NOTE

IN PURSUIT OF QUALITY: AMPLIFYING PANEL EFFECTS ON THE UNITED STATES COURTS OF APPEALS

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INTRODUCTION

The Shouldice Hospital, a medical center outside of Toronto, has become well known for bucking prevailing medical norms. Rather than performing the full panoply of medical services, like most hospitals, it focuses on a single type of surgery—hernia repair. The surgeons at Shouldice perform up to 800 hernia repairs per year, more than a general surgeon would likely perform in a lifetime. This repetition has produced results. A hernia repair at Shouldice costs $2,000 less than at the average hospital, takes about half the time, and boasts a recurrence rate of 1%—much less than the 10–15% seen in general hospitals.[1] Shouldice has broken from prevailing medical norms and embraced radical specialization in pursuit of quality above all else.

The lesson to be learned from Shouldice is that sometimes improving the quality of a process or practice means breaking from tradition, even though it may be less profitable or make us uncomfortable. This principle is not exclusive to the medical field; it operates in, among other disciplines, the law, specifically within the decision-making process of courts. Like hospitals, courts exert a heavy influence over those before them. Often, the wellbeing and liberty of those coming before a court is at stake. Courts are responsible for ensuring fair treatment of those individuals, and ultimately for making the right decision in a case. At the appellate level, where decisions serve as guidance for lower courts, this responsibility is amplified. Making the correct decision is crucial to maintaining the integrity of the legal system generally. The stakes are similarly high, and therefore so should be the emphasis on quality.

This Note will attempt to emulate the philosophy of Shouldice and evaluate whether different changes to prevailing norms in the U.S. Courts of Appeals enhance the quality of decision making. Specifically, this Note will explore different means of amplifying "panel effects," a phenomenon in which a judge or judges on a circuit court panel influence the votes of their colleagues. First, this Note will summarize the existing literature on panel effects and argue that they increase the quality of judicial decisions. Second, this Note will articulate

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[1] Atul Gawande, *No Mistake*, THE NEW YORKER, Mar. 30, 1998, at 74, 74, [https://perma.cc/46ZR-ELCG].

the biggest problems in designing a system to amplify panel effects and offer ways to work around them. Finally, the Note will explore the potential effects of different alternatives to current circuit-court procedure on panel effects.

I
Panel Effects on the U.S. Courts of Appeals

Cases heard by U.S. Courts of Appeals are decided by three-judge panels rather than by a single judge sitting alone. The judges sit together when hearing oral argument, discuss the case amongst themselves, and issue a joint opinion, which may include a dissent. Scholars largely agree that this approach is meant to increase the likelihood of a "correct" decision by subjecting it to the process of collective decision making.[2]

There are numerous tangible benefits to collective rather than individual decision making.[3] Judges are human and are just as susceptible to mistakes and unconscious bias as the rest of us[4]—multi-member panels can weed out those mistakes and reduce the impact of individual biases.[5] Collective decision making also ensures that a broader range of information is considered, as groups have "a more diverse body of knowledge."[6] Panel effects can be thought of as an expression of these characteristics.

"Panel effects" are the phenomena by which the votes of individual panel judges are influenced by the preferences of their panel colleagues.[7] They are best explained by example.

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2 *See* 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, 1321, 1321 n.4 (2009) (surveying different explanations for the use of three-judge panels as a means of increasing the quality of judicial decisions).

3 Brian M. Barry, *Judging Better Together: Understanding the Psychology of Group Decision-Making on Panel Courts and Tribunals*, 14 Int'l J. for Ct. Admin. 1, 6 (2023) (describing several benefits of collective decision making, including decreased rate of error, stronger memory performance, and a larger pool of ideas).

4 *See, e.g.*, Chris Guthrie, Jeffery J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 13–27 (2007) (demonstrating that judges are susceptible to reliance on intuition, which can increase the chance of error).

5 Evan H. Caminker, *Sincere and Strategic Voting Norms on Multi-member Courts*, 97 Mich. L. Rev. 2297, 2362 (1999) ("On a collegial court, [false] . . . redundancy within a majority-rule regime minimizes the impact of individual judgment errors on the Court's output."); Robert C. Ziller, *Group Size: A Determinant of the Quality and Stability of Group Decisions*, 20 Sociometry 165 (1957).

6 Barry, *supra* note 3, at 7.

7 Kim, *supra* note 2, at 1322.

Panel effects have been shown in a variety of contexts, and they are motivated by a variety of judge characteristics. In sex discrimination cases, for example, a judge's gender has been shown to affect the votes of their colleagues. One study found that male judges are 12% to 14% more likely to rule for the plaintiff when a female judge sits on the panel.[8] Another study found that the gender of judges on the panel also affects the votes of their colleagues beyond the sex discrimination context.[9] Outside of gender, one study found that Black judges vote in favor of affirmative-action programs more frequently than non-Black judges.[10] Another found that the presence of one Black judge on a panel made it more likely that the panel as a whole would hold for plaintiffs in cases involving the Voting Rights Act.[11]

The ideology of panel judges has also been studied. In environmental law cases heard by the D.C. Circuit, one study found that the ideology of a judge's panel colleagues influenced their vote more than their own ideology.[12] Another study analyzed the presence of partisan panel effects in more than twenty areas of law and found that a similar impact on votes existed.[13] Panel effects are not exclusive to issues affecting minorities, but instead appear in a wide range of legal areas. A recent study found evidence of panel effects in "consumer, securities, labor and employment, antitrust, insurance, product liability, environmental, and many other areas of law."[14]

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8 Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010); *see also* Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (finding that in Title VII sexual-harassment and sex discrimination cases, panels with at least one female judge found for the plaintiff almost twice as often as all-male panels).

9 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, 324 (2004) (finding that male judges vote more "liberally" when one woman judge is present).

10 *See* Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 179 (2013).

11 Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1536 (2008).

12 Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1764 (1997).

13 *See* Jonathan P. Kastellec, *Hierarchical and Collegial Politics on the U.S. Courts of Appeals*, 73 J. POL. 345, 356 (2011) (finding that the addition of one Democratic judge to a panel of Republican judges decreases the probability of a conservative vote, and vice versa).

14 Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 231–32 (2020).

A. Why Do Panel Effects Occur?

Panel effects are best understood as an output of collective decision making, but exactly why they occur is still up for debate. There are several competing hypotheses which are grouped into two categories: deliberative and strategic.[15] The deliberative hypotheses ground panel effects in communication amongst judges, arguing that votes change because of persuasion by colleagues. The strategic hypotheses represent a more cynical view of judicial decision making, where judges bargain for the inclusion of their preferences in the final decision. Under this model, judges in the minority use "threats" of undermining unanimity and issuing dissents as leverage against the majority.

The first of the deliberative hypotheses is the (aptly named) deliberation hypothesis, whereby judges are persuaded by their colleagues to adopt some version of their views, usually as a result of the judge in the minority bringing a fresh perspective to the issue.[16] This hypothesis may take different forms—perhaps judges, while discussing the case in good faith, are simply moved to change their position by arguments their colleague makes. Alternatively, their colleagues may be correcting intuitive mistakes made by the judges in the majority. This version of the deliberation hypothesis tracks the "intuitive-override" theory furthered by Guthrie, where a judge's reliance on intuition may be displaced by deliberative processes encouraged by their colleagues.[17]

Alternatively, some scholars have argued that judges in the minority are able to make precedential arguments to persuade their colleagues, drawing their "attention to legally relevant arguments that . . . deserve careful consideration and sometimes

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15 *See* Kim, *supra* note 2, at 1324–25 (separating the different hypotheses into deliberative and strategic categories).

16 *See* Revesz, *supra* note 12, at 1732 (explaining that panel effects may result if "there is deliberation on the panel and . . . the judges take seriously the views of their colleagues"); Harry T. Edwards, *The Effect of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003) ("[J]udges have a common interest . . . in getting the law right, and . . . as a result, [they] are willing to listen, persuade, and be persuaded." (footnote omitted)); Farhang & Wawro, *supra* note 9, at 308 ("The central idea of the deliberative model of panel decision making is that judges take one another's views seriously . . . caus[ing] judges on a heterogenous panel . . . to moderate their views toward the center."); ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 176 (2d ed. 1991) (Judges "can be swayed by an articulate and well-reasoned argument from a colleague with a differing opinion."). *But see* RICHARD A. POSNER, HOW JUDGES THINK 32 (2008) (arguing that "judges do not engage in much collective deliberation").

17 Guthrie, Rachlinski & Wistrich, *supra* note 4, at 6–13.

make a difference to the outcome."[18] These hypotheses bear the most resemblance to the traditional collective decision-making model; judges take each other and their views seriously, and work together in good faith to reach the most correct outcome.

On the strategic side, other scholars argue that panel effects are driven by bargaining between judges in an effort to uphold the strong norm of unanimity on the U.S. Courts of Appeal and avoid dissents, which are believed to weaken the legitimacy of the court.[19] The vast majority of decisions issued by the Courts of Appeals are unanimous, with dissenting opinions accompanying only 10% of decisions.[20] Sunstein offers a competing hypothesis for why dissents are rare, arguing that would-be dissenters conform to the shared views of majority judges.[21] In response to more "moderate" decisions associated with the presence of one counter-judge in the majority, which would seem to support the bargaining hypothesis, Sunstein postulates that panels of like-minded judges produce polarized decisions, where the shared beliefs of the panelists are taken to the extreme.[22] Thus, the presence of the single counter judge is not inducing bargaining, but merely preventing polarization.

The "whistleblower" theory, another prominent hypothesis within the strategic category, accords dissenting opinions as a flag to reviewing courts that the decision is not consistent with precedent. Panel effects ensue as the majority bargains to prevent a would-be-dissenter from "blowing the whistle."[23]

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18 CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 79 (2006).

19 *See* Farhang & Wawro, *supra* note 9, at 308 ("[B]argaining is motivated by the . . . fear that dissents promote legal uncertainty, reduce the court's institutional legitimacy, and possibly diminish compliance."); POSNER, *supra* note 16, at 34 (arguing that panel effects are driven by "dissent aversion"); Sheldon Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 WIS. L. REV. 461, 479 (1968) (noting that out of twenty-seven appeals judges interviewed, "[a]bout half . . . observed that panel and en banc conferences are conducted in a spirit of 'give-and-take' . . . in an effort to reach decisional consensus and thus avoid public dissension."); Donald R. Songer, *Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals*, 26 AM. J. POL. SCI. 225, 229 (1982) (observing that not all unanimous decisions are "consensual").

20 VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT 46 (2006).

21 *See* SUNSTEIN, SCHKADE, ELLMAN & SAWICKI, *supra* note 18, at 67 (arguing that studies demonstrating a conformity effect in collective decision making also apply to judges).

22 *See id.* at 71–78; *see also* Kim, *supra* note 2, at 1330 (summarizing Sunstein's conformity and polarization theories).

23 *See* Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partnership and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107

It is important to note that panel effects do not only flow in one direction. While the judge in the minority can certainly influence the majority (think the single woman judge on a panel in sex discrimination cases), those in the majority can also influence the judge(s) in the minority.[24] The way that this influence plays out is a bit more straightforward. Scholars have attributed this effect primarily to dissent aversion; writing a dissent obviously consumes resources and may undermine the legitimacy of the courts, causing would-be minority judges to join the majority.[25]

Working in the background of each of these proposed explanations of panel effects is an important question—is it the *characteristics* of the judges that are driving observed effects, or their *votes*? If it were the former, the pull on the two male judges hearing a sex discrimination case with a female colleague would be attributed to that colleague's gender. If the latter, it would simply be because the third judge voted a certain way. Joshua Fischman explored these two alternatives in a 2015 study,[26] reanalyzing eleven prior studies that understood panel effects as an effect of colleagues' characteristics. Adjusting to test for the effect of judges' votes, Fischman found that the effect was uniform across several different areas of law—each colleague's vote increased a judge's probability of voting in the same direction by 40%.[27] Notably, this effect held even in areas of law where previous scholars had found no evidence of panel effects.[28]

Of course, nearly "every study of panel voting" assumes a direct link between a judge's characteristics and their vote.[29] For the purposes of this Note, the important takeaway from Fishman's study is that judge characteristics themselves do

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YALE L.J. 2155, 2156 (1998) (arguing that the presence of a "whistleblower" on the panel "is a significant determinant of whether judges will perform their designated role as principled legal decisionmakers"); Kim, *supra* note 2, at 1326 ("[C]ourt of appeals judges are hypothesized to act with an eye to the expected behavior of the Supreme Court, the circuit sitting en banc, and their panel colleagues.").

24 *See* Kastellec, *supra* note 13, at 349 (explaining that panel effects flow in both directions).

25 *See* Farhang & Wawro, *supra* note 9, at 306 (describing this phenomenon as the "suppressed dissent").

26 Joshua B. Fischman, *Interpreting Circuit Court Voting Patterns: A Social Interactions Framework*, 31 J.L. ECON. & ORG. 808 (2015).

27 *Id.* at 810.

28 *See id.* at 832 (noting the presence of panel effects in death penalty cases, an area of law that Sunstein et. al did not find evidence of panel effects in).

29 *Id.* at 811.

not drive panel effects. Rather, it is a judge's *vote* that does, which may in turn be predicted by judge characteristics. This is important to underscore because not all "diverse" judges share the same worldview. While a judge's race or gender may influence the way they vote, it is not determinative.

II
Panel Effects Improve the Quality of Decision-Making

Whether panel effects are driven by pure deliberation between judges or by a more strategic bargaining process, they are still an expression of the benefits of collective decision making. The fact that judges are influencing the way their colleagues vote *at all* is proof enough—strictly understood as the influence one judge has on another, panel effects are a direct consequence of using panels to decide cases rather than individuals. What most of the studies discussed above focus on proving is that panel effects are an expression of one of the key benefits to collective decision making—the incorporation of diverse perspectives.

Diversity of perspective and ideas is one of the primary benefits of collective decision making.[30] There is good reason to conclude that a diverse set of ideas amongst decision makers leads to a higher *quality* of decisions rendered as well. The ability to evaluate different perspectives and comprehend all sides of a story can help people reach more correct decisions. This phenomenon is often referred to as the "wisdom of the crowd," first formalized by Francis Galton in 1907.[31] Galton conducted a famous experiment at a Plymouth county fair in 1906, in which he collected over 800 guesses of an ox's weight as part of a weight-guessing competition.[32] Galton computed the average amongst all the guesses to be 1207 lbs., which happened to be just 9 lbs. over the ox's actual weight of 1198 lbs.[33] None of the individual guesses alone came as close—Galton noted that, if a random guess was selected, there was an equal chance of that guess falling 3.7% below the average value or 2.4% above it.[34] The experiment's lesson was clear—while individual efforts may fall short, the collective "wisdom of the

30 *See* Barry, *supra* note 3, at 6.

31 Francis Galton, *Vox Populi*, 75 Nature 450 (1907).

32 *Id.* at 450.

33 *Id.*

34 *Id.* at 451.

crowd," incorporating a variety of diverse viewpoints, gets us closer to the most correct answer.

Judicial infrastructure is no stranger to this principle. Juries, which form the cornerstone of the American legal system, are themselves designed to harness the wisdom of the crowd.[35] Marquis Condorcet's famous jury theorem captures this clearly, postulating that, so long as each member of a decision-making body is more than 50% likely to make a correct decision, adding more members to the group increases the probability that the decision will be correct.[36] At the core of the jury system is the principle that a diverse body of decision makers renders a higher-quality decision.

The demonstrated panel effects discussed above prove that this principle operates at the Court of Appeals level. This is clearest in the sex discrimination cases—with one female judge present, the answer changes. An all-male panel would have come to different decision, but for the introduction of an alternative perspective.[37] Yet, this outcome-shifting change in perspective is often left to chance, to be handled by deliberation amongst the judges selected to be on the panel. While judge deliberations can (and likely do) serve as a vehicle for the introduction of diverse perspectives, they are limited to the capacity of their individual parts. If an all-male panel is selected, the chances of a different perspective making it into the group's calculus is little to none.

Seeing as the quality of decisions is already given great importance in the Courts of Appeals,[38] changing the way that appeals courts operate to better incorporate diverse perspectives seems logical. However, this is no small task—alterations to how a system of courts works, especially a system so ingrained as appeals courts, is likely to meet criticism. The thrust of these

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35 *See, e.g.*, Josh Chafetz, *It's the Aggregation, Stupid!*, 23 YALE L. & POL'Y REV. 577, 580 (2005) ("[T]he jury system . . . presuppose[s] that crowds can and generally will make good decisions."); Michael H. O'Donnell, *Judge Extols the Wisdom of Juries*, IDAHO STATE J. (Aug. 16, 2014), https://www.idahostatejournal.com/news/local/judge-extols-wisdom-of-juries/article_8dad172c-2521-11e4-8891-001a4bcf887a.html [https://perma.cc/E7TH-N5MC] (describing a presentation by U.S. District Court Judge Lynn Winmill comparing the virtues of the jury system to Galton's 1907 experiment).

36 Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 328 (2002) (summarizing Condorcet's jury theorem).

37 *See* Peresie, *supra* note 8, at 1782–83 (discussing two explanations for the finding that the presence of one female judge results in more pro-plaintiff rulings, including in each the female judge's different preferences changing the outcome).

38 *See* Kim, *supra* note 2, at 1321.

arguments amounts to little more than discomfort, which, as Shouldice Hospital shows, serves as a mere limitation on what we can achieve.

A. Why Panel Effects Should be Amplified

An immediate consideration in favor of amplifying panel effects is that they cause the answer *to change*. The fact that the answer is different doesn't automatically mean that it is more correct; however, to assume otherwise would impugn the credibility of judges. Even under the strategic hypotheses for panel effects, which argue for the presence of some background force being used by the minority judge as leverage (the norm of unanimity or the threat of "whistleblowing"), the majority judges would not cede any ground if they thought the minority judge was *wrong*. Indeed, the whistleblower hypothesis holds weight only insofar as the dissenting opinion would alert a reviewing court—a blatantly incorrect opinion would do no such thing.[39] As Judge Edwards famously said, "judges have a common interest, as members of the judiciary, in getting the law right"[40]—panel effects can hardly be said to be the result of judges changing their position to a *less* correct one.

Even if it were completely unclear whether a decision rendered with the benefit of diverse perspectives would be more or less correct than one without, it would still be logical to seek diversity on the bench. As Sunstein argues, uncertainty demands diversity simply because there are more reasonable positions to choose from—"there is reason to favor a mix of views merely by virtue of its moderating effect."[41]

In fact, if any configuration of perspective would be most likely to produce incorrect or low-quality results, it would be one in which judges are all like-minded. This is reflected by Sunstein's argument that panels consisting mostly or entirely of like-minded judges may produce extreme results through a process of "group polarization."[42] The inclusion of diverse

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39 *See* Kastellec, *supra* note 13, at 351 (demonstrating that the strength of the whistleblower effect varies depending on the alignment of the Supreme Court and the Circuit as a whole with the panel's majority position).

40 Edwards, *supra* note 16, at 1645.

41 Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, Essay, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 349 (2004) (citing Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context Dependence in Legal Decision Making*, *in* BEHAVIORAL LAW AND ECONOMICS 61, 61 (Cass R. Sunstein ed., 2000)).

42 SUNSTEIN, SCHKADE, ELLMAN & SAWICKI, *supra* note 18, at 71–78.

perspectives at a minimum moderates these otherwise radical outcomes.

It is important to clearly define what "diverse" means here. Diversity does not only mean identity diversity, or diversity along gender, race, or age lines. Rather, it also includes viewpoint diversity—differences in experience, socioeconomic status, career, education, ideology, etc. For example, a judge with a background as a partner in a big law firm will undoubtedly have a different worldview from a judge who spent the majority of their career as a public defender. It is important to ensure that judges who have these different perspectives interact with one another so that the best aspects of their relative experiences can shine through in the decisions that they issue.

Aside from helping the court to reach a more correct decision, the existence of different outcomes implicates fundamental fairness concerns. Putting Boyd et al.'s findings another way, a sex discrimination plaintiff is 12 to 14% more likely to prevail if their case is heard by a panel with one female judge as opposed to an all-male panel. Depending on the gender makeup of judges within the circuit that the case comes up in, one litigant may have better odds over another. To make matters worse, because this is taking place at the appellate level, the effects are not felt by that litigant alone. A case that pulled an all-male panel, which may have come out differently if a single woman had joined the bench, will continue to drive precedent in trial courts for years to come.

Further, accepting that outcomes are contingent on whether there is a diverse judge sitting on the panel may hamper legal development. Professor Bert Huang postulated the existence of "silent splits" among circuits as a result of disparate circuit workload, whereby more overworked circuits would in fact apply lighter scrutiny when reviewing lower courts, preventing conflicts with other circuits from coming to the fore.[43] A similar phenomenon operates here. Seeing as case outcomes differ based solely on whether a diverse point of view was randomly included within the deciding panel, some cases that would have created a split and driven the development of the law but for the lack of any diverse perspectives on the panel will instead perpetuate the status quo.

This point can also stand on its own—even though the *lack* of diverse perspective may *prevent* the development of law,

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[43] *See* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1139–42 (2011).

the inclusion of diverse perspectives in its own right will drive it forward. Creating more numerous opportunities for inter-panel and intra-circuit splits will provide more data to circuits generally and to the Supreme Court, triggering review more frequently. Additionally, even if the decisions themselves do not trigger further review, they will be more nuanced and complete than decisions produced by homogenous panels would be, which itself will contribute to the development of law through the application of these decisions by trial courts.

B. Arguments Against Amplifying Panel Effects

While there are several arguments that counsel against instituting some mechanism to amplify panel effects and incorporate more diverse perspectives into judging on courts of appeals, they pale in comparison to the benefits derived from the heightened quality of decision making that such a mechanism would produce.

First, it could be argued that some formal mechanism to introduce diverse perspectives into each case may produce bias towards a certain ideology, or at the very least may create a perception of bias. This argument generally finds its roots in a misunderstanding of panel effects. As noted above, panel effects are not a one-way phenomenon; the majority judges can influence the judge in the minority. The use of some mechanism to *introduce* a different perspective to the group does not mean that that perspective will automatically dominate. The other judges still must be convinced by that colleague—and in turn, that colleague may be convinced by them.[44] Any mechanism used to amplify panel effects would be presumed only to increase the likelihood of their occurring, not to *force* them to occur.

For similar reasons, such a mechanism, properly tailored, should not erode the legitimacy of the federal courts of appeals. Admittedly, this argument may hold weight if the chosen mechanism was the mandatory inclusion of a majority of judges on a panel appointed by a Democratic or Republican president, or mandated inclusion of a majority of judges from a certain gender or race. However, more subtle tweaks to court procedure and judge selection mechanisms would be unlikely to have a

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44 *See, e.g.*, Peresie, *supra* note 8, at 1783 (finding support for a "deference" theory of panel effects, whereby the male judges deferred to the female judge only in gender-coded cases where they viewed the female judge as more knowledgeable).

similar effect. This "subtlety" is really the key—so long as the focus remains on merely introducing different perspectives, rather than forcing the dominance of some distinct ideology over all others, the legitimacy of the courts of appeals should not be threatened.

If anything, taking affirmative steps to introduce different experiences and perspectives will fortify the legitimacy of courts of appeals. For one thing, the frequency of extreme opinions would likely be significantly reduced, and decisions could be expected to be more nuanced generally. Trial courts would likely respond more negatively to polarizing opinions—outcomes that are consistently more balanced will give trial courts more room to work with and will encourage compliance.

Most of the arguments against the amplification of panel effects assume that they further a specific agenda, and that if the ideology of "diverse" judges takes hold, law will become more homogenous, inflexible, and skewed towards one side. Not only does this argument assume that all "diverse" judges share the same worldview, it also assumes that extreme deference will be practiced by judges in the majority. Neither of these assumptions holds water, however. Taking steps to introduce different sides of the story more efficiently would only serve to improve the quality of decisions issued by appeals courts and more completely capture the benefits of collective decision making, the foundation upon which the panel system is built.

III
The Issues with Designing a System to Amplify Panel Effects

Figuring out ways to change existing practices and procedure in the courts of appeals to amplify the occurrence of panel effects is no simple task. The most significant issues with efficiently injecting diverse perspectives into appellate decision making are discussed in detail below.

A. Grappling with Different Explanations of Panel Effects

The first problem that must be dealt with when designing a system to better harness the benefits of collective decision making is dealing with the competing explanations for why panel effects exist. Different hypotheses will interact with different proposed solutions in varying ways, potentially with undesirable effects. For example, if the strategic hypotheses of panel effects were more accurate, specifically the "whistleblower" hypothesis, then increased judge deliberation would

hardly move the needle, as the motivating force is not face time between the panel judges, but alignment of the majority position with the circuit or Supreme Court.

Given the difficulty in navigating different explanations of panel effects, there is some value in determining which, if any, have been proven to be more correct, or at least more likely to be correct. Pauline Kim's study, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*,[45] attempts to answer this question by examining panel effects in Title VII sex discrimination cases. Kim finds that there is little support for the theory that panel effects are the result of strategic behavior aimed at triggering Supreme Court review but does find that the makeup of the *circuit* drives panel effects.[46] Specifically, judges are influenced by their colleagues to vote counter to their ideology more so if their colleagues are aligned with circuit preferences.[47]

Notably, however, Kim's study focused only on sex discrimination cases, and found no dispositive proof that strategic hypotheses explained panel effects better than deliberative ones.[48] Indeed, Kim argues that panel effects are best expressed as a mixture of numerous different motivations. A more recent study[49] testing a set of search and seizure cases between 1953 and 2010 reached a similar conclusion. While the data supported the deliberative model to an extent, it showed that the "lion's share" of the explanation of panel effects came from influence external to the panel itself, mainly from circuit preferences.[50] However, this study focused mainly on panel effects resulting from partisanship and admitted that the deliberative explanations of panel effects were difficult to test empirically.[51] Similar to Kim's takeaway, the lesson here is that panel effects are likely motivated by a mixture of different hypotheses, perhaps with a lean towards the strategic.

For the purposes of designing a system to amplify panel effects, the lesson is twofold. First, alternatives must in some

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45 Kim, s*upra* note 2, at 1321–24.

46 *Id.* at 1361.

47 *Id.* at 1361–64.

48 *Id.* at 1328.

49 Rachael K. Hinkle, Michael J. Nelson & Morgan L.W. Hazelton, *Deferring, Deliberating, or Dodging Review: Explaining Counterjudge Success in the US Courts of Appeals*, 8 J.L. & Cts. 277 (2020).

50 *Id.* at 295 (referring to the deliberative hypothesis as having "modest" explanatory value).

51 *Id.*

way accommodate both the deliberative and strategic hypotheses to maximize effect. Second, because the alignment of the panel with circuit preferences seems to drive panel effects the most, an effective system of amplification should in some way aim to influence those circuit preferences.

B. The Education Problem

Inevitably, any system designed to amplify panel effects will lean on diverse judges. Either they bear the burden of persuading their colleagues to vote a certain way during deliberations, or they take on the task of bargaining with their colleagues to produce a more correct decision. Either way, the responsibility of crafting a higher-quality decision lands disproportionately on them. Depending on the chosen mechanism to amplify panel effects, that responsibility can quickly become too burdensome, potentially to the detriment of the decision ultimately reached by the panel.

This is the reality in many other professions aside from judging. One study examining whether professors and doctoral candidates in the ecology and evolutionary biology fields engaged in diversity-and-inclusion activities found that underrepresented faculty played a disproportionate role in facilitating said activities.[52] These same faculty, as part of a national questionnaire sent out by the study's authors, indicated that advancing diversity and inclusion efforts was relatively unimportant for obtaining tenure.[53] This captures the central dynamic and challenge at work here. Despite bearing the disproportionate burden of educating nondiverse colleagues, diverse actors in professional environments are rarely rewarded for doing so, which both disincentivizes these actors from speaking out and distracts them from their duties. This is especially true when their attempts at education fall on deaf ears[54]—a belief that their actions are futile is a sure way to silence dialogue from diverse actors.

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52 Miguel F. Jimenez et al., Brief Communication, *Underrepresented Faculty Play a Disproportionate Role in Advancing Diversity and Inclusion*, 3 NATURE ECOLOGY & EVOLUTION 1030 (2019).

53 *Id.* at 1030 (finding that 71.7% of surveyed faculty thought facilitating diversity and inclusion activities, like hiring diverse candidates and performing outreach to minority communities, was "relatively unimportant" for obtaining tenure).

54 *See* Beverly Daniel Tatum, *Together* and *Alone? The Challenge of Talking About Racism on Campus*, 148 DÆDALUS J. AM. ACAD. ARTS & SCIS. 79, 85 (2019) (describing Black students' hesitancy to engage in dialogue with their white

There is reason to believe that this phenomenon is somewhat diminished amongst judges. After all, panel effects themselves are proof that *some* of the dialogue is finding its mark. Further, if the deliberative hypotheses are to be believed, judges respect one another and are willing to be persuaded to one another's views.[55] While this argument may have some merit, it is ultimately naïve. Judges are human too, and even if they harbor immense respect for their colleagues, they still suffer from the same implicit biases as the rest of us.[56] The upshot is lacking incentive for diverse judges to speak out. Not only will doing so distract from their duties as impartial adjudicators, it will also put strain on their already stressful and busy lives.

Implementing a system that leans too heavily on diverse judges to "educate" their colleagues may also make those colleagues less receptive. The belief that they are being told what to do, or that the system has identified their "problematic" viewpoint and is seeking to correct it may breed resentment amongst panels. Nobody likes to be told that they harbor biases, least of all judges, who pride themselves on their impartiality. A heavy-handed approach could provoke judges in the majority to entrench themselves more deeply in their beliefs, potentially stifling the occurrence of panel effects.

The lesson here is that a system designed to amplify panel effects cannot be completely dependent on the actions of diverse judges alone. Designating a "diverse" judge to lead oral argument or deliberations would be the extreme example, as would designating a "diverse" judge or judges to sit on every panel. Those solutions would run headlong into the problems discussed above. Rather, systems of amplification should set diverse judges up to succeed and put infrastructure in place to lessen the burden placed on their shoulders. Diverse actors will inevitably play a crucial role in amplifying panel effects—the trick will be in striking the proper balance.

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colleagues, citing frustration "about the futility of talking to White people about racism").

55 *See* Edwards, *supra* note 16.

56 *See, e.g.*, Guthrie, Rachlinski & Wistrich, *supra* note 4; *see also* Burbank & Farhang, *supra* note 14, at 272, n.122 ("Justice Ginsburg said her own influence in all sorts of cases at the justices' conferences was uncertain. 'I will say something and I don't think I'm a confused speaker and it isn't until somebody else says it that everyone will focus on the point,' Justice Ginsburg said." (quoting Adam Liptak, *The Waves Minority Judges Always Make*, N.Y. TIMES (May 30, 2009), https://www.nytimes.com/2009/05 /31/weekinreview/31liptak.html [https://perma.cc/NUE3-BF3J])).

C. The Universal Worldview Assumption

Another problem posed by relying too heavily on diverse judges is the reality that judges with diverse characteristics do not share the same worldview. Their preferences, lived experiences, and beliefs are likely to be radically different—one may assume that assigning one Black judge to every panel hearing an employment-discrimination case would introduce a more pro-plaintiff point of view, but such an assumption may be misplaced.

While framed as a problem, this is a feature of panel decision making and collective decision making generally, not a bug. Panel effects should and do arise naturally, with a variety of different views being contributed by a variety of different judges. The goal of a system aiming to amplify panel effects should be to diversify the ideas and backgrounds represented by the panel, not to prescribe specific beliefs to be present on any given panel. These considerations give rise to the similar lesson posed by the education problem—systems of amplification selecting a "diverse" judge or judges to sit on a panel for certain types of cases will ultimately fail. Not only do such systems assume, from a judge's characteristics, that they will espouse the desired preferences or ideas during deliberation, they also undermine the natural occurrence of panel effects. Attempts to ensure that certain worldviews are always present on panels hearing certain kinds of cases may in effect stifle discussion of diverse viewpoints.

Both this and the education problem make clear the lack of benefit to a prescription approach, which is outweighed by the negative effect of its likely consequences. Selecting judges with certain characteristics to hear certain types of cases can quickly cause an erosion of legitimacy. This can be seen clearly in President Biden's nomination of Justice Ketanji Brown Jackson to the Supreme Court—despite her being an incredibly qualified jurist, the mere consideration of race and gender in her appointment spurred public outcry.[57] While there was

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57 *See, e.g.*, Danielle Kurtzleben, *Republicans Take Issue with Biden's Pledge to Pick a Black Woman for Supreme Court*, NPR (Feb. 4, 2022), https://www.npr.org/2022/02/04/1078358077/republicans-take-issue-with-bidens-pledge-to-pick-a-black-woman-for-supreme-cour [https://perma.cc/G6ZN-ZKJS]; *see also, e.g.*, Teaganne Finn, *Senators Split on Biden's Pledge to Pick Black Woman for Supreme Court Seat*, NBC News (Jan. 30, 2022), https://www.nbcnews.com/politics/congress/senators-split-biden-s-pledge-pick-black-woman-supreme-court-n1288220 [https://perma.cc/V2ZT-NWGQ].

support for the decision,[58] most of it came in celebration of more diverse representation on the Supreme Court. Assigning specific judges to sit on cases would take this a step further—we can assume that the public pushback would also be taken a step further. Seeing as such systems would likely not bear fruit, they are simply not worth the risk.

D. The Limited Resource Problem

A rather obvious but still impactful problem with any system designed to amplify panel effects is the limited resource pool from which to draw on the federal bench. Breaking diversity down into race, gender, and professional background, disparities are stark. Of all federal circuit-court judges, roughly 68% are white, 14% are Black, 15% are Hispanic, and 8% are Asian.[59] The gender split is a bit less extreme—roughly 59% of federal circuit-court judges are men, and the remaining 41% are women.[60] Along professional experience lines, former prosecutors and judges with corporate experience dominate. 36% and 33% of circuit-court judges appointed by Obama and Trump were former federal prosecutors, respectively, compared to a dismal 2.9% and 0.0% of former federal public defenders.[61] Further, 46.4% and 55.4% of circuit-court judges appointed by Obama and Trump, respectively, had significant experience representing corporations, compared to an identical 2.9% and 0.0% of those with experience at a legal aid society.[62]

What this data shows is a lack of competing viewpoints—a significant number of former prosecutors being elevated to the bench isn't a bad thing in and of itself, but it becomes problematic given the complete lack of criminal defense lawyers making the jump. Disparate representation of professional experience, race, gender, and sexuality stifle diverse viewpoints and

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58 *See, e.g.*, Jocelyn Noveck & Deepti Hajela, *For Black Women, Hopes and Dreams Rest on Biden Court Choice*, Associated Press (Feb. 9, 2022), https://apnews.com/article/us-supreme-court-race-and-ethnicity-a58be7c079a6ef9c449b65a6ae0fd89c [https://perma.cc/LFV4-DUKS]; Matt Haines, *African American Women Find Inspiration in Biden's Supreme Court Pick*, VOA (Mar. 6, 2022) https://www.voanews.com/a/6470875.html [https://perma.cc/EX9U-PKRD].

59 *See Diversity of the Federal Bench*, Am. Const. Soc'y, https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/ [https://perma.cc/6J6G-U5NV] (last visited Nov. 25, 2023).

60 *Id.*

61 *See* Joanna Shepherd, Jobs, Judges, and Justice: The Relationship Between Professional Diversity and Judicial Decisions 6 (2021), https://demandjustice.org/report/ [https://perma.cc/CKS4-5CNC].

62 *See id.*

depress the existence of panel effects, save for the rare instance in which a minority viewpoint serendipitously finds itself on a panel. With these restraints working in the background, the primary challenge of any system of amplification is to bring out those minority viewpoints in the face of their rarity.

A simple solution to this problem would be to just stack the bench with more diverse judges. There are, of course, several ways to accomplish this, some with more teeth than others. The biggest hurdle to such an alternative would be coaxing the machinery of the federal government to actually appoint and confirm said judges—a tall task given the amount of discretion involved in nearly every step of that process. Even if such a mechanism were to be put into action, it would take a very long time to accomplish, barring some significant increase in the number of federal judgeships. Incremental replacement of retiring judges with those harboring more "diverse" viewpoints would also undoubtedly spur the same sort of backlash as did President Biden's appointment of Justice Jackson, threatening to slow the process down even more.

Such a massive shift would not be reliable unless formalized to some degree, most clearly through the use of hiring quotas. Of course, "quotas" are a much-maligned form of diversification that, if enacted along the lines of a constitutionally suspect classification, run a significant risk of being found unconstitutional.[63] Even loose consideration of a constitutionally suspect classification in admissions processes has become taboo.[64] While this issue has been explored primarily in the context of college admissions, it could be extended to a judge appointment scheme very easily—and likely would. With this in mind, a formal approach seems infeasible, and with it any efficient diversification of the judiciary. Inevitably, progress will have to be made incrementally, leaving most of the heavy lifting in terms of amplification of panel effects to other solutions.

The core lesson here is that the focus of any system of amplification must be on working with available resources. Because a sudden injection of diverse perspectives into the judiciary is unlikely and infeasible, alternatives to amplify panel effects should focus on maximizing the odds of landing diverse

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63 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (holding that using racial quotas for the purpose of determining admissions to a government-supported entity violates the Equal Protection Clause).

64 *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023) (holding that any consideration of race in admissions is unconstitutional).

perspectives on panels and increasing their influence when they do appear. While political forces and the arc of progress will likely bend towards long-term diversification of the federal bench, creative strategies should be employed in the meantime to bolster the diverse voices already on it.

IV
Alternative Systems of Amplification

With the different competing explanations of panel effects on the table and the biggest issues with amplifying them anticipated, it is time to address some potential means of amplifying panel effects on the U.S. Courts of Appeals. Of course, the adoption of any tweak to circuit-court procedure or institutional norms is no small feat. Aside from the daunting task of actually passing congressional legislation to enact it, any change would have to withstand the inevitable and likely vehement pushback from the judges it affects. Some solutions would be harder to swallow than others—any increase in circuit judges' already hefty workload would likely provoke the most resistance. For the purposes of this paper, the gravity of this problem will be assumed away to a degree. While institutional pushback is certainly an apt consideration when weighing any change, if given too much weight it would defeat even modest alterations to prevailing norms. Instead, the focus here will be on the *potential* for these changes to impact judicial decision making at the federal appellate level.

That being said, some discussion of how these reforms could be put into place is needed. The Constitution grants broad power to Congress to shape the federal court system. Aside from the creation of the Supreme Court, the Constitution tasks Congress with structuring the court system,[65] meaning that they could by legislation alter and adjust the structure of the courts as they see fit. All of the reforms discussed below could be enacted through congressional legislation.

Two broad categories of reforms to the U.S. Courts of Appeals will be considered. First, alterations to the size of individual panels will be explored, including increases in panel size and decreases. Second, different methods of opinion distribution amongst panel judges and non-panel judges will be analyzed.

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65 U.S. Const. art. III, § 1.

A. Altering Panel Size

Changing the size of the panels that hear cases goes to the heart of the appellate decision-making process. The panel system is an expression of the desire for a higher quality of decision making at the appellate level,[66] and any meddling done with it must be conducted with an eye to that goal. Intuitively, increasing the size of panels would seem to have the greatest impact on the prevalence of panel effects—more judges means more opportunities for diverse perspectives entering the discussion.

In articulating different alternatives to the traditional three-judge panel, it is important to keep the competing explanations of panel effects in mind. Some size configurations may facilitate more effective deliberation between judges, while sacrificing the ability for judges to act as strategic bargainers seeking to match the final decision up more closely to their preferences, and vice versa. In the end, some series of tradeoffs is inevitable—the goal should be to find the sweet spot where as many of the different explanations of panel effects are accommodated as possible.

1. *The Five-Judge Panel*

The first alternative to the traditional three-judge circuit-court panel is the five-judge panel. Immediately, it should be noted that the dynamic between five decision makers is similar to three—the majority rules. As a result, the considerations underlying the existence of panel effects remain relatively unchanged. Judges in the minority will still seek to persuade their colleagues through good-faith deliberation and may bargain for a decision that better reflects their preferences in return for a concurrence rather than a dissent. The biggest difference is, rather obviously, the addition of two more judges. Despite the similar structure, this small tweak has significant consequences.

Putting two additional judges on a panel means two more chances for a judge with a diverse perspective to land on the panel. Given the limited reservoir of diversity from which any given panel has to draw, any increased chance at getting a diverse perspective is valuable—and the difference here is not insignificant. Take the Fourth Circuit,[67] for example, which

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66 *See supra* note 3.

67 The Fourth Circuit boasts somewhat lower gender diversity than other circuits. It was selected here to better illustrate the odds of selecting a diverse judge or judges on any given panel. As explained, diversity is not just differences in gender or race, but differences in viewpoint. In the Ninth Circuit, where there is

currently has fifteen active judges, comprised of ten men and five women.[68] For the purpose of this illustration, assume that female judges are "diverse" judges, whose inclusion on a panel would amplify panel effects. Diversity is, of course, much more than gender; making this assumption, however, nicely demonstrates the odds of getting a judge with a diverse perspective on any given panel.

Assuming a three-judge panel, the probability of getting at least one woman judge on the panel is roughly 74%.[69] On a five-judge panel, assuming the same man to woman distribution, the odds of selecting at least one woman judge increases to 92%.[70] While this is a significant increase, the greatest value of a panel of five is the increased likelihood of getting *two* diverse judges on any given panel. On a panel of three, again using the Fourth Circuit as an example, the probability of selecting at least two woman judges is roughly 22.2%.[71] On a five-judge panel, the odds of selecting two woman judges jumps to 32.9%, an increase of 10.7%.[72] While the presence of one diverse judge has been shown to drive panel effects, having two makes a significant difference.[73] While statistically improbable on a three judge panel, having five chances to draw a diverse judge makes the possibility that two end up on the panel significantly more likely.

Another positive aspect of a larger panel is the potential for greater efficiency of the collective decision-making process.

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a 50-50 split of men and women on the bench, lived experience and viewpoints are not similarly 50-50; gender is used here for ease of illustration, and using a circuit with a roster of male and female judges comparable to the Ninth Circuit's would undermine that illustration.

68 *United States Courts of Appeals for the Fourth Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Fourth_Circuit [https://perma.cc/4485-KCXA] (last visited Nov. 18, 2024).

69 The probability of selecting one woman judge is determined using the following formula: P(At least one woman selected) = 1 – P(No woman selected). The probability that no woman is selected is equal to the probability of three successive draws of a male judge, or $\frac{10}{15} \times \frac{9}{14} \times \frac{8}{13}$.

70 The same formula is used, but this time, P(No woman selected) is equal to the probability of five successive draws of a male judge, or $\frac{10}{15} \times \frac{9}{14} \times \frac{8}{13} \times \frac{7}{12} \times \frac{6}{11}$.

71 To determine the probability of selecting two woman judges, I use a binomial probability formula expressed as follows: $P(k \text{ successes in } n \text{ draws}) = \binom{n}{k} \times p^k \times (1-p)^{n-k}$, where p is equal to the probability of selecting one woman judge, or $\frac{1}{3}$. Here, $n = 3$, and $k = 2$.

72 The same formula as in note 71 is used, with $n = 5$ and $k = 2$.

73 *See, e.g.*, Peresie *supra* note 8, at 1768 (observing that with two female judges present on a panel hearing a sex discrimination case, the likelihood of a pro-plaintiff ruling increased by 9%).

More voices in the decision-making process generally leads to better outcomes, so long as each decision maker has a decent chance of coming to the correct answer.[74] This tracks both of the deliberative explanations of panel effects; a greater number and array of viewpoints and voices in the room will increase the likelihood that mistakes reached through faulty reliance on intuition are corrected, and will allow for more opportunities for each judge to persuade their colleagues to come around to their way of viewing the case. On the other hand, the addition of two more participants in each discussion could dilute the individual impact of each, causing diverse viewpoints to get lost in the crowd. However, taking the underlying assumptions behind the deliberative hypotheses to be true, that judges deal with one another in good faith and with a willingness to listen and be persuaded,[75] it seems as though this would not happen *too* often. One can easily imagine a scenario where four judges are united against one, a daunting task of persuasion for the odd-judge-out that would be less of a hurdle if they were opposed by only two colleagues. Nonetheless, the greater chance that diversity of viewpoint will come into the discussion and the broader range of deliberation outweigh this lone circumstance.

The five-judge panel runs into some additional problems when its effectiveness is measured by the strategic explanations of panel effects. Most pressingly, the greater number of judges may weaken the norm of unanimity on federal Courts of Appeals, potentially eroding the bargaining power of each judge. While the rare dissent may have a negative connotation on a three-judge panel, they are likely to be much more common on panels with five judges, especially given the greater difficulty posed by cases that make it to the circuit court level. Because of the increased likelihood of at least one dissenter on the larger panel, dissents may become less taboo, more acceptable, and potentially even *preferable*—dissenting opinions on larger courts, like the Supreme Court, often serve as guideposts for future decisions, and can inform the gradual shifting of law over time.[76] However, there is some evidence to

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74 *See supra* text accompanying note 36.

75 *See supra* note 16.

76 *See, e.g.*, MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 5 (2015); Douglas R. Rice, *Issue Divisions and U.S. Supreme Court Decision Making*, 79 J. POL. 210 (2017) (arguing that dissenting Justices alter how issues addressed in the majority opinion are understood, yielding both more nuanced majority opinions and slowly realigning the Court over time).

the contrary—even when Circuits hear cases *en banc*, typically with many more than five judges, the decision-making process is still described as one of "give[] and[] take" where judges moderate their positions to *avoid dissent*.[77]

As for the whistleblower theory, the five-judge panel fares a bit better. Unlike the more unstable norm of unanimity that may fluctuate in potency based on the size of the panel, the ability for a lone whistleblower to moderate a panel outcome remains constant. As discussed earlier,[78] a judge is most likely to shift the overall decision of the panel by serving as a whistleblower when their preferences are aligned with those of the circuit as a whole. Adding two judges to each panel provides two more chances for such a judge to be selected, increasing the likelihood of a whistleblower being present on the bench. However, such a whistleblower would still be beholden to the preferences of the circuit—which, given the current demographics on the United States Courts of Appeals, would likely favor judges in the majority, who typically would not be in a position to act as whistleblower.

2. *Even-Numbered Panels*

Changing panel size to an even number completely warps the dynamic; suddenly, a tie becomes a possibility. There is a reason that most (if not all) multimember courts have an odd number of judges. A decision where judges are evenly split on either side can frustrate the objectives of the litigation by denying either party an immediate remedy, and this can create confusion for lower courts which struggle to ascertain what the law is. In the rare instances where the Supreme Court sits with an even number of justices, the Court goes to great lengths to avoid an even split—in the event of a tie, the Court simply affirms the lower court decision, and they render a decision with no precedential effect.[79] This desire to avoid a tie scenario may have some use in the realm of panel effects, however—it may stand to strengthen the norm of unanimity, apportioning more bargaining power to would-be dissenters.

The next logical question is, what happens in the event of a tie? Should there be some tie-breaking mechanism put into place, like a rehearing of the case by a fresh panel or the

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77 *See* Goldman, *supra* note 19, at 479.

78 *See* Kim, *supra* note 2.

79 *See, e.g.*, Justin Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. 245 (2016).

circuit en banc? Or should there be *no* such mechanism, like the approach taken by the Supreme Court? Trying to create and implement a tie-breaking mechanism would be messy—requiring the circuit to rehear the case en banc would consume precious judicial resources and may not increase the bargaining power of diverse judges. Judges in the majority may be more unwilling to compromise with their diverse colleagues if they think that the circuit as a whole will vote with them. The same is true of appointing a new panel to rehear the case—judges in the majority may choose to simply "roll again" and hope for a panel that represents their views rather than compromise. Given the lack of diversity on the federal bench, this would probably be a good bet.

Taking the Supreme Court's approach would mitigate these concerns. Aside from being a cleaner solution, the incentive for judges to bargain with their colleagues is greater—the alternative is issuing an opinion with no precedential value. If "dissent aversion" is enough to drive bargaining on panels, the desire to avoid an opinion with no precedential value would be an even stronger catalyst to bargaining amongst judges. Such an opinion would suffer from the same defects that drive judges to avoid dissents, only in stronger form.[80] It would undermine court legitimacy by displaying an embarrassing inability for the judges to come to an agreement and promote significant uncertainty due to a failure to state clearly what the law is, which in turn would substantially undermine lower-court compliance.

3. *The Four-Judge Panel*

This concept operates in the second alternative, altering panel size to include four judges rather than three. It should immediately be recognized that the addition of that extra judge increases the probability of a diverse judge sitting on the panel, albeit less than the five-judge panel. Importantly, the chances of getting two diverse judges to sit on the same panel is also significantly less, although still greater than the traditional panel of three. The other typical benefits that come with increased panel size apply here too—the collective decision-making process is made more effective, and deliberations become more nuanced. Further, there is a slightly lesser chance of diverse perspectives getting lost in the crowd given the slightly smaller size.

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80 *See* Farhang & Wawro, *supra* note 9.

However, it is not clear whether the primary benefit of the four-judge panel—the strengthened norm of unanimity created by the incentive to avoid ties—would reliably apply. In the (likely) case of a three-to-one judge split, there is no possibility of a tie; the majority can get its way no matter what, and the only incentive to bargain with the lone holdout is dissent aversion. But that just takes us right back to the three-judge panel, and while having that additional judge spot is preferable, it would not be moving the ball a substantial amount. The effect on the norm of unanimity depends strongly on the presence of *two* judges who differ from the majority, which, while not incredibly improbable, is bound not to happen often enough for the predicted boost of diverse judge bargaining power to have its intended effect.

Taking the Fourth Circuit from above as an example, the odds of getting a panel with at least one woman judge is 79%,[81] and the odds of getting a panel with two woman judges is 26.97%.[82] While not as impressive as the five-judge panel, both probabilities represent a significant improvement from the three-judge panel. The probability of a panel with two women judges is a bit low, however, calling into question the effectiveness and consistency of the increased bargaining power afforded to each individual judge. Still, there is reason to think that the presence of at least two diverse judges on a panel of four would happen somewhat often.

B. Opinion Distribution

Adding judges to the panel is not the only way to bolster deliberation between judges. Aside from just upping the chance of diverse perspectives emerging on any given panel, formalizing the deliberation process and starting it earlier can amplify diverse voices and make for a more nuanced discussion of the issues. Even if no diverse opinions are present, more time to grapple with an opinion may lead judges to consider the issues more carefully, leading to a higher-quality decision. This is the aim of the second category of alternatives, requiring a panel to produce a tentative opinion before hearing oral argument. There are several different tweaks that can be made here. The tentative opinion could be in written or oral form. If written, one judge could be tasked with producing it, or every judge

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81 *See supra* note 69. The same formula is used, but with *P*(No woman judge) equal to the probability of four successive draws of male judges.

82 *See supra* note 71. The same formula is used, with n = four and k = two.

on the panel. The opinion could be distributed only amongst panel colleagues, or to every judge on the circuit, allowing a much broader array of viewpoints to weigh in on the issue.

Distributing tentative opinions before oral argument is common in some California state-appellate courts. Originally, written tentative opinions were used by Division Two of California's Fourth Appellate District to dissuade parties from requesting oral argument in an effort to deal with bloated dockets.[83] Division Eight of California's Second Appellate District instead opts for oral tentative opinions delivered by the judges from the bench immediately preceding oral argument, which serve to narrow the issues for the advocates rather than dissuade oral argument from occurring.[84] While these examples of tentative opinions are focused on the advocates, the same technique could be repurposed with an eye on judges.

One important consideration, however, is what to do in absence of oral argument—data published by the Administrative Office of U.S. Courts indicates that from September 2021–22, the Federal Courts of Appeal granted oral argument in only 21% of cases.[85] If this solution operates in only 21% of cases, it ca not be all that effective in amplifying panel effects. While these cases are likely the most difficult to decide and thus those that would benefit from diverse perspectives the most, a system of amplification should aspire to affect at least a *majority* of cases heard by each circuit.

The missing puzzle piece is provided by the custom of the Pennsylvania Commonwealth Court, one of two intermediate appellate courts in the state. There, one judge out of the three-judge panel writes a tentative opinion, which the panel then casts preliminary votes on.[86] The opinion is then circulated to all the judges on the court, who provide feedback and comments, and even cast a vote of objection or no objection.[87] Based on that feedback, the panel judges can change their votes, change the opinion, or keep everything the same. The clear

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83 *See* Joshua Stein, *Tentative Oral Opinions: Improving Oral Argument Without Spending a Dime*, 14 J. App. Prac. & Process 159, 163 (2013).

84 *See id.* at 167–68.

85 U.S. Cts., Table B-10: U.S. Court of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2022 1, https://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2022.pdf [https://perma.cc/9G4U-5N6T]

86 *See* Renee Cohn Jubelirer, *Communicating Disagreement Behind the Bench: The Importance of Rules and Norms of an Appellate Court*, 82 L. & Contemp. Probs. 103, 119 (2019).

87 *Id.*

benefit to this system is the exposure of the panel judges to a variety of different perspectives and opinions on the issue. In a sense, this emulates the deliberations of an en banc proceeding without the strategic pressures of a large voting body. The panel judges control the outcome—they just get a *lot* of second opinions. Importantly, this system operates whether oral argument is granted or not.

A marriage of these two techniques would make the optimal system for amplifying panel effects. Deliberation would be significantly enhanced in *all* cases, as with each judge on the court having an opportunity to provide feedback, different perspectives would have a chance to correct errors by the panel judges, expand their view of the case, and even shift the outcome. In the hardest cases, those where oral argument is granted, judges would be forced to confront the issues presented by the case earlier in the process, encouraging more deliberation and narrowing the issues to be presented at oral argument, which itself may be useful in bringing different points of view to the fore.

The downside is two-fold: first, the predictable yet important concern for judicial resources, and second, the reliance on the deliberative explanations of panel effects. In the cases where oral argument is heard, requiring judges to draft written tentative opinions shifts the workload to the start of the process. Taking an approach similar to that of the Pennsylvania Commonwealth Court would bloat the responsibilities of *every* judge on the court. As one appellate judge put it, such alternatives are "as welcomed as a porcupine at a dog show."[88] There is a real risk that judges would resent additions to their duties, potentially watering down the potency of such alternatives. Perhaps feedback on opinions would fall to the wayside in favor of cases on the judge's own docket, or the drafter of the tentative opinion may not take it seriously. Further, these approaches do not lend themselves to the strategic explanations of panel effects. Panel judges may not be swayed by the objections of their non-panel colleagues, with any change in their vote remaining dependent on their fellow panel members' choice to dissent or not.

However, one of the strategic hypotheses is on point here. The whistleblower hypothesis, which, as discussed previously, forces those in the majority to moderate their positions for fear

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[88] Stein, *supra* note 83, at 163 (quoting Robert S. Thompson, *One Judge and No Judge Appellate Decisions*, 50 CAL. ST. BAR J. 476, 518 (1975)).

of a judge in the minority "blowing the whistle" and alerting the circuit to review the case, would be formalized by this solution. In fact, it would take the whistle out of the equation—rather than relying on one of the panel judges to alert their colleagues, those colleagues *each get to look at the opinion*. Kim's findings[89] that the whistleblower effect is driven by *circuit* preferences makes this the perfect fit. Circuit judges themselves can put pressure on the panel to moderate their views one way or another to avoid a review by the circuit in the form of a formal objection and written feedback. Improved efficiency aside, this also takes pressure off the would-be whistleblower. Their colleagues would be doing the work for them, leaving them to focus more closely on their role as an impartial adjudicator. Further, in the absence of clear feedback from their colleagues, the whistleblowing judge would inevitably have to guess at the likelihood of review by the circuit, which may cause them to doubt themselves to the point of just going along with the majority. A system where each judge gives definite feedback on their position with regards to the case removes the need for guesswork.

This alternative seems to hit the sweet spot, enhancing panel effects both under the deliberative and strategic hypotheses, even with the traditional three-judge panel. If combined with increased panel size, the results could be even more pronounced, specifically with the four-judge panel. The increased panel size would carry the aforementioned positives, including a higher chance of diverse perspectives held by a voting member and the increased bargaining power created by the possibility of a tie. The feedback from other judges on the circuit could shape that dynamic, informing both sides of the discussion and streamlining deliberation.

Conclusion

The existence of panel effects is proof that the system is working. Regardless of which hypothesis correctly explains their occurrence, they are the result of judges working together at the highest level with the shared aim of producing a quality decision. It is only natural that we should want them to occur more; given the importance of the precedent set by the federal Courts of Appeals, and the fact that they usually have the last

89 *See supra* text accompanying notes 45–47.

word in any given case, rendering decisions of the highest quality is of paramount importance.

Our fealty to institutional norms exists for good reason. As the saying goes, if it ain't broke, don't fix it. There is a (perhaps justified) fear that tweaks to the way things are might cause the system to perform worse, or even to collapse. This fear can act as a powerful inhibitor to progress, however, and it is important that we are ready to challenge it when progress demands. Panel effects provide the perfect venue for such a challenge—they have been demonstrated statistically, raise fundamental fairness concerns, and send a clear signal that things can be improved.

Just as Shouldice Hospital of Toronto embraced the abnormal as a means of jumpstarting quality, so should the U.S. Courts of Appeals. After all, as is implied by the panel system itself, quality is the name of the game, and the stakes present in any case heard by a federal circuit court are (arguably) higher than those of a hernia operation. Over time, the diversity of the courts will almost certainly improve, and we can expect panel effects to become more common as it does. Waiting for that to become reality, however, cuts against the purpose of the judiciary. The judicial branch is one tasked with fairness and impartiality to each party before it, and with delivering a correct, high-quality resolution to our nation's most contentious disputes. We should strive to better it in every way possible, as soon as possible, so that the current generation of parties seeking judicial guidance is served just as completely as the next. To do otherwise is to consign ourselves to the limitations of our time, and to submit to the fear of change in sacrifice of progress.