realists of various sorts have challenged the principle as a myth, while formalists have defended the ideal. To be sure, this issue is not a binary one. The rule of law can never be perfectly achieved, but it may be approached in relative degrees. The difficult problem is how to advance the rule of law. While numerous substantive proposals have been made over the years, including admonitions by judges and academics to have more determinate statements of law and doctrine, none have been demonstrated, thus far, to be effective. Our modest procedural change, by contrast, has greater promise. Both theory and empirical data presented herein suggest that a compulsory split of circuit court panels along partisan lines would enhance adherence to the rule of law and limit the partisan excesses currently found in decisionmaking by federal appellate judges. While certainly a clean break with the current accepted practice of randomly assigning judges, our proposal is nonetheless quite modest considering the benefits. It would reduce ideologically extreme outcomes, enhance the role of stare decisis, and improve the horizontal equity of the federal justice system.

[Footnotes]

[25] **Another Look at the "Party Variable" in Judicial Decision-Making: An Analysis of the Michigan Supreme Court**
Malcolm M. Feeley
Polity, Vol. 4, No. 1. (Autumn, 1971), pp. 91-104.
Stable URL:
http://links.jstor.org/sici?sici=0032-3497%28197123%294%3A1%3C91%3AALAT%22V%3E2.0.CO%3B2-M

[25] **Voting Behavior on the United States Courts of Appeals Revisited**
Sheldon Goldman
The American Political Science Review, Vol. 69, No. 2. (Jun., 1975), pp. 491-506.
Stable URL:
http://links.jstor.org/sici?sici=0003-0554%28197506%2969%3A2%3C491%3AVBOTUS%3E2.0.CO%3B2-M

[25] **Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978.**
C. Neal Tate
The American Political Science Review, Vol. 75, No. 2. (Jun., 1981), pp. 355-367.
Stable URL:
http://links.jstor.org/sici?sici=0003-0554%28198106%2975%3A2%3C355%3APAMOTV%3E2.0.CO%3B2-O

LINKED CITATIONS

[80] **The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets**

Barry R. Weingast; William J. Marshall

The Journal of Political Economy, Vol. 96, No. 1. (Feb., 1988), pp. 132-163.

Stable URL:

http://links.jstor.org/sici?sici=0022-3808%28198802%2996%3A1%3C132%3ATIOOCO%3E2.0.CO%3B2-S