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THE EFFECTS OF COLLEGIALITY ON JUDICIAL DECISION MAKING

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In *The Nature of the Judicial Process*, Justice Benjamin Cardozo tried to explain how appellate judges overcome their individual predilections in decision making.[1] His thesis was that the different perspectives of the members of an appellate bench "balance one another."[2] He argued that "out of the *attrition* of diverse minds there is *beaten* something which has a constancy and uniformity and average value

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[1] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 176-77 (1921).

[2] *Id.* at 177.

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greater than its component elements."[3] Attrition, of course, literally means the gradual wearing down through sustained attack or pressure, or the wearing away by friction.[4] It is interesting that Justice Cardozo chose this word to explain how "diverse minds" come together to produce "truth and order"[5] in decision making. I think that he was wrong in his explanation. *Collegiality*, not attrition, is the process by which judges achieve the "greater value" of which he wrote.

INTRODUCTION

In recent years, I have written several articles and given a number of speeches in which I have reflected on collegiality as it informs the judicial function.[6] I have contended that some academics who have analyzed judicial decision making, especially on the basis of limited empirical data, have paid insufficient attention to collegiality.[7] In particular, I have rejected the neo-realist arguments of scholars who claim that the personal ideologies and political leanings of the judges on the D.C. Circuit are crucial determinants in the court's decision-making process.[8] These scholars invariably ignore the many ways in which col-

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[3] *Id.* (emphasis added).

[4] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 142 (1981) (defining attrition as "the condition of being worn down or ground down by friction," and "a breaking down or wearing down from repeated attacks").

[5] CARDOZO, *supra* note 1, at 176-77.

[6] *See, e.g.*, Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358-62 (1998) [hereinafter Edwards, *Collegiality*] (arguing that collegiality among appellate judges facilitates judicial decision making); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 852-53, 858-59 [hereinafter Edwards, *The Judicial Function*] (suggesting that collegiality assists with principled decision making for judges in difficult cases); Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329 (2002) [hereinafter Edwards, *Race and the Judiciary*] (reasoning that "a judicial environment in which collegial deliberations are fostered . . . necessarily results in better and more nuanced opinions"); Harry T. Edwards, *Reflections (on Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999, 2006 (2002) [hereinafter Edwards, *Reflections*] (arguing that judicial collegiality helps foster intellectual discourse, resulting in enhanced performance by the court in its decision making).

[7] *See, e.g.*, Edwards, *Collegiality*, *supra* note 6, at 1357-58 (criticizing a prior study for "ignor[ing] the possibility of collegiality" in its analysis).

[8] *See, e.g.*, 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, 2169 (1998) (arguing that empirical evidence demonstrates that "there is a significant political determinant to judicial decisionmaking" in the D.C. Circuit); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1104 (2001) [hereinafter Revesz, *Congressional Influence*] (concluding that "strong, statistically significant evidence

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legiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions.

When I first joined the D.C. Circuit twenty-three years ago, collegiality drew very little attention in scholarly writings on judicial decision making. In recent years, especially as empiricists have attempted to quantify judicial decision making, the idea of collegiality has gained some currency. Scholars and judges have noted that these quantitative studies are inherently suspect, because they fail to account for the effects of collegiality on judicial decision making.[9] Thus far, however, discussions of collegiality, mostly by judges, have been brief and suggestive, usually introduced only in passing.[10] No one has attempted a

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of ideological voting" in the D.C. Circuit exists in administrative law cases); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) [hereinafter Revesz, *Environmental Regulation*] (concluding that judges' "ideology significantly influences judicial decisionmaking on the D.C. Circuit"); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805, 844 (1999) [hereinafter Revesz, *Reply*] (reaffirming Revesz's earlier conclusion that "in certain cases, ideology significantly influenced judicial votes" in the D.C. Circuit despite possible collegiality among the judges of that court).

[9] *See* Edwards, *Collegiality*, *supra* note 6, at 1357-62 (arguing that the "moderating effect of collegial deliberation" is not properly evaluated in statistical studies that attempt to assess the amount of "ideological" or "strategic" decision making by federal judges); Deannell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585, 586 ("I urge that we go beyond the matrix of computerized decisionmaking to consider the qualitative aspects of judicial interaction . . . ."); *cf.* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2298 (1999) (arguing that legal scholars "have paid insufficient attention to the ways in which the vote of each individual judge is influenced by the views of her colleagues on a multimember court"); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 1 (1993) [hereinafter Kornhauser & Sager, *The One and the Many*] (stating that the collective nature of adjudication is "[o]ne of the most salient features of appellate courts[, but] is also one of the most ignored"); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 82 (1986) [hereinafter Kornhauser & Sager, *Unpacking the Court*] (reasoning that "[t]raditional theories of adjudication are curiously incomplete" because they ignore the fact that judges "sit and act together with colleagues on adjudicatory panels"); Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 255 (1999) (noting that the "formal labeling of judges" by political party is "the antithesis of collegial decisionmaking").

[10] *See, e.g.*, FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 213-29 (1994) (defining collegiality and discussing its impact on the process of judicial decision making); FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 58, 171-92 (1980) [hereinafter COFFIN, THE WAYS OF A JUDGE] (describing different manifestations of judicial collegiality and cooperation, and discussing specific cases that were a product of that value); JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 12-13 (2002) (arguing that collegiality among appellate judges "promotes judicial efficiency and a better judicial work product"); Shirley S. Abrahamson, *Judging in the Quiet of the Storm*,

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comprehensive, sustained treatment of collegiality—what it is, how it affects group decisions on appellate courts, how it is achieved and

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24 ST. MARY'S L.J. 965, 992 (1993) (mentioning collegiality as a constraint on judicial decision making); Rudolph J. Gerber, *Collegiality on the Court of Appeals*, ARIZ. ATT'Y, Dec. 1995, at 19 (offering a personal accounting of collegial decision making on the Arizona Court of Appeals); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 141, 148 (1990) (discussing the effect of collegiality on the number of dissents and concurrences by members of a federal appellate court); Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1016-18 (1991) (noting that the D.C. Circuit may be more collegial than other federal appellate circuits because all members of the D.C. Circuit are located in a single courthouse); Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991-2002*, 70 GEO. WASH. L. REV. 259, 260 (2002) (citing collegiality as one possible explanation for the increase of cases reheard en banc during the 1990s); Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1072 (1996) ("[J]udicial etiquette [is] a means of maintaining the collegiality requisite to a great court."); Michael R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 457-61 (2000) (discussing how the use of technology, like teleconferencing and e-mail, can lead to a breakdown in collegiality); Francis P. O'Connor, *The Art of Collegiality: Creating Consensus and Coping with Dissent*, 83 MASS. L. REV. 93, 93 (1998) (arguing that an appellate judge's "dissents are entirely consistent with collegiality"); Diarmuid F. O'Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313, 315 (1996) (noting that "[a]s a court of appeals becomes increasingly larger, it loses the collegiality among judges that is a fundamental ingredient in [the] effective administration of justice"); Randall T. Shepard, *The Special Professional Challenges of Appellate Judging*, 35 IND. L. REV. 381, 386 (2002) (arguing that judicial collegiality "is absolutely imperative if we are to maintain public respect for the judiciary"); Walter K. Stapleton, *The Federal Judicial System in the Twenty-First Century*, DEL. LAW., Fall 1995, at 34, 37-38 (explaining why relatively small appellate courts are necessary for collegiality); Tacha, *supra* note 9, at 592 (asserting that "collegiality is critical in energizing and qualitatively improving the work of any court"); Deannell Reece Tacha, *The Community of Courts: The Complete Appellate Judge*, J. KAN. B. ASS'N, May 1996, at 4, 5 [hereinafter Tacha, *The Community of Courts*] ("Because appellate judges in both the state and federal system always operate as either three-judge or en banc panels, the interaction among judges . . . has an important effect upon the decision-making process); Deanell Reece Tacha, *The Federal Courts in the 21st Century*, 2 CHAP. L. REV. 7, 19 (1999) [hereinafter Tacha, *The Federal Courts*] (expressing concern over the potential loss of collegiality due to video conferencing); Patricia M. Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals*, *in* THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 171, 178-82 (Cynthia Harrison & Russell R. Wheeler eds., 1989) (stating that collegiality is "all important" in the appellate process); Patricia M. Wald, *The Problem with Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 784-86 (1983) (discussing the necessity of judicial rules and deadlines to preserve collegiality); Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the* Harvard Law Review *and Other Great Books*, 100 HARV. L. REV. 887, 905 (1987) (arguing that "the major constraint on appellate discretion is probably judicial collegiality"); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1173-78 (1994) (concluding that a "loss of collegiality" comes with the expanding size of a federal appellate court).

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maintained, and how courts with collegiality may differ from those without it.[11] That is my aim in this Article.

Until now, my own reflections on collegiality and its effects have been either tentative, formed before I had actually experienced collegiality on the D.C. Circuit,[12] or limited, framed in response to ideology-based accounts of judicial decision making.[13] Here, I focus on judicial collegiality as a concept in its own right and draw on observations gained during my twenty-three years on the bench to fill out its characteristics and effects. Legal scholars generally have given judicial collegiality short shrift. In making this observation, I do not mean to disparage members of the legal academy. I understand that scholars do not have access to collegial interactions among judges on a court, for most judicial deliberations are confidential. So it is understandable that scholars have not afforded collegiality the attention it deserves. Nonetheless, collegiality merits serious discussion to generate a fuller understanding of judicial decision making.

Obviously, judges can be most helpful in filling in the variables of judging that may not be readily visible to academics.[14] I do not claim that collegiality is the holy grail of judging. But it is a crucial variable that deserves more attention by scholars who study appellate courts. Thus, in this Article, I give content to collegiality by describing how it works, observing its effects on appellate decision making, reflecting frankly on my experiences on a circuit court in both collegial and uncollegial times, and exploring factors that may promote or undermine collegiality.

In discussing the effects of collegiality on judicial decision making, I have in mind collegiality only in the circuit courts. I do not address district courts or the Supreme Court. Trial judges sit alone, so they normally do not experience the sort of collegial deliberations at the core of appellate judging. The Supreme Court, however, is a collegial

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[11] *Cf., e.g.*, Edwards, *Collegiality*, *supra* note 6, at 1338 ("The qualitative impressions of those engaged in judging must be thoughtfully considered as part of the equation."); Tacha, *The Community of Courts*, *supra* note 10, at 5 ("Defining collegiality is, of itself, a difficult task. Attempting to identify its characteristics and effects upon the work of the judiciary is even more difficult.").

[12] *See* Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 420-22 (1983-1984) (stating that those outside the judiciary may perceive "a circuit court as consisting of a group of judges who are woefully lacking in collegiality").

[13] *See* Edwards, *Collegiality*, *supra* note 6 (responding to Revesz, *Environmental Regulation*, *supra* note 8).

[14] *See id.* at 1364 ("[J]udges' views on how they decide cases should be relevant to understanding how judges in fact decide cases.").

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body,[15] and commentators have noted the group-decisional aspects of the Court's work.[16] Some of the insights generated by the social science studies of group decision making among Supreme Court Justices[17] may lend to an understanding of judicial deliberations among circuit court judges. But I limit my own observations on collegiality to the circuit courts, because it is what I know best and, also, because I am inclined to believe that the differences between the Supreme Court and circuit courts may be too substantial to generalize from one to the other.

Most significantly, the Supreme Court's docket consists of many more "very hard" cases than do those of the lower appellate courts.[18] The majority of the cases in the circuit courts admit of a right or a best answer and do not require the exercise of discretion.[19] Lower appellate courts are thus constrained far more than the Supreme Court. As a result, in the eyes of the public, the media, judges, and the legal profession, the Supreme Court is seen as more of a "political" institution than are the lower appellate courts. The Supreme Court also faces the burden of having to sit en banc in every case. This may mean that collegiality on the Court operates very differently from the collegial process at work in the lower appellate courts, where judges only rarely sit en banc. Thus, my discussion of collegiality does not refer to the Supreme Court.

THE PRINCIPLE OF "COLLEGIALITY" BRIEFLY STATED

When I speak of a collegial court, I do not mean that all judges are friends. And I do not mean that the members of the court never

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[15] By "collegial body" here, I mean only that it takes a vote of the majority to decide a case, not that collegiality is necessarily present on the Supreme Court.

[16] A *New York Times* article, for example, noted that the Court is not

> immune from basic principles of small group dynamics. In a place where little can happen without a majority . . . the justices are locked into intricate webs of interdependence where the impulse to speak in a personal voice must always be balanced against the need to act collectively in order to be effective.

Linda Greenhouse, *The Court: Same Time Next Year. And Next Year.*, N.Y. TIMES, Oct. 6, 2002, § 4, at 3.

[17] *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 112-27 (1998) (discussing the strategic aspects of judicial decision making); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 12-36 (1964) (considering the political context in which Supreme Court Justices act).

[18] *See* Edwards, *supra* note 12, at 389-92 (defining "very hard" cases).

[19] *See id.* at 390 ("Using rough numbers, I would say that in only five to fifteen percent of the disputes that come before me do I conclude . . . that the competing arguments . . . are equally strong.").

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disagree on substantive issues. That would not be collegiality, but homogeneity or conformity, which would make for a decidedly unhealthy judiciary. Instead, what I mean is that judges have a common interest, as members of the judiciary, in getting the law right,[20] and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a *process* that helps to create the conditions for *principled* agreement, by allowing all points of view to be aired and considered. Specifically, it is my contention that collegiality plays an important part in *mitigating* the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.[21]

What is at issue in the ongoing collegiality-ideology debate is not whether judges have well-defined political beliefs or other strongly held views about particular legal subjects; surely they do, and this, in and of itself, is not a bad thing. Instead, the real issue is the degree to which those views ordain the outcomes of the cases that come before the appellate courts. Collegiality helps ensure that results are not preordained. The more collegial the court, the more likely it is that the cases that come before it will be determined solely on their legal merits.

THE MITIGATING EFFECTS OF COLLEGIALITY ON PARTISANSHIP, DISAGREEMENT, AND DISSENTING OPINIONS

In an uncollegial environment, divergent views among members of a court often end up as dissenting opinions. Why? Because judges tend to follow a "party line" and adopt unalterable positions on the issues before them. This is especially true in the hard and very hard cases that involve highly controversial issues. Judges who initially hold different views tend not to think hard about the quality of the arguments made by those with whom they disagree, so no serious attempt is made to find common ground. Judicial divisions are sharp and

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[20] Professor Kornhauser's "team model" of judging assumes that "all judges seek to maximize the number of correct answers and that the judges share a conception of 'right answers.'" Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1613 (1995).

[21] Throughout this Article, "ideology" and "politics" are used interchangeably. These and other related terms are used to refer to judges' *personal* predilections that may or may not coincide with what the law requires. It is my view that these personal predilections have no place in judicial decision making.

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firm. And sharp divisions on hard and very hard issues give rise to "ideological camps" among judges, which in turn beget divisions in cases that are not very difficult. It is not a good situation.

I should be clear again that, when I speak of collegial decision making, I am not endorsing the suppression of divergent views among members of a court. Quite the contrary. In a collegial environment, divergent views are more likely to gain a full airing in the deliberative process—judges go back and forth in their deliberations over disputed and difficult issues until agreement is reached. This is not a matter of one judge "compromising" his or her views to a prevailing majority. Rather, until a final judgment is reached, judges participate as equals in the deliberative process—each judicial voice carries weight, because each judge is willing to hear and respond to differing positions. The mutual aim of the judges is to apply the law and find the right answer.

Some commentators worry that, when members of a court have strong collegial relationships, judges may be reluctant to challenge colleagues and may join opinions to preserve personal relationships. They argue that "[l]ess collegiality may thus increase independence—a virtue of good judging."[22] In my view, it is collegiality that allows judges to disagree freely and to use their disagreements to improve and refine the opinions of the court. Strong collegial relationships are respectful of each judge's independence of mind while acknowledging that appellate judging is an inherently *interdependent* enterprise.[23]

Social science studies on group composition and decision making[24] offer some support for the idea that collegiality may make dis-

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[22] Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 72; *see also* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 324 (1996) ("Judges who know, like, and depend on each other might be less likely to risk their relationship by disagreeing on matters of importance to one or the other. Over time, colleagues might accumulate debts of deference on key issues, and subtle, unarticulated vote trading could occur.").

[23] Others raise the question whether the principle of judicial independence that underlies Article III dictates that each judge should act without regard to the views of colleagues. *See, e.g.*, Tacha, *supra* note 9, at 586 ("[D]oes the principle of the independence of the judiciary, which clearly underlies Article III, dictate that each judge should act without regard to the views of his or her colleagues, or, instead, should the mix of judges from different backgrounds . . . qualitatively enhance the decisionmaking process through interaction?"). But the interdependence of judicial colleagues does not impede the independence of the judiciary as an institution.

[24] *See, e.g.*, Deborah H. Gruenfeld et al., *Group Composition and Decision Making: How Member Familiarity and Information Distribution Affect Process and Performance*, 67 ORG'L BEHAV. & HUM. DECISION PROCESSES 1, 2-3 (1996) (examining how "the extent

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agreement more comfortable and more likely, not less. These studies indicate that group members who are familiar to each other feel less of a need to conform and to suppress alternative perspectives and judgments.[25] Unfamiliar group members, by contrast, are likely to be concerned with social acceptance within the group.[26] This leads to a tendency to conform: unfamiliar group members are apprehensive about how they will be evaluated, which leads them to suppress "alternative perspectives and judgments"[27] and to "behave like other group members, regardless of the nature of their private beliefs."[28] Unfamiliar group members may be less likely to express views inconsistent with those that others have expressed.[29] In contrast, group members who are familiar with one another have less uncertainty and less anxiety about social acceptance.[30] This increases the fluency and flexibility of their thoughts[31] and reduces the pressure to suppress unique perspectives to avoid social ostracism.[32]

Familiarity is one of the major components of collegiality, and these insights on the effect of familiarity in groups resonate, to a certain degree, with my experience on the D.C. Circuit. Through the experience of working as a group, one becomes familiar with col-

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to which members know one another and the extent to which they hold common or specialized knowledge can affect how groups process information and make decisions").

[25] *Id.* at 2 (citing SOLOMON E. ASCH, SOCIAL PSYCHOLOGY (1952); Charlan Jeanne Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCHOL. REV. 23 (1986); Stanley Schacter & Jerome E. Singer, *Cognitive, Social, and Physiological Determinants of Emotional State*, 69 PSYCHOL. REV. 379 (1962)).

[26] *See id.* ("[Unfamiliar group members] are as likely to be concerned with social acceptance as they are with task performance . . . ." (construing STANLEY SCHACHTER, THE PSYCHOLOGY OF AFFILIATION: EXPERIMENTAL STUDIES OF THE SOURCES OF GREGARIOUSNESS (1959); Morton Deutsch, *A Theory of Co-operation and Competition*, 2 HUM. REL. 129 (1949))).

[27] *Id.* at 3 (citing Charles S. Carver & Michael F. Scheier, *The Self-Attention-Induced Feedback Loop and Social Facilitation*, 17 J. EXPERIMENTAL SOC. PSYCHOL. 545 (1981); Lawrence J. Sanna & R. Lance Shotland, *Valence of Anticipated Evaluation and Social Facilitation*, 26 J. EXPERIMENTAL SOC. PSYCHOL. 82 (1990)).

[28] *Id.* (citing James H. Davis, *Group Decision and Social Interaction: A Theory of Social Decision Schemes*, 80 PSYCHOL. REV. 97 (1973); Sarah Tanford & Steven Penrod, *Social Influence Model: A Formal Integration of Research on Majority and Minority Influence Processes*, 95 PSYCHOL. BULL. 189 (1984)).

[29] *See id.* (concluding that such members would be reluctant to share ideas that others haven't previously mentioned (citing ROBERT S. BARON ET AL., GROUP PROCESS, GROUP DECISION, GROUP ACTION (1992))).

[30] *Id.* (citing Paul S. Goodman & Dennis Patrick Leyden, *Familiarity and Group Productivity*, 76 J. APPLIED PSYCHOL. 578 (1991)).

[31] *Id.* (citing Nemeth, *supra* note 25).

[32] *Id.*

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leagues' ways of thinking and reasoning, temperaments, and personalities. All of this makes a difference in how smoothly and comfortably group members can share, understand, and assimilate each other's ideas and perspectives.

One of the reasons I believe collegiality encourages the sharing of ideas is that I know the difference between serving on a court that is collegial and serving on one that is not. During my extended tenure on the D.C. Circuit, now in its third decade, I have seen the court go through many different phases and express a number of different moods. It has gone from a divided and divisive place, to one stamped with the blessings of collegiality. In 1962, Justice Felix Frankfurter reportedly described the D.C. Circuit as "a collectivity of fighting cats."[33] I came to understand what this meant when I joined the court in 1980. On my first day as a member of the court, I was greeted by one of the liberal judges. This judge's first words to me, after saying "hello," were: "Can I count on your vote?" I knew very little of the inner workings of the D.C. Circuit in those days, so I was shocked by the question. I responded by telling my colleague that he could count on my vote only on those occasions when we agreed on how a case should be decided. In short order, however, I came to understand that, in those days, the D.C. Circuit was ideologically divided on many important issues. In those bad times, if two or three so-called "liberal" or "conservative" judges were randomly assigned to sit together, they might use the occasion to tilt their opinions pursuant to their partisan preferences.

In my early days on the D.C. Circuit, judges of similar political persuasions too often sided with one another (say, on petitions for en banc review) merely out of partisan loyalty, not on the merits of the case. In fact, judges might have voted together to hold their allegiances even in cases that had no ideological or political component. The point was that you were not supposed to "break ranks" if a colleague asked for your allegiance. At that time, I believe, the absence of collegiality made it more likely that judges would walk in lock step with other judges with whom they shared political or ideological views.[34] There was pressure to conform along those lines, because

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[33] JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 197 (2001) (quoting Letter from Felix Frankfurter to Philip B. Kurland, Professor, University of Chicago Law School (1962)).

[34] *But cf.* Greenhouse, *supra* note 16 (discussing scholars' speculations that sitting together for a long period of time leads to stable coalitions and "a greater willingness

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there were ideological "camps" on the court. The absence of a genuine sense of being involved in an *institutional* enterprise contributed, I believe, to a feeling that one was not really free to disagree except along the predictable party lines. When a court is bereft of collegiality, judges become distrustful of one another's motivations; they are less receptive to ideas about pending cases and to comments on circulating opinions; and they stubbornly cling to their first impressions of an issue, often readily dismissing suggestions that would produce a stronger opinion or a more correct result. Judges on our court in those days did not like to receive comments on draft opinions from other judges. In the end, these tendencies do damage to the rule of law. They make the law weaker and less nuanced.

In my experience, judges on a collegial court do not seek advantage in panel composition. When a court is operating collegially, panel members focus on what each person brings to conference in terms of intellectual strength, preparation, and background. So, for example, in a labor law case, my colleagues may seek my views, drawn from years of practice, study, teaching, and scholarship in the field before I came to the bench; other members of the court will share their expertise in energy law, economics, antitrust law, trial litigation, education law, trial court procedures, small-firm practice, large-firm practice, the Solicitor General's office, criminal prosecution, criminal defense, Department of Justice operations, national security, and diplomatic affairs. In some instances, when a judge on a panel is struggling with a difficult issue, he or she may seek the expertise of another judge who is not on the panel. In other words, in a collegial environment, judges will check their substantive knowledge against a nonvoting colleague's expertise. This process of seeking and giving expert advice has nothing to do with partisanship.

On a collegial court, the overarching mission of a panel is to figure out where a particular case fits within the law of the circuit. The goal is to find the *best answer* (not the best "partisan" answer) to the issues raised. The judges also think carefully about writing too much on an issue and about deciding issues that are not before the panel. Our mutual aim is to avoid these things. The consequences of alternative approaches are also openly discussed, so that all members of the panel are equally informed. We are looking for a sound basis for decision making, not a strategy for achieving one's preferred result.

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to compromise in order for the group to speak with one voice," accounting for the Rehnquist Court's "lock-step march").

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The mental states of judges who are engaged in collegial deliberations are entirely different from those of judges on a court that is not operating collegially. On the D.C. Circuit of today, judges not only accept feedback from colleagues on draft opinions, they welcome it, and might even be disappointed if none is forthcoming. When a judge disagrees with the proposed rationale of a draft opinion, the give-and-take between the commenting judge and the writing judge often is quite extraordinary—smart, thoughtful, illuminating, probing, and incisive. Because of collegiality, judges can admit and recognize their own and other judges' fallibility and intellectual vulnerabilities. No judge, no matter how smart and confident, can figure out everything perfectly on his or her own. To be able to admit that one is not perfect and to look to one's colleagues to provide a safety net and a check against error is a wonderful thing in a work environment. The result is a better work product. If one's reasoning or writing admits of ambiguities that one did not intend or legal consequences that one did not foresee, these can be cured through the give-and-take of collegial deliberation. When such flaws are addressed during the drafting of the opinion for the court, dissenting and concurring opinions are rarely required.

A very good example of what I am talking about is the recent decision of the D.C. Circuit in *United States v. Microsoft Corp.*[35] I cannot discuss the merits of the case or any of its substantive details, but I can say that the work of the court was a model of collegial decision making. The issues in the case were as difficult as any that I have seen in my twenty-three years on the bench, and, at least when measured by public attention, the case was one of the most important ever heard by the D.C. Circuit.

After many months of deliberations, the court sitting en banc issued a unanimous, unsigned, 125-page opinion. There was great irony in this. Months before we heard argument, *The Washington Post* had published an article on the likely outcome of any appeal in the D.C. Circuit. The headline read, "A Game of Judicial Roulette: Microsoft's Fate Could Hinge on Which Judges Hear Appeal," and the article predicted that the court's decision would be a matter of "dumb luck," "judicial lotto," and "blue-bucket bingo," clearly implying that the political leanings of the judges would outweigh any other consid-

[35] 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

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erations in the court's ruling.[36] In July of 2001, following the issuance of our opinion, the *Post* published a very different story. The *Post* article stated:

> Seven judges of extremely diverse politics took on a politically divisive case that involved a complex record and had significant implications for the national economy. Defying almost all predictions, they put ideology aside and managed to craft a ruling that every member of the court could sign in its entirety. The D.C. Circuit did not look much like a partisan battleground last week. Rather, its judges looked, well, like judges—neutrally applying complicated precedents to even more complicated facts and striving successfully to get the right answer.[37]

A decision like *Microsoft* is forged as much out of *productive disagreement* as out of agreement. Through careful, collective exploration and consideration of the different views of each judge, a product that reflects consensus can emerge. The freedom to disagree with one's colleagues, which is fostered by collegiality, enables judges accurately and honestly, and without hesitation, to identify what is common ground and what is not, all the while remaining open to revising their views. Instead of asking each other, "What is your vote?," judges inquire, "What makes sense to you?"

On a collegial court, if there is to be a dissent in a case, judges will help one another to make dissenting opinions as effective as possible. Dissents become more precise, focused, and useful to the development of the law. In a collegial environment, a dissenting judge can more effectively identify and articulate what exactly bothers him or her about the majority position, because other judges on the panel participate in playing that out. The simple truth, however, is that most cases in the lower appellate courts do not warrant a dissent. The Supreme Court's practice of issuing multiple opinions in a relatively large percentage of their cases is an entirely inappropriate norm for the courts of appeals. We hear too many cases, most of which admit of a best answer. What the parties and the public need is that answer, not a public colloquy among judges. A multiplicity of opinions in a single case can contribute to confusion about what the law is.[38] These

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[36] David Segal, *A Game of Judicial Roulette: Microsoft's Fate Could Hinge on Which Judges Hear Appeal*, WASH. POST, Nov. 20, 1998, at D1.

[37] Benjamin Wittes, *What Judges Do*, WASH. POST, July 6, 2001, at A25.

[38] *See, e.g.*, Ginsburg, *supra* note 10, at 148 (noting that what is "[m]ore unsettling than the high incidence of dissent [in Supreme Court opinions] is the proliferation of separate opinions with no single opinion commanding a clear majority," and suggesting that this may signal less collegiality).

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days, the trend on the D.C. Circuit is to dissent less and less,[39] because the members of the court can see that collegiality enables all judges' views to be aired and routinely taken into account in the court's judgments. When dissenting opinions are written, they are more likely to indicate the presence of truly important competing legal arguments that ought to be presented to the legal community, the legislature, and the public at large.

THE FALLACIES OF "ATTITUDINAL" AND "STRATEGIC" MODELS OF JUDICIAL DECISION MAKING

Social scientists who have studied judicial behavior have developed two primary models of how judges decide cases: the attitudinal model and the strategic model.[40] The attitudinal model, which was the dominant model of judicial behavior among social scientists for decades, essentially posits that judges decide cases on the basis of their personal policy preferences and political ideologies—their "attitudes."[41] Under the attitudinal model, judicial behavior is analyzed pursuant to an assumption that judges act to maximize their policy preferences and ideologies. Because judges generally do not publicly discuss the content of their ideological preferences, scholars working within the attitudinal model have commonly used the political party of the appointing President as a proxy for a judge's "attitudes."[42]

In contrast, the strategic model, which has gained prominence in recent years, views judges as responsive to the decisions of colleagues. The strategic model does not reject the possibility that judges act in accordance with their personal ideologies; rather, it focuses on panel composition and presumed interactions among judges in an attempt

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[39] *See infra* note 65 (citing dissent statistics).

[40] *See* Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1635 (1998) (analyzing the attitudinal and strategic models of judicial decision making, and their ability to answer the question, "[H]ow do courts of appeals judges actually decide cases?"); *see also* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 90-94 (1997) (discussing strategic voting and suggesting that strategy plays a role in both the attitudinal and strategic models of decision making).

[41] For a general discussion of the attitudinal model of judicial decision making, see DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 134-57 (1976); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265-79 (1997); George, *supra* note 40, at 1642-55; Harold J. Spaeth, *The Attitudinal Model*, *in* CONTEMPLATING COURTS 296 (Lee Epstein ed., 1995).

[42] *See, e.g.*, George, *supra* note 40, at 1652 ("[O]n average, judges reflect the ideological positions of the President who appoints them.").

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to determine how judges influence one another in decision making.[43] Under this model, a judge's vote may not always reflect his or her "sincere" ideological preferences, because the internal dynamics of the panel may lead judges to compromise their ideological preferences to maximize "strategic" goals—such as being in the majority, influencing the content of the majority opinion, avoiding writing a dissent, or building capital for future cases. Both the attitudinal and strategic models of judging rely solely on quantitative data to assess judicial decision making. Qualitative variables—such as what the law requires, the parties' arguments, the actual content of judges' deliberations, and the nuances of opinions—are not taken into account.

I have never been persuaded by quantitative empirical studies purporting to show that the personal politics of judges substantially influence judicial decision making, nor by theories that posit that judges act to maximize their ideological preferences.[44] In order to give content to my views, I should briefly explain the nature of the debate that I have had with legal scholars who seek to use quantitative tools to measure the qualitative work of appellate judges.

My most notable encounters have been with my friend and colleague, Richard L. Revesz, the Dean of the New York University School of Law. In 1997, in an article in the *Virginia Law Review* entitled *Environmental Regulation, Ideology, and the D.C. Circuit*,[45] Dean Revesz argued that, in a subset of cases involving challenges to actions taken by the Environmental Protection Agency (EPA), political ideology "significantly influence[d]" judicial decision making on the D.C. Circuit.[46] Dean Revesz's study principally addressed so-called "procedural challenges" to decisions of the EPA in which the court had re-

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[43] For a general discussion of the strategic model of judicial decision making, see EPSTEIN & KNIGHT, *supra* note 17, at 1-18; Lee Epstein & Jack Knight, *The New Institutionalism, Part II*, LAW & CTS., Spring 1997, at 4; Melinda Gann Hall & Paul Brace, *Order in the Courts: A Neo-Institutional Approach to Judicial Consensus*, 42 W. POL. Q. 391 (1989).

[44] Nor do I give much credence to the theory that judges are self-interested pursuers of prestige, reputation, careerist ambition, or influence. *See, e.g.*, Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983) (hypothesizing that "self-interested judges seek prestige"); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 625-34 (2000) (discussing judicial motivation of Supreme Court Justices and hypothesizing that they are motivated by, inter alia, reputation, ambition, and influence). *But see* Lynn A. Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1609 (2002) (refuting the self-interest hypothesis with the proposition that "the modern judiciary rests on the expectation that judges will behave in an altruistic fashion" (emphasis omitted)).

[45] Revesz, *Environmental Regulation*, *supra* note 8.

[46] *Id.* at 1719.

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viewed agency action under the Administrative Procedure Act's familiar "arbitrary and capricious" standard. Relying on multivariate regression analyses that purported to quantify the voting patterns of judges, Dean Revesz argued that, in resolving these "procedural" appeals, judges appointed by Republican Presidents voted differently than did judges appointed by Democratic Presidents.[47]

In focusing on "procedural" challenges to EPA action, however, Dean Revesz minimized his findings that there were *no* statistically significant effects related to judges' political leanings in so-called *Chevron* cases.[48] *Chevron* held that where Congress has explicitly or implicitly delegated authority to an agency to implement a statute, the courts must defer to that agency's reasonable statutory interpretation.[49] The Revesz study found that, in deciding *Chevron* issues, the judges decided appeals without regard to their presumed political and ideological preferences.[50]

When a court finds agency action arbitrary and capricious in a case involving a so-called "procedural" challenge, it normally sends the matter back to the agency so that the agency can better *explain* its action.[51] In contrast, a *Chevron* reversal is based on a judgment by the court that the agency lacks statutory authority to take the action that is under review.[52] The agency rarely gets a second chance to interpret the disputed statute. If judges really wanted to impose their political ideologies on the administrative process, one would expect them to do so in *Chevron* cases, which, after all, have more permanent and significant legal and regulatory consequences. It is telling that Dean Revesz found that judges on the D.C. Circuit reach decisions in *Chevron* challenges without regard to their presumed political leanings.

Some of my doubts about the significance of Dean Revesz's study have been fueled by an article by Professor William Jordan in the *Ad-*

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[47] *See id.* at 1759-60 (reporting the results of the multivariate regression analysis).

[48] *Id.* at 1748.

[49] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984).

[50] Revesz, *Environmental Regulation*, *supra* note 8, at 1748; *see also* Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 177 (2002) ("Between 1986 and 1994 . . . there were no statistically significant differences in the way in which Democrats and Republicans voted on issues of statutory interpretation.").

[51] *See, e.g.*, Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1048-49 (D.C. Cir. 2002) (remanding the case to the FCC for further consideration).

[52] *See, e.g.*, Hill v. Norton, 275 F.3d 98, 99 (D.C. Cir. 2001) (vacating the Secretary of the Interior's decision to exclude mute swans from the list of migratory birds protected by the Migratory Bird Treaty Act).

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ministrative Law Review.[53] Professor Jordan examined data similar to that examined by Dean Revesz, but he arrived at very different conclusions. Jordan, in contrast to Revesz, analyzed voting patterns at the level of the individual *issues* raised in particular appeals. He examined the individual votes cast by D.C. Circuit judges on 133 issues in eighteen cases in which the court reversed EPA rulemaking decisions between 1985 and 1995. Jordan discovered virtually the opposite of what Revesz reported: Overall, "the Republican dominated panels tended to favor environmentalist positions more often than did Democratic dominated panels."[54] In fact, this difference was even more pronounced in so-called "procedural" appeals involving "arbitrary and capricious" review, as opposed to *Chevron* review.[55] Jordan thus concluded that

> [t]he political explanation simply does not seem to fit. It is much more likely that the judges struggled with the issues and reached reasoned conclusions without particular regard to their own preferences.[56]

Ideological voting, in other words, could not be discerned from the evidence.

Professor Deborah Hensler, the former Research Director at the Rand Institute for Civil Justice and now a widely respected scholar at Stanford Law School, argues that, because of the inherent limitations of certain quantitative analyses, empiricists who aim to achieve credible results in the study of judicial decision making should employ *qualitative* research techniques to supplement their quantitative data. Professor Hensler recognizes that multiple regression and its variations can be enormously powerful research tools, but she cautions that "many of the civil justice phenomena that need study are not suited to current quantitative analytic technique."[57] According to Professor Hensler, in studies of the judicial process, "[r]esearchers simply do not have available very good quantitative approaches to studying large social organizations [like courts] or interaction processes [within the courts]."[58] Furthermore, she argues that

> [t]he very factors that make the U.S. civil legal system so interesting to

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[53] William S. Jordan, III, *Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45 (2001).

[54] *Id.* at 74.

[55] *Id.*

[56] *Id.* at 72.

[57] Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, LAW & CONTEMP. PROBS., Summer 1988, at 55, 63.

[58] *Id.*

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> study—the wide range of situations that might stimulate legal claiming, the wide range of opportunities for strategic lawyering [and judging]—when coupled with the lack of public information on correlates and outcomes of legal behavior . . . raise huge obstacles to drawing valid inferences about [judicial] behavior. . . . The limitations on the data that supports most empirical analysis inevitably . . . leads to skepticism about the robustness of any conclusions drawn from these data.[59]

Quantitative studies of judicial decision making thus must be viewed with great caution. Attitudinal studies of judicial behavior, for example, have very limited capacity to explain how judges decide cases because they leave crucial qualitative elements of judicial decision making out of the equation. Collegiality is a *qualitative* variable in appellate decision making,[60] because it involves mostly private personal interactions that are not readily susceptible to empirical study. Regression analysis does not do well in capturing the nuances of human personalities and relationships, so empirical studies on judicial decision making that rely solely on this tool are inherently flawed.

The fundamental principle of collegiality is the recognition that judging on the appellate bench is a *group* process. Too often researchers ignore the fact that appellate judges sit in panels of three and decide cases together through deliberation. A model that takes each appellate judge as an atomized individual casting a purely individual vote in any given case will not produce a good explanation of how judges decide cases. The appellate courts are courts of collective decision, and appellate judges act collectively *as a court* in disposing of cases.

Any credible attempt to explain judges' behavior, therefore, must take account of the collective nature of the enterprise. Imagining judges reflecting alone in the solitude of their chambers may tap into a cultural fantasy of the brilliant, intellectual judge in the tradition of Learned Hand. But as Professor Gunther's biography of Learned Hand reveals, Hand himself was a collegial participant on a highly collegial court.[61] Appellate judging is not a process whereby three soli-

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[59] Deborah R. Hensler, Beyond Proseletyzing: Some Thoughts on Empirical Research on the Law 4 (Mar. 15, 2002) (unpublished manuscript, on file with author).

[60] *See, e.g.*, COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 40 (1998) (noting that collegiality's effects "cannot be quantified or measured"), *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf; Tacha, *supra* note 9, at 591 ("One cannot express the value of collegiality quantitatively or understand its importance except in context.").

[61] GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994); *see, e.g.*, *id.* at 288 (describing the high quality of the collegial exchanges between Hand and his colleagues, due in part to their use of a preconference memo system that promoted

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tary judicial minds reason on separate tracks to decide how to vote. While a judge spends much time working alone, the crucial decisional points in appellate judging occur in the company of, and in active engagement with, one's colleagues.[62]

To be sure, judges have personal views, like other thoughtful people who reflect on issues affecting our society. And judges do not stop having views when they become judges. Nor should they. But knowledge of judges' individual partisan and ideological preferences does not tell you much about what happens when judges enter into the collective process of appellate judging. The attitudinal model infers too readily that individual preferences are directly reflected in decisions that are essentially collective decisions. Group decision making does not lend itself to the unconstrained expression or imposition of an individual's preferences,[63] at least not in appellate judicial decision making where judges deliberate as equals.

In contrast to the attitudinal model, the strategic model of judicial decision making does consider the collective nature of the enterprise and analyzes judicial decision making as a group process. The strategic model posits that judges are sophisticated actors who do not make decisions based merely on their ideological attitudes. Indeed, the strategic model sees judges as strategic actors whose decisions take into account the preferences of other actors, the choices they expect other actors to make, and the institutional context in which they act.[64] Judges are constrained by, and responsive to, the behavior of other

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group deliberation rather than individual decision making).

[62] Professors Kornhauser and Sager usefully distinguish between four different kinds of collective enterprises: "distributed enterprises" in which individuals act in isolation but "the prior structuring of their tasks assures the necessary coordination of effort," as in an assembly line; "team enterprises" in which members must coordinate their actions and collaborate during the performance of the task, as in orchestras and basketball teams; and "redundant enterprises," which consist of multiple independent efforts coordinated by an external structure, such as the judging of Olympic gymnastics; and finally, there are "collegial enterprises" in which collaboration, deliberation, interaction, and exchange are crucial, and the product belongs to the enterprise in a "uniquely collective way." Kornhauser & Sager, *The One and the Many*, *supra* note 9, at 3-5. Collegial enterprise "involves a shift in the agency of performance from the individual to the group." *Id.* at 5.

[63] *See* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 189 (1981) ("The organizational principles of collegiality and random rotation . . . profoundly shape decision making in intermediate federal courts. No circuit judge, however motivated, is entirely a free agent. Judging is a collective enterprise governed by established rules and routines to which any individual member is expected to conform.").

[64] Epstein & Knight, *supra* note 43, at 5.

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judges. Judges might, it is argued, vote against their ideological preferences in order to influence the content of a majority opinion. Or judges may be "loss averse," and desire to be on the winning side rather than register a dissenting vote. It is also hypothesized that judges may vote against their preferences in cases on which they do not feel strongly, in the implicit knowledge that other judges will reciprocate in future cases in which they do feel strongly, thereby engaging in subtle vote trading. Judges' choices can best be explained, according to this account, as strategic behavior, and not merely as a reflection of ideological preferences.

The strategic model of judicial behavior is arguably an advance over the attitudinal model, because it at least acknowledges that collective decision making is the sine qua non of judging. It also takes note of the importance of the deliberative *process* among judges in the production of judicial outcomes. These insights help us get past the notion that judges' personal ideological attitudes are the crucial determinants of judicial decisions.

Nonetheless, the strategic model provides a foggy lens through which to assess judicial decision making. An example of this is seen when scholars attempt to explain why judges on the D.C. Circuit dissent so infrequently. In 2001, the court's dissent rate was less than 1% in all cases and 4.8% in cases with published opinions.[65] The court also rarely rehears cases en banc.[66] Dean Revesz has offered a strategic explanation of why the judges on the D.C. Circuit dissent so infrequently, even when, as he claims, the court is so ideologically divided.[67] The Dean argues that panel composition determines how judges vote: a "Democratic" judge, allegedly in favor of environmental regulation, may vote to reverse the EPA in a case brought by

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[65] *See* The Clerk's Office, U.S. Court of Appeals for the D.C. Circuit, Statistics for 1986-2001 (n.d.) (unpublished document, on file with author) (providing annual statistics for full or partial dissents as a percentage of published and total opinions). In 2000, the dissent rate was 1.6% overall and 7.8% in cases with published opinions; in 1999, 1.8% overall and 8.9% in published opinions; in 1998, 2.1% overall and 9.1% in published opinions. *Id.*; *see also* Edwards, *Collegiality*, *supra* note 6, at 1359 (reporting an overall dissent rate of 2-3% in all D.C. Circuit cases between 1995-97, and 11-13% of cases in which the court published an opinion).

[66] *See* Ginsburg & Boynton, *supra* note 10, at 259-60 (noting that the number of en banc cases heard by the D.C. Circuit declined from sixty-three in the 1980s to thirty-three in the 1990s).

[67] *See* Revesz, *Environmental Regulation*, *supra* note 8, at 1733-34 & n.48 (noting reasons why there are not more appellate dissents, for example, that when a judge sits with two colleagues from the other party, she moderates her views "in order to avoid having to write a dissent").

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an industry group when sitting with two "Republican" judges favorable to industry concerns, but not when sitting with at least one other Democrat.[68] According to Dean Revesz, "[a] judge's vote is affected by the identity of her colleagues such that the ideology of the majority of the panel prevails and the ideology of the remaining member is . . . suppressed."[69]

By ignoring the possible effects of collegiality—that is, the possibility that intrapanel discussion can lead to a mutually agreeable result—scholars can assume that judges make strategic decisions to bury their dissenting views. On this theory, judges who are would-be dissenters go along with the views of the panel in order either to avoid having to write a dissent, or to help foster a climate in which they will be less likely to have to respond to future dissents when their preferred ideological position finds itself in the majority.[70] Notice that this thesis forecloses any other explanation for judicial voting. If a so-called "Republican" judge is reviewing an agency decision favoring an "industry cause," she votes "ideologically" if she votes to uphold the decision and "strategically" if she votes against it. In either event, according to this explanation, judicial "ideology" is fixed and it substantially affects decision making. A judge either expresses this ideology or suppresses it. There is no account of the effects of dialogue among judges. Ideologies do not influence one another; they cannot be moderated; they do not change. By systematically undervaluing the possibility of collegiality, an analysis of this sort overemphasizes the role that partisanship plays in determining legal outcomes. Interestingly, in a subsequent article, Dean Revesz acknowledged that his data do not foreclose an alternative "deliberation" hypothesis, under which judges typically vote sincerely, with their sincere views continually shaped and reshaped by those of the judges around them.[71]

"The use of the term 'strategic' with regard to judging is implicitly pejorative,"[72] suggesting judgments that are only coincidentally related to a judge's view of what the law requires. But this pejorative inference is based on the fallacious assumption that we must conceive of

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[68] *Id.* at 1732.

[69] Revesz, *Reply*, *supra* note 8, at 839.

[70] *See, e.g.*, Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 20 (1993) (discussing "'[g]oing-along' voting" as an "example of the influence of leisure-seeking on judicial behavior").

[71] *See* Revesz, *Congressional Influence*, *supra* note 8, at 1112 (noting that Revesz's prior analysis may be consistent with a "deliberation hypothesis" where "judges vote sincerely, but deliberations affects their sincere views").

[72] Kornhauser & Sager, *The One and the Many*, *supra* note 9, at 52 (1993).

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judges' behavior only in terms of a binary opposition between acting "sincerely" in line with their ideological or other purely personal preferences and acting "strategically" in derogation of these preferences. This is a paltry way of describing judicial behavior.[73] The dichotomy ultimately has no resonance in the experience of judging. Judges, as I shall suggest later, are subject to cultural and institutional forces very different from other actors, such as politicians or business executives.

More true to life is the give and take of collegial deliberation, during which a judge's approach to a case must withstand careful scrutiny and criticism from his or her colleagues.[74] What results from this interaction can be, and often is, a shift of a judge's initial views on a case. The shift can range from refinement and recharacterization to compromise and, sometimes, even a change in one's view of the bottom line. Are judges to be considered "sincere" only if they maintain their initial views in the face of good observations by smart colleagues who convincingly point out ways to improve an opinion's reasoning? Are judges to be considered "strategic" because, upon confronting colleagues' views, they realize that some parts of an articulated argument have more merit than others, or that some initial reasoning or language can be changed in the interest of clarity or consensus without sacrificing any principle?

During deliberations, judges must hash out what precisely it is that the court will agree to hold. Arriving at a holding is not a binary phenomenon that reflects either "sincerity" or "strategy." It is a complex conversation, both in conference and during the drafting of opinions, in which judges, individually and collectively, often come to see things they did not at first see and to be convinced of views they did not at

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[73] *See id.* ("The simple line between strategic and sincere behavior seems inapt to multi-judge courts . . . ."); *see also* Caminker, *supra* note 9, at 2310 n.41 ("'Strategic' tactics designed to 'persuade' a colleague to modify her views . . . do not count as 'strategic behavior' for my purposes. If by using such tactics one Justice convinces the second to believe sincerely in rule *X*, neither Justice engages in 'strategic voting' because both pursue their (ultimate) sincere positions."). Kornhauser and Sager also usefully distinguish between expressing preferences and rendering judgments. *See* Kornhauser & Sager, *Unpacking the Court*, *supra* note 9, at 84-85 (comparing the subjective nature of preference with the more objective nature of judgment, and arguing that "[a]t the core of the distinction between expressing a preference and rendering a judgment lies the proposition that some questions have 'right' or 'correct' answers"); *see also* Caminker, *supra* note 9, at 2303 (embracing "the conventional view that a *normative* account of adjudication should view judges as rendering judgments rather than expressing personal preferences").

[74] *See* COFFIN, THE WAYS OF A JUDGE, *supra* note 10, at 171-75 (describing judicial collegiality as "unremitting criticism" by one judge of another's "perceptions, premises, logic, and values").

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first espouse. As judges engage with their colleagues on a case, from oral argument and conference to opinion drafting and revising, their views evolve out of an interdependent push and pull. They do not misrepresent or suppress their "sincere" views to further a "strategic" purpose. In fact, it is specious to distinguish one judge's "sincere" views from another's when all are working as a group to fashion as correct, accurate, and clear a holding as possible. If the end product looks different from what a judge had in mind at the beginning of the process, that fact reflects the very nature of the group process in which each judge can only contribute to a group product that is ultimately attributable to the court. The group enterprise may result in the omission of some of an individual judge's unique reasoning and turns of phrase because other judges find them unclear or inaccurate. This is neither suspect nor tragic, for a judge's job is not "self-expression" through the law. It is to decide cases accurately and clearly in concert with colleagues.

To characterize this phenomenon as judges "strategically" deciding against their "sincere" preferences in their interactions with colleagues is a bit perverse. The theorists who embrace this construct of judicial decision making seem to me to be seduced by the extreme simplicity of the model. Because they can only "measure" two variables—judges' political parties and case outcomes—they fall into the trap of thinking that these two variables are sufficient to model a very complex process. Where theorists of the strategic model might see a judge sacrificing his or her principles or convictions to respond to colleagues' pressure, I see a judge who is open and responsive to colleagues' arguments, criticisms, and insights, with the result being the thoughtful and efficient development of a judicial outcome through the deliberative process.

The strategic model suggests that judges, on occasion, suppress preferences in the service of achieving larger personal or ideological goals. And under the strategic model, no matter how a judge votes—"sincerely" or "strategically"—the votes only coincidentally correspond with what the *law* requires. This is a disquieting view of the judicial enterprise, and it has the unfortunate effect of badly distorting the public's view of how judges operate.

Deliberations among judges are characterized more accurately as a process of dialogue, persuasion, and revision. To be sure, judges do develop a familiarity with their colleagues' inclinations, habits of mind, and patterns of reasoning. Over time, they may be able to anticipate how colleagues will approach issues. This is all part of getting

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to know how one's colleagues think. Of course this knowledge affects how judges frame and present their arguments to other judges. Sometimes a judge will express reservations with the majority reasoning and wait to see how an opinion "writes" before deciding whether to join. And the writing judge may draft the opinion in a way that is more likely to bring the hesitating judge on board. These are not strategic sacrifices of principle, exchanges of votes for changes in opinion content, or the trading of votes for future votes. Rather, they are the expression of the consensual process by which the precise contours of agreement or disagreement among several judicial minds take shape in a given case. A judgment, after all, is the agreement of the majority of a panel on a precise holding. And coming to a multijudge *agreement* is not a straightforward matter of voting for one side or another. Rather, it is a complex interplay of reasoning that may be overlapping, contiguous, related, or opposed, and which must, if we do our job well, ultimately distill to a clear holding that tells the parties and future litigants what the law is.

INSTITUTIONAL CONSTRAINTS IN FURTHERANCE OF COLLEGIALITY

There is one other social science model that seeks to shed light on judicial decision making: "new institutionalism."[75] The proponents of this model "treat[] courts as institutions rather than as platforms for the display of individual [judges'] attitudes."[76] These "law-and-courts" scholars thus recognize that strategic behavior does not paint the full picture of judicial motivation. It is of course possible to define institutions in strategic terms and to characterize institutional behavior as strategic self-promotion. But this rational choice approach is not very good at capturing our conventional understanding of courts or the motivations that judges as institutional actors might possess.[77] Profes-

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[75] A good example is Howard Gillman, *The New Institutionalism, Part I: More and Less than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics*, LAW & CTS., Winter 1996-97, at 6.

[76] *Id.* at 6. Gillman's approach, "interpretive-historical institutionalism," presents an alternative to rational choice/game theory institutionalism, and intends to shed light on dimensions of institutions "that are not usefully described as strategic." Howard Gillman, *Placing Judicial Motives in Context: A Response to Lee Epstein and Jack Knight*, LAW & CTS., Spring 1997, at 10, 10-11.

[77] Legal scholars have recently used rational choice theory to study the Supreme Court's relation to other institutions within the governmental system. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 3-5 (1991) (analyzing the implications of public choice for the American legal system); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 354-59

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sor Howard Gillman, a proponent of the new institutionalism model, suggests that, "in the absence of evidence that institutional actors transform all nonstrategic missions into strategic opportunities," we should adopt a concept of institutions that can accommodate a variety of normative goals, including

> (a) experiences of duty and professional obligation, (b) understandings of shared purpose, (c) concerns about the maintenance of corporate authority or legitimacy, and (d) participation in a routine—each of which suggest the presence of a kind of motivation [that is] something other than rational, self-interested, strategic, and calculating.[78]

Rogers Smith, another proponent of the model, notes that institutions "influence the self-conception of those who occupy roles defined by them in ways that can give those persons distinctively 'institutional' perspectives."[79]

There is little doubt that institutional perspectives inform the judicial function as judges internalize the institutional mission of the judiciary. Institutional rules and norms motivate judges to behave in ways that further the institutional mission. They help to form judges' motivations and influence how they do their job.[80] Thus, the new institutionalism model provides a more useful framework for assessing judicial decision making than the attitudinal and strategic models.

In my view, "institution" broadly includes the rule of law, not just the court on which a judge sits, or local circuit precedent. Judges do feel loyalty to their own courts. But we also feel loyalty to the federal courts and the U.S. judiciary generally. We have fellow feeling even

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(1991) (analyzing the public choice model's discussion of the Court, Congress, and the President in statutory interpretation); John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 263-64 (1992) (examining judicial statutory interpretations as "reflecting the strategic setting in which they are announced," particularly in regard to both the Congress that enacted a particular statute and the Congress that sits contemporaneous to the Court's interpretation).

[78] Gillman, *supra* note 75, at 8.

[79] Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 95 (1988).

[80] Although I do not favor the characterization in Judge Posner's analogy of the pleasure of judging to the utility one gains from playing a game according to its rules even when one can get away with cheating, *see* Posner, *supra* note 70, at 28-30 (comparing the role of judging to the role of playing a game and noting that in either case it is the act of complying with the rules that allows one to know one is successfully playing the role, and to enjoy playing the role), my institutionalist argument here is not completely dissimilar in some respects. That is, judges gain satisfaction from playing by the "institutional rules of judging" and become invested in playing the judge role according to the rules.

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for judges abroad. But most fundamentally, we feel that we owe a duty to the law itself.

Collegiality plays a very important role in "institutionalizing" judges into this shared mission. An institutional mission can find expression in the "collection of structures, procedures, rules, and customs that characterize the experience of being associated with a particular corporate form."[81] These rules are normally promulgated by the members of a court, so the judges have a real stake in their enforcement. The consequence is a cross-fertilizing effect between collegiality and internal rules. Collegiality fosters the promulgation of institutional rules, and the presence of these rules promotes collegiality.

On the D.C. Circuit (and on other federal appellate courts as well), internal operating rules and procedures facilitate cooperation among judges and infuse quotidian interactions with a sense of shared purpose. For example, on the D.C. Circuit, the random assignment of judges to cases is mitigated by the rule that every judge must sit with every other active judge on the court at least four times in a term. This rule ensures that each judge works with every other judge. It prevents any one group of judges from sitting together too often and promotes familiarity and good working relationships among all judges on the court. It also ensures the appearance of fairness from a public perspective. Randomness is "fair," but will not always appear fair. This rule is an example of how the promotion of collegiality among judges and the fulfillment of institutional goals are inextricably intertwined and cross-fertilizing. It strengthens the institutional mission of the court when all judges are familiar with each other in their work. The rule also promotes collegiality.

Another rule that has been important to the rise in collegiality on the D.C. Circuit is an agreement among the judges that, absent a grave emergency, the court will not use visiting judges to decide cases on our docket.[82] This rule implies no disrespect for our judicial colleagues from other courts. Rather, working without visiting judges allows us to interact with fewer outside distractions. The D.C. Circuit docket largely consists of very dense administrative law cases in appeals that often include huge records and numerous parties with their numerous briefs. It is not an inviting caseload for judges who are not

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[81] Gillman, *supra* note 75, at 8.

[82] The D.C. Circuit "has not sat with a visiting judge since at least mid-1994." Ginsburg & Boynton, *supra* note 10, at 259.

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used to it. To ensure expeditious issuance of our decisions, balanced work assignments among our judges, and coherence in the law of the circuit, we decided that only the judges of the court should do the work of our court.[83] The rule allows us to maintain tight control over the law of the circuit. We can monitor and react to one another very closely. I have noticed the impact of this rule on the cohesiveness of both the group and circuit law. In my view, the adoption of this rule in the early-1990s represented a crucial turning point for the D.C. Circuit at a time when collegiality was at a low point.

Deliberation is one of the most important components of collegiality. Rules that structure our deliberations ensure that we deal with substantive ideas effectively as a group. For example, the most senior active judge presides during conferences, and judges speak in inverse order of seniority. The senior judge in the majority assigns opinions. Although simple, these rules help keep our conferences professional, respectful, and orderly. Collegiality does not consist of spontaneous conversations by the water cooler. It consists primarily of ordered deliberation in which all views are aired and considered to every judge's satisfaction.

Once opinions are assigned, there are rules that govern the circulation of opinions, for collegial deliberation is most effective when there is a text with which to work. For example, on the D.C. Circuit, judges who have been assigned to write opinions must endeavor to circulate draft opinions within ninety days of assignment. Judges must respond to draft opinions by panel members within five days. Prior to issuance, a majority opinion must be circulated to the entire court for seven days. If a judge wants to write a separate concurring or dissenting opinion, she or he must do it within thirty days after the third judge has concurred in the majority opinion. And a judge who has three or more assigned opinions pending from a term that are not in circulation to the panel by August 15 is not allowed to sit on any new cases until this backlog is cleared.

These rules are taken very seriously by the members of the court. They structure the paths by which judges collaborate on opinions and

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[83] Michael Abramowicz proposes that en banc decisions should be made *entirely* by visiting judges randomly selected from other circuits to decrease circuit parochialism. *See* Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1619 (2000) ("Using visiting en bancs will ensure that panel decisions are subject to a form of outside review, rather than review by judges' immediate colleagues."). In my view, this proposal would have huge costs for collegiality and for the coherence of circuit precedent.

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share ideas about how a disposition of the court can be improved in accuracy and clarity. The deadlines ensure that work gets done expeditiously, and they protect against maverick behavior that might run counter to the court's mission. But the most important function of the rules, I think, is to establish a common routine and understanding about how we do our work together. When all the judges subscribe to common norms about how to work together and how to offer criticisms and suggestions, it sets the expectation that this is a shared endeavor.[84] These group norms also free up judges to disagree with each other and to write separately, because there are rules that tell us how to do so. With these rules, new judges who join the court are brought into the fold of common understanding of institutional workings.[85] Again, a judge's experience of "institutionalization" and the experience of collegiality and collaboration are intertwined and cross-fertilizing.

DIVERSITY ON THE BENCH IN FURTHERANCE OF COLLEGIALITY

The term "collegiality" may evoke the clubbiness, exclusivity, and homogeneity found among certain privileged classes of people and elite institutions in society. The idea of collegiality among judges perhaps conjures up images of wood-paneled chambers in which judges make plans to play golf.[86] The collegiality which I have thus far described is obviously very different from this. The collegiality of which I speak embodies an ideal of diversity and envisions judges drawing on their differences in the process of working together to get the law right.

There are two major types of "diversity." Researchers on group decision making typically focus on diversity in terms of variations in expertise or information. Researchers on organizational demography focus on characteristics such as age, race, and sex. There are some in-

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[84] *Cf.* Paul Brace & Melinda Gann Hall, *Integrated Models of Judicial Dissent*, 55 J. POL. 914, 920 (1993) ("[T]he neo-institutional approach to judicial decision making stresses the independent role of standard operating rules, external decisional rules, and organizational structures in defining the values, norms, and interests of the judicial institution.").

[85] *See* HOWARD, *supra* note 63, at 222-25 (discussing "freshman socialization" in the federal judiciary).

[86] *Cf.* William L. Reynolds & William M. Richman, *Justice and More Judges*, 15 J.L. & POL. 559, 563 (1999) (noting that the "discredited and elitist collegiality of old-boys-and-girls sitting-around-sipping-sherry" is different from the "collegiality of judges who know one another well enough to think alike and through that group think to achieve a coherent and stable body of law").

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teresting and useful precepts to be drawn from this research, even though certain findings are superficially inconsistent. In the end, however, as I will explain, the findings are not inconsistent with the conclusion that both forms of diversity enhance collegiality in judicial decision making.

The research on diversity in organizations suggests a diversity paradox. Under several major theories, the bulk of the evidence suggests that diversity is likely to impede group functioning in organizations.[87] However, information and decision-making theories posit that variance in group composition can make for better decisions because of an increase in the skills, abilities, information, and knowledge that diversity brings.[88] Diversity is thus valuable when it brings a rich range of information and perspectives.[89] Yet, the same heterogeneity that provides for different perspectives and the "cognitive conflict" that can lead to better decisions may also result in increased emotional conflict, which impedes group functioning.[90]

Research on the interaction between informational diversity and member familiarity in groups suggests another paradox:

> [T]he more familiar group members are with one another, the less likely they are to possess unique knowledge or different points of view. Thus, while familiar groups may be better equipped psychologically to resolve conflicts effectively, they may be less likely than stranger groups to experience the knowledge asymmetries from which cognitive conflicts arise. On the other hand, groups of strangers are likely to know different facts and have different perspectives, but they may lack the social ties and interpersonal knowledge to tap into the spoils of their diversity.[91]

This suggests that the ideal group performance could be expected from groups composed of diverse yet familiar members. In other words, without familiarity, it is difficult for the group to take advan-

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[87] *See* Katherine Y. Williams & Charles A. O'Reilly, III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, *in* 20 RESEARCH IN ORGANIZATIONAL BEHAVIOR: AN ANNUAL SERIES OF ANALYTICAL ESSAYS AND CRITICAL REVIEWS 77, 121 (Barry M. Staw & L.L. Cummings eds., 1998) (reviewing forty years of empirical research as suggesting that group heterogeneity may result in better decisions but also increased emotional conflict).

[88] *Id.* at 86-87.

[89] *See id.* at 87 ("Researchers largely agree that functional or background diversity provides the range of knowledge, skills and contacts that enhances problem solving . . . ."); *see also* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1024 (1996) (citing studies finding that diversity leads to better decision making in workplaces and in juries).

[90] Williams & O'Reilly, *supra* note 87, at 90-121.

[91] Gruenfeld et al., *supra* note 24, at 12-13.

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tage of the unique knowledge and perspectives that each diverse member may have to share.

I have experienced the benefits of diversity in expertise, knowledge, and information among my colleagues on the bench. It is clear to me that when the court has been collegial, this diversity has improved our decision making. Differences in professional and personal background, areas of expertise, and ideological perspectives make the deliberative process more lively, rich, and thorough. In a judicial environment in which collegial relations are fostered, diversity among the judges makes for better-informed discussion. As I have written elsewhere, diversity in a collegial setting

> provides for constant input from judges who have seen different kinds of problems in their pre-judicial careers, and have sometimes seen the same problems from different angles. A deliberative process enhanced by collegiality and a broad range of perspectives necessarily results in better and more nuanced opinions—opinions which, while remaining true to the rule of law, over time allow for a fuller and richer evolution of the law.[92]

Recognizing the importance of diversity can undermine some reductive assumptions that inform certain scholars' work on judging. For example, judges who are assigned to a particular political category, such as "liberal" or "conservative," or Democratic or Republican, are often assumed to be of like mind and to have policy preferences on most substantive legal issues that are indexed with these political labels.[93] This is likely to be accurate in an uncollegial environment, because judges are more likely to flatten out their differences and allow themselves to be grouped into the most obvious categories available. Just the opposite happens on a collegial court. As our court has become more collegial, I have seen my colleagues become familiar with each other along a variety of dimensions. As a result, the party of the appointing President recedes in importance and the multitude of other characteristics differentiating each judge comes to the fore. When this multidimensional diversity became visible, judges began to encounter each others' differences without the battle mentality that existed in my earlier days on the D.C. Circuit. As judges come to see each other as multidimensional people with a variety of reasons for their different views, it is more likely that they will present and consider a greater variety of legal arguments without regard to whether

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[92] Edwards, *Race and the Judiciary*, *supra* note 6, at 329.

[93] *See* Wald, *supra* note 9, at 252 ("The diversity judges bring to the table, like that of all Americans, is not bipolar.").

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the arguments are associated with a "liberal" or "conservative" perspective.

The existence of collegiality on a court, then, greatly affects whether the judges on that court will be able to capitalize on their diversity. A court that can use the diversity of its members productively will make better decisions than a court that cannot. I have found that, as my court became more collegial, the judges came to enjoy what made them different.

I have thus far been speaking of "diversity" in the sense of differential expertise, experience, and professional background—that is, diversity that denotes the possession of unique knowledge, information, or perspectives by group members. Demographic diversity on a court—such as race, sex, age, and socioeconomic and geographic background, for example—raises different issues. It is more difficult to explain how the race or sex of judges affects collegiality in judicial decision making.[94] Do these diverse voices make it easier or harder to attain and maintain a collegial environment?

Research on demographic diversity in organizations suggests that increased diversity of race, ethnicity, and gender can have negative effects on group functioning because it leads to increased stereotyping and makes communication more difficult and conflict more likely.[95] But, as noted earlier, diversity research also shows that diverse groups have access to diverse information, which may enhance group processes.[96]

My own experience suggests that demographic diversity enhances collegiality. The studies that suggest otherwise are not focused on judicial settings, where judges are equal in status, pay, authority, and position. Most judges on the federal bench are very smart and accomplished, so they are not vying for recognition on these terms. Indeed, we appreciate and admire unique feats of scholarship among our colleagues, because it aids us in our work and brings respect and prestige to the court. I see no reason why race, sex, or ethnic diversity should be disruptive in this context, and I have not experienced it as a disruptive force on my court. If anything, demographic diversity lends to the

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[94] *Cf.* Heather Elliott, *The Difference Women Judges Make: Stare Decisis, Norms of Collegiality, and "Feminine Jurisprudence": A Research Proposal*, 16 WIS. WOMEN'S L.J. 41, 47 (2001) (hypothesizing that "[f]emale judges may respond more strongly to the doctrines of restraint" and be more drawn to consensus and collegiality).

[95] *See* Williams & O'Reilly, *supra* note 87, at 104-14 (presenting research that demonstrates the negative effect of demographic diversity on group functioning).

[96] *Id.* at 86-87.

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richness of deliberation among members of a court.[97] In my experience, increased demographic diversity often fosters the informational diversity that promotes improved appellate decision making.

I believe that a collegial court becomes greater than the sum of its diverse parts and that demographic diversity can promote, not impede, collegiality. Why? Judges are whole people who have multiple identities and experiences. But judges also serve as equals who are obliged to enforce the law no matter their distinctive perspectives. "A more diverse judiciary . . . reminds judges that all perspectives inescapably admit of partiality. With this understanding, judges are less likely to fall prey to the temptations that trouble scholars and members of the public who believe that judicial decision making is mostly a product of personal ideology."[98]

THE NECESSITY OF LEADERSHIP

Professor Lynn Stout has examined social science literature in her attempt to explain why judges generally decide cases according to law, even though they have no external economic incentives to do so.[99] She notes that social scientists have determined that several factors lead people to cooperate, rather than betray one another or "defect," in experiments. These factors may be relevant to theorizing about the conditions under which judges will act collegially. First, Professor Stout notes that people tend to follow the suggestions of their leadership.[100] This finding resonates with my experience as Chief Judge of my court from 1994 to 2001.

When I took over as Chief Judge of the D.C. Circuit, I was determined to promote collegiality as I have described it. And I was forthright in stating my intentions. Of course, my intentions and my colleagues' willingness to subscribe to my views were two different things—the former did not guarantee the latter. So I decided to lead by deed, following a very simple formula. First, I made it clear that "ideology" would have no effect whatsoever on my work as the administrative and managerial head of the court. Rather, my mission was to

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[97] *See* Edwards, *Race and the Judiciary*, *supra* note 6, at 329 ("[R]acial diversity on the bench can enhance judicial decision making by broadening the variety of voices and perspectives in the deliberation process.").

[98] *Id.* at 329-30.

[99] *See* Stout, *supra* note 44 (examining the "common and predictable" nature of altruism formulated by social science research as the motivating force behind judicial behavior).

[100] *Id.* at 1615.

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serve everyone on the court equally. I was not the "*liberal* Chief Judge"; I was the "Chief Judge." And I worked very hard in every aspect of judicial administration and management to make the D.C. Circuit as good an operation as was possible. As the court managers and I began to fulfill our goals, we saw a positive energy develop in the court. We also garnered the trust of the judges and staff. The more that we did right, the more we inspired others to think of the work of the court as a "common enterprise." The *court's* reputation then became a matter of personal pride to everyone within the operation.

This effect mirrors a second factor noted by Professor Stout. She reports that studies have found that experimental subjects cooperate in social dilemmas when "the players share a sense of social identity (that is, a sense of membership in a common group)."[101] As Chief Judge, I tried to instill this sense of membership in a common enterprise by increasing pride in the institution of the court itself.

On judicial matters, I made it clear to everyone that I was merely the "first among equals"—meaning that I would preside at hearings, but my voice in decision making carried no greater voice than any other judge's voice. Although in technical terms that was obviously true, I thought it was important to emphasize it, since I am no shrinking violet. I did not moderate my voice strategically; I just made sure my colleagues knew I did not believe that being Chief Judge gave my views any special weight.

I encouraged divergent voices on controversial operational issues. For example, individual judges were allowed to append separate statements to the court's *Gender, Race, and Ethnic Bias Task Force Report.*[102] This diffused a great deal of anger that had built up over certain aspects of the report. And when Congress sought the views of the court on whether we needed additional judges, Judge Silberman testified with me at a congressional hearing before Senator Grassley. Judge Silberman took the position that the court did not need another judge,[103] while I testified that we did.[104] Judge Silberman and I

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[101] *Id.*

[102] D.C. CIRCUIT TASK FORCE ON GENDER, RACE & ETHNIC BIAS, THE GENDER, RACE, AND ETHNIC BIAS TASK FORCE PROJECT IN THE D.C. CIRCUIT (1995) (on file with author).

[103] *Conserving Judicial Resources: The Caseload of the U.S. Court of Appeals for the District of Columbia Circuit and the Appropriate Allocation of Judgeships: Hearings Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 104th Cong. 25-27 (1995) (statement of Laurence H. Silberman, Judge, U.S. Court of Appeals for the D.C. Circuit).

[104] *Id.* at 7-10 (statement of Harry T. Edwards, Chief Judge, U.S. Court of Appeals

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told each other in advance what we were going to say and sent each other our remarks before we went to the Hill. In fact, he asked me for, and I provided, factual information that he used to support his point. In my view, this is the way the court is supposed to operate. There was no "right" or "wrong" position on the number of judges that we needed. So if Judge Silberman and other judges felt strongly that no more judges were needed, it was better for us to know each other's views in advance, so we could share our thinking openly and respectfully. Interestingly, but of no surprise to me, Judge Silberman's position on the need for more judges remained the same even after the election of President Bush, as did my own view.

Such experiences engendered a critical sense of trust among the judges. This trust carries over into our discussions about cases. We trust one another to present legitimate legal arguments and not to work to advance an ideological agenda. This element of trust has also been documented by social scientists. Studies have shown that experimental subjects are more likely to cooperate when they believe that their fellow subjects are likely to cooperate.[105] Similarly, when I demonstrated to judges on my court that they could trust me not to use administrative power for partisan or controversial ends, they responded in kind.

I also tried very hard to bring my colleagues together outside of our roles as judges. I remembered their birthdays and sent them small gifts. (The first time I did this, one colleague was so shocked that he called to ask me why I had sent him a gift on his birthday.) I arranged for private luncheons for the judges, to which we invited notable public figures from other fields—like General Colin Powell (before he became Secretary of State), Washington Redskins owner Daniel Snyder, Washington Wizards owner Abe Pollin, chef Roberto Donna of Galileo Restaurant, news commentator David Brinkley, and National Gallery of Art Director Earl Powell, to name a few. And, each term, we had a festive private dinner with our spouses or mates, during which we shared raucous tales about one another and laughed about the trying moments of the year that had just ended.

The effect of such interactions is also documented by social scientists. Not surprisingly, studies have shown that allowing experimental subjects to communicate with each other increases their cooperative

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for the D.C. Circuit).

[105] Stout, *supra* note 44, at 1616.

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behavior in social game situations.[106] This is true "even when the [subjects] are not allowed to discuss the game itself."[107] Similarly, it is not surprising that judges behave more collegially on the bench when they have opportunities to interact outside of the courtroom and the conference room.

There is not much doubt in my mind that a court must have a leader who values collegiality and who takes steps to nurture it in order to bring about a more collegial court.[108] It is more difficult to know for sure, however, what personal attributes contribute to strong and effective leadership. Fortunately, it is easy for me to discuss this issue without any self-serving intention to "congratulate" members of my own court, because there are a number of outstanding leaders in the federal judiciary outside of my own court. An excellent example is Chief Judge Edward R. Becker on the Third Circuit. When Chief Judge Becker was nominated for the Devitt Distinguished Service to Justice Award, his colleagues' letter in support of his nomination was a testament to his efforts to foster collegiality on his court.[109] His colleagues credited him with "the promulgation of a number of innovat[ions] . . . [that] had the effect of welding the different courts of the [Third] Circuit into one collegial body."[110] On awarding the Devitt Award to Chief Judge Becker, the Selection Panel commended his activities that helped "reinforce collegial ties within the judicial branch."[111] Chief Judge Becker's leadership strengths are clear: he is active, visionary, tireless, loyal, decisive, and creative. He aggressively tries to understand his colleagues' needs, embraces their concerns, and presses to offer them support. He confronts and addresses prob-

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[106] *Id.* at 1615-16.

[107] *Id.*

[108] *Cf.* LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 85-87 (1999) (discussing "ideal qualities" in the leadership of a Chief Justice: willingness and ability to work hard, intellectual capability, sensible assignment of opinions, running an organized ship, sensitivity to others, development and maintenance of a collegial atmosphere, and spirit of conciliation). For a thoughtful analysis of leadership in the allocation of work on the circuit courts, see HOWARD, *supra* note 63, at 222-58.

[109] *See* Letter from The Honorable Leonard I. Garth, Individually and on Behalf of the Unanimous Members of the Third Circuit Court of Appeals, to the Devitt Selection Panel, Devitt Distinguished Service to Justice Award (Nov. 9, 2001) (on file with author) (detailing Chief Judge Becker's many achievements on the bench that make him a worthy recipient of the Devitt Award).

[110] *Id.* at 4.

[111] Press Release, American Judicature Society, Edward R. Becker Chosen as Recipient of 20th Annual Devitt Award (May 2002) (on file with author).

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lems directly and deals with people honestly. He is earnest, almost to a fault, but he is never faulted for his earnestness. He knows everything about his operation and everyone in the operation, both judges and staff. He combines enormous energy with commitment and intelligence. Most important, his leadership is selfless, always focused on the enterprise, never on himself. When he receives a suggestion for how the operation could run better, he embraces the concept, goes directly to his colleagues, talks, listens, and pursues the idea with energy.

Described by a commentator as a "judge in full," Chief Judge Becker exemplifies the "aspirations for institutional architecture and arrangements that are both efficient and humane."[112] He epitomizes the ideal of a good and effective leader and gives credence to the view that "the modern judiciary rests on the expectation that judges will behave in an altruistic fashion."[113]

A BRIEF NOTE ON OTHER FACTORS AFFECTING COLLEGIALITY

It is worth noting that, apart from the matters that I have already discussed, there are several other factors that may affect judicial collegiality. One such factor is the size of a court.[114] In the face of growing caseloads,[115] the question whether to increase the number of judges raises the question whether collegiality would be undermined by such an increase.[116] Many judges are convinced that collegiality enables

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[112] Stephen Burbank, Remarks at the 20th Annual Edward J. Devitt Distinguished Service to Justice Award Ceremony (Sept. 30, 2002) (transcript on file with author).

[113] Stout, *supra* note 44, at 1609 (emphasis omitted).

[114] On collegiality and the expansion of the federal judiciary, see Frank M. Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 OHIO ST. L.J. 399, 401 (1989); Ginsburg & Falk, *supra* note 10, at 1017-18; Reynolds & Richman, *supra* note 86, at 563; William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290, 1296 (1996); William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37, 45-46 (1999) [hereinafter Richman, *An Argument*]; Richman & Reynolds, *supra* note 22, at 323-25; Symposium, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 270, 284 (1996); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1275 (1996); Wilkinson, *supra* note 10, at 1173. On collegiality and the question of splitting the Ninth Circuit, see Procter Hug, Jr. & Carl Tobias, *A Preferable Approach for the Ninth Circuit*, 88 CAL. L. REV. 1657, 1670 (2000); Robert C. Mueller, *Finding a System of Courts that Work*, 45 FED. LAW. 2, 3 (1998); O'Scannlain, *supra* note 10, at 315-16; Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 912-13 (1998); Symposium, *supra*, at 285, 320-21.

[115] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 60-64 (1996) (detailing increases in case filings and caseloads in the federal courts).

[116] *See, e.g.*, Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L.

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better decisions, and that smaller courts tend to be more collegial. I agree. The appointment of more judges to handle growing caseloads does not come without substantial costs.[117] Chief Judge Wilkinson of the Fourth Circuit has argued that

> one engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd . . . . Smaller courts by and large encourage more substantial investments in relationships and in the reciprocal respect for differing views that lie at the heart of what appellate justice is about.[118]

It stands to reason that the larger the court, the less frequently any two judges sit together and interact with each other.[119] I have always believed that it is easier to achieve collegiality on a court with twelve members than on one with twenty or thirty. It is easier for judges to keep up and become familiar with each other. Smaller groups have the potential to interact more efficiently, making close and continual collaboration more likely.[120]

Having the entire circuit's chambers in the same building, as with the D.C. Circuit and the Federal Circuit, can also be immensely helpful.[121] The ease of face-to-face interactions outside the context of hearings and conferences makes a difference, especially for a Chief Judge who is trying hard to hear, understand, and address the needs of her or his colleagues.

REV. 583, 597 (1997) (noting the "somewhat greater collegiality of a smaller court"). *But see* Richman, *An Argument*, *supra* note 114, at 45 (suggesting that collegiality is not a function of size).

[117] *See* Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 918-19 (1983) (arguing that increasing the number of federal judgeships will make it more difficult to lure qualified judges and will negatively impact "the manageability and the collegiality of the circuits").

[118] Wilkinson, *supra* note 10, at 1173-74.

[119] *See* Ginsburg & Falk, *supra* note 10, at 1018 ("As the size of a court grows, and the probability of depending again upon the concurrence of a particular judge declines, the coin of the realm is devalued.").

[120] There are a number of my respected colleagues on the federal bench, especially on the Ninth Circuit, who would disagree with this assessment, for they do not view collegiality as a function of the size of the court.

[121] *See* A. Leo Levin, *Lessons for Smaller Circuits, Caution for Larger Ones*, *in* RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 331, 335-36 (Arthur D. Hellman ed., 1990) (discussing the costs of dispersion to collegiality); Tacha, *The Federal Courts*, *supra* note 10, at 19 (worrying about collegial relationships among appellate judges who are distanced geographically).

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The potential adverse effects of a large or geographically spread out court can be mitigated somewhat by advanced systems of electronic communications. A major development that contributed to a rise in collegiality in the D.C. Circuit was our push into the world of technology. All of the judges, law clerks, secretaries, managers, and staff are bound together by our advances in automation. We routinely exchange messages via e-mail. We use the Internet and an intranet, on which every rule, procedure, event, committee, sitting schedule, opinion, etc. is posted. We have an application called "Team Talk" (soon to be "Web Vote"), which allows judges to vote electronically on the more than 1000 motions we receive each term (and on a host of other matters as well). We also use an instant-messaging system within the courthouse. This program allows the judges to talk to each other and to law clerks electronically during oral argument. We can access the Internet during oral argument if we need to look up a case. And judges can continue to work when they are away from the courthouse, by use of handheld communication devices and by remote access to the court's computer network.

All of these developments have been good for collegial relations and collaboration among the judges.[122] In addition to making the place run more efficiently, which is a good in itself, moving the court into the world of technology has enhanced our personal interactions and the efficacy of our deliberations. We now have more total communications overall because of e-mail. We can easily keep abreast of the development of colleagues' thinking on cases, and there are more opportunities for discussion. Finer points and details that occur to us on reflection do not have to wait for a face-to-face meeting, since now we can write brief e-mails noting our concerns and receive quick responses. The quality of our deliberations has been enhanced by technology because it allows us to "talk" more frequently and more efficiently. Fewer matters fall through the cracks, resulting in fewer misunderstandings that can provoke problems.

Law clerks can also contribute, both positively and negatively, to collegiality among judges. By being privy to some of the exchanges

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[122] *See Circuit Chief: How the Court Really Works*, LEGALTIMES.COM (Oct. 27, 1999), *available at* http://www.cadc.uscourts.gov/common/suite/chambers/hte/legaltm.pdf (discussing the benefits of technological advances for judges); *cf.* Henry H. Perritt, Jr. & Ronald H. Staudt, *The 1% Solution: American Judges Must Enter the Internet Age*, 2 J. APP. PRAC. & PROCESS 463, 469 (2000) (discussing judicial collaboration and the use of the Internet). *But cf.* Murphy, *supra* note 10, at 455 (probing the "tension between technology and collegiality").

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between judges, especially in the context of reading and criticizing each other's opinions, law clerks can assist judges to understand better their colleagues and help them find ways to reach common ground and communicate their ideas effectively. But if a court is ideologically divided, law clerks who come to the job with highly politicized views of the law can exacerbate that polarization in their conversations among themselves.[123] Judges can also become too comfortable in the hierarchical fiefdoms of their chambers, with law clerks and staff who can sometimes, quite unconsciously, promote judicial insularity.[124] At bottom, however, law clerks follow the lead of their judges. If a court is unduly politicized or its judges too insular, it is because of an absence of collegiality among the judges and is not the fault of law clerks.

And then there is the wild card of individual personalities. I often wonder how much the change in collegiality that took place on my court was a result of the personalities of the judges then and now. It is well known that the D.C. Circuit of the uncollegial days had on it some judges with very intense personalities and strong views.[125] But the personalities on the court today are far from meek, so I do not know what to think of this consideration. Perhaps there were simply ill-starred combinations in days past. One judge alone probably cannot destroy collegiality on a court, because of the various ways in which the group can successfully bring him or her into the fold of institutional norms. But a few uncompromising personalities, together, can distract a court from its mission.

Finally, the effect of public scrutiny cannot be ignored. The ideologically driven image of courts resurfaces whenever judicial nominees' political views are scrutinized in the public eye. In my earlier years on the bench, I witnessed occasions when ideology took over

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[123] *See* Edwards, *The Judicial Function*, *supra* note 6, at 855 (noting that "it is not unusual these days to find instances of excess zeal among law clerks—conservatives and liberals alike—in support of preferred ideological positions"); J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 338 n.70 (1988) ("Young, headstrong clerks are less likely than their judges to be willing to compromise . . . .").

[124] *See* COHEN, *supra* note 10, at 13 (arguing that "[a]s judicial staffs grow, judges will become insulated from their colleagues"); *cf.* Edwards, *supra* note 12, at 407 ("Speaking almost exclusively to receptive (and frequently captive) audiences, [a judge] is likely to acquire a complacent confidence in the accuracy of his view of things.").

[125] *See* Jeffrey Rosen, *Obstruction of Judges*, N.Y. TIMES MAGAZINE, Aug. 11, 2002, at 38, 41 ("[T]he liberal and conservative judges were at one another's throats. On the left and on the right, a few of the judges had strong ideological agendas and aggressive personalities, and this combination led them to fight constantly over internecine issues.").

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and effectively destroyed collegiality, because the confirmation process "promoted" ideological commitment. In other words, if an appointee joins the court feeling committed to the political party that ensured the appointment, the judge's instinct may be to vote in a block with other perceived conservatives or liberals. Even worse, a judge who has been put through an ideologically driven confirmation ordeal may take the bench feeling animosity toward the party that attempted to torpedo the appointment on ideological grounds. One commentator recently argued that, "[b]y subjecting lower-court nominees to brutalizing confirmation hearings in the Supreme Court style, the Senate" may contribute to producing a judge who is

> so scarred and embittered by his confirmation ordeal that he becomes radicalized on the bench, castigating his opponents and rewarding his supporters. In short, by exaggerating the stakes in the lower-court nomination battles, interest groups on both sides may be encouraging the appointment of judges who will fulfill their worst fears.[126]

Focusing on the ideology of the nominee can be detrimental to collegiality if this promotes a self-fulfilling prophecy.

> The more that judges are assessed in terms of "political" (result-oriented) decisionmaking, the more likely it is that this will become a self-fulfilling prophecy. Even if judges are able to resist the temptation to conform to the false perception, continued assessments of judicial performance in political terms will promote a "new reality," for most people will come to believe that the judicial function is nothing more than a political enterprise. No matter how good the intentions of its servants, the judiciary will be sharply devalued and incompetent to fulfill its role as mediator in a society with lofty but sometimes conflicting ambitions. This would be a horror to behold.[127]

The good thing about a court that is blessed with collegiality is that new judges are able to join the court and find their way easily.

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[126] *Id.* at 40.

[127] Edwards, *The Judicial Function*, *supra* note 6, at 838-39. Ken Starr, a former colleague on the D.C. Circuit, remarks that one hallmark of good judging is the ability to vote without regard to the appointing party:

> I was reminded . . . of a comment in my early days as an appellate court judge by a more senior judge, Harry Edwards, whom President Carter appointed. "Ken, you know you're really a judge when you vote, in conscience, against the folks who appointed you." That was exactly right. When the judge honestly votes against the friends who put him on the bench, then the judge is reaching the goal of being genuinely disinterested and dispassionate—as a truly honorable judge should be.

KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE 52-53 (2002).

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Getting the law right is the mission of a truly collegial court. New members of a collegial court quickly surmise that they have no good incentive to pursue individual ideological goals. And a single new judge has no real standing or authority to undo the norms of collegiality. In due course, new judges on a truly collegial court come to appreciate that judges all have a common interest, as members of the institution of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.[128]

JUDGES' VIEWS ON COLLEGIALITY

It is clear from the foregoing discussion that collegiality affects judicial decision making in significant ways. It is also clear that judges are the instruments of collegiality. It is less clear, however, what judges think about collegiality. It is also hard to determine whether and how judges *invoke* collegiality as a principle in the course of their judicial duties. Interestingly, in addition to judges' writings on the subject,[129] it turns out that there are a number of instances in which judges have relied on "collegiality" in support of judicial opinions. These judicial opinions give some clues as to how judges think about collegiality.

I was surprised to find that I had invoked the principle of collegiality in 1987, in a concurring opinion in *Bartlett v. Bowen*.[130] My purpose was to express my opposition to a petition for rehearing en banc and respond to a dissenting colleague's views in favor of en banc review. I wrote that the "clearly wrong" or "highly dubious" test urged by the dissent to determine when to rehear a case en banc was "a self-serving and result-oriented criterion"[131] that was doing

> substantial violence to the collegiality that *is* indispensable to judicial decisionmaking. Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case en banc in order to vindicate that judge's position. Politicking will replace the thoughtful dialogue that should characterize a court where every judge

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[128] *See supra* text accompanying notes 20-21 (describing collegiality as a process that allows all viewpoints to be considered to ensure that the law is interpreted correctly).

[129] *See supra* note 10 (providing a sample of judges' writings on collegiality).

[130] 824 F.2d 1240, 1243-44 (D.C. Cir. 1987) (Edwards, J., concurring). In *Bartlett*, the D.C. Circuit, having decided to grant an en banc rehearing, reconsidered its decision and denied rehearing. *Id.* at 1240.

[131] *Id.* at 1242.

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> respects the integrity of his or her colleagues. Furthermore, such a process would impugn the integrity of panel judges, who are both intelligent enough to know the law and conscientious enough to abide by their oath to uphold it.[132]

My concurring statement in *Bartlett v. Bowen* is the only time that I have actually discussed collegiality in an opinion, which is ironic in light of the fact that I did so at a time when collegiality as I know it today did not exist on the D.C. Circuit—but that much may be obvious from my pointed remarks in *Bartlett.* That opinion is a testament to my desire for a collegial court at a moment when the D.C. Circuit was very much in the grip of ideological division. In an uncollegial environment at its worst, decisions to rehear cases en banc can result in disastrous judicial decision making—ideologically driven and result-oriented. A high rate of rehearing cases en banc can be a symptom of an absence of collegiality. And, as my colleague Chief Judge Ginsburg has noted, it can also pose a threat to collegiality.[133] It can both reflect and feed a court's lack of confidence in the work of panels.[134] However, the complete absence of en banc review may also be detrimental to collegiality, because panels may become too independent of the rest of the court.[135] On a collegial court, the court trusts panels to do their work, and the possibility of en banc rehearings constrains panels to be responsible to the full court.

I am not the only judge who has invoked collegiality in a judicial opinion. There have been numerous instances in the various circuits in which collegiality explicitly informed legal reasoning in an opinion. For example, judges have cited collegiality in support of adherence to circuit precedent and the principle of stare decisis.[136] Judges have as-

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[132] *Id.* at 1243-44 (emphasis in original).

[133] *See* Ginsburg & Falk, *supra* note 10, at 1021 (arguing that too high a rate of rehearings en banc makes judicial panels less responsible to the rest of the court because frequent rehearings would weaken the presumption of finality associated with panel decisions).

[134] *See id.* (noting that frequent rehearings en banc encourage panels to stake out adventuresome positions in the knowledge that the reviewing court can always overturn the decision). Chief Judge Ginsburg partially attributes the decrease during the past decade in the number of cases reheard en banc in the D.C. Circuit to the judges becoming more "collegial, in the sense that the judges, notwithstanding their different views, had more confidence in each other's good faith and competence, and so deferred more to judgments of panels on which they did not sit." Ginsburg & Boynton, *supra* note 10, at 260.

[135] Ginsburg & Falk, *supra* note 10, at 1021.

[136] *See, e.g.*, United States v. McFarland, 264 F.3d 557, 559 (5th Cir. 2001) (DeMoss, J., concurring) ("[O]ur rule of orderliness and considerations of collegiality within the Court require our adherence to the Circuit precedents . . . ."); Harter v. Vernon, 101

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sociated collegiality with a court's custom and practice.[137] Judges have used collegiality to explain why, in the interest of speaking with collective authority, the court should decline to reach matters on which there is disagreement not essential to the result.[138] Judges have expressed reluctance to decide certain matters in the absence of collegial deliberation.[139] Judges have used collegiality as a justification for

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F.3d 334, 343 (4th Cir. 1996) (Luttig, J., dissenting) (stating that, were one panel able to overturn a previous panel "unconstrained by any sense of obligation to the principles of stare decisis, our own internal rules, or notions of collegiality," such a panel "could run roughshod over prior precedent, effectively repealing a rule whose importance to both the rule of law and to the orderly operation of a court is beyond dispute"); Fine v. Bellefonte Underwriters Ins. Co., 758 F.2d 50, 51 (2d Cir. 1985) (Cardamone, J.) (noting that reversing a previous panel in an attempt to remedy a perceived error would "throw a wrench into the collegial workings of our Court that are essential to its institutional integrity"); *cf.* Nat'l Patent Dev. Corp. v. T.J. Smith & Nephew, Ltd., 865 F.2d 353, 359 (D.C. Cir. 1989) (Ginsburg, J., concurring) ("I am convinced that the full circuit, having had ample time for reflection and running no risk of undermining the court's collegiality, should reverse the course set by *Neidhart*.").

[137] For example, one judge proclaimed:

> This is a court which has been marked by collegiality and fairness. We work well together and are all, without exception, proud of this institution. We will all continue in that vein when this case is over. Nevertheless, it is essential to observe that the refusal to permit a late en banc call was contrary to our custom and practice and was indeed aberrational and extraordinary, as is Judge Kozinski's dissent.

Thompson v. Calderon, 120 F.3d 1045, 1060 (9th Cir. 1997) (Reinhardt, J., concurring).

[138] On a particular Title VII issue, Judge Kleinfeld explained:

> [I]t would be better for us to avoid deciding whether Title VII applies. . . . [D]eciding the issue reduces the collegiality of our decision. By "collegiality" . . . I mean the dictionary definition, "shared authority among colleagues," so that we meld our individual voices into the voice of the court. An appellate court ought to speak collectively as nearly as possible . . . .

Ass'n of Mexican-Am. Educators v. California, 231 F.3d 572, 601 (9th Cir. 2000) (Kleinfeld, J., concurring in part and dissenting in part) (citation omitted). In a different situation, Judge Roney of the Eleventh Circuit stated:

> [I]n the interest of efficiency and collegiality on this Court, where there are differing views as to the substantive right, this panel has chosen to withdraw all of its prior opinion which relates to whether the complaint alleges a constitutional right so that the opinion will serve as no precedent on that issue.

Spivey v. Elliott, 41 F.3d 1497, 1499 (11th Cir. 1995).

[139] *See* United States v. Baldwin, 60 F.3d 363, 368 (7th Cir. 1995) (Ripple, J., dissenting from the denial of rehearing en banc) ("It is indeed sad that many of the judges of the court believe that, on so important an issue, neither argument of counsel at oral argument nor the collegial discussion of the conference room is appropriate to the decision-making process."); Wells *ex rel.* Kehne v. Arave, 18 F.3d 658, 661 (9th Cir. 1994) (Reinhardt, J., dissenting) ("The Ninth Circuit en banc court less than four hours later denied a stay without any oral argument and without even assembling or otherwise discussing the case in a collegial manner. Surely this is no way for judges to

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following sister circuits.[140] And judges have invoked collegiality to chide their colleagues for permitting disagreements over the law to take the form of personal attacks.[141]

While the invocations of collegiality in judicial opinions are varied, a few telling tendencies emerge. First, collegiality seems to be associated with rule of law principles such as following precedent, stare decisis, and court custom. Second, collegiality is pressed as a constraint on individual judges deciding issues without the benefit of group deliberation and consensus. Third, collegiality is sometimes used to chide colleagues who are perceived to be behaving uncollegially, whether it is in behavior that goes against custom, precedent, the consensus imperative, or professionalism. Clearly, judges perceive collegiality as bolstering institutional and rule of law norms. Perhaps the danger of being perceived as uncollegial by one's colleagues works to constrain judges and induces them to behave in ways more in keeping with institutional and rule of law norms. Institutional thinking is not merely an individual state of mind that accounts only for individual judges' motivation; institutionalism can be "enforced" among colleagues by the expectations that one will act in a manner befitting a judge, respectful of the rule of law and respectful of professional norms. Collegiality thus appears to function as an umbrella concept and a catchphrase that captures those norms of judging.

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perform the single most important duty assigned to them by the Constitution and federal law." (emphasis omitted)); United States v. Salinas-Garza, 811 F.2d 272, 273 (5th Cir. 1987) (per curiam) ("[T]he conference provides the opportunity for the members of the panel to engage in a more thorough discussion of a case in a collegial atmosphere . . . ."); Glass v. Blackburn, 767 F.2d 123, 124 (5th Cir. 1985) (per curiam) (noting that "the remaining issues require additional evaluation and collegial consideration before a ruling can be made"); Cleburne Living Ctr., Inc. v. City of Cleburne, 735 F.2d 832, 834 (5th Cir. 1984) (Higginbotham, J., specially concurring in the dissent) ("[I]t is not necessary to reach a final judgment without the benefit of oral argument and collegial effort and I stop short of doing so."); United States v. Glover, 731 F.2d 41, 48 (D.C. Cir. 1984) (Mikva, J., dissenting) ("There was none of the traditional collegiality of the decisional process normal to a multi-member appellate court.").

[140] *See* Caldwell v. Amend, 30 F.3d 1199, 1201 (9th Cir. 1994) (Choy, J.) (referring to a "collegial context" in the Ninth Circuit's extension of a Third Circuit filing exception for pro se habeas petitioners).

[141] *See, e.g.*, Memphis Planned Parenthood, Inc. v. Sundquist, 184 F.3d 600, 608 (6th Cir. 1999) (Batchelder, J., concurring in denial of rehearing en banc) ("Our dissenting colleague's own purposes may be furthered by publicly impugning the integrity of his colleagues. Collegiality, cooperation and the court's decision-making process clearly are not.").

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COLLEGIALITY IN FURTHERANCE OF JUDICIAL AUTHORITY, JUDICIAL RESTRAINT, PRINCIPLED DECISION MAKING, AND BETTER DECISIONS

What scholars and other commentators often miss in their assessments of appellate decision making is that *shared authority* is an *essential component* of the judicial function. Thus, even in the worst of times, an appellate court must function collegially, because the judges must act pursuant to "shared authority" in the performance of their work.[142]

Although three judges sit together on a panel, they must arrive at one disposition of a case. Whatever their different perspectives, they must channel their views into a collective effort. This is not optional. It is a formal requirement of legal authority. A circuit judge has no individual authority. His or her authority consists solely in joining a collegial product. If an appellate judge does not persuade or agree with at least one other judge, his or her position simply does not become the law. The area of overlap between the positions of panel members is the common ground that becomes the court's holding. Legal authority on the circuit courts thus depends on judicial consensus.

Because finding common ground is a condition of legal authority, judges must invest in building trust and respect among colleagues. Panel judges cannot easily go their separate ways on their own intellectual paths, for they are bound together by the nature of their job.[143] They are quite literally *constrained* by the consensus imperative.[144] They must find common ground in a case and maintain it, as the ten-

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[142] This is a very simple concept: "collegiality" means "[s]hared authority among colleagues." THE AMERICAN HERITAGE DICTIONARY 291 (2d college ed. 1982). It is also defined as "collective responsibility shared by each of the colleagues." THE RANDOM HOUSE COLLEGE DICTIONARY 264 (rev. ed. 1980).

[143] *Compare* Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 826-29 (2000) (explaining that collegiality in judging is necessary to gather a majority and to give the opinion authority whereas, in academia, collegiality flows from the decisions of writers who have similar approaches to work together), *with* Ginsburg & Falk, *supra* note 10, at 1017 (noting that legal academics work without collaborators or peer review and have less incentive to value the opinions of colleagues than a judge, whose legal authority depends on persuading colleagues).

[144] *See* HOWARD, *supra* note 63, at 189 ("Group decision making . . . [is] a major potential limit on the personal discretion of circuit judges."); Fried, *supra* note 143, at 828-29 (arguing that collegiality's "horizontal, synchronic continuity" acts as a constraint on decisions); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1377 (1995) (noting that "consensus is a formidable constraint on what an opinion writer says and how she says it").

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tative agreements reached in conference are translated into the written word.

Justice Cardozo may have been wrong in suggesting that "attrition" is the reason why "diverse minds" come together to produce "truth and order" in decision making.[145] He was right, however, in his implicit suggestion that, over time and over the experience of repeatedly working together, judges become more mature and balanced as they internalize the need for group consensus. They can become temperamentally more flexible, open to persuasion, and less entrenched. They also learn to remain mindful of the partiality of all perspectives.[146] In other words, judges, like other professionals, evolve in their thinking,[147] and we are aided by the wisdom and insights given to us by our seniors, as well as by our time on the bench. After having seen my court evolve over the years, I see collegiality's moderating effect, not only on the decisions of panels, but on the judges themselves, so that as a judge becomes more experienced, he or she develops habits of mind that reflect the constraints of collegiality.[148]

It is my explicit contention that the quality of judges' decisions improves when collegiality filters their decision making. I think there are several qualitative measures suggesting that collegiality enables courts to reach better decisions. First, if, as I argue, collegiality has the effect of removing the determinism of politics and ideology, then collegial decisions are necessarily better in terms of the rule of law. Such decisions are less likely to admit of judges' personal ideological preferences. Judges are more likely to focus only on matters that properly should affect decision making, such as positive law, precedent, the record in a case, and the parties' arguments. Second, since collegiality enables smart people to lend fully what they have to offer to the process of deliberation, judicial decisions made in a collegial environment invariably will benefit from the full range of expertise, experience, intellectual ability, and differing perspectives that exist on a court. The deliberative process is richer and fuller because of collegiality, so the decisions are the product of more rigorous, challenging, and thorough discussion. Third, since collegiality fosters better delib-

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[145] CARDOZO, *supra* note 1, at 176-77.

[146] *See* Edwards, *Race and the Judiciary*, *supra* note 6, at 329-30 (finding that "all perspectives inescapably admit of partiality").

[147] On the development of my thought, see Brian C. Murchison, *Law, Belief, and Bildung: The Education of Harry Edwards*, 29 HOFSTRA L. REV. 127 (2000).

[148] *See* Edwards, *Collegiality*, *supra* note 6, at 1358 (arguing that collegiality has a moderating effect on judges' voting behavior).

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erations, collegial judges are more likely to find the right answer in any given case. Most cases heard in the courts of appeals, both "easy" and "hard," admit of a best answer if judges do their work correctly.[149] It is only in a very small percentage of appeals, involving "very hard" cases, that no "right" answer can be found.[150] Collegiality prevents judges from going astray in "hard" cases and facilitates the process of finding right answers.

In short, in a collegial environment, both judges and their decisions become more "objective." I do not mean objectivity in its most literal sense, but, rather, as the term is employed in the physical sciences. Sharon Traweek, in her anthropological study of physicists, notes that even in the realm of science, "[p]ure objectivity is tacitly recognized as impossible; but error can be estimated and minimized. The means is peer review, or collective surveillance; the final degree of order comes from human institutions."[151] The same is true with judges.

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[149] *See* Edwards, *supra* note 12, at 389-403 (categorizing cases as "easy," "hard," or "very hard," and describing how judges go about deciding cases).

[150] One must also not forget that there is a significant fail-safe in connection with cases involving judicial interpretations of contested statutory provisions: Congress can repeal or revise the disputed provision if it disagrees with the court's construction. See, for example, *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983) (Edwards, J.), which was superceded by statute. Congressional action is not necessarily a measure of whether a court's decision is "right" or "wrong." But it does at least ensure that, in those cases in which congressional intent is what is ultimately at issue (which is most of the case fare before the courts of appeals), Congress can reclaim the last word by revising the statute. In some "hard" cases, and in most "very hard" cases, collegiality cannot guarantee a "right" answer, because none may exist. But collegiality will produce a thoughtful opinion that will allow Congress to reflect further on its intentions. Indeed, the D.C. Circuit has a procedure whereby Congress is given notice of decisions involving questionable statutory provisions that might usefully be amended. *See generally* Robert A. Katzmann & Stephanie M. Herseth, *An Experiment in Statutory Communication Between Courts and Congress: A Progress Report*, 85 GEO. L.J. 2189 (1997) (describing the development and operation of the system of notification between the D.C. Circuit and Congress).

[151] SHARON TRAWEEK, BEAMTIMES AND LIFETIMES: THE WORLD OF HIGH ENERGY PHYSICISTS 125 (1988); *see also* Benjamin Freedman, *Equipoise and the Ethics of Clinical Research*, 317 NEW ENG. J. MED. 141, 144 (1987) (assuming that progress in medicine relies on consensus, and stating that individual clinical judgments, even when based on evidence, lack a privileged status).

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The study of consensus in science provides something of an analogue to collegial judging.[152] Sociologists,[153] anthropologists,[154] philosophers,[155] and historians[156] have studied the formation of consensus among scientists, and their research is illuminating. While their findings are of course various, one leading school of sociology has posited that scientific "truth" is built out of the interactions and negotiations among scientists in specific institutional and work settings, such as laboratories.[157]

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[152] *See* JOHN ZIMAN, AN INTRODUCTION TO SCIENCE STUDIES: THE PHILOSOPHICAL AND SOCIAL ASPECTS OF SCIENCE AND TECHNOLOGY 138-39 (1984) ("The modern phenomenon of *team research* . . . involves direct collaboration between scientists of relatively equal standing . . . . [T]he extreme *individualism* embodied in the academic ethos, and the norms associated with it, is no longer consistent with the realities of scientific life, where *collective* action is now the rule."); JOHN ZIMAN, PROMETHEUS BOUND, SCIENCE IN A DYNAMIC STEADY STATE 60-61 (1994) (explaining that "[t]he advance of knowledge has come to depend on the active collaboration of scientists with specialized skills drawn from a number of distinct research areas or traditions," and that "[t]he most natural way of exploiting these linkages is to put the research in the hands of a closely interacting group of people, each of whom can look at it from a different point of view and contribute his or her particular expertise to the common pool of effort").

[153] For discussions of the group structure and dynamics of collaborative scientific communities, such as laboratories, and their impact on work product, see STEPHEN COLE, MAKING SCIENCE: BETWEEN NATURE AND SOCIETY (1992); ROBERT N. GIERE, EXPLAINING SCIENCE: A COGNITIVE APPROACH (1988); KARIN D. KNORR-CETINA, THE MANUFACTURE OF KNOWLEDGE: AN ESSAY ON THE CONSTRUCTIVIST AND CONTEXTUAL NATURE OF SCIENCE (1981); BRUNO LATOUR & STEVE WOOLGAR, LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS (Princeton Univ. Press 1986) (1979); BRUNO LATOUR, SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY (1987).

[154] *See, e.g.*, TRAWEEK, *supra* note 151, at 120-25 (discussing the collaborative ways in which physicists often work).

[155] *See, e.g.*, PHILIP KITCHER, THE ADVANCEMENT OF SCIENCE: SCIENCE WITHOUT LEGEND, OBJECTIVITY WITHOUT ILLUSIONS 382-87 (1993) (evaluating the "considerations [that] affect the costs and benefits of consensus-forming mechanisms" within the scientific community); LARRY LAUDAN, SCIENCE AND RELATIVISM: SOME KEY CONTROVERSIES IN THE PHILOSOPHY OF SCIENCE (1990) (constructing a philosophical debate of science and scientific research among different schools of philosophical thought); KEITH LEHRER & CARL WAGNER, RATIONAL CONSENSUS IN SCIENCE AND SOCIETY: A PHILOSOPHICAL AND MATHEMATICAL STUDY (1981) (articulating a theory of rational consensus in science and society).

[156] *E.g.*, PETER GALISON, HOW EXPERIMENTS END (1987); PETER GALISON, IMAGE AND LOGIC: A MATERIAL CULTURE OF MICROPHYSICS (1997).

[157] *See, e.g.*, KNORR-CETINA, *supra* note 153, at 4 (setting forth the idea that scientists engage in the "*instrumental manufacture* of knowledge" in the laboratory); LATOUR & WOOLGAR, *supra* note 153, at 48-49 (depicting the laboratory as a situs of communication and creativity); LATOUR, *supra* note 153, at 64-80 (describing the laboratory as an incubator for theory and countertheory in an ultimate quest for truth).

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Probably the most interesting research is found in the work of Bruno Latour, the prominent sociologist of science. Latour, who is well known for his emphasis on the role of social interaction and social construction in the production of scientific "truth,"[158] has in recent years turned his attention to French administrative law. The Conseil d'État, which is the supreme judicial administrative law body in France, granted Latour unprecedented access to its deliberations on a series of complex administrative law matters over the course of several years.[159] This was remarkable in itself, because the Conseil has a long tradition of secrecy just as entrenched as our tradition of confidentiality in judicial deliberations.[160] More impressive, however, is what Latour found. In a recently published book, Latour argues that the most salient feature of French administrative law and judicial review is the process whereby factually complex, politically charged disputes are refined into abstract questions of administrative law that are removed from the realm of politics.[161] The result, he suggests, is a form of objectivity in legal interpretation, as the abstraction away from the facts enables judges to focus on getting the law right in a quasi-objective process of trying to specify rights through legal means.

Of course the French administrative law system is different from our own in innumerable ways, but it has some important points of similarity. The *conseillers* have undergone a more uniform training than have our judges, since they were all educated at the École Nationale d'Administration.[162] Nonetheless, they have a range of experiences, from active roles in administration, to the private sector, the bar, and administrative judging.[163] The Conseil is, by Latour's account, an extraordinarily collegial body in which loyalty to the institution is profound and respect for others' opinions in discussion is a cherished norm.[164] There is therefore a potentially useful analogy between the collegiality of the Conseil, in its focus on questions of law, and the operation of our appellate courts. It is almost deliciously

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[158] *See generally* LATOUR & WOOLGAR, *supra* note 153, at 29 (analyzing "the craft character of scientific activity through . . . observations of scientific practice"); LATOUR, *supra* note 153, at 173-76 (explaining Latour's theory of scientific truth reached through social interaction).

[159] BRUNO LATOUR, LA FABRIQUE DU DROIT: UNE ETHNOGRAPHIE DU CONSEIL D'ÉTAT 7-8 (2002).

[160] *Id.*

[161] *Id.* at 154-55.

[162] *Id.* at 124.

[163] *Id.* at 124-26.

[164] *Id.* at 139-206.

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ironic that Latour, who is noted for his extreme skepticism of "objectivity" in science, and who made familiar the role of social consensus in producing scientific truth,[165] has observed such remarkable "objectivity" in the deliberations among the *conseillers* of the Conseil d'État.

I have to admit that I am surprised that the Conseil was willing to open its doors to Latour. Access to judicial deliberation in our system would implicate serious ethical and confidentiality issues. Latour changed names and facts, and agreed to allow his manuscript to be reviewed by the Conseil before publication.[166] But it is possible that a sleuth would be able to reconnect Latour's account to actual cases, and possibly to specific *conseillers*. I am not calling for any such study in our appellate courts, and indeed I would be opposed to such study, because of the potential violation of legal and ethical canons.[167] Even our law clerks are not privy to deliberations in conference. I believe that the mere presence of a "neutral," even silent, observing anthropologist or sociologist in our deliberations would change the character and course of the deliberations among judges.[168]

This leads me to acknowledge that the ability of scholars to study the qualitative aspects of judging on a collegial court may have some significant limits. If scholars cannot directly access the deliberations that would generate qualitative data, how successful can their studies

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[165] *See supra* note 158 (focusing on Latour's view of scientific truth as the product of scientists' deliberations).

[166] LATOUR, *supra* note 159, at 7-8.

[167] The court's decision in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam), is instructive. In *Microsoft*, the D.C. Circuit confronted a situation in which a district court judge had made ex parte statements to reporters from *The New Yorker* and other publications while the case was pending before him. *Id.* at 108. The court found that the judge had breached his ethical duty each time he spoke to a reporter about the merits of the case, even though his statements were to be kept secret and not published until the final judgment issued. *Id.* at 112. The decision noted the dialogic nature of interviews between judge and reporter, and the resulting difficulty of knowing whether the personal views of reporters had found their way into the judge's thinking on the case during the interviews. *Id.* at 113. And even if secrecy is demanded and agreed to, there is no way for judges to police the select few who are granted access from trading on the basis of the inside information. *Id.* at 113-14. Just as serious is the appearance of impropriety and the risk of jeopardizing public confidence in the integrity of the federal courts. *Id.* at 114. Opening up our collegial deliberations to a sociologist or anthropologist would likely raise similar ethical problems, even if the researcher would not be engaged in conversation with us but only observing silently.

[168] *Cf.* Laura Nader, *Up the Anthropologist—Perspectives Gained from Studying up*, *in* REINVENTING ANTHROPOLOGY 284, 301-08 (Dell Hymes ed., 1969) (discussing the problems of anthropologists in gaining access to institutions of the powerful, as opposed to the poor and powerless cultures typically studied).

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be? Scholars can interview judges about their experience of collegial deliberation and work with judges' own written observations of the process.[169] But, obviously, this is not a foolproof method of research. Scholars are thus unfortunately limited in the qualitative data they can gather, and there may be no direct, immediate way to study fully the effects of collegiality on judging. Perhaps this recognition of the structural and ethical impediments to data gathering might lead scholars to acknowledge the limits of empirical analysis of adjudication and to adopt an appropriately modest stance regarding their claims about how judging works.

CONCLUSION

The D.C. Circuit has changed dramatically in the years that I have been on the bench. In that time, it has gone from an ideologically divided court to a collegial one in which the personal politics of the judges do not play a significant role in decision making. In reflecting on this over the years, I have come to understand that there are a number of factors that may affect appellate decision making, some that should and some that should not. Among these factors are the requirements of positive law, precedent, how a case is argued by the litigants, the effects of the confirmation process, the ideological views of the judges, leadership, diversity on the bench, whether a court has a core group of smart, well-seasoned judges, whether the judges have worked together for a good period of time, and internal court rules. My contention is that decision making is substantially enhanced if these factors are "filtered" by collegiality. There are cross-fertilizing effects between collegiality and certain of these factors (such as internal court rules, leadership, and diversity), so that the factors both promote collegiality and enhance decision making when they are filtered by collegiality. In the end, collegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions. In other words, the more collegial the court, the more likely it is that the cases that come before it will be determined on their legal merits.

I have by no means attempted a final and definitive account of collegiality. Rather, my hope is that my observations on collegiality here, and my effort to contextualize them within related literature on both adjudication and group decision making, will serve as an invita-

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[169] *See, e.g.*, COHEN, *supra* note 10, at 12 n.63 (drawing on interviews with judges on collegiality).

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tion to further interdisciplinary research.[170] I also hope I have been able to convey the vital importance of collegiality to the judicial function. For, in my view, collegiality invokes the highest ideals and aspirations of judging.

[170] "It makes no sense to talk about legal materials without reference to our goals for society, which entail extralegal forms of knowledge and inquiry. However, legal scholars and educators have a unique obligation to employ some pragmatism when engaging with other disciplines." Edwards, *Reflections*, *supra* note 6, at 2003.

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