The Judicial Voice on the Courts of Appeals

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ABSTRACT: The judicial voice on an appellate court typically speaks in the collective, so when a judge chooses to go solo—either in a dissent or a concurrence—that act deserves a close look. Separate opinions on the U.S. Supreme Court are common because the Justices have strong incentives to articulate a distinctive personal jurisprudence. But lower court judges have always been more reluctant to write separately, and for good reason. The institutional design and longstanding practices of the U.S. courts of appeals are very different from the Supreme Court: Lower appellate court judges are bound by precedent in a different way, rarely sit all together, and embrace deep-seated norms that lean into anonymity and value consensus whenever possible. Unlike Supreme Court Justices who write to a national audience, the separate writings of appeals judges have historically been internally focused, directed to other circuit judges and the litigants.

Today, however, newspaper headlines increasingly reflect a new use for the judicial voice on the lower courts. Some federal appellate judges seem to be seeking celebrity status by using separate opinions to reach external national audiences. These judges are writing for "groupies," in behavior that is perhaps auditioning for a future Supreme Court vacancy, proselytizing for a cause, mimicking the voices of the Justices, or all of the above. This is a marked change from the model of the judicial voice on the lower courts that judges appointed by both political parties have long embraced. And, because many of the users of this new voice were appointed by President Trump, his election to a second term makes this dynamic critical to consider now.

For this Article, we interviewed those who know the judicial voice best—over twenty-five federal appellate judges appointed by Presidents of both political parties. We asked them why they wrote separately, to whom they were writing,

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and (importantly) what changes they observed. Based on those interviews and original empirical work on new partisan patterns, we detail what makes a separate opinion beneficial to the healthy functioning of a lower court . . . and what makes it dangerous. Along the way we theorize the model of decision-making that is central to the identity of the lower courts, and we offer several reform suggestions for the future, including the elimination of separate filings in cases where the circuit turns down a petition for en banc review.

INTRODUCTION

Appellate judging is a collective enterprise, which means disagreement is inevitable. One place where this disagreement surfaces is in separate opinions. Separate opinions from the Supreme Court are common and the subject of much scholarly attention.[1] But separate opinions in the lower federal appellate courts are on the rise too, likely in part due to increased polarization in

1. *See generally* PAMELA C. CORLEY, AMY STEIGERWALT & ARTEMUS WARD, WHEN DISSENTS MATTER: JUDICIAL DIALOGUE THROUGH US SUPREME COURT OPINIONS (2023); M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283.

judicial appointments at every level.[2] These opinions come in all shapes and sizes: concurrences, dissents, concurrences that are really dissents, and dissents from decisions not to rehear cases en banc (which some have called judicial "press release[s]").[3]

Writing separately increases a judge's daily workload—it is like asking for more homework—so there must be a compelling reason to do it.[4] Is it shameless self-promotion or devotion to getting the law right? The stakes in answering that question are extraordinarily high.[5] If judges write separate opinions to show allegiance to a national cause or to mark their commitment to a "partisan team," it undermines the important and time-honored vision of the federal courts as being comprised of open-minded decision-makers—people with normative priors, of course, but people also capable of being persuaded by legal reasoning.[6] Separate opinions, therefore, are not mere academic curiosities. They are key to delineating the identity of these courts and their place in our democracy.

We have good company in making this connection. In 1992, then-federal appeals judge Ruth Bader Ginsburg delivered a lecture at New York University which she titled *Speaking in a Judicial Voice*.[7] Harkening to the founders' hopes for a "steady, upright, and impartial administration of the laws," then-Judge

2. With increased polarization, for example, there are fewer judicial moderates predisposed to find common ground. For data on frequency, see data derived from the Federal Judicial Center. *Integrated Database (IDB)*, FED. JUD. CTR. (2025), https://www.fjc.gov/research/idb (on file with the *Iowa Law Review*) (data was retrieved on July 23, 2025, and is current through September 30, 2024). For a description on polarized appointments, see Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL'Y 521, 530–35 (2018). For preliminary assessments of whether President Trump's second-term appointments will exacerbate polarization, see Jess Bravin & C. Ryan Barber, *Trump Loyalists Push for a Combative Slate of New Judges*, WALL ST. J. (Oct. 14, 2024, 9:00 AM), https://www.wsj.com/politics/elections/trump-loyalists-push-for-a-combative-slate-of-new-judges-a3a007e9 (on file with the *Iowa Law Review*); Nate Raymond, *Trump Readies to Name 'Fearless' Conservative Judges in Second Term*, REUTERS (Nov. 8, 2024, 3:10 AM), https://www.reuters.com/world/us/trump-readies-name-fearless-conservative-judges-second-term-2024-11-07 [https://perma.cc/TP64-EP9Y]; and Hailey Fuchs & Josh Gerstein, *How Trump Is Picking 'Battle-Tested' New Judges*, POLITICO (Mar. 18, 2025, 7:00 PM), https://www.politico.com/news/2025/03/18/trump-judges-nominations-process-courts-00236800 [https://perma.cc/8MWV-9ENK].

3. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 576 (2001) (comparing a dissent from denial of rehearing en banc to a "press release"). For important past work on dissents from denial of rehearing en banc, see Jeremy D. Horowitz, *Not Taking "No" for an Answer: An Empirical Assessment of Dissents from Denial of Rehearing En Banc*, 102 GEO. L.J. 59, 60–65 (2013).

4. For empirical analysis of what prompts separate opinions in the lower courts, see generally VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING (2006); and Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011). Our contribution is less about *why* a lower court judge chooses to write separately, but an examination of their collective impact on the legitimacy of the federal courts.

5. In the words of political scientists who work on this topic, "judges who file separate opinions either maintain the integrity of the federal judiciary or undermine its legitimacy, depending on one's point of view." HETTINGER ET AL., *supra* note 4, at 2.

6. *Id.*

7. *See generally* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992).

Ginsburg emphasized how these ideals are linked to the "voice" a lower court judge uses in separate opinions.[8] She argued for this voice "to 'be courteous, respectful, . . . civil,'" and "[m]easured."[9] Quoting her mentor Gerald Gunther, she said it should reflect a person who is "open-minded and detached, . . . [and] heedful of limitations stemming from the judge's own competence."[10] Only through mastery of the proper judicial voice, she argued, can judges on the federal courts fulfill their constitutional role in our democracy.[11]

This Article asks: Is that judicial voice changing on the lower courts? And if so, what is lost along the way?

To be sure, separate opinions can be the hallmark of a thoughtful, deliberative decision-making process—or at least a reflection that such a process took place. As Ninth Circuit Judge Marsha Berzon explains, separate opinions—and particularly the possibility of dissent—help to avoid groupthink and echo chambers.[12] Likewise, Cass Sunstein argues that separate opinions keep collective blindness at bay.[13] Some rather influential judges and Justices have referred to separate opinions as "liberating," a way to "shap[e] history," and "fun."[14]

But not everyone is a fan. There are significant institutional costs that come with writing separately—notably, increasing the time it takes for the court to resolve the dispute and sparking resentment from the author of the majority who likely feels the need to respond and the burden of that response.[15] Moreover, by taking extra time to decide one case there is less time to settle others; consequently, some disputes will be relegated to the second tier of appellate decision-making where there is no oral argument and no published opinion. Beyond those costs, a new dynamic is also emerging which further calls separate opinions into question.

According to some federal appellate judges, their colleagues are now "writ[ing] for Twitter," using language in separate opinions intended to "show off" and play to an increasingly national, increasingly ideological fan base.[16] Specifically, some judges are referencing *The Bachelor* and quoting Will

8. *Id.* at 1188 (quoting THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

9. *Id.* at 1198.

10. *Id.* at 1209.

11. *Id.* at 1188, 1197–98, 1209.

12. Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 CALIF. L. REV. 1479, 1480–81 (2012).

13. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 6 (2003).

14. Bernice B. Donald, *Judicial Independence, Collegiality, and the Problem of Dissent in Multi-Member Courts*, 94 N.Y.U. L. REV. 317, 318 (2019) (quoting Judge Patricia Wald, Justice Felix Frankfurter, and Justice Robert Jackson).

15. Epstein et al., *supra* note 4, at 104 (cataloging costs of dissents for judges on the courts of appeals).

16. Nate Raymond, *'Judges Gone Wild': Trump-Appointed Judge Says Too Many Write for Twitter*, REUTERS (Nov. 2, 2022, 3:37 PM), https://www.reuters.com/legal/government/judges-gone-wild-trump-appointed-judge-says-too-many-write-twitter-2022-11-02 [https://perma.cc/N7ST-PN6E]. Twitter of course is now the platform known as X, but it was called Twitter at the time these remarks were made.

Ferrell movies;[17] they prompt headlines about the use of a snarky tone or personal attacks.[18] There are also even more unusual moves afoot—such as the decision to author a concurrence to one's own majority opinion,[19] to release a draft majority opinion as an attachment to a dissent entitled "the panel opinion that *should* have been issued,"[20] to concur in one case to respond to Supreme Court oral argument in another one,[21] and even (most dramatically) the filming of an eighteen-minute videotaped dissent used to demonstrate how to disassemble firearms (featuring the author of the dissent in robes in chambers).[22]

This behavior has ruffled judicial feathers. Ninth Circuit judges spoke to reporters calling some of their colleagues bulldozers who are oblivious to court traditions and are sending "shock wave[s]" through the circuit.[23] Judge Jerry Smith of the Fifth Circuit—himself a conservative mainstay—described his court this way: "the Good Ship 5th Circuit is afire. . . . We need all hands on deck."[24]

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17. Debra Cassens Weiss, *After Judge Takes Umbrage at Dissenter's 'Sound and Fury' Quote, 5th Circuit Grants En Banc Rehearing*, ABA J. (Mar. 11, 2021, 10:07 AM), https://www.abajournal.com/news/article/after-judge-takes-umbrage-at-dissenters-sound-and-fury-quote-5th-circuit-grants-en-banc-rehearing [https://perma.cc/XQ5R-HMVB] (reporting an exchange of quotes from *Macbeth* and *Talladega Nights: The Ballad of Ricky Bobby*); Alison Frankel, *Snarky 9th Circ ConAgra Opinion Obscures Big Question in Consumer Cases*, REUTERS (June 30, 2021), https://www.reuters.com/legal/litigation/snarky-9th-circ-conagra-opinion-obscures-big-question-consumer-cases-2021-06-02 [https://perma.cc/SXU3-9D4V] (noting references to *The Bachelor* and *Star Wars*).

18. Frankel, *supra* note 17.

19. Weiss, *supra* note 17.

20. This move came from Judge Jerry Smith of the Fifth Circuit. *See* Suzanne Monyak, *Fifth Circuit Judge Adds Alternate Majority Opinion to Dissent*, BLOOMBERG L. (Oct. 10, 2023, 6:14 PM) (emphasis added), https://news.bloomberglaw.com/us-law-week/fifth-circuit-judge-adds-alternate-majority-opinion-to-dissent [https://perma.cc/8P3F-5E5H] (quoting from the opinion, "In the interest of time, instead of penning a long dissent pointing to the panel majority's and district court's myriad mistakes, I attach the Fifth Circuit panel opinion that should have been issued.").

21. Kathryn Rubino, *Judge James Ho Uses Fifth Circuit Decision to Audition for Supreme Court. Again.*, ABOVE L. (Nov. 21, 2023, 2:33 PM), https://abovethelaw.com/2023/11/judge-james-ho-uses-fifth-circuit-decision-to-audition-for-supreme-court-again [https://perma.cc/XN89-BH96] (explaining how Judge Ho reiterates his prior concurrence in the *Rahimi* case to respond to subsequent Supreme Court oral argument, repeating his position separately in a new case, *USA v. Kersee*).

22. Kerry Breen, *Judge Releases Video of Himself Disassembling Guns in Chambers in Dissent Against Court Ruling*, CBS NEWS (Mar. 22, 2025, 10:42 AM), https://www.cbsnews.com/news/judge-lawrence-vandyke-california-guns-video [https://perma.cc/3VTE-2PSS].

23. Maura Dolan, *Trump Has Flipped the 9th Circuit — and Some New Judges Are Causing a 'Shock Wave,'* L.A. TIMES (Feb. 22, 2020, 7:06 AM), https://www.latimes.com/california/story/2020-02-22/trump-conservative-judges-9th-circuit (on file with the *Iowa Law Review*) (quoting several Ninth Circuit judges); *see* Matt Ford, *The Rude Trump Judge Who's Writing the Most Bonkers Opinions in America*, NEW REPUBLIC (Jan. 31, 2022), https://newrepublic.com/article/165169/lawrence-vandyke-judge-ninth-circuit-appeals-trump-bonkers-opinions [https://perma.cc/BSW3-NUXG].

24. Debra Cassens Weiss, '*The Good Ship 5th Circuit Is Afire': Majority Invented 'New Title VII Sin' in Vaccine Case, Dissenter Says*, ABA J. (Feb. 17, 2022, 3:32 PM), https://www.abajournal.com/news/article/the-good-ship-5th-circuit-is-afire-dissenter-says-majority-invented-new-title-vii-sin-in-vaccine-case [https://perma.cc/6RXT-Q637] (quoting a dissent to a per curium Fifth Circuit decision). Judge Smith complained that his colleagues strategically decided not to publish this decision as a way of discouraging en banc review, and he derisively called it a "one and done

Are separate opinions from federal appellate judges virtues or vices to the federal judicial system? And is that answer changing? To answer those questions we interviewed over twenty-five federal appellate judges—at least one from each circuit and judges appointed by Presidents dating from Gerald Ford to Joe Biden.[25] We asked the judges why and whether they write separately, when these opinions are helpful, when they are harmful to collegiality, and, importantly, what they think is changing about the practice.

There is no one-size-fits-all easy answer to these questions, nor do we purport to offer one. On the one hand, separate opinions sometimes serve as a check on partisan behavior and ideological decisions. They provide leverage to a potential dissenter and, in so doing, can facilitate dialogue and compromise. On the other hand, separate opinions might serve as a forum for the ideologically-driven judge who wants to show loyalty to a cause nationwide and uses a separate opinion as a battle cry.

Further complicating matters, the decision to write separately is multifarious.[26] According to Virginia Hettinger, Stefanie Lindquist, and Wendy Martinek, many variables influence an appellate judge's decision to write separately including: ideology, time on the bench, circuit norms, the judge's prestige, and a case's complexity or political salience, to name but a few.[27] To be sure, it is not our project to develop some sort of formula for the "right" level of separate opinions to expect from circuit court judges—that may in fact be impossible to do.

Judging by the headlines, however, there does seem to be some sort of relationship between increased separate opinions and a worry that today's federal courts are facing a legitimacy crisis.[28] In a popular podcast, for example, Melissa Murray called out this kind of attention-seeking behavior as "an 'American Idol'" for judges vying "for a spot someday on the high court."[29]

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opinion." *Id.* It is worth noting that Judge Smith is a Republican-appointed judge like the majority of his colleagues.

25. We are basing our observations from interviews we conducted of judges for this project and a prior project. *See generally* Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 VA. L. REV. 1315 (2022); Interviews with Judges (2024).

26. *See* Epstein et al., *supra* note 4, at 104–07; Donald, *supra* note 14, at 323–28.

27. *See* HETTINGER ET AL., *supra* note 4, at 87–88; Epstein et al., *supra* note 4, at 134–35. Our over two dozen interviews with federal appellate judges (for this project and a prior project) corroborate this. *See generally* Interviews with Judges (2024); Larsen & Devins, *supra* note 25.

28. For examples of these claims, see Jeevna Sheth & Devon Ombres, *The 5th Circuit Court of Appeals Is Spearheading a Judicial Power Grab*, CTR. FOR AM. PROGRESS (May 15, 2024), https://www.americanprogress.org/article/the-5th-circuit-court-of-appeals-is-spearheading-a-judicial-power-grab [https://perma.cc/2AM7-AXG4]; Ian Milheiser, *The Edgelord of the Federal Judiciary*, VOX (Aug. 26, 2023, 6:00 AM), https://www.vox.com/scotus/23841718/edgelord-federal-judiciary-james-ho-fifth-circuit-abortion-guns (on file with the *Iowa Law Review*) (speaking of one Fifth Circuit Judge, "He revels in taking deliberately provocative positions. He often joins a fairly extreme opinion written by a colleague, and then writes separately to take an even more extreme position. His judicial opinions mingle Fox News talking points, men's rights activism, Federalist Society fantasies, and discredited legal doctrines.").

29. Robert Barnes & Ann E. Marimow, *This Conservative Appeals Court's Rulings Are Testing the Supreme Court*, WASH. POST (Oct. 26, 2023, 2:05 PM), https://www.washingtonpost.com/politics/2023/10/26/5th-circuit-supreme-court-reversals-decisions (on file with the *Iowa Law Review*) (quoting Murray).

The fact that some of these opinions may be dismissed as showboating does not eliminate the serious risks they pose. People look to the U.S. judicial system to resolve their disputes peacefully and with integrity. And as that integrity devolves into attention-seeking behavior, nothing short of the legitimacy of the judicial system itself becomes endangered.[30] Our goal in this Article is to theorize what we mean by legitimacy in the federal appellate courts, and then to explore the types of separate opinions that bolster that legitimacy . . . and also the ones that undermine it.

Any article concerned with judicial legitimacy needs to define some terms first. We thus articulate a model of judicial decision-making integral to the identity and legitimacy of the lower appellate courts: what we call the *deliberative model*.[31] The idea is different from the simple notion of collegiality or civility politics, especially to the extent that the latter means cementing "the hierarchy of the status quo."[32] Put simply, the deliberative model maintains that although a federal appellate judge inevitably has normative priors, that judge walks onto the bench with a mindset capable of being persuaded by the litigants and by his or her colleagues.[33] And—importantly—that judicial decisions are better when they are the product of this deliberation.

This model is time-honored and has bipartisan appeal.[34] By focusing on how appeals judges interface with one another, the deliberative model prioritizes the circuit itself. In so doing, circuit norms and traditions are reinforced, and

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30. Judicial legitimacy is a slippery concept, to be sure, which has spawned many thoughtful articles on the subject. *See, e.g.*, Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)). We expand on our definition below.

31. We believe we are the first to connect the deliberative model of the courts of appeals to judicial legitimacy, but we do not claim we are the first to note that collegiality is important to the enterprise of judging. This latter observation has been made by many. For example, Morgan Hazelton and her colleagues documented that "collegiality matters to opinion language. . . . [and] 'personal attacks regarding character, intelligence, and motives' . . . are 'very harmful.'" MORGAN L.W. HAZELTON, RACHAEL K. HINKLE & MICHAEL J. NELSON, THE ELEVATOR EFFECT: CONTACT AND COLLEGIALITY IN THE AMERICAN JUDICIARY 167, 188 (2023) ("When circuit judges anticipate working together more frequently in the future they are less likely to use [language] viewed as quite rude in judicial circles."). For other examples of scholars discussing the importance of collegiality in judicial decision-making, see Jonathan Remy Nash, *Measuring Judicial Collegiality Through Dissent*, 70 BUFF. L. REV. 1561, 1566–70 (2022) (linking collegiality to the tone of dissenting opinions); and Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1917–18 (2009). *See generally* HETTINGER ET AL., *supra* note 4.

32. *See* Leila Fadel, *In These Divided Times, Is Civility Under Siege?*, NPR (Mar. 12, 2019, 5:49 PM), https://www.npr.org/2019/03/12/702011061/in-these-divided-times-is-civility-under-siege [https://perma.cc/8BHS-6D53] ("Civility has been about making sure that the status quo, the hierarchy of the status quo at the moment, which means racial inequality, gender inequality, class inequality, stays permanent." (quoting Professor Lynn Itagaki)).

33. For an articulation of this approach to judging in the political science literature, see Nash, *supra* note 31, at 1573–74.

34. For a Democratic-appointed judge endorsing this model, see Harry T. Edwards, *Collegial Decision-Making in the US Courts of Appeals*, *in* COLLECTIVE JUDGING IN COMPARATIVE PERSPECTIVE 57, 61 (Birke Häcker & Wolfgang Ernst eds., 2020). For a Republican-appointed judge endorsing it, see generally J. Harvie Wilkinson III, *Building a Legal Culture of Affection*, 99 NW. U. L. REV. 1235 (2005).

the name of the game is internally focused, open-minded deliberation. Normative priors may shape that conversation, but there is no place for the close-minded advancement of external partisan goals—whether they be general legal policy preferences or personal advancement.

Like many other norms, however, this model is currently being stress-tested by extreme political divisions and partisan politics.[35] In particular, changes in the appointments process have shifted attention away from circuit norms and towards partisan goals and related ties to national ideological organizations.[36] This helps explain both the rise in externally focused, separate opinions and in a statistically significant partisan shift in the filing of separate opinions after en banc proceedings conclude and the case is over.

Partisan creep, however, does not mean that we throw the baby out with the bathwater. We reject the one-dimensional view—embraced by many political scientists—that separate opinions are a mark of a noncollegial court, and consequently that unanimity is a good measure of collegiality.[37] On the contrary, dissents are often reflective of something precious and increasingly rare in American democracy: collective reasoning and principled disagreement.

Our formidable task is thus to sort the constructive separate opinions from the destructive ones. We argue that the judicial voice of federal appeals judges should be collegial and internally focused. In an effort to be constructive and concrete we offer several reform suggestions along these lines regarding: the timing of draft circulation, optimal circuit size, a commitment to avoid seeking praise from an external audience, increasing contact between circuit judges, and even the abandonment of one particular type of separate opinion that we find does more harm than good—the dissent from denial of rehearing en banc ("DDR").

Part I of the Article articulates and explores the deliberative model of appellate judging, and Part II explains how that model is baked into the structure of the U.S. courts of appeals in ways that are significantly different from what we should expect from the U.S. Supreme Court. Then Part III begins the difficult task of sorting which features of separate opinions chip away at the deliberative model, and which ones reinforce it. Part IV tackles the special case of the dissent from denial of rehearing—a separate opinion we think should be abandoned. And Part V concludes with some reform suggestions. This Article constitutes far more than just a curious look at

35. *See generally* Katherine Shaw, *Partisanship Creep*, 118 NW. U. L. REV. 1563 (2024) (exploring how long-standing norms of nonpartisanship across government institutions are eroding).

36. In our earlier articles, *Weaponizing En Banc* and *Circuit Personalities*, we discuss the dual challenges of nationalization and polarization. For discussion of partisan polarization, see generally Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373 (2021) [hereinafter Devins & Larsen, *Weaponizing En Banc*]. For discussion of nationalization, see generally Larsen & Devins, *supra* note 25.

37. *See* HAZELTON ET AL., *supra* note 31, at 12 ("[I]ncreased collegiality concerns can dampen the role of ideological disagreement on a judge's decision to write separately."); Epstein et al., *supra* note 4, at 104 (noting dissent aversion); Frank B. Cross & Emerson H. Tiller, *Understanding Collegiality on the Court*, 10 U. PA. J. CONST. L. 257, 260 (2008) ("[E]vidence of collegiality (or lack thereof) could be found in the willingness to issue separate opinions, such as concurrences, even in the event of outcome agreement."). *But see* Nash, *supra* note 31, at 1631–34.

separate opinions on the lower courts; it is a critical first step in understanding both the role of the federal appeals judges in our democracy and the boundaries that must be honored to preserve their legitimacy.

I. THE DELIBERATIVE MODEL OF FEDERAL APPELLATE JUDGING

There is an important theoretical question lurking in the background of our project: How should a judge on the U.S. courts of appeals conceptualize their job? What exactly is the goal? We start by articulating the model that we and nearly all circuit judges we interviewed endorse. It is an idea that is likely familiar but rarely verbalized and to our knowledge unnamed. We call it the *deliberative model* of federal appellate judging.[38]

A. MORE THAN JUST PLAYING NICE

Federal judges have always stressed how collegiality is critical to what it is they do, but for a long time scholars have brushed it off.[39] This is unwise. We can learn a lot from the people who are actually on the job.[40]

In many public statements judges concur that collegiality is central to success on the job—not just satisfaction, but *success*. Shortly after becoming a judge on the Fourth Circuit, Judge Pam Harris wrote:

> What I had not been prepared for or been able to anticipate in any real way [when I first joined the court], is just how *collective* th[e] decision-making process is for federal appellate judges—how little of it is about what I think in isolation, and how much of it is about what I think in relation to what two other judges think. . . . Deciding how a case comes out and on what grounds is fundamentally a group enterprise. And a recognition of that fact is at the heart of what most judges mean when we talk about judicial collegiality.[41]

Recognizing that reality, we think deliberation is key to the success of the federal courts of appeals. Specifically, there are at least three important tenets of the deliberative model of federal appellate judging: (1) any panel of three

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38. For examples of judicial public comments along these lines, see Edwards, *supra* note 34, at 65; Sri Srinivasan, Pamela Harris & Daphna Renan, *A Model of Collegiality: Judge Harry T. Edwards*, 105 JUDICATURE, no. 1, 2021, at 76, 77; and Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1446 (2012). Political scientists Jonathan Nash and Adeno Addis have articulated a very similar model in the context of inter-tribunal deliberation—across courts and judicial systems. *See* Adeno Addis & Jonathan Remy Nash, *Identitarian Anxieties and the Nature of Inter-Tribunal Deliberations*, 9 CHI. J. INT'L L. 613, 615–17 (2009).

39. As discussed below, recently political scientists Morgan Hazelton and colleagues have picked up the mantle to study collegiality and its effect on a judge's decision to dissent. *See infra* notes 176–77 and accompanying text.

40. Lee Epstein, William Landes and Richard Posner agree with us on this point: "[J]udges frequently refer to the importance of collegiality . . . and just as frequently, scholars reject it. We should not." *See* HAZELTON ET AL., *supra* note 31, at 5 (quoting LEE EPSTEIN, WILLIAM M. LANDES, RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 48 (2013)).

41. Edwards, *supra* note 34, at 76 (emphasis omitted) (quoting Judge Pamela Harris with permission).

judges can deliver a legitimate verdict for the court as a whole; (2) any circuit can resolve a case in a principled way for any litigant; and (3) judges of all ideological stripes can and should work together in a way that reflects open-mindedness, maintains collegial working relationships over time, and invites decision by deliberation even when they disagree vigorously.[42]

The deliberative model is necessary to the proper functioning of the federal courts of appeals, but it does not mean that a judge's ideological leanings are irrelevant. What it means is that judges will work collegially to give due regard to the arguments of litigants and their circuit colleagues, even if they vehemently disagree with one another.

As mentioned above, the aim of this model is nothing less than the legitimacy of the courts. By *legitimacy* we do not only mean the assurance that the public will abide by judicial decisions they do not like.[43] The judicial legitimacy we are concerned about, rather, reflects assurance that disputes will be resolved with integrity—which means, above all, that the decision-makers will seriously consider competing arguments and will work collaboratively with other panel judges to reach a decision. It also means that appeals judges are not trying to score points with national ideological groups or even judges on other circuits. Their focus is to listen and learn from their circuit colleagues—that they may persuade others and that they are open to being persuaded.

Deliberation does more than facilitate compromise (although sometimes that happens). It leads to spotting new issues, looking at facts in a new way, and thinking about blind spots that might not be apparent without the assistance of a new point of view.[44] Importantly this does not equal a commitment to see all legal issues the same way. "That," as Judge Harry Edwards put it, "would not be collegiality, but homogeneity or conformity, which would make for a decidedly unhealthy judiciary."[45]

This process distinguishes the judiciary from other institutions in our democracy who are not bound by reason-giving or quite as steeped in the norms of the legal profession.[46] Deliberating is a fundamentally different decision-making process than collecting up or down votes across individuals.

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42. For elaboration on the value of deliberation in decision-making, see Kevin Olson, *Deliberative Democracy*, *in* JÜRGEN HABERMAS: KEY CONCEPTS 140, 140–41 (Barbara Fultner ed., 2011). It is also reflected in some of the more recent political science literature on federal judging. *See* HAZELTON ET AL., *supra* note 31, at 75–76; Nash, *supra* note 31, at 1590–91 (linking collegiality to the tone of dissenting opinions). Perhaps most famously Judge Harry Edwards (of the D.C. Circuit) and Professor Michael Livermore are known for indicting empirical judicial studies generally for failing to take account of "collegiality and interjudge deliberations." Edwards & Livermore, *supra* note 31, at 1917.

43. *See* Grove, *supra* note 30, at 2240 ("[I]n legal discourse, we have an intuitive sense that *illegitimate* means something more than erroneous or incorrect. The term signifies something absolutely without foundation and perhaps ultra vires. So when a government institution or organization lacks legitimacy, it may no longer be worthy of respect or obedience.").

44. An example of this line of thinking is Condorcet's jury theorem. For discussion of this theory see, for example, Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617, 617–19 (1992).

45. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003).

46. *See* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 159–61 (2007).

Under the deliberative model, victory is not a numbers game, and judges are not reduced to "partisan warriors."[47] Litigants should not feel that victory or defeat is solely contingent on the party affiliations of the judges before them, or that en banc review will ensure whichever party has the most appointments in a circuit will get to dictate all policy disputes there.[48] And while judges will and should sometimes disagree with one another—indeed disagreement is baked into the design—judges should be collegial when disagreeing and open to hearing and honestly evaluating other views.

We are certainly not the first to claim collegiality is central to the identity of the courts of appeals. In their 2023 book, *The Elevator Effect*, political scientist Morgan Hazelton and her colleagues measured ways the interpersonal dynamics of judges assigned to the same circuit manifest themselves, noting these dynamics affect the language of judicial opinions, their willingness to write separately, and even moderation of ideological priors in the outcomes reached.[49] Indeed, as the authors discovered, "changes in the amount of contact" that judges have with each other "influence how they make decisions."[50]

In sum, this model of judging assumes that decisions are better when deliberated and that deliberation is better when collegial.[51] A helpful phrase to describe the decision-making process embraced by this model is "adversarial collaboration," in the words of Judge Berzon.[52] She explains that separate opinions actually help sharpen analysis by allowing all points of views to be aired.[53] The judges we interviewed explained that they are more willing to write a dissent on a collegial court when they know they will remain friends afterwards.[54]

Circuit norms reflect and reinforce this. As an illustration, at least in some circuits, even if the vote after oral argument is 2-1, the two judges in the majority will ask the dissenter if there is any narrower path that would allow them to join.[55] Similarly, the status of an opinion as unpublished or published is often brought up in these discussions as a way to appease a dissenting colleague.[56] Indeed, circuits with significant polarization are especially likely

47. *In re* Trump, 958 F.3d 274, 292 (4th Cir. 2020) (Wilkinson, J., dissenting), *vacated as moot*, Trump v. District of Columbia, 141 S. Ct. 1262 (2021) (mem.).

48. *See* Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'* N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html (on file with the *Iowa Law Review*) (describing Chief Justice Roberts's statement that judicial independence defies thinking of judges as "Trump judges" or "Obama judges").

49. *See generally* HAZELTON ET AL., *supra* note 31.

50. *See id.* at 11.

51. *See* Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 863 (2014) (discussing the Condorcet Jury Theorem).

52. Berzon, *supra* note 12, at 1481 (quoting psychologist Daniel Kahneman).

53. *Id.* at 1486–87. Dissents should be contrasted with dissents from denial of rehearing en banc ("DDRs"), as discussed below, *infra* Part IV. DDRs, Judge Berzon says, are disfavored because they are essentially a public shunning of circuit colleagues and do little more than indicate that "we are unwilling to stand behind the results of our decision-making processes." *Id.* at 1491–92.

54. Larsen & Devins, *supra* note 25, at 1336 (interviewing a Fourth Circuit Judge).

55. *See* Interview with Fourth Circuit Judge (Feb. 8, 2021).

56. *See* Interview with Eleventh Circuit Judge (May 29, 2024); Interview with Sixth Circuit Judge (June 21, 2024).

to sidestep the filing of dissents by issuing unpublished opinions.[57] Because successful appellate judging depends on repeat interactions with people who may not always see the law in the same way, loyalty to the group and dedication to the collective enterprise is key.

In fact, academics have even measured the effects of these norms on case outcomes. Cass Sunstein, Frank Cross, and others have measured what are often called "panel effects," which, broadly speaking, mean that judges on a panel will moderate their own views in response to the views of another judge on the panel.[58] And the moderation comes not just from *who* is on the panel, but also from *how* they interact with one another. As the authors of the *Elevator Effect* documented, judges who regularly interact with their colleagues are more collegial than those with more limited contact (especially seasoned judges who sit with the same colleagues over an extended period of time).[59]

All of this means that a certain reputation is prized under the deliberative model of appellate judging: that of being someone who plays well with others, even—and perhaps especially—with those from different ideological camps.[60] Appellate judges who ascribe to this model care how they are viewed by their colleagues, and they want to be viewed as fair-minded, nonpartisan, and committed to the rule of law.[61] "As one judge we interviewed put it, dividing up on partisan grounds too often is, frankly, a 'bad look.'"[62]

It is also important to remember that federal appellate judges are legal elites who have been educated and brought up to prize neutral, nonpartisan,

57. Alex Badas, *Measuring Ideological Polarization on the Circuit Courts of Appeals 1953–2022*, 13 J.L. & CTS. 463, 475–76 (2024). Badas's important study calls attention to the costs of polarization on the issuance of timely consequential opinions. We too are very aware of those costs but we also see a silver lining in the ability of judges to avert open warfare by occasionally making use of avoidance techniques.

58. *See* CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 8–13 (2006) (discussing how judges will "amplify" or "dampen" their positions based on ideological preferences of other panel judges); *see also* CROSS, *supra* note 46, at 148–77 (examining "panel effects," where an appellate judge's vote is swayed by the other two judges on the panel).

59. Those with the least contact are younger judges, especially junior judges who sit on large circuits (where judges do not regularly sit on the panels with all other judges from the circuit). *See* HAZELTON ET AL., *supra* note 31, at 81–91.

60. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 54 (2006).

61. JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 173 (2002) ("Court culture teaches that a court that presents a unified face has fewer fragmented opinions, has a higher degree of civility among its judges, speaks with a higher degree of moral authority, and enjoys a higher degree of legitimacy."). Learned Hand (who sat on the Second Circuit from 1924 to 1961) went so far as to suggest that dissent fosters the view that law is political by canceling "the impact of monolithic solidarity on which the authority of a bench of judges so largely depends." LEARNED HAND, THE BILL OF RIGHTS 72 (1958); *see also* James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 392–93 (1995) (detailing Chief Judge Hand's reluctance to use the en banc process as it "often yields a confusing multiplicity of opinions").

62. Larsen & Devins, *supra* note 25, at 1356; *see* Devins & Larsen, *supra* note 36, at 1374–78.

rule-of-law commitments.[63] Law-oriented behavior is thus a powerful expectation in the legal community. Larry Baum explains:

> Because of their socialization and experience, lawyers appreciate a judge's commitment to legal reasoning and skill in interpreting the law. For this reason, judges who want the respect of practicing lawyers, legal academics, and other judges have an incentive to be perceived as committed to the law and skilled in its interpretation.[64]

Being a "good judge" according to this model, in other words, means putting the law above one's "partisan team." The reputation an appellate judge seeks to build—at least traditionally—is in line with those ideals.[65]

In this regard, it is important to think carefully about the role of the Federalist Society. The Federalist Society has become a major player in the appointment of federal judges, and because of this many people equate the organization with President Trump and equate the behavior of "Trump judges" with the Federalist Society.[66]

Often overlooked in that narrative, however, is the fact that the Federalist Society's tenets are more consistent with the deliberative model of appellate judging than they are with President Trump. Although certainly committed to conservative methodology and ideals, the Federalist Society is also committed to free debate and the rule of law.[67]

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63. NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 53–57 (2019).

64. BAUM, *supra* note 60, at 106.

65. HAZELTON ET AL., *supra* note 31, at 159 ("Federal appellate judges serve life terms and can only shape policy with the cooperation of their colleagues. They spend a significant amount of time in one another's company. This environment incentivizes judges to manage their relationships with an eye to both substantive cooperation and general harmony."). *See generally* Dan M. Kahan et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349 (2016) (reporting the results of a study showing that judges—unlike the general public—are unaffected by ideological preferences when resolving a politically charged statutory interpretation issue).

66. Jonathan Swan, Charlie Savage & Maggie Haberman, *If Trump Wins, His Allies Want Lawyers Who Will Bless a More Radical Agenda*, N.Y. TIMES (Nov. 1, 2023), https://www.nytimes.com/2023/11/01/us/politics/trump-2025-lawyers.html (on file with the *Iowa Law Review*) ("At the start of Mr. Trump's term, his administration relied on the influential Federalist Society, the conservative legal network whose members filled key executive branch legal roles and whose leader helped select his judicial nominations."). For more on what a "Trump judge" means in common parlance and evidence that, as a group, these judges are distinct in terms of their productivity, influence, and independence, see Stephen J. Choi & Mitu Gulati, *How Different Are the Trump Judges?*, 78 VAND. L. REV. EN BANC 1, 12–13, 16–17, 23–26 (2025). For additional discussion of "Trump judges'" penchant to write separate opinions, see Avalon Zoppo, *Trump-Appointed Judges More Likely to Pen 'Dissentals' than Colleagues, Study Finds*, LAW.COM (April 8, 2025, 2:38 PM), https://www.law.com/nationallawjournal/2025/04/08/trump-appointed-judges-more-likely-to-pen-dissentals-than-colleagues-study-finds (on file with the *Iowa Law Review*).

67. *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 136–37 (2008); *see also* Peter S. Canellos, '*A Moment of Truth for the Federalist Society': Politics or Principle?*, POLITICO (Nov. 10, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/11/10/federalist-society-dobbs-abortion-00066067 [https://perma.cc/KVQ9-WU8E] ("Teles showed how the society built a big tent by advising its chapters to avoid billing their events as conservative confabs, and to include liberal professors in their

Correspondingly, Trump's first-term appointees—almost entirely Federalist Society appeals judges—are legal elites who were brought up to seek the approval of other legal elites. Most went to top law schools, clerked for appellate judges, and litigated both before the federal courts of appeals and the U.S. Supreme Court.[68] For sure, as we will document in Parts III and IV, some Trump appointees have engaged in attention-seeking behavior antithetical to the deliberative model.[69] At the same time, Trump appointees have also resisted calls to define themselves as partisans. In fact, when several Trump-appointed judges rejected the former President's claims of election fraud in 2020, this commitment to the rule of law was on prominent display, causing Trump himself to fiercely complain.[70]

Perhaps for this reason, recent reports indicate Trump is now in the market for a new style of lawyer. As reported by the *New York Times*, Trump and his advisors are discussing a break from the Federalist Society because "elite conservative lawyers" ultimately proved to be too "timid," too "squish[y]," and "too worried about maintaining their standing in polite society."[71] President Trump's frustration with judges he appointed who ruled against him in his second term has allegedly prompted a break up between President Trump and the Federalist Society, even leading the President to call Leonard Leo (the Federalist Society's founder) a "sleazebag."[72]

Whatever one thinks of the Federalist Society generally or its role in judicial appointments, the core tenets of the Society are not antithetical to the deliberative model of appellate judging. In fact, the Federalist Society's norms—and the "polite society" with which they maintain ties—can actually reinforce the tenets of that model.[73]

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discussions. . . . Likewise, the group refused to take positions on issues, declined a proposal to rate judges and resisted the creation of a litigation branch. All of these moves served to keep the society above the fray, out of the line of political fire, whether from the left or factions of the right.").

68. *See* Choi & Gulati, *supra* note 66, at 8 (making use of "measures of productivity, influence, and independence" to conclude that Trump appointees often outperformed their peers).

69. *See infra* Parts III–IV.

70. Canellos, *supra* note 67 ("'Neil Gorsuch is not Corey Lewandowski; Stephanos Bibas is not Rudy Giuliani,' wrote *National Review* editor Rich Lowry in 2020, after Bibas, a Trump-appointed circuit judge and longtime Federalist Society member, authored an opinion dismissing Trump's challenge to Pennsylvania's election results. But Trump seems to have noticed that his Federalist Society appointees aren't necessarily the toadies he wanted." (citation omitted)).

71. Swan et al., *supra* note 66; *see also* Bravin & Barber, *supra* note 2 ("[T]he conservative legal movement is laying the groundwork for Donald Trump to appoint judges who prioritize loyalty to him and aggressively advocate for dismantling the federal government . . . . The movement's old guard, including lawyers who helped found the Federalist Society in the 1980s, is pushing back . . . .").

72. Jill Colvin, *Trump, Frustrated with Some Judges, Lashes Out at Conservative Activist Leonard Leo*, ASSOCIATED PRESS (June 1, 2025, 8:00 AM), https://apnews.com/article/trump-leonard-leo-federalist-society-judges-trade-454c4ae1b946bd2d37a29de9b24b02a1 [https://perma.cc/MA98-MW2L].

73. Statements by then-candidate Trump and some of his associates suggest that Trump's second-term judicial nominees will be more partisan than his first-term appointees. *See* Bravin & Barber, *supra* note 2. Whether this proves true remains to be seen. Moreover, unlike the beginning of Trump's first term (when the majority Republican Senate's refusal to confirm Obama appeals court nominees paved the way for seventeen vacancies when Trump took office),

Finally, it is worth noting that although this is a model embraced by judges in the past, it is certainly not limited to the demographic of judges, i.e., white men, who dominated the bench in the past. On the contrary, the norms of this model are embraced well beyond those who traditionally could become judges.[74] And the social science evidence suggests that diverse judges who increasingly populate the bench today prize collegiality and collaboration at an even higher rate than judges from the past.[75]

B. COMPARED TO WHAT? A TRIBAL MODEL

To better understand what a deliberative model of appellate decision-making looks like and why it is important, it is perhaps helpful to think of its opposite—call it a *tribal model* of judicial decision-making.[76]

Two features of a tribal model make it distinct: (1) treating cases as a team sport in which the partisan affiliation of one's colleagues is what matters most; and (2) approaching decisions with an increased confidence in one's own impulses, making the views of others less relevant or less worthy of consideration.

Consider the way Judge Edwards describes his early days on the D.C. Circuit in the 1980s in what he calls a "'broken' court for want of collegiality."[77] He recalls:

> During my first day as a member of the court, I was greeted by one of the senior members of the court who, after saying 'hello,' asked, 'Can I count on your vote?' I was floored by the question. I responded that he could count on my vote only on those occasions when we agreed on how a case should be decided. I came to understand, however, that—in those days—the DC Circuit was ideologically

there were only two open appeals court seats for Trump to fill at the start of his second term. *See* Kevin Freking, *Democrats Strike Deal to Get More Biden Judges Confirmed Before Congress Adjourns*, ASSOCIATED PRESS (Nov. 21. 2024, 8:51 PM), https://apnews.com/article/biden-trump-judges-confirmation-battle-schumer-senate-ecef59aed90804a53d4436dc154a2ee14 [https://perma.cc/TR6B-874Q]. With next to no Democratic-appointed appeals judges likely to step aside and pave the way for Trump appointees, it is an open question whether the partisan balance on the federal courts of appeals will change dramatically during Trump's second term. *See* Xiao Wang, *The Old Hand Problem*, 107 MINN. L. REV. 971, 974 (2023) (documenting the unwillingness of Democratic appointees to step aside during Trump's first term); John Deschler & Maya Sen, *The Role of Judge Ideology in Strategic Retirements in U.S. Federal Courts*, 1 J.L. & EMPIRICAL ANALYSIS 98, 99 (2024) (finding that both partisanship and ideology impact judges' decisions to retire).

74. Indeed, one of the most vocal defenders of the deliberative model is Judge Harry Edwards of the D.C. Circuit, only the second Black member to ever join that court. *See infra* notes 77–80, 278 and accompanying text.

75. *See* SUSAN B. HAIRE & LAURA P. MOYER, DIVERSITY MATTERS: JUDICIAL POLICY MAKING IN THE U.S. COURTS OF APPEALS 80–98 (2015) (demonstrating nontraditional judges value inclusive decision-making more than white men and that nontraditional judges influence white men on panels).

76. Referring to a similar dystopia, Judge Edwards calls it running in "ideological camps." Edwards, *supra* note 45, at 1646.

77. Edwards, *supra* note 34, at 84. For an account of the bitter lines of division among liberal and conservative judges on the D.C. Circuit in the early 1970s, see JOSEPH C. GOULDEN, THE BENCHWARMERS: THE PRIVATE WORLD OF POWERFUL FEDERAL JUDGES 250–90 (1974).

> divided on many issues . . . Judges of similar political persuasions too often sided with one another (say, on petitions for *en banc* review) largely out of partisan loyalty. We dissented more, and we were more inclined to rehear cases *en banc*. . . . [We were] distrustful of one another's motivations.[78]

Judge Edwards was convinced that this team-sport mentality led to poorer case outcomes. When judges hate each other, he explained, "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 better result."[79] The toxic atmosphere that Judge Edwards inherited when he joined the D.C. Circuit, in other words, inhibited the judges' ability to "get[] the law right."[80]

The Sixth Circuit also went through a dark time for collegiality in the early 2000s. Most accounts attribute the discord to the highly contentious affirmative action cases from the University of Michigan that culminated in *Grutter v. Bollinger* and *Gratz v. Bollinger*, both decided by the Sixth Circuit in 2002 and the U.S. Supreme Court in 2003.[81] The disagreement between the judges extended far beyond the merits of the cases and included claims of judicial misconduct and shenanigans involving opinion assignment and the timing of en banc review.[82]

Whether the affirmative action fights were the cause of the nastiness or just a symptom of a pre-existing dynamic, the contentiousness of this episode led to such a tremendous dip in collegiality that the Sixth Circuit judges were said not to be able to sit in the same room with one another.[83] Indeed in the words of *New York Times* reporter Adam Liptak, the Sixth Circuit was "surely the most dysfunctional federal appeals court in the nation. . . . [and] relations

78. Edwards, *supra* note 34, at 84–85.

79. *Id.* at 85.

80. *A Conversation with Judge Harry T. Edwards*, 16 WASH. U. J.L. & POL'Y 61, 64 (2004). We elaborate below on steps Judge Edwards took to remedy this problem once he became the Chief Judge of the D.C. Circuit, but for a longer explanation, see Larsen & Devins, *supra* note 25, at 1340–44.

81. *See* Interview with Sixth Circuit Judge, *supra* note 56; Interview with D.C. Circuit Judge (Mar. 17, 2021); Sheryl G. Snyder, *A Comment on Litigation Strategy, Judicial Politics and Political Context Which Produced* Grutter *and* Gratz, 92 KY. L.J. 241, 248–53 (2004).

82. Opinion, *Sixth Circuitry*, WALL ST. J. (May 17, 2002, 12:01 AM), https://www.wsj.com/articles/SB102159170560244032O (on file with the *Iowa Law Review*) ("According to Judge Boggs's account, corroborated by another judge, Judge Martin assigned himself to the three-judge panel that was considering *Grutter*, bypassing the usual random-selection process. He then delayed telling the court, which then had 11 active members, that the university had petitioned for a full-court or en banc review. Instead, he waited until two Republican-appointed judges had taken senior status, thereby losing the right to sit in an en banc hearing. It's not unusual for judges to time their move to senior status so that they can participate in cases that interest them and it's reasonable to assume that *Grutter*, which dealt with one of the most contentious legal issues of the day, would have been such a case.").

83. *See* Interview with Tenth Circuit Judge (Feb. 24, 2021).

among the judges on the Sixth Circuit have been marred by venomous discord for at least a decade, mostly along ideological lines."[84]

One might be asking: Who cares if judges on a court don't like each other? But an important lesson lurks behind these two stories: Judges in both circuits took steps to change the culture because they thought the discord was affecting their *work*.[85] When judges adhere to the tribal model, they decide cases without deliberation, without collective issue-spotting efforts, and without the second thought that comes from seeing a dispute from a different perspective. That is more than just an uncomfortable workplace; it is a shoddier workplace.

As law students and legal academics who regularly read and analyze the final product of judicial decisions, it is easy to assume these decisions are predetermined—and certainly where the judges end up has a lot to do with their normative priors. Numerous empirical studies, for example, back up the commonsense observation that dissents are more likely when ideologically divergent judges sit on the same panel.[86]

It therefore would not be surprising if Trump and Biden appointees would come out on opposite sides of a case.[87] But that does not reflect the entire reality of the process as described by the judges we spoke to who are actually doing the work. Instead, the final opinions are a reflection of an evolution of thought. In other words, by paying attention to their colleagues rather than some national ideological network, judges are better equipped to look beyond stereotypes and caricatures. As one judge told us, "we are learning along the way."[88]

Indeed, the judges we spoke to in our interviews all asserted that it was a regular occurrence for their minds to change about a case—but only after fruitful conversation with colleagues either in conference, or in the sharing of drafts later on. Judges appointed by Presidents of both political parties agreed that it is dangerous to approach a case with heels dug in or without "room to be moved" because in those circumstances one is deprived of wisdom that colleagues bring to bear.[89] In the helpful phrasing of one judge, "my secret weapon[s] are the other two colleagues on the panel."[90]

For democratic leaders in other institutions who make deals or swap votes as part of their institutional role, a tribal mentality is understandable and perhaps inevitable. The currency of the tribal model is power—"Do we have the votes?" But judges must approach their decisions differently.[91] The currency

84. Adam Liptak, *Weighing the Place of a Judge in a Club of 600 White Men*, N.Y. TIMES (May 16, 2011), https://www.nytimes.com/2011/05/17/us/17bar.html (on file with the *Iowa Law Review*).

85. *See* Larsen & Devins, *supra* note 25, at 1340–48.

86. *See, e.g.*, HAZELTON ET AL., *supra* note 31, at 96–99; Epstein et al., *supra* note 4, at 130.

87. This may be particularly true of second-term Trump appointees. As noted, President Trump may well be looking for particularly strong conservatives to appoint to the federal bench. *See* periodical sources cited *supra* note 2.

88. Interview with Third Circuit Judge (June 12, 2024).

89. Interview with Eleventh Circuit Judge, *supra* note 56; *see* Interview with Fourth Circuit Judge (May 23, 2024).

90. Interview with Fourth Circuit Judge, *supra* note 89.

91. For a similar observation, see Donald, *supra* note 14, at 331 ("[I]t may be useful to consider how an appellate court's output is like, and unlike, that of a legislative body. The chief output of a legislature is the text of the bills it enacts. Dissent is silent in a statute—the losing side

of the deliberative model is not power but reason. As Judge J. Harvie Wilkinson III puts it, "for better and for worse, law and lawyers are central to America. And law is, after all, a profession of reason. Reason, by its nature, is a temperate and calming force. A culture of affection in the most reasoned of all professions should not be out of reach."[92]

Implicit in this observation is what some have called "judicial humility."[93] Judicial humility, according to legal philosophers, includes "awareness of one's fallibility, an openness to learning, curiosity about and engagement with the perspectives of others, [and] respect for and deference to other decision-makers and institutions."[94] A good judge, in other words, knows that other judges are smart and that their views must be worthy of consideration. Acting infallible—ignoring judges of the past, ignoring colleagues of the present—is a surefire way to make mistakes. A hallmark of an *unhealthy* court is one in which the actors do not rely on each other to help with collective reasoning and do not pay attention to each other beyond counting sides for a potential en banc.

We think the deliberative model is the normatively desirable way to approach judicial decision-making. But even one who disagrees with us on that score must admit that this model is integral to the very structure of the U.S. courts of appeals—interestingly, in ways that are significantly different from the structure and practices of the U.S. Supreme Court. It is to those important differences that we now turn.

II. WHY SEPARATE OPINIONS ON LOWER COURTS ARE DIFFERENT

Judge Edwards writes that "[t]he collegial operations and internal decision-making processes of the Supreme Court and the Courts of Appeals are strikingly different."[95] Thinking about those differences is helpful in illuminating the model of judging embraced by lower courts. Important differences include the appeals court judges' smaller audience, their larger caseloads and more limited resources, the design of randomly assigned panels, and norms that expect unanimity.

First, consider the relevant audience for the two types of court.[96] Supreme Court Justices have a brand to protect, a crowd to please, and a reputation to

does not . . . have the ability to memorialize its reservations or objections within the text of the legislation. A judicial dissent, in contrast, is a direct, accessible part of the public record.").

92. Wilkinson, *supra* note 34, at 1236.

93. R. George Wright, *Judicial Humility in an Age of Certitude*, 58 IND. L. REV. 381, 381 (2024); *see also* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 178–79 (2003) (discussing virtue jurisprudence); Amalia Amaya, *The Virtue of Judicial Humility*, 9 JURISPRUDENCE 97, 99 (2018) (tying judicial humility to virtue).

94. Wright, *supra* note 93, at 389 (citation omitted).

95. Edwards, *supra* note 34, at 61; *see also* Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 857 (2022) ("Taken together, these features make the lower courts different in kind from the Supreme Court, and that difference makes minimalism in the lower courts a considerably more attractive approach.").

96. Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT'L L. 451, 452 (2009) ("Through their decisions and

uphold.[97] They feel the need to keep their decisions consistent on an individual level and to follow a sort of "self-stare decisis" over time.[98] In their opinions this means they "commit themselves, and their future votes, to idiosyncratic views of the law."[99]

Justices are also writing for a growing national audience as the Supreme Court looms larger in public life than it did in the past.[100] Think about the cult followings of "the Notorious R.B.G." or Justice Alito authoring op-eds in the *Wall Street Journal* to defend himself.[101] Six Justices now on the Court have received "big-money advances for writing books [mainly] about themselves."[102]

As others have remarked, today's Supreme Court Justices have reached "celebrity status."[103] Over the past decade, for example, Americans are increasingly likely to be able to name a Supreme Court Justice (even though the number of Americans who can name at least one Supreme Court case has declined).[104] And like other celebrities, Supreme Court Justices feel the need to "play to their [fan] bases."[105] In real terms that means they do more book

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actions, judges acquire a reputation with different audiences."). *See generally* BAUM, *supra* note 60 (examining judicial audiences and influences).

97. Garoupa & Ginsburg, *supra* note 96, at 452–54; *see* Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 157, 159–60 (2016).

98. *See* Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 447 (2008); Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 826 & n.8 (2023).

99. Re, *supra* note 98, at 828.

100. Supreme Court appointments now rank as one of the top voting issues in presidential elections. *See* CARROLL DOHERTY, JOCELYN KILEY & BRIDGET JOHNSON, 2016 CAMPAIGN: STRONG INTEREST, WIDESPREAD DISSATISFACTION 31 (2016), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2016/07/07-07-16-Voter-attitudes-release.pdf [https://perma.cc/J3RY-NWBH] (noting Supreme Court appointments as the ninth most important issue, immediately below social security and education and immediately above environment, trade, and race relations). In the 2016 election, then-presidential candidate Donald Trump sought political leverage by producing a list of potential nominees to fill the seat left vacant by the death of Justice Scalia. *See* Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html (on file with the *Iowa Law Review*). In 2024, Democratic candidates ran against Trump's Supreme Court appointees who voted to overturn abortion rights. *See* Elaine Kamarck, *Abortion and the 2024 Election: There Is No Easy Way Out for Republicans*, BROOKINGS (April 17, 2024), https://www.brookings.edu/articles/abortion-and-the-2024-election-there-is-no-easy-way-out-for-republicans [https://perma.cc/KB86-ZDXK]. For additional discussion, see *infra* Part III.

101. *See* Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 182 (2020) ("Television appearances, books, movies, stump speeches, and separate opinions aimed at the Justices' polarized fan bases have created cults of personality around individual Justices."); Hasen, *supra* note 97, at 157.

102. David G. Savage, *Supreme Court Justices Disclose Book Advances, Including Nearly $900,000 for Jackson*, L.A. TIMES (June 7, 2024, 12:23 PM), https://www.latimes.com/world-nation/story/2024-06-07/supreme-court-justices-disclose-book-advances-including-900-000-for-jackson [https://perma.cc/6NUA-ZTZY]. The six are Justices Jackson, Barrett, Gorsuch, Kavanaugh, Sotomayor, and Thomas. *See id.*

103. Sherry, *supra* note 101, at 187, 191; *see* Hasen, *supra* note 97, at 157–58.

104. *See* ROBERT GREEN & ADAM ROSENBLATT, SUPREME COURT SURVEY: AGENDA OF KEY FINDINGS 7, 27 (2018), https://www.c-span.org/c-span-supreme-court-survey-2018 [https://perma.cc/238G-SSYY] (noting, however, a 2017 dip in Justice identifiability).

105. Sherry, *supra* note 101, at 189.

tours and speaking events, they are the subject of movies and merchandise, and their opinions are increasingly marked by spicy language meant to please their fans and generate memes.[106] In fact, Richard Hasen documented an eight-fold increase in public appearances by the Justices in recent years, and he explains that Justices have become "rock star Justices, drawing adoring crowds who celebrate [them] as though they were teenagers meeting Beyoncé."[107]

Reflecting today's partisan ideological divide, moreover, today's Justices often seek to curry favor with ideological groups. Conservative Justices are increasingly likely to speak at the Federalist Society annual meeting and other conservative gatherings; liberal Justices, in turn, are likely to appear at the American Constitution Society ("ACS") Convention and left-leaning conferences.[108] At these events, the Justices are celebrated for being leaders of the cause. Witness, for example, Volokh Conspiracy blogger Josh Blackman's description of the spontaneous "thunderous applause" that the conservative Justices receive "[w]hen they enter a ballroom at the Federalist Society Convention."[109]

Appellate judges, by contrast, are largely anonymous actors (at least historically). For the most part, nobody would recognize those judges on the street. When a judge is anonymous, that affects the audience they play to and the type of reputation they are seeking to build. On the classic model, opinions by appellate judges are written for the ears of the litigants and one's circuit colleagues, but not generally destined for social media or national headlines. By focusing on an internal audience, the circuit comes first, and the judge is an agent of the circuit. Indeed, in some circuits the names of the individual judges on any given panel are not even revealed until the morning of argument—reinforcing the framework supporting this model of judging where the identity of the judge is not critical to the result delivered.[110]

Anonymity is reinforced in several other ways—all of which call attention to differences between courts of appeals and the Supreme Court. To start, the Supreme Court controls its docket and hears around seventy cases a year. The Supreme Court even has control of the "question presented," including the power to ask for arguments on whether it should overrule past precedent.[111]

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106. *Id.* at 185–87.

107. Richard L. Hasen, *Siloed Justices and the Law/Politics Divide*, BALKINIZATION (Apr. 2, 2019), https://balkin.blogspot.com/2019/04/siloed-justices-and-lawpolitics-divide.html [https://perma.cc/EE7J-KMV9].

108. *See* DEVINS & BAUM, *supra* note 63, at 43–44 (charting rise of public appearances before ideological groups).

109. Josh Blackman, *Ten Reflections on Justices Kavanaugh and Barrett's Votes in* Dobbs, REASON: VOLOKH CONSPIRACY (Dec. 16, 2023, 11:58 PM), https://reason.com/volokh/2023/12/16/ten-reflections-on-justices-kavanaugh-and-barretts-votes-in-dobbs [https://perma.cc/FK6Q-Q6E8].

110. This is a procedure followed by the Fourth Circuit Court of Appeals, for example. *Attending Oral Argument*, U.S. CT. APPEALS FOR FOURTH CIR., https://www.ca4.uscourts.gov/oral-argument/attending-oral-argument [https://perma.cc/R3V3-7NZB].

111. *See* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 839 (2022). As an example, in a recent Supreme Court case involving transgender rights the Justices deliberately declined to take the parental rights claim. *See, e.g.*, Amy Howe, *Supreme Court to Hear Challenge to Ban on Transgender Health Care for Minors*, SCOTUSBLOG (Dec.

Indeed, the political salience of the Court is very much tied to this power and, correspondingly, the Justices are public figures precisely because they are advancing one or another vision of legal policy.

Appeals judges, by contrast, have limited power with respect both to their docket and their ability to be legal policy entrepreneurs. With all litigants having a right to appeal, appeals judges must move nimbly and quickly.[112] Appeals judges we interviewed, for example, spoke about the challenges of resolving cases and issuing opinions in a timely way.[113] There are 167 active circuit judges and they rack up more than sixty thousand panel appearances each year; the average circuit judge participates in around 365 decisions annually as compared to around seventy for U.S. Supreme Court Justices.[114] Because of this volume, oral arguments are increasingly bypassed in the courts of appeals and unpublished nonprecedential opinions (often drafted by career staff attorneys) are more regularly released.[115] In short, to a higher degree than Supreme Court Justices, appeals judges must spend their time managing their dockets.

Caseload burdens and docket control are just the tip of the iceberg separating the Supreme Court from other courts. Litigation before the Supreme Court is fundamentally different from litigation before the federal courts of appeals: "[T]he Supreme Court operates in a resource-rich environment"; Supreme Court advocacy is controlled by "highly competent specialists"; and, if "any important aspects of the case are neglected by the parties, amicus briefs fill the gap."[116]

Indeed, the Supreme Court bar is overstocked with attorneys who previously served both as Supreme Court law clerks and as attorneys in the Office of Solicitor General—so much so that a network of well-credentialed lawyers now

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3, 2024), https://www.scotusblog.com/2024/12/supreme-court-to-hear-challenge-to-ban-on-transgender-health-care-for-minors [https://perma.cc/2KMV-X5HE] ("The justices granted only the Biden administration's petition for review – which, unlike the families' petition, did not ask the court to decide whether SB1 violates the right of parents to make decisions about their children's medical care . . . .").

112. For a thorough overview of the caseload crisis facing the federal courts of appeals, see generally Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789 (2020). *See also* Donald R. Songer & Susan B. Haire, *Access to Intermediate Appellate Courts*, *in* THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 149, 157–58 (Lee Epstein & Stefanie A. Lindquist eds., 2017) (exploring "the caseload crisis").

113. *See, e.g.*, Interview with Eleventh Circuit Judge (June 10, 2024); Interview with Third Circuit Judge, *supra* note 88.

114. Henry J. Dickman, Note, *Conflicts of Precedent*, 106 VA. L. REV. 1345, 1366 & n.122 (2020) (noting that the average circuit judge (in 2018) "participated in about 365 decisions" and that there were (also in 2018) 61,037 panel seatings by active circuit judges (excluding the Federal Circuit)).

115. The use of such shortcuts calls into question the so-called right to appeal. For critical assessments, see WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 115–27 (2013); and Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1137, 1144 (2022).

116. Bruhl, *supra* note 51, at 865–66.

clamor over the opportunity to be part of an amicus brief.[117] We have previously dubbed this enterprise "the amicus machine" and it means that every case argued before the Supreme Court will have competing amicus filings.[118]

Dramatic differences in how precedent does (or does not) constrain the Supreme Court and courts of appeals are also quite relevant.[119] The Supreme Court sits atop the judicial hierarchy;[120] it can follow, distinguish, or ignore both lower court precedent and its own precedents.[121] Federal appeals judges are writing opinions under different conditions than their Supreme Court counterparts because they are bound not only by Supreme Court precedent (vertical stare decisis) but also by the law of their circuit, or decisions on point that prior panels of the circuit have decided before (horizontal stare decisis).[122]

These constraining forces are arguably self-imposed (it is unclear whether the Supreme Court has supervisory authority and the contours of the "law of the circuit" are within the control of each of the circuits).[123] Lower court judges, however, rarely vary from precedent.[124] They are strongly committed to making legally correct decisions and the related "norm that the decision making of judges should be governed by a consideration of the relevant legal factors."[125] Whatever the explanation, it is quite clear that vertical and horizontal *stare decisis* narrows the discretion of appeals judges.[126]

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117. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1926–27 (2016).

118. *See generally id.*

119. *See generally* Schmidt, *supra* note 95.

120. For a useful overview, see generally John P. Kastellec, *The Judicial Hierarchy*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (2017).

121. Supreme Court Justices are also uniquely positioned precisely because they can digest the relevant circuit court decisions and related academic commentary. *See* Bruhl, *supra* note 51, at 863–64 (discussing Condorcet Jury Theorem and its application across lower court decision-making).

122. *See id.* at 863–65 (discussing vertical stare decisis). *See* Dickman, *supra* note 114, at 1368–76 (detailing of ways that the law of the circuit constrains appeals court decision-making).

123. The tradition of horizontal stare decisis, for example, came through court opinions over time. *See* Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1463–66 (2010); *see also* Dickman, *supra* note 113 at 1357–63 (discussing lower federal courts and horizontal stare decisis); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 516–17 (2000) (explaining that horizontal stare decisis at odds with historical practice). For an examination of why the Supreme Court is without supervisory authority, see generally Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383 (2007) (criticizing Supreme Court supremacy and, with it, the principal–agent model); and Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (criticizing Supreme Court's efforts to advance a singular vision of the law). For a competing argument (defending vertical stare decisis), see generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (delineating constitutional and prudential arguments that support vertical stare decisis).

124. *See* Kim, *supra* note 123, at 394–95.

125. Wendy L. Martinek, *Judges as Members of Small Groups*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 73, 77 (David Klein & Gregory Mitchell eds., 2010). For an empirical study on how it is that judges place paramount importance on getting the law right, see DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 7–9, 133–34, 140 (2002) (noting "the desire to maintain clarity and consistency in the law" as a likely factor).

126. A prominent coursebook on judicial decision-making, for example, notes that "study after study finds that obedience to precedent is 'nearly universal.'" BARRY FRIEDMAN ET AL.,

And this narrowed discretion has a big impact. Three randomly selected judges may not agree on the right outcome if writing on a clean slate, but they are more likely to reach agreement if a precedent controls the range of choices available. Consensus is within reach, in other words, in more of the circuit court docket than the Supreme Court docket. And even if one does not think consensus is the name of the game in judicial decision-making, the reality that consensus is possible cannot help but affect the mindset of a judge when they approach a case.[127] If deliberation *can* change case outcomes (at least some of the time), judges are more likely to take that deliberation seriously every time.

Perhaps the most important difference between the model of decision-making at the Supreme Court and the one at work in the lower courts is structural: Federal appellate judges hear cases in randomly-assigned panels of three that continuously shuffle.[128] Like the law of the circuit, the decision to impose a randomness constraint is imposed by the court itself (as opposed to being a constitutional or statutory constraint).[129] In the words of the Judicial Conference of the United States, the random case-assignment policy "deters judge-shopping and the assignment of cases based on . . . [perceptions] of a particular judge. It promotes the impartiality of proceedings and bolsters public confidence in the federal Judiciary."[130]

In this way, the federal courts of appeals have embraced an institutional design that reflects the belief that any panel on any circuit can render a legitimate verdict for the circuit as a whole. Correspondingly, by taking a stand against "judge shopping," as the Judicial Conference did recently, the judicial establishment is signaling that litigants should see panel judges as invisible,

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JUDICIAL DECISION-MAKING: A COURSEBOOK 449 (2020) (citation omitted). There are other constraints too. The Supreme Court has chastised lower courts for treating a Court precedent as nonbinding if they anticipate the overruling of that precedent. Federal appeals courts have also limited their authority to distinguish Supreme Court rulings by invoking the law-dicta distinction. For a discussion of the reluctance of appeals courts to distinguish by calling out "dicta," see generally David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021 (2013). For additional discussion, see generally Curtis Bradley & Tara Leigh Grove, *Disfavored Supreme Court Precedent in the Lower Federal Courts*, 111 VA. L. REV. 1353 (2025).

127. Interviews with judges we conducted for both this project and a prior project confirmed this hunch. *See* Larsen & Devins, *supra* note 25, at 1332 ("There is thus a significant benefit to catching judicial disagreement early and privately, while there is still time to iron out differences, as opposed to initiating a public showdown where the battle lines are already drawn.").

128. This design of three-judge-panel decision-making on the courts of appeals is set forth in 28 U.S.C. § 46(b), (c) (2018). By statute, cases are decided on appeal by panels of three judges, unless a majority of the judges in regular active service vote to hear the case all together or "in banc." *Id.* § 46(c).

129. It is typically understood that judges are randomly assigned to panels, however this is not strictly required by the statute and recent studies have questioned whether panels are truly randomly assigned in every circuit. *See* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 3–4, 8 (2015) (finding evidence of non-randomness in panel selection).

130. *Conference Acts to Promote Random Case Assignment*, U.S. CTS. (Mar. 12, 2024), https://www.uscourts.gov/data-news/judiciary-news/2024/03/12/conference-acts-promote-random-case-assignment [https://perma.cc/3FLL-KXN2].

interchangeable widgets, not identifiable partisans determined to back one side and punish the other.[131]

For lower appellate court judges, the partners in decision-making vary from week to week. It means the dissenter on a panel today may well need a vote from the one of the judges in the panel's majority to make a majority tomorrow.[132] This feature of their job changes the incentive structure. Circuit court judges are distinct from the district court judge who always writes solo or the Supreme Court Justice who tangles with the same eight people in every case and knows the likely score. As Judge Diane Wood of the Seventh Circuit puts it, a court of appeals judge "cannot hope to get anything done without persuading at least one fellow judge to agree with her."[133] Another way to think about this is that these long-standing norms of collegiality and open-mindedness are *useful* for the appellate judges. The norms of collegiality and compromise are tools to get stuff done.

This brings us to the final contrast we will draw between the Supreme Court and the federal courts of appeals, that is, the unanimity norm on the courts of appeals.[134] Conventional wisdom (backed by both empirical evidence and our interviews with appeals judges) strongly "favors judicial consensus and discourages dissent" on the lower appellate courts.[135] Judge Learned Hand, for example, said that a dissent "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."[136] Under this view, separate opinions stand in the way of appeals judges getting their jobs done.[137]

131. The specific problem addressed by the Judicial Conference in 2024 was single judge district courts where litigants could effectively pick their presiding judge. *See* Russel Wheeler, *Effort to Curb Judge-Shopping at the Federal Courts Explained*, BROOKINGS (Apr. 18, 2024), https://www.brookings.edu/articles/effort-to-curb-judge-shopping-at-the-federal-courts-explained [https://perma.cc/MKW5-S4UK]. The proposal was pushed by Chief Justice Roberts who raised the problem of judge shopping in his annual report. *See* Dahlia Lithwick & Mark Joseph Stern, *John Roberts Just Dropped the Hammer on Rogue, Lawless Trump Judges*, SLATE (Mar. 15, 2024, 3:04 PM), https://slate.com/news-and-politics/2024/03/john-roberts-matthew-kacsmaryk-nationwide-injunctions-judge-shopping.html [https://perma.cc/MB2D-STU4]. The random assignment directive was ultimately withdrawn after affected judges complained that the Judicial Conference lacked statutory authority to impose such a mandate. *Cf.* Tobi Raji, *U.S. Courts Clarify Policy Limiting 'Judge Shopping*,*'* WASH. POST (Mar. 16, 2024), https://www.washingtonpost.com/politics/2024/03/16/judge-shopping-guidance-abortion-patent-courts (on file with the *Iowa Law Review*) (noting a shift from "direct[ive]" to "guidance").

132. *See* Larsen & Devins, *supra* note 25, at 1349.

133. Wood, *supra* note 38, at 1446.

134. Our concern, of course, is the propriety of filing separate opinions. Basic differences between the design and function of the Supreme Court and federal courts of appeals is relevant in other contexts too, including the question of whether the courts of appeals are designed to make minimalist rulings whereas the Supreme Court is designed to be maximalist. *See generally* Schmidt, *supra* note 95 (discussing the concept of "judicial minimalism" and proposing, among other things, the development of judicial role fidelity and structural reforms to help guide lower courts towards minimalist outcomes).

135. Frank B. Cross, *Collegial Ideology in the Courts*, 103 NW. U. L. REV. 1399, 1413 (2009).

136. HAND, *supra* note 61, at 72.

137. As we elaborate below, we do not think all separate opinions are destructive in the way Judge Learned Hand implies, but the existence of the norm just underscores the stark difference between lower courts (where unanimity is the goal) and the U.S. Supreme Court (where that is not necessarily the case).

More to the point, concurrences and dissents take time to write, prompt time-consuming responses by the majority, and slow down the business of deciding cases. A 2011 study by Judge Richard Posner and other researchers found that both "[t]he effort cost" of writing a dissent and "the ill will generated by a dissent" cut against the filing of dissents.[138] Appeals judges have a heavy caseload burden to begin with and, consequently, there is a strong aversion to the extra work of writing dissents, particularly when that extra work spills over to your colleagues who then feel the need to respond.[139] A dissent in a court of appeals increases the length of the majority opinion by twenty percent.[140] Frequent expressions of disagreement are also the trademark of attention-seeking judges and further undermine collegial relationships. Judge Jeffrey Sutton put it this way: "Most judges prefer to agree. Dissents and concurrences take time . . . . And dissents run the risk of straining collegiality. No appellate judge would last long who insisted on deciding every case just so."[141]

Our interviews repeatedly reinforced the costs of dissent and the related hesitancy to sit en banc (where dissents are regularly filed).[142] More than ninety-seven percent of federal courts of appeals decisions are unanimous and less than one percent of panel decisions are vacated and reconsidered en banc.[143] To reach consensus, judges engage in "a continual quest to reduce conflict through holding conferences, circulating draft opinions and memorandums, and conducting private meetings between individual judges or groups of judges."[144] Several judges told us that it was not unusual for a dissenting opinion to be withdrawn in exchange for some change to the majority opinion or, alternatively, the majority agreeing to make a panel decision unpublished and nonprecedential.[145]

Empirical measures of collegiality (tied to the amount of time that judges serve together and the likelihood of serving together in the future) reveal that judges who have served together in the past and anticipate serving together in the future are less likely to dissent, are less likely to use caustic language when dissenting, and are more likely to cite colleagues with increased levels

138. Epstein et al., *supra* note 4, at 104.

139. *See id.*

140. *Id.* at 102.

141. Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think (2008)*, 108 MICH. L. REV. 859, 870 (2010).

142. For dissent rates in en banc cases, see EPSTEIN ET AL., *supra* note 40, 268–72. For articles highlighting the collegiality costs of en banc and the primacy of three-judge panels, see Devins & Larsen, *supra* note 36, at 1421–22; and Randy J. Kozel, *Going En Banc*, 77 FLA. L. REV. 233, 244–45, 263 (2025).

143. For data on rates of dissent, see EPSTEIN ET AL., *supra* note 40, at 264–65. For data on en banc grants, see Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2015 n.128 (2014).

144. Sheldon Goldman & Charles M. Lamb, *Prologue*, *in* JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS 1, 1 (Sheldon Goldman & Charles M. Lamb eds., 1986).

145. Interview with Third Circuit Judge, *supra* note 88 (withdrawing opinion); Interview with Third Circuit Judge (Feb. 8, 2021) (downgrading to non-precedential).

of respect.[146] For court of appeals judges the costs of dissent are high and the historic benefits (measured by the influence of a dissent) are quite low: Dissenting opinions are rarely cited and there is little prospect that a dissent will prompt either an en banc overturning or Supreme Court review.[147]

In sharp contrast, Supreme Court Justices have much to gain and little to lose by dissenting. The Supreme Court now decides around seventy merits cases each term and has more than ample resources for Justices to file separate opinions.[148] Dissents, moreover, are well-cited and often serve as markers for the future.[149] After all, as the Roberts Court's decision-making makes clear, dissents can become majority opinions when there are changes in the Court's composition.[150] And unlike federal court of appeals judges (who typically steer clear of en banc review),[151] the Supreme Court always sits en banc. Correspondingly, there is little reason to suppress a dissent to stave off conflict for another day. The Supreme Court grants certiorari for the specific purpose of resolving a legal issue. Indeed, the dissent rate in the Supreme Court stands at 57.4 percent; in the courts of appeals, the dissent rate averages only 2.7 percent.[152]

One final observation: Court of appeals judges are assigned cases to sit on and their job is to decide those cases expeditiously and in a way that does not draw attention to the judge herself. Litigants need to believe that any panel of three can decide a case and judges need to work together to stay on top of their docket. It is little wonder that appeals judges embrace horizontal and vertical stare decisis; these constraints on their decision-making reduce opportunities for disagreement and facilitate the speedy resolution of litigation. Supreme Court Justices, on the other hand, are visible front-line players in today's culture wars. Their public appearances, book contracts, and separate opinions are markers of where they stand.[153]

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146. HAZELTON ET AL., *supra* note 31, at 228–29. For additional discussion of how a judge's behavior is impacted by who their colleagues are in a given case, see *supra* notes 57–60 and accompanying text (discussing panel effects literature).

147. Epstein et al., *supra* note 4, at 103–05, 128–29 (noting, however, that dissents slightly increase the chance of Supreme Court review).

148. *Oral Arguments*, SUP. CT. U.S., https://www.supremecourt.gov/oral_arguments/oral_arguments.aspx [https://perma.cc/XZ69-FKND].

149. *See* Larsen, *supra* note 98, at 452–59 (discussing instances of high-profile dissents).

150. The highest-profile recent examples of this are *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) (overturning *Roe v. Wade* after years of dissent from conservative jurists) and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (overturning *Grutter v. Bollinger* implicitly after years of dissent from Justices on the right about affirmative action).

151. *See* Devins & Larsen, *Weaponizing En Banc*, *supra* note 36, at 1376 (discussing how rare en banc hearings are historically).

152. EPSTEIN ET AL., *supra* note 40, at 264–65.

153. We do not mean to suggest that Supreme Court Justices do not care about attacks on the Court's legitimacy. *See* Grove, *supra* note 30, at 2269–72 (discussing the quandary faced by the Court given the potential tension between social and legal legitimacy). Our point is simply that Supreme Court Justices and appeals court judges have fundamentally different jobs, so their legitimacy concerns and mitigating moves are not the same.

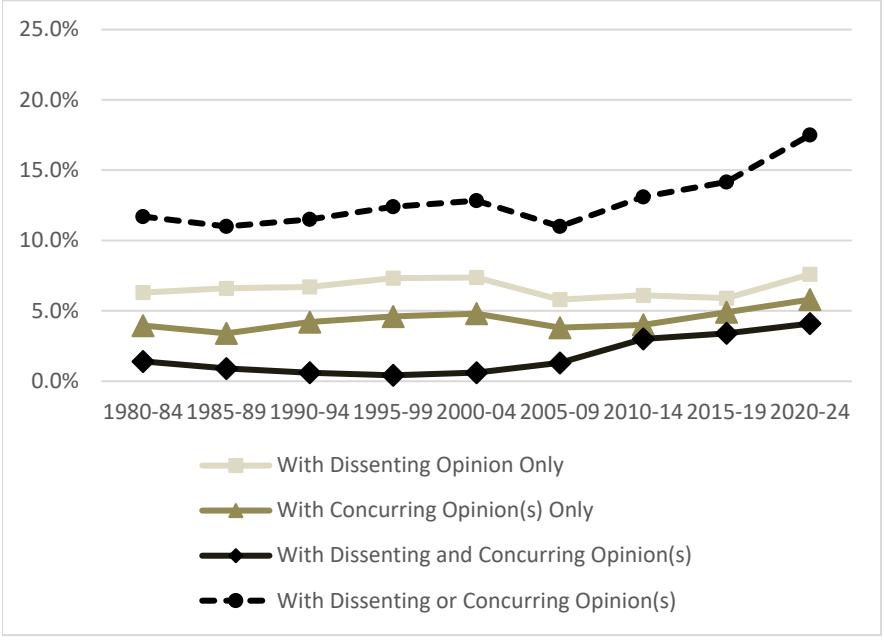
In sum, the structure and process of the lower appellate courts are of an entirely different kind than the decision-making model on display in the U.S. Supreme Court. It is therefore a mistake to lump all dissents and concurrences from the federal judiciary together—either in criticism or in praise. Whatever one thinks of the U.S. Supreme Court—and particularly the sharp divisions revealed in separate opinions there—the lower courts have their own unique design and deserve their own separate evaluation.

III. WHAT MAKES A SEPARATE OPINION DESTRUCTIVE TO THE DELIBERATIVE MODEL?

Given that the deliberative model is uniquely baked into the structure of decision-making on the U.S. courts of appeals, we must next turn to the task of distinguishing which separate opinions are the mark of healthy deliberation on those courts and which undermine the conditions necessary for such deliberation to take place.

This question matters because separate opinions of all sorts are on the rise, albeit not dramatically. We looked at Federal Judicial Center ("FJC") data concerning published panel opinions from 1980 to 2024. As depicted in the below graph, separate opinions (meaning dissents or concurrences) have steadily increased since 2005[154]:

Figure 1. U.S. Courts of Appeals: Published Panel Cases with Dissenting and Concurring Opinions, 1980 to 2024



154. Data from *Integrated Database (IDB)*, *supra* note 2.

What does writing separately (even increasingly so) have to do with courts as an institution? To be sure, the decision to write separately is an individual judicial act, but there are also institutional costs and benefits to doing so. The institutional benefits include shaping the law's development over the long term, avoiding echo chambers in the short term, and giving reassurance to the losing litigants that their arguments were heard and given a fair shake.[155]

The institutional costs should also be familiar.[156] Some judges have called separate opinions "petty ankle-biting,"[157] or acts that "fray[] collegiality"[158] and signal "disunity."[159] There is an unavoidable risk to collegiality, in other words, in putting pen to paper to explain why you think someone is wrong.

We were able to draw some generalizations from the perspectives of the judges we interviewed about what makes a separate opinion good for the court as a whole, and what makes it harmful. What we found is that the fault line separating good from bad was very much tied to whether the judge was writing to his colleagues and the litigants or, instead, writing to an external, nationally-focused audience.

Below we address three of the destructive varieties: (1) opinions that have a pointed tone; (2) opinions that look like auditions or are written for "groupies";[160] and (3) opinions that delay the work of the court or devolve into a performative back and forth arising out of a need to have the last word. In Part IV, we will extend this analysis to a type of separate opinion that we propose eliminating: dissents to denials of a rehearing en banc.

A. Using "Fiery" Language and "Crying Wolf"

The judges we spoke to all agreed that the tone of a dissent or concurrence really makes a difference in how it is perceived by one's circuit colleagues. This insight is confirmed by political scientists who have also studied collegiality, the tone of judicial opinions, and their effects on the law.[161]

Specifically, personal or *ad hominem* attacks are almost universally regarded as destructive, as are separate opinions that are disproportionally alarmist, "pointed," or use "fiery" language.[162]

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155. For a description of these benefits, see Patrick J. Bumatay, *The Value of Dissent*, 47 HARV. J.L. & PUB. POL'Y 75, 90–92 (2024); and Donald, *supra* note 14, at 325.

156. *See* Epstein et al., *supra* note 4, at 120 (tracking increased effort).

157. Michael O'Donnell, *What's the Point of a Supreme Court Dissent?*, NATION (Jan. 21, 2016), https://www.thenation.com/article/archive/whats-the-point-of-a-supreme-court-dissent [https://perma.cc/W2JV-CUXF] (referring to the U.S. Supreme Court).

158. RICHARD A. POSNER, HOW JUDGES THINK 32 (2008). As would be expected, delay is more common in highly polarized circuits (where strong disagreement is more likely to occur). *See* Badas, *supra* note 57, at 3.

159. MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT 9 (2015) (quoting Judge Learned Hand).

160. *See* Interview with D.C. Circuit Judge (May 24, 2024).

161. HAZELTON ET AL., *supra* note 31, at 167, 188 ("When circuit judges anticipate working together more frequently in the future they are less likely to use [language] viewed as quite rude in judicial circles.").

162. *See* Interview with Fourth Circuit Judge, *supra* note 89 (against *ad hominem* attacks in dissents); Interview with Sixth Circuit Judge, *supra* note 56 (same); Interview with Eleventh

Certainly, melodramatic language in a separate opinion—what one judge we talked to called a "hair on fire" dissent[163]—is not new, but perhaps their frequency is new or at least their salience to a general audience is growing. For example, an op-ed writer in *Reuters* recently remarked that judges on the lower courts are now issuing opinions laden with pop-culture references and full of "snark."[164]

At least some circuits have norms that discourage this. We learned of what one judge called a norm of "diplomatic politeness."[165] There is even a growing practice in some circuits of pre-circulating a draft dissent to the author of the majority to ask if anything is unfair before it gets circulated to the court as a whole.[166] These moves are, of course, not the same thing as requiring separate opinions to be half-hearted in their advocacy. In the words of one judge, "There is a register that gives voice to moral urgency that is not uncollegial."[167]

Hand in hand with avoiding a disproportionally dramatic tone, we learned there also seems to be a "boy who cried wolf" balance to writing separately. Judge Wood has written that a judge loses credibility when they become "branded as a frequent complainer."[168] Judge Bernice Donald of the Sixth Circuit made the same point in a recent essay: "The voice that repeatedly sounds in dissent," she explains, "can undermine its own effectiveness—like the boy who cried 'Wolf!' too often."[169]

Although one might think of this as only a dissent dynamic, Judge Patricia Wald explains that the concurrence actually can be even more of a threat to collegiality: "[C]oncurrences raise more collegial eyebrows, for in writing separately on a matter where the judge thinks the majority got the result right, she may be thought to be self-indulgent, single-minded, even childish in her insistence that everything be done her way."[170]

The judges we interviewed explained a nuanced distinction about concurrences. Many of them applauded "thought pieces," or concurrences that set out an idiosyncratic view or a "we should rethink this" approach to a problem. One judge told us that as long as they aren't annoying anyone, they feel obligated to contribute their ideas to the "marketplace" once they have thought through an issue thoroughly and "organically."[171] Another judge made the same point in a slightly different way: "A productive concurrence plants a

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Circuit Judge, *supra* note 56 (cautioning against dissents that are too "pointed"); Interview with Third Circuit Judge, *supra* note 88 (indicating forceful dissents can be constructive but not "fiery" ones).

163. Interview with Fourth Circuit Judge, *supra* note 89.

164. Frankel, *supra* note 17 (referring to a Ninth Circuit judge's opinion as "not . . . subtle," "snarky," and "pop culture-laden").

165. Interview with Third Circuit Judge, *supra* note 145.

166. *See* Interview with Third Circuit Judge, *supra* note 88.

167. Interview with Fourth Circuit Judge, *supra* note 89.

168. Wood, *supra* note 38, at 1463.

169. Donald, *supra* note 14, at 328.

170. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1413 (1995).

171. Interview with Eleventh Circuit Judge, *supra* note 56.

seed for another day" and "[i]nitiates a court wide heads up – 'it is time to rethink it in the right case.'"[172]

But all of these observations were subject to the caveat that tone makes all the difference. As we were told, there is a difference between "it seems to me," on the one hand, and "you are wrong" or "you are acting like [a] partisan warrior[]" on the other.[173]

Tone, to be sure, is difficult to measure. Political scientist Jonathan Nash acknowledges this reality but recently authored a study that attempted to identify phrases that indicate collegiality—as in the phrase "respectfully dissents" or references to one's co-judges as "colleagues" or "friends."[174] Like the judges we spoke to, Nash concluded that these subtle differences in language are important to collegiality and maintaining a functional court.[175]

Judges are human and when a colleague repeatedly gets nasty it decreases one's incentive to take their point of view seriously in the future. Indeed, in *The Elevator Effect*, Morgan Hazelton and her colleagues documented that "collegiality matters to opinion language . . . . 'personal attacks regarding character, intelligence, and motives' . . . 'are very harmful.'"[176] These swipes at collegiality, they conclude, effectively destabilize the deliberative model of appellate decision-making.[177]

B. WRITING FOR "GROUPIES" AND ATTENTION-SEEKING

Apart from using a pointed or melodramatic tone, there is another feature of a separate opinion that can damage collegiality. We learned from the judges we interviewed that they thought "auditioning behavior" from circuit court judges—meaning auditioning for the next Supreme Court vacancy—was growing, and not in a good way.[178] In the memorable words of one judge we spoke to, it seems some lower court judges are issuing separate opinions that are written for "groupies."[179]

Writing for "groupies" is a colorful way of explaining that some separate opinions these days are not written for the benefit of the litigants (to explain a result) or for the ears of circuit colleagues (to plant a seed for the future). Instead, they are designed for a separate audience altogether. Reflecting the

172. Interview with Fourth Circuit Judge, *supra* note 89.

173. Interview with Eleventh Circuit Judge, *supra* note 56; Interview with Fourth Circuit Judge, *supra* note 89.

174. *See* Nash, *supra* note 31, at 1596–98 (linking collegiality to the tone of dissenting opinions); HAZELTON ET AL., *supra* note 31, at 188 ("When circuit judges anticipate working together more frequently in the future they are less likely to use [language] viewed as quite rude in judicial circles.").

175. *Cf.* Nash, *supra* note 31, at 1635 ("Empirical investigation using the measures reveals that collegiality is not [a] function of ideological differences, [and] that judges are more likely to exhibit collegiality in published opinions—i.e., when there is more of a spotlight on their actions.").

176. HAZELTON ET AL., *supra* note 31, at 167, 188.

177. *See id.* at 189.

178. For corroborating observations, see Sophia Cai, *Trump Judges Audition for Supreme Court*, AXIOS (Apr. 27, 2022), https://www.axios.com/2022/04/27/trump-judges-audition-for-supreme-court (on file with the *Iowa Law Review*).

179. Interview with D.C. Circuit Judge, *supra* note 160.

rise of nationalization, these opinions seek to market the judge outside of their home circuit.

Judge Stephanos Bibas of the Third Circuit put his finger on this issue in a lecture at Harvard Law School. He lamented that some judges are now writing for Twitter and display a "'judges gone wild' mentality of writing" intended to "show off."[180] "For the show off," Judge Bibas explained, "it seems to be all about the judge's musings, even the judge's ambitions to be noticed . . . . 'Look at me, look at me, I'm so cool.' That is not authoritative. It is even disrespectful."[181]

The Fifth Circuit in particular has been a circuit to watch for unusual attention-seeking moves in judicial opinions—even among Republican appointees fighting with each other.[182] For example, Judge James Ho quoted *Talladega Nights: The Ballad of Ricky Bobby* (a Will Ferrell movie about race cars) in a special concurrence to his own majority opinion.[183] And Judge Edwin Smith released a draft majority opinion as an attachment to his dissent entitled "the panel opinion that *should* have been issued."[184]

But the Fifth Circuit is not alone in this regard. Judge Lawrence VanDyke of the Ninth Circuit made news by accusing his colleagues in an opinion of "making a 'blatantly inappropriate power grab'" and "engaging [in] . . . 'some good old-fashioned judge-jitsu.'"[185] He also raised eyebrows, as mentioned above, by creating a videotaped dissent of himself in judicial robes disarming a machine gun.[186] And his colleague on the circuit, Judge Kenneth Lee, made headlines of his own by referencing the reality television show *The Bachelor*, the *Star Wars* franchise, the movie *How to Lose a Guy in Ten Days*, and the actor Matthew McConaughey, all in the same opinion.[187]

What does it matter if judges are using colorful language, pop-culture references, or writing for social media? For one thing, it seems to matter to the other judges. Offended colleagues, in fact, are writing about it in their opinions. Recently Judge Andrew Hurwitz of the Ninth Circuit wrote separately

180. Raymond, *supra* note 16. Jeff Sutton, Chief Judge of the Sixth Circuit, made similar remarks in 2022 in an article for JUDICATURE. Taking aim against overwrought opinions and overheated rhetoric, Judge Sutton condemned the "'teams' approach to statutory and constitutional interpretation." Raymond J. Lohier, Jr., Jeffrey S. Sutton, Diane P. Wood & David F. Levi, *Losing Faith?: Why Public Distrust in the Judiciary Matters—and What Judges Can Do About It*, 106 JUDICATURE, no. 2, 2022, at 70, 76. For Sutton, the use of overly strong language "is usually unproductive in the case at hand, usually springs from vanity, and is not good for the courts in general." *Id.* at 77.

181. Raymond, *supra* note 16.

182. *See* Barnes & Marimow, *supra* note 29.

183. Weiss, *supra* note 17.

184. *See* Monyak, *supra* note 20 (quoting from the opinion: "In the interest of time, instead of penning a long dissent pointing to the panel majority's and district court's myriad mistakes, I attach the Fifth Circuit panel opinion that should have been issued.").

185. HAZELTON ET AL., *supra* note 31, at 161.

186. Breen, *supra* note 22.

187. *See* Frankel, *supra* note 17 ("The judge also packed in pop-culture references, comparing the allegedly worthless injunction both to a marriage proposal on The Bachelor and to an imaginary promise from George Lucas that Disney wouldn't debase the Star Wars franchise. He threw in an 'all right, all right, all right' quote, albeit without specifying whether it was a reference to The Doors' song or actor Matthew McConaughey's catch phrase.").

just to call out his colleague for using inappropriate language.[188] Judge Hurwitz explained: "I recognize that colorful language captures the attention of pundits and partisans, and there is nothing wrong with using hyperbole to make a point. But my colleague has no basis for attacking the personal motives of his sisters and brothers on this Court."[189]

And some insulted judicial colleagues are even speaking to the press about it. Maura Dolan of the *L.A. Times* interviewed several Ninth Circuit judges and her reporting revealed some unrest in the circuit, to put it mildly.[190] One judge explained to her that some of the new judges have sent a "shock wave through the system."[191] They are "oblivious to court tradition," routinely use combative language, and "put strains upon the court."[192] An older judge told her—speaking of a recent appointee—"[he] bulldozed his way around here . . . . [e]ither he doesn't care or doesn't realize that he has offended half the court already."[193]

Given what we know—and certainly what judges know—about the importance of collegiality, why would a judge do this and risk harming his reputation within the circuit?

The answer, we think, involves a trade-off. This is more complicated than just straight-up auditioning. Judges are increasingly connected to national ideological groups (like the Federalist Society or ACS) and to each other in new ways, so much so that they seem willing to trade reputation interests in the eyes of their circuit colleagues in favor of praise from their national audience and inter-circuit peers. These opinions, put differently, are designed to reinforce those connections and generate "the kind of cheerleading you get from Twitter," in the cautionary words of Judge Bibas.[194]

Insight on what motivates these attention-seeking opinions could be gleaned by observing recent off-the-bench behavior from circuit judges that seems unusual. Examples may be familiar and include: publicly announcing one would no longer hire law clerks from Yale or Columbia;[195] setting in motion

188. Joe Patrice, *Ninth Circuit Judge Has Had It with Trump Judge's Insulting Dissents*, ABOVE L. (Dec. 2, 2021, 12:12 PM), https://abovethelaw.com/2021/12/ninth-circuit-judge-has-had-it-with-trump-judges-insulting-dissents [https://perma.cc/292U-2BUD] (quoting Judge Andrew Hurwitz: "I ordinarily would not say more, but I am reluctantly compelled to respond to the dissent of my brother Judge VanDyke, who contends that the 'majority of our court distrusts gun owners and thinks the Second Amendment is a vestigial organ of their living constitution.' That language is no more appropriate (and no more founded in fact) than would be a statement by the majority that today's dissenters are willing to rewrite the Constitution because of their personal infatuation with firearms. Our colleagues on both sides of the issue deserve better.").

189. *Id.*

190. Dolan, *supra* note 23.

191. *Id.*

192. *Id.*

193. *Id.*

194. Raymond, *supra* note 16.

195. Nate Raymond, *Trump-Appointed Judges Behind Yale Clerk Boycott to Speak on Campus*, REUTERS (Mar. 8, 2023, 3:27 PM), https://www.reuters.com/legal/legalindustry/trump-appointed-judges-behind-yale-clerk-boycott-speak-campus-2023-03-08 [https://perma.cc/RY2D-RYQG]; Michael T. Nietzel, *13 Trump-Appointed Judges Vow Not to Hire Columbia University Grads*, FORBES (May 8,

a protest at Stanford and then writing an op-ed about it in the *Wall Street Journal*;[196] authoring and promoting a biography defending Justice Clarence Thomas;[197] and recording a podcast defending originalism.[198]

Each of these acts can be explained away individually, to be sure. Certainly, judges speaking at events is not new, nor is the penning of books from the bench (although most of the books authored in the past have been on substantive legal topics),[199] and virtually every judge has run across the occasional "fiery" dissent that ruffled feathers.

But this sort of behavior does seem different in degree if not in kind. As Richard Hasen noted in an interview with NPR, some of these new judges are setting themselves apart from "a more conventional appellate judge."[200] Speaking specifically about Judge Ho of the Fifth Circuit, Hasen explained that he "directs his attention toward big, strategic criticism about the size of government, as opposed to one focused more on the laws at issue in the case."[201]

Accusations of auditioning behavior from lower courts waiting for a Supreme Court vacancy are not new.[202] But there are new dynamics at work. First, the mode of auditioning has changed. In the past, a lower court judge with Supreme Court ambitions would seek to build credibility within the circuit. They would use a restrained tone and champion an ability to work well with others; ties to

2024, 4:58 PM), https://www.forbes.com/sites/michaeltnietzel/2024/05/08/13-trump-appointed-judges-vow-not-to-hire-columbia-university-grads [https://perma.cc/L2Y7-JLPC].

196. Stuart Kyle Duncan, *My Struggle Session at Stanford Law School*, WALL ST. J. (Mar. 17, 2023, 2:59 PM), https://www.wsj.com/articles/struggle-session-at-stanford-law-school-federalist-society-kyle-duncan-circuit-court-judge-steinbach-4f8da19e (on file with the *Iowa Law Review*).

197. Carl Hulse, *Federal Judge Defends Clarence Thomas in New Book*, N.Y. TIMES (July 6, 2023), https://www.nytimes.com/2023/07/06/us/politics/clarence-thomas-supreme-court-amul-thapar.html (on file with the *Iowa Law Review*).

198. FedSoc Events, *Originalism: Perspectives from the Bench*, FEDERALIST SOC'Y, at 01:54–03:26, 09:10–10:48, 11:14–16:38 (Dec. 13, 2021), https://podbay.fm/p/fedsoc-events/e/1639416302 (on file with the *Iowa Law Review*).

199. For a few examples of the latter sort of book penned by conservative jurists, see, e.g., JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 307–27 (2022) (Judge Sutton on state constitutionalism); BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 110–37 (2017) (Judge Bibas on technology); and FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW, at vii (1991) (Judge Easterbrook on law and economics).

200. Carrie Johnson, *Legal Opinions or Political Commentary? A New Judge Exemplifies the Trump Era*, NPR (July 26, 2018, 5:01 AM), https://www.npr.org/2018/07/26/632005799/legal-opinions-or-political-commentary-a-new-judge-exemplifies-the-trump-era [https://perma.cc/SC3B-S2E4].

201. *Id.*

202. *Cf.* Lily Rothman, *Why Sandra Day O'Connor's Appointment to the Supreme Court Won Bipartisan Praise*, TIME (Dec. 1, 2023, 11:08 AM), https://time.com/6341777/sandra-day-oconnors-nomination-bipartisan (on file with the *Iowa Law Review*) ("[S]he was widely seen as a 'meticulous legal thinker' whose devotion to the law would triumph over ideology."); Barbara Perry, *George W. Bush's Supreme Court Nominations*, U. VA., https://millercenter.org/Bush-43/george-w-bushs-supreme-court-nominations-o [https://perma.cc/ZKX2-3Y5Y] (noting Bush and the Republican Party stated they would look to appoint judges with judicial restraint and who would be tenure-long conservatives).

the establishment were thought to be a plus.[203] These qualities were used by some commentators to describe then-Judge Brett Kavanaugh when he sat on the D.C. Circuit, and Judge Wilkinson of the Fourth Circuit who was often discussed as a possible Supreme Court pick.[204]

The audition style has changed. Instead of portraying oneself as a "judge's judge," Supreme Court hopefuls now market themselves in a new way. They don't criticize a legal argument, but critique the size of the government.[205] They don't trumpet relationships across the aisle; they proclaim themselves as being willing to suffer for the cause. They don't cite Blackstone; they cite Will Ferrell movies.[206]

Moreover, there is reason to think this is shaped by the cultural moment we live in. Beginning in the mid-2010s, during the rise of social media, our culture started talking about the need to "cultivate a personal brand" in professional and social settings. Personal brands are distinct from reputations. As explained recently by Harrison Monarth in the *Harvard Business Review*:

> Your reputation is made up of the opinions and beliefs people form about you based on your collective actions and behaviors. Your personal brand, on the other hand, is much more intentional. It is how you *want* people to see you. Whereas reputation is about credibility, your personal brand is about visibility and the values that you outwardly represent.[207]

The compulsion to attract attention on social media, followers on Instagram, and views on TikTok is palpable and omnipresent in our society. Particularly as today's federal appellate judges come from a younger generation, it is naïve to think they are immune to these cultural changes. The difference seems to be that judges who engage in behavior seeking to make a name for themselves are celebrated in some circles and not disparaged. The spicy language, the public appearances, the proselytizing for an idea or a cause all seem part of cultivating a judicial brand that seeks to elevate the judge's status outside of the judge's home circuit.

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203. Elisabeth Bumiller, *Court in Transition: The President; An Interview by, Not with, The President*, N.Y. TIMES (July 21, 2005), https://www.nytimes.com/2005/07/21/us/front%20page/court-in-transition-the-president-an-interview-by-not-with.html (on file with the *Iowa Law Review*) (reporting on President Bush's vetting interviews with judges).

204. Danny Cevallos, *Kavanaugh's Judicial Opinions Have Been 'Restrained.' Will That Continue on the Supreme Court?*, NBC NEWS (Oct. 8, 2018, 2:03 PM), https://www.nbcnews.com/politics/supreme-court/kavanaugh-s-judicial-opinions-have-been-restrained-will-continue-supreme-n917791 [https://perma.cc/8DMQ-MA2K]; *Who Is J. Harvie Wilkinson III?*, ABC NEWS (Oct. 27, 2005, 5:56 PM), https://abcnews.go.com/Politics/SupremeCourt/story?id=1257307 [https://perma.cc/D4UE-HZYS] (describing Judge Wilkinson as conservative and personable).

205. Johnson, *supra* note 200. For a left-leaning critique of auditioning by Trump appointees, see Mark Joseph Stern, *Meet the Extremist Trump Judges Likely to Shift the Supreme Court Even Further Right*, SLATE (Nov. 6, 2024, 5:11 PM), https://slate.com/news-and-politics/2024/11/meet-trump-supreme-court-justice-round-two.html [https://perma.cc/Q9LV-4PRU].

206. Weiss, *supra* note 17.

207. Harrison Monarth, *What's the Point of a Personal Brand?*, HARV. BUS. REV. (SPECIAL ISSUE) 34–35 (Spring 2025).

Whether or not one is a fan of branding, it is hard to deny that the cultivation of these brands serves as a stress test on the model of federal appellate judging described in Part I. This behavior is neither anonymous nor collegial and is certainly not part of a system that "incentivizes judges to manage their relationships with an eye to both substantive cooperation and general harmony."[208]

C. *Stalling Tactics and Needing to Have the Last Word*

One final feature of a separate opinion that has the potential to aggravate collegiality involves timing. Lee Epstein and colleagues have documented a statistically significant difference in opinion length when there is a separate opinion that prompts a back-and-forth round of responses: "A dissent in the court of appeals increases the length of the majority opinion by about 20 percent."[209]

Not surprisingly the extra length—responding to a separate opinion and then replying to the response and then replying to replying to the response—takes extra time.

Using FJC data, we found that from 2008 to 2023, the median time for cases decided in the U.S. courts of appeals without a separate opinion was ninety-five days.[210] For cases with a concurring opinion only, that becomes 127 days. With a dissent only, 154 days. For a concurrence and a dissent, 169 days. In proportional terms, these gaps have been remarkably steady. In both 2008 and 2023, cases with dissents took seventy-five percent longer than cases with no separate opinions.[211]

The judges we spoke to universally acknowledged that this delay can breed resentment.[212] Even if unintentional, the delayed issuance of a mandate can sometimes moot a case out, cause an inter-circuit split, frustrate the litigants, or just cause irritation and fray collegial relationships among the judges.[213]

Moreover, this delay is often a by-product of needing to have the last word. The repeated iterations of responses to each other, most judges we interviewed concurred, is ultimately performative. By that point in the process the judges are not actually really trying to change each other's minds. Most of

208. HAZELTON ET AL., *supra* note 31, at 159.

209. Epstein et al., *supra* note 4, at 102.

210. *Integrated Database (IDB)*, *supra* note 2. For these calculations we used panel decisions only. To make these calculations we used the "days elapsed" column from the FJC database. For cases that were decided after a hearing, "days elapsed" counts the days between the hearing date ("HEARDATE" in the FJC data) and the judgment date ("JUDGDATE"). For cases decided without a hearing, "days elapsed" counts the days between the submission date ("SUBDATE") and the judgment date. The FJC defines the submission date as: "the date the appeal was submitted on its merits to the first judge on the panel." *Id.*

211. *Id.*

212. *See, e.g.*, Interview with Fourth Circuit Judge, *supra* note 89; Interview with D.C. Circuit Judge, *supra* note 160; Interview with Third Circuit Judge, *supra* note 88.

213. *See* Interview with Fourth Circuit Judge, *supra* note 89; Interview with D.C. Circuit Judge, *supra* note 160.

the productive debate happens earlier—for some circuits at conference after oral argument, and for others with early exchanges of drafts.[214]

It is impossible from the outside to see whose fault it is when a mandate is delayed (whether it is the majority author or the author of a separate opinion). But it is very evident to the judges on the inside. The "right" or "neighborly" thing to do, they explained, is to prioritize a separate opinion in a case where someone else is writing the majority—"because no one should have to wait for me."[215]

Interestingly this is a facet of separate opinions, as explored in Part V below, that is ripe for concrete reforms. The judges can control *when* they are required to exchange drafts. And by all accounts these rule changes make a difference. As one judge told us when explaining the values of these timing rules, "[g]ood fences make good neighbors."[216]

IV. THE SPECIAL CASE OF THE DDR

There is one sort of separate opinion that we think deserves special attention. Dissents from denial of rehearing en banc ("DDRs") are a unique judicial act. They are not the same as regular dissents nor are they viewed in the same way by appellate judges. DDRs are written after the circuit has decided not to take the case en banc, making the panel's conclusion final, with no deliberation yet to occur. The DDR, in other words, is an epilogue to the case—written after the case is over and the litigants have all gone home. This means the audience for a DDR is exclusively outside the circuit. The judges we interviewed all agreed that DDRs are written for multiple reasons: to draw attention to the judge who writes them, to influence judges on other circuits (who may look to the DDR for guidance), and to seek help from the Justices on the Supreme Court (who can overrule the circuit). None of these reasons reflect the deliberative model of judicial decision-making because the DDR (by definition) is written after the file is closed.

Furthermore, the vast majority of the time DDRs are written by judges who were not on the panel originally to consider the underlying case which means the authors are likely not fully briefed nor did they have months to think about the case.[217] The number of non-panel DDRs is higher than you might think. From 2014 to 2024, eighty-four percent of all DDRs issued were authored by judges who were *not* on the original panel.[218] The number is slightly higher for Republican-appointed judges than Democratic-appointed ones. Of

214. Interview with D.C. Circuit Judge, *supra* note 160; Interview with Eleventh Circuit Judge, *supra* note 56.

215. Interview with Fourth Circuit Judge, *supra* note 89.

216. Interview with D.C. Circuit Judge, *supra* note 160.

217. For a great recap of the debate over DDRs, see Horowitz, *supra* note 3, at 60–64. According to Horowitz's data, only fourteen percent of DDR authors from 1943 to 2012 were on the original panel. *Id.* at 73–75.

218. *See infra* note 240 for our methodology in identifying DDRs generally (and note that we excluded the Federal Circuit). Once we were able to identify DDRs we could then search author name and cross-check to see if the author was also on the initial panel.

all the Republican-appointee-authored DDRs, eighty-seven percent of them were off panel, and for Democrat appointees that number is seventy-eight.

Unlike panel judges who have no choice but to sign onto the panel opinion or write separately, DDRs are purely voluntary.[219] These opinions have no precedential weight, and—in the words of Judge Rosemary Pooler of the Second Circuit—they have "as much force of law as if those views were published in a letter to the editor of their favorite local newspaper."[220] David McGowan has called them "en banc missives" and "the judicial equivalent of a press release."[221] Judge Berzon admonishes that "their goal is not to facilitate decision making but to garner attention."[222] For this reason, DDRs are seen by many judges as anti-collegial, highlighting a judge's disapproval of circuit doctrine and, with it, revealing a commitment instead to party and ideology.[223]

With a few notable exceptions, most judges who are vocal about DDRs have been quite critical of them.[224] And those concerns have been amplified recently. In a well-publicized spat on the Fourth Circuit in 2021, for example, Judge James Wynn bemoaned what he saw as a recent rise of DDRs on his circuit.[225] These opinions have serious "drawbacks," he complained, and "come[] at the cost of not 'upholding [the Circuit's] decision-making processes once they are completed.'"[226] They endanger collegiality, and read "inappropriately, like petitions for writs of certiorari."[227] Moreover, according to Judge Wynn, DDRs create an image problem for the courts of appeals. DDRs, he says, are the product of judges "step[ping] out of the robe and into the role of an

219. Judge Berzon of the Ninth Circuit is especially critical of DDRs for this reason. She sees dissents and concurrences as critical to the functioning of courts of appeals—as these separate opinions provide a means for the panel to outline competing approaches to resolving the case. *See* Berzon, *supra* note 12, at 1491. By way of contrast, DDRs are seen as disruptive, a mechanism by which judges who are not part of the case seek to short-circuit panel authority. *See id.*

220. United States v. Stewart, 597 F.3d 514, 519 (2d Cir. 2010) (mem.) (Pooler, J., concurring).

221. McGowan, *supra* note 3, at 576.

222. Berzon, *supra* note 12, at 1491.

223. *See, e.g.*, *id.* at 1491–92.

224. DDRs also have their defenders. *See* Horowitz, *supra* note 3, at 61 (quoting Judge Charles Clark in *United States v. N.Y., New Haven & Hartford R.R. Co.*, 276 F.2d 525, 549 (2d Cir. 1960) (Clark, J., dissenting)). Two of the most well-known defenders of the DDR include former Judge Alex Kozinski and Judge James Burnham. They argue that DDRs "serve an important function and are taken seriously by courts, the public, the academy, and the legal profession." Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J.F. 601, 607 (2012). Others point out they are an important signal to the U.S. Supreme Court that a case is important and worth a hard look. *See* Horowitz, *supra* note 3, at 61–63 (discussing these views).

225. Doe v. Fairfax Cnty. Sch. Bd., 10 F.4th 406, 407–09 (4th Cir. 2021) (mem.) (Wynn, J., concurring) (en banc denied August 31, 2021); Nate Raymond, *4th Circ. Judge Calls for Rule Change to Address En Banc Dissent 'Drawbacks,'* REUTERS (Aug. 31, 2021, 3:49 PM), https://www.reuters.com/legal/litigation/4th-circ-judge-calls-rule-change-address-en-banc-dissent-drawbacks-2021-08-30 [https://perma.cc/6NBM-CC34].

226. *Doe*, 10 F.4th at 407 (quoting Marsha S. Berzon, *Introduction*, 41 GOLDEN GATE U. L. REV. 287, 294 (2011)).

227. *Id.* (quoting Berzon, *supra* note 226, at 294). It is worth noting that Judge Wilkinson, who authored the DDR in question, also noted that they should "not be routine," but he also explained this was no "routine" case. *Id.* at 414 (Wilkinson, J., dissenting).

advocate."[228] This, he says, contributes to "heighten[ing] the degree to which politics overtly governs judicial activity."[229]

Even more recently, in 2025, judges on the Sixth Circuit took aim at one another over the propriety of *dissentals* (what we call DDRs). Echoing Judge Wynn's concerns, Judge Karen Nelson Moore worried about the "rising trend in our circuit of publishing separate statements when rehearing is denied."[230] She wrote, "[T]he opinions of the majority and the dissent have already been fully and carefully explained. Drafting CliffsNotes versions of our views is not only unnecessary, but it is also offensive to our system of panel adjudication."[231] For her colleague Judge Chad Readler, however, "writing at the en banc stage in fact increases our Court's legitimacy."[232] Specifically, he argued, "[d]ebate over weighty issues is the heart and soul of the legal profession. In nearly all respects, we encourage the exchange of ideas."[233] When making this point, Judge Readler took aim at Judge Moore—referencing numerous occasions where she had filed DDRs of her own.

DDRs are not new—the first one was authored in 1943[234]—but they are on the rise. In 2013, Jeremy Horowitz studied DDRs over time, collecting them from 1943 through the end of 2012. Horowitz noted that the prevalence of DDRs grew at a relatively steady clip over this time period and really jumped up beginning in 1971.[235]

Interestingly, Horowitz also found that judges appointed by both political parties wrote DDRs roughly equally. Republican appointees accounted for 52.4 percent of DDRs and make up 51.3 percent of active appellate court judges during the time period he studied.[236] Although there were shifts in these numbers and percentages over time, Horowitz found "the proportions of DDRs written by affiliates of each party closely track the parties' respective shares of appeals court judgeships."[237]

Horowitz also found that the Supreme Court granted twenty-five percent of all certiorari petitions in which a DDR was filed—significantly higher than the 8.3 percent of petitions granted generally under the Burger Court or the 3.6 percent typically granted by the Roberts Court.[238] The DDR is, Horowitz

228. *Id.* at 407–08 (quoting Indep. Ins. Agents of Am., Inc. v. Clarke, 965 F.2d 1077, 1080 (D.C. Cir. 1992) (Randolph, J., separate statement)).

229. *Id.* at 408 (quoting Horowitz, *supra* note 3, at 85).

230. Mitchell *ex rel.* A.M. v. City of Benton Harbor, 147 F.4th 663, 664 (6th Cir. 2024) (mem.) (Moore, J., concurring).

231. *Id.*

232. *Id.* at 674 (Readler, J., dissenting).

233. *Id.* It is interesting to note Judge Readler was one of six judges who joined Judge Joan Larsen's DDR in the case. *See id.* at 673. Judges Larsen and Readler are Trump appointees; indeed, five of the six Trump appointees to the Sixth Circuit signed that DDR.

234. *See* Horowitz *supra* note 3, at 66 (discussing Crutchfield v. United States, 142 F.2d 170 (9th Cir. 1943)).

235. *Id.* at 70.

236. *Id.* at 73.

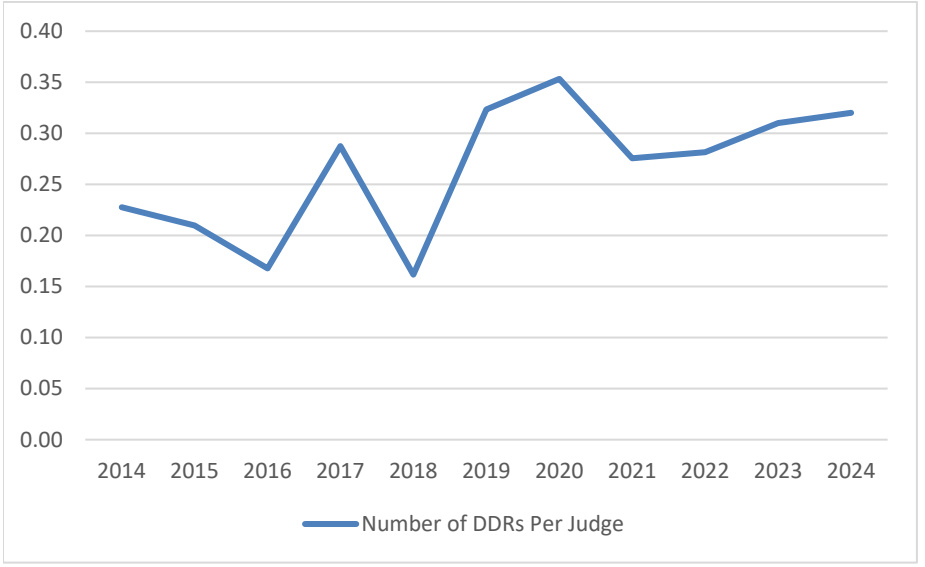
237. *Id.* at 74. Like us, Horowitz used FJC data to track appointing party of judges on the courts of appeals. *Id.* at 73 n.78.

238. *Id.* at 82.

found, a more effective attention-grabbing flag than even an en banc decision. And—in an important finding—"DDRs written by Republican judges are *more than twice as likely* to obtain certiorari review as DDRs by Democratic judges" from the years 1943 to 2012.[239]

Intrigued, we updated the Horowitz data and looked at DDRs from 2014 through the end of 2024 (using the same search terms he did).[240] In terms of frequency, we found a continued uptick, although not in a straight line.

Figure 2. DDRs Per Judge in U.S. Courts of Appeals, 2014 to 2024 (Excluding Federal Circuit)



As you can see in the above graph, the high point year for the time period we studied was the year 2020 (for Horowitz the peak was 2008, where the frequency was close to what we found in 2020).[241] We thus confirmed Horowitz's findings of increasing frequency over time since 1943, albeit with fluctuations.

But even more interesting than the data on frequency was a change we discovered in partisan dynamics since the Horowitz data ended in 2012.

239. *Id.* at 83.

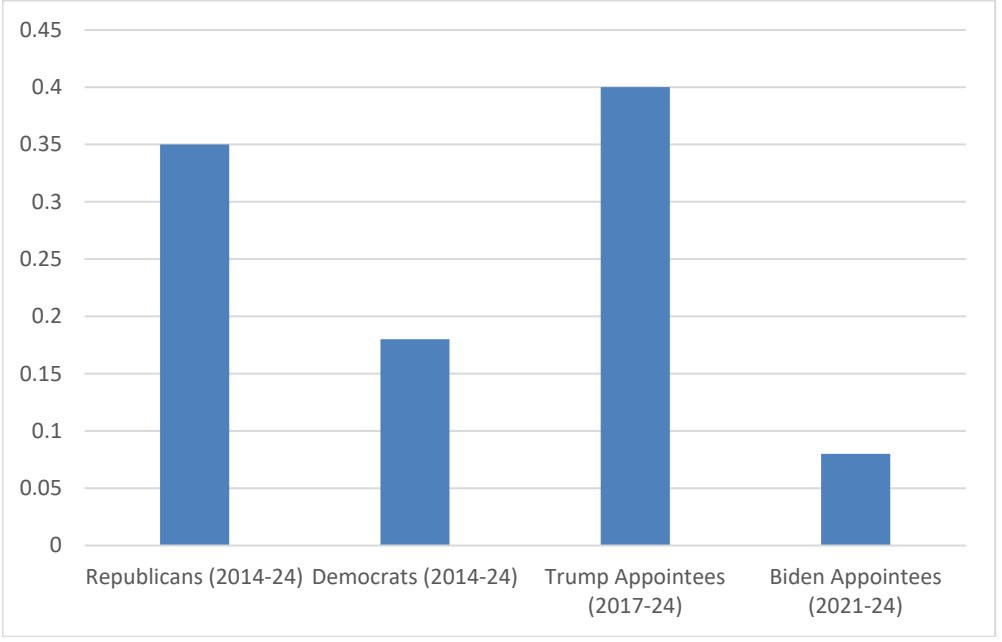
240. To generate these numbers, we used the same search query Horowitz used in his article: *DISSEN! /10 (DEN! REFUS! DECLIN! FAIL! /S ("EN BANC" "IN BANC")) & DA ([4-digit year])* in Westlaw's U.S. Courts of Appeals database. *See id.* at 97. Results were then reviewed to exclude false positives and Federal Circuit cases and divided by 167 (167 is the number of active judgeships in the courts of appeals in this time period, excluding the Federal Circuit). *U.S. Courts of Appeals: Additional Authorized Judgeships*, U.S. CTS. 1, https://www.uscourts.gov/sites/default/files/appealsauth.pdf [https://perma.cc/2Y2H-ZCZP].

241. Horowitz, *supra* note 3, at 70. The highest rate Horowitz was found was .38 DDRs per judge in 2008. *Id.* Our highest was .35 in the year 2020.

Horowitz found Democratic and Republican appointees equally likely to author DDRs, particularly in the years 2000 to 2012.[242]

Our updated data, however, revealed a new partisan pattern. Looking at authors of DDRs filed from 2014 to 2024, there is now a new, clear partisan gap.[243] Gone is the 50/50 split. Between 2014 and 2024, Republican appointees wrote 327 of 487 total DDRs while Democratic appointees wrote 160. While Republican appointees made up fifty-one percent of active judges from 2014 to 2024, they wrote sixty-seven percent of all DDRs while the forty-seven percent of judges who were Democratic appointees wrote thirty-three.[244] That means today's Republican appointees are almost twice as likely to author a DDR than their Democratic counterparts—a rather startling pattern when compared to the even number in the Horowitz data.

Figure 3. Average DDRs Per Judge Per Year (Excluding Federal Circuit)



242. *Id.* at 73–74 ("Republican appointees account for around 52.4% of all DDRs and make up 51.3% of active appeals court judges since 1943. . . . Since 2000 . . . the proportions of DDRs written by affiliates of each party closely track the parties' respective shares of appeals court judgeships.").

243. The number of judges, party affiliation, and status data was obtained from the *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., https://www.fjc.gov/history/judges [https://perma.cc/45FU-3TLU].

244. The percentages of active judges—the denominator—did not change very much since the Horowitz data. Based on FJC data for the time period we studied, Republican judges made up fifty-one percent of the active judges from 2014 to 2024. In the earlier time period that Horowitz studied the percentage varied but averaged 51.3 percent. *See* Horowitz, *supra* note 3, at 73 & n.78.

Even more illuminatingly, first-term Trump appointees were the most likely of all Republican appointees to author DDRs—by a wide and statistically significant margin.[245] As shown in the graph above, Trump appointees were fifteen percent more likely to issue a DDR than Republican appointees generally.[246] Notably, when you take Trump appointees out of the denominator—so compare non-Trump Republican appointees to Trump appointees—the gap grows. Trump appointees are twenty-five percent more likely to author a DDR than non-Trump Republican appointees.

Although Horowitz found party affiliation was largely irrelevant to the decision to write a DDR from 1943 to 2012 (judges in the two camps authored them basically equally),[247] it is highly relevant now. Why the change in who authors these controversial and attention-grabbing opinions over the last decade or so?

One obvious explanation has to do with a change in personnel at the U.S. Supreme Court. If a prime motivation for authoring a DDR is to attract the attention of Supreme Court Justices and clerks—a "judicial tattle," if you will—it only makes sense for those tattles to become more frequent as the audience becomes more friendly. Indeed, Horowitz found that Republican-appointed judges were twice as successful as their Democratic-appointed counterparts in getting petitions for certiorari granted in the cases for which they authored a DDR.[248] It follows that tattles come more quickly when the parent keeps coming to intervene. So, as the Supreme Court became more conservative (with the three first-term Trump appointees), the attraction to tattle from increasingly conservative Republican appointees grew stronger, as did the disinclination of Democrat appointees to rock the boat.[249]

The simple Supreme Court personnel shift is not a complete explanation for the data we found, however. Consider the chart below:

245. Statistical tests were run in Microsoft Excel® version 16.81. Under this test, the alpha value is 0.05 and the p-value (for a result to be found statistically significant) is less than or equal to 0.05. Here, the p-value is 0.0015 for the two-tailed test and 0.03 for the one-tailed test. These tests were run on the data through 2023.

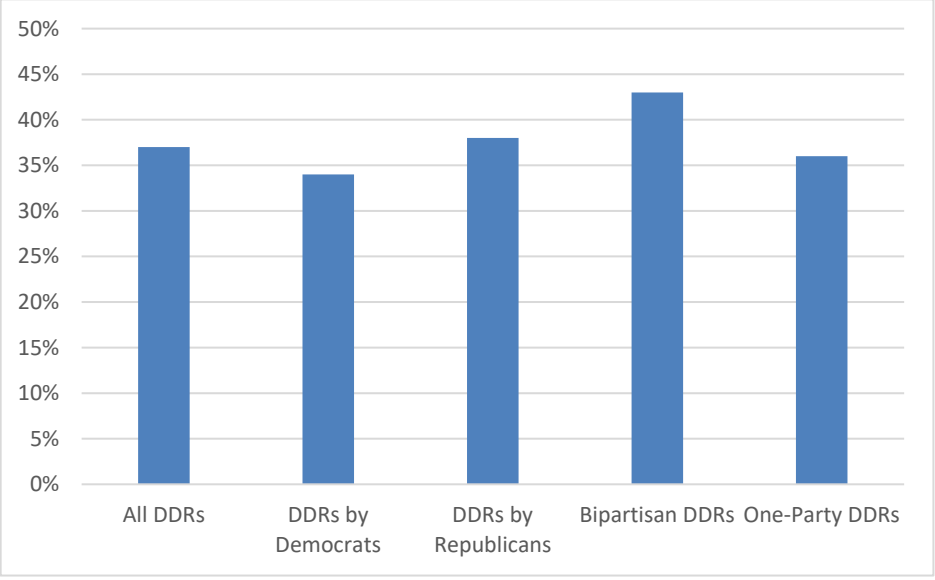
246. Stephen J. Choi & Mitu Gulati similarly found that first-term Trump appointees "dominate[d]" other appointees in filing dissents and concurring opinions (often filing such opinions in cases where another Republican appointee wrote the majority opinion). *See* Choi & Gulati, *supra* note 66, at 22–28.

247. Horowitz, *supra* note 3, at 73.

248. *Id.* at 83.

249. *See* Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS., Winter 2021, at 97, 110–16 (tracking increasing ideological gap between Democrat and Republican appointees).

Figure 4. Cert Grant Rates Following DDRs, 2014 to 2023
(In Cases with Cert Petitions, Excluding Federal Circuit)



A few observations stand out here.[250] First, the effectiveness of the judicial tattle to the Supreme Court has only grown over time. Horowitz found the Supreme Court granted about twenty-five percent of all petitions for certiorari accompanied by a DDR. That number was high, but it turns out it was only the beginning. The number for the more recent time period was a whopping thirty-seven percent—compare that to the 3.8 percent grant rate for paid petitions coming out of the Roberts Court.

Second—and surprisingly—it is no longer true that Republicans are much more successful at using the judicial tattle in their DDRs. DDRs authored by Democratic appointees had a thirty-four percent chance of resulting in a grant of certiorari, while DDRs authored by Republican appointees had a thirty-eight percent chance. The difference is far less stark than what Horowitz found in the earlier time frame. Indeed, DDRs that were bipartisan (joined by both a Democratic-appointed judge and a Republican-appointed judge) were the most likely of all DDRs to attract a grant of certiorari.[251]

250. In this chart, "DDRs by Democrats" and "DDRs by Republicans" mean DDRs authored by Democratic appointees and authored by Republican appointees, respectively. "Bipartisan DDRs" mean DDRs joined by judges from both parties. The 2014 to 2023 date range refers to the dates of the DDRs, not the dates of the cert decisions. The chart was updated in November 2024 to include the cert decisions on the 2023 DDRs (some of which were decided in 2024).

251. There is little difference between solo DDRs and DDRs joined by other judges: thirty-six percent and thirty-seven percent, respectively. So it is not likely that the difference between bipartisan and one-party DDRs can be attributed to the number of judges independent of party affiliation. We define a *bipartisan DDR* as a single DDR joined by both Republican and Democratic

What explains that combination of changes? Why would Republican appointees write more DDRs now even though they are not as successful in attracting a grant of certiorari? It could be that Democratic-appointed judges are gun-shy and less likely to author a DDR generally, so that the ones they do author are more obviously cert-worthy. But another explanation is that some judges are using the DDRs as a new way to express themselves, regardless of the effect on certiorari.

Consider striking differences *within* Republican appointees. Judges appointed by President Trump were more than twice as likely to author DDRs than their Democratic counterparts, and also more likely as a group to write separately at this stage than other judges appointed by Republican Presidents.[252] Indeed, first-term Trump appointees have authored a statistically significant volume of DDRs compared to other Republican appointees.[253] Trump judges also appear more loyal to each other than to other Republican appointees. They joined sixty-nine percent of the DDRs authored by other Trump judges while they joined forty-one percent of DDRs written by other Republican-appointed judges.[254]

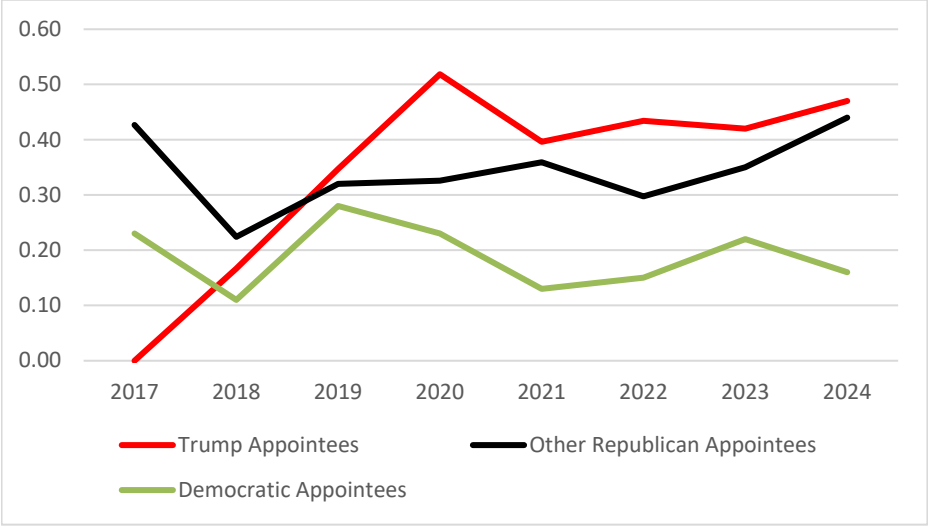
judges. But in many cases, there are multiple DDRs for the same case, sometimes with separate Democratic- and Republican-authored DDRs. We don't refer to those situations as bipartisan and we did not track them because our data is at the DDR level, not the case level.

252. DDRs were identified through the search query *DISSEN! /10 (DEN! REFUS! DECLIN! FAIL! /S ("EN BANC" "IN BANC")) & DA ([4-digit year])* in Westlaw's U.S. Courts of Appeals database (search query borrowed from Horowitz). Results were then reviewed to exclude false positives and Federal Circuit cases. The results include any statement expressing disagreement with the decision to deny en banc rehearing, including statements from senior judges. The number of judges was obtained from the *Biographical Directory of Article III Federal Judges, 1789-present*, *supra* note 243.

253. Using a t-test calculation we found a statistically significant relationship between the volume of DDRs written by Trump appointees compared to the volume written by Reagan, George H.W. Bush, and George W. Bush appointees between 2017 to 2023. Under this test, the probability of error was five percent (alpha: $p < 0.05$) and the p-value (for the result to be found statistically significant) was less than 0.05. Our thanks to Hayden Smith for his support with this analysis.

254. Trump judges joined in ninety-seven of the 141 DDRs written by other Trump judges and only fifty-one of the 124 DDRs written by other Republicans from 2017 through 2024.

Figure 5. Average DDRs Per Judge, 2017 to 2024
(Excluding Federal Circuit)



As the line graph above indicates, Trump-appointed judges are not only the most prolific authors of DDRs, but they started writing them quickly after getting sworn in (bearing in mind that the first Trump-appointed judge was not sworn in until 2017). And, interestingly, the top three most prolific DDR authors nationwide are not only all appointed by the same President (Trump) but they were all appointed to the same circuit (the Ninth) and confirmed in the same year (2019).[255]

DDRs, therefore, are not a new tool but since 2014 they are being used in a new way, at least with a small group of repeat players.[256] We think DDRs are being used to speak to an external audience—the "groupies" or Twitter listeners. Some judges we spoke to even suspect that DDR authors—particularly those not on the original panel—will vote to hear a case en banc just to have the opportunity to put their mark on an issue through a DDR, even knowing they don't have the votes to get the en banc hearing. As described more fully below, the DDR is a tool for judicial branding and may have outlived its usefulness altogether.

V. REFORM SUGGESTIONS: STRIVING FOR CONSTRUCTIVE SEPARATE OPINIONS

In an effort to illuminate constructive paths forward we offer the following reform suggestions inspired by our research. Each one is an attempt to separate constructive, internally-focused separate opinions from the destructive,

255. From 2014 to 2024, Judges Collins, Bumatay, and VanDyke wrote the most DDRs per year of active service.

256. If the past is prologue, there is good reason to think that some second-term Trump appointees would follow the lead of first-term appointees.

externally-focused ones—and an effort to preserve and protect the deliberative model of judicial decision-making. Importantly, divisive politics need not get involved; all of our suggestions have cross-ideological appeal—meaning there is nothing inherently "conservative" or "liberal" about any of them. And all but one of these suggestions can be accomplished through changes implemented by the judges themselves.

A. ABANDONING DDRS

Our first suggestion is the most clear-cut: We think the time has come to abandon the dissent from denial of rehearing.[257]

There are two important points to remember and keep separate in rationalizing this recommendation. First, DDRs are not written for the members of the circuit. At the time they are penned the case is over in the circuit—by definition, final en banc review has been denied. DDRs are instead strictly intended for an external audience—be it Supreme Court Justices, "groupies," judges in other circuits, academics, members of the press, or all of the above. Separately, the partisan divide in the use of DDRs is growing, which is a bad look for the circuit (and a pattern that does not go unnoticed by the judges internally).[258]

As to the first point, when DDRs are defended they are most often seen as a way to highlight a case's cert-worthiness for the Supreme Court.[259] There may have been a time when the DDR was useful for spotting and highlighting cert-worthy cases—particularly when circuit splits were plentiful and Supreme Court litigators were few. But those days have passed. Today, the Supreme Court decides fewer cases than ever before, and the number of Supreme Court advocates clamoring to be a part of those cases is at an all-time high.[260] As Supreme Court veteran Kathleen Sullivan puts it: "With the shrinking docket, there are too many Supreme Court lawyers chasing too few cases on the merits."[261] In that kind of market, one can fully anticipate a hungry Supreme

257. A more modest reform would be to reserve DDRs to members of the original panel in cases where there is no dissent from the panel initially. That would facilitate consensus while preserving the right to dissent for panel members and, in so doing, allow that panel member to send a message to the losing party that one of the panel judges agreed with them. But there are not that many DDRs that fall into this category. To give some perspective, 278 out of 487 DDRs we collected (fifty-seven percent) were written in cases with no panel dissent. But only twelve of those 278 were authored by a judge who was on the panel originally (who did not dissent the first time around but eventually felt the need to).

258. There is reason to think that this partisan divide will continue to grow; the just-elected Trump Administration has signaled it will appoint strong conservatives to the courts of appeals. *See supra* Section I.A.

259. *See* Horowitz, *supra* note 3, at 61–63 (discussing these views).

260. *Cf.* Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber: At America's Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014, 10:30 AM), https://www.reuters.com/investigates/special-report/scotus [https://perma.cc/9CZD-CEBE] (detailing the small pool of successful Supreme Court specialists).

261. Stephanie Francis Ward, *Friends of the Court Are Friends of Mine*, ABAJ. (Nov. 1, 2007, 8:10 PM), https://www.abajournal.com/magazine/article/friends_of_the_court_are_friends_of_mine [https://perma.cc/7KLQ-P6N6] (quoting Kathleen Sullivan).

Court specialist will find the cert-worthy cases, with or without the help of a DDR.[262]

Of course, maybe the motivation of the DDR author has nothing to do with a judicial tattle to the Supreme Court. As discussed, these opinions could be written to earn praise from external court-watchers or (less cynically) to influence another judge on a different circuit who might encounter the same issue in the future. Indeed, Judge Kozinski (formerly of the Ninth Circuit) applauds DDRs for exactly this reason: as "a way for judges to express a view on the merits of important cases decided by their courts when the luck of the draw does not assign them to the original three-judge panel."[263]

We just do not agree with Judge Kozinski that there is a significant benefit to providing an open microphone to any judge who may want to chime in on any important issue at any time, whether or not he is briefed on it. And we are not alone. Judge William Pryor of the Eleventh Circuit has publicly explained why he does not author DDRs as a rule:

> When a judge dissents from an order denying rehearing en banc and expresses an opinion about how that appeal should have been decided, the dissenter writes both without the authority to decide that appeal and without the benefit of the reliable process for deciding an issue worthy of en banc rehearing. . . . It is more like having a scholar-in-residence provide academic criticism of the court, but that function is supposed to be performed externally by law professors and law reviews, not by judges.[264]

At the very least, the marginal benefit to a DDR is not worth its costs any more now that the DDR has taken on a partisan taint. As the data discussed above reveals, today Republican appointees are almost twice as likely to author a DDR than their Democratic counterparts, in contrast to the approximately equal frequency of authorship by appointees of both parties ten years ago.[265] DDRs further encourage tribalism when judges of the same party (and often the same appointing President) sign onto each other's DDRs. This too is increasingly the case, especially with regard to first-term Trump appointees.

Such a partisan divide in the use of DDRs, we think, changes the game. Recall what Judge Wynn of the Fourth Circuit said about the cost of DDRs: They reveal the judge "stepping out of the robe and into the role of an advocate."[266] This, he says, "contributes [to] heighten[ing] the degree to which politics overtly governs judicial activity."[267]

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262. Larsen & Devins, *supra* note 117, at 1926–27 (describing the incentives of the Supreme Court bar).

263. Kozinski & Burnham, *supra* note 224, at 607.

264. William H. Pryor, Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007, 1021 (2008).

265. *See supra* Part IV.

266. Doe v. Fairfax Cnty. Sch. Bd., 10 F.4th 406, 408 (4th Cir. 2021) (mem.) (Wynn, J., concurring) (quoting Indep. Ins. Agents of Am., Inc. v. Clarke, 965 F.2d 1077, 1080 (D.C. Cir. 1992) (Randolph, J., separate statement)).

267. *Id.* (quoting Horowitz, *supra* note 3, at 85).

Even if there is nothing necessarily partisan or ideological about a DDR in its organic form, the growing partisan gap in the *use* of a DDR makes these separate opinions more toxic than before. Just like we have argued in previous work about en banc decisions, there comes a point where the partisan use of such a tool comes at too high a cost.[268] This cost is both external to the circuit—a "bad look," as one judge told us—but also internal to the circuit. To the extent judges think their colleagues are using DDRs as vehicles to get points across to national audiences or to line up in teams, their use can only chip away at collegial relationships over time.[269]

B. ADOPTING TIMING RULES

"Good fences make good neighbors." Recall that this was a line we heard when asking appellate judges about the timing of separate opinions.[270] All judges we spoke with—regardless of time on the bench or the political party of the appointing President—concurred that the time delay caused by separate opinions can be a "huge irritant."[271] Making someone late is an easy way to make them cranky, and judges are no exception.[272] The circuits all have some version of a "late list" that gets circulated indicating which cases are still outstanding and undecided.[273] One can easily imagine the frustration that comes from being placed on that list just because a co-panelist judge wants to write separately and has yet to do so.

Accordingly, several circuits have adopted either formal or informal rules regulating when colleagues on the bench must respond to each other. As Marin Levy and Judge Jon Newman note, all the circuits have "'targets' for circulating and responding to opinions – some by custom, some by internal operating procedure . . . and some by general order."[274] Of course, it is to be expected that not all of these targets are going to be met every time.

We learned from our interviews that the circuits vary in terms of how they address these delays and which methods they believe are appropriate to enforce the timing targets they set for themselves. In the D.C. Circuit, for example, there is a rule that judges intending to author a separate opinion must submit a draft thirty days after receiving a draft of the majority, and that if the delay extends to ninety days the decision can be issued with a notation that the

268. Devins & Larsen, *supra* note 36, at 1417–22, 1436–37; *see* Kozel, *supra* note 142, at 256–67, 269–73 (reviewing the costs and rationales for going en banc).

269. We are not suggesting such a rule need to come from the political branches. Indeed, as is the case for the majority of our reform suggestions, we think this one should come from within the judiciary.

270. Interview with D.C. Circuit Judge, *supra* note 160; *see supra* notes 215–16.

271. Interview with Sixth Circuit Judge, *supra* note 56. *See generally* Interviews with Judges (2024).

272. We also learned from our interviews that one cannot always tell from the outside who is the culprit when an opinion is late. It is easy to blame the dissent author, but it can just as easily be the majority who waited for too long to circulate a draft or a revised draft. *See* Interview with D.C. Circuit Judge, *supra* note 160. Judges know the culprit, however, which means the risk to collegiality exists regardless.

273. JON O. NEWMAN & MARIN B LEVY, WRITTEN AND UNWRITTEN 115–20 (2024).

274. *Id.* at 116.

separate opinion will follow.[275] Similarly, in the Ninth Circuit, when a judge issuing a separate opinion has not responded to the majority draft within sixty days, the author of the main opinion (joined by a second judge) is supposed to send a memo to the clerk and ten days later "the clerk is to file the opinion with a notation that the third judge may file a separate opinion later."[276] In other circuits that have adopted the same or similar rules to the D.C. and Ninth Circuits, these cutoff dates can be used in a persuasive manner by the Chief Judge even if it is rarely formally invoked.[277]

The point of these informal and formal deadlines is not just to get the circuit's work done on time—although all judges agree that is important. Equally important is the collegiality bonus to circulating separate opinions in a timely manner. Indeed, implementing rules to govern when judges writing separately must respond to each other was part of Judge Edwards' concerted effort to heal the D.C. Circuit culture in the mid-1990s.[278] Put simply, a separate opinion is destructive to the deliberative model if it comes in long after the case was argued—regardless of what the opinion ultimately says. This just reflects reality. After months and months, there comes a point when a judge's attention shifts to other issues and new cases, law clerk personnel change, and even circumstances shift such that an issue can be mooted out or create a new conflict during the delay. None of this is healthy to the deliberative model of judicial decision-making.

An easy reform suggestion therefore—and one that the judges can institute for themselves in a cross-ideological effort—is to install timing rules for responding to separate opinions à la the D.C. Circuit. We learned that several circuits have norms along the lines of "drop what I'm doing and respond to other people's work first."[279] Codifying these—or strengthening the norms with rules—is an easy way to help everyone get along and reduce friction that gets in the way of productive deliberation.

C. CIRCUIT SIZE MATTERS

Another reform possibility involves circuit size—and although this is a reform that would need to be pursued by Congress, it is one worth seriously considering. We noticed a pattern when looking at circuit variation for separate opinions, at least with respect to dissents: Judges on smaller circuits write dissents in fewer cases, as a percentage of the total number of panel decisions they publish, than do judges on larger circuits. Consider the following chart[280]:

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275. Interview with D.C. Circuit Judge, *supra* note 160.

276. NEWMAN & LEVY, *supra* note 273, at 121.

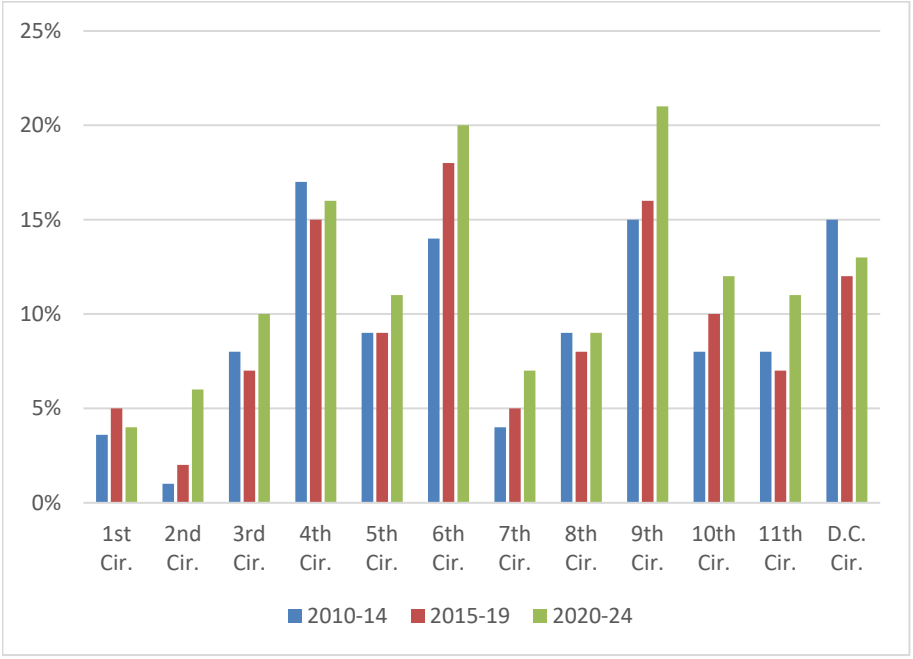
277. Interview with Eleventh Circuit Judge, *supra* note 113.

278. Edwards, *supra* note 34, at 85–86; *see* Larsen & Devins, *supra* note 25, at 1338; *see also* Srinivasan et al., *supra* note 38, at 78 ("Most observers rightly credit Judge Edwards with helping to restore a more cooperative and collegial culture on the D.C. Circuit, and he has gone on to write and speak extensively about the importance of judicial collegiality.").

279. *See* Interview with First Circuit Judge (Mar. 12, 2021); Interview with Sixth Circuit Judge, *supra* note 56; Interview with Seventh Circuit Judge (Mar. 1, 2021).

280. *Integrated Database (IDB)*, *supra* note 2.

Figure 6. Published Panel Decisions with Dissents by Circuit, 2010 to 2024



Notice how the bigger circuits (meaning the circuits with the most judges on them) tend to issue more dissents, even when divided by percentage to account for docket variation and caseload discrepancies. The three biggest circuits are the Ninth (which is the largest by far), the Fifth, and the Sixth Circuits.[281] The smaller circuits include the First, the Seventh, and the Eighth Circuits.[282]

One possible explanation for this pattern involves the ease of informal communication between judges when there are simply fewer of them.[283] We learned from several judges we interviewed that the best deliberation happens behind the scenes and that the most powerful dissents are often the ones that "never see the light of day."[284] One judge (who sits on a smaller circuit) recalled writing a forceful dissent and then having a phone conversation with the author of the majority about it. Together they found a way to a narrower rationale that they could both join, meaning the dissent was never seen outside

281. *United States Court of Appeals*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals [https://perma.cc/2A3S-GAHY]. The Ninth Circuit has twenty-nine active judges, the Fifth Circuit has seventeen, and the Sixth Circuit has sixteen. *Id.*

282. *See id.* The First Circuit is the smallest circuit with only six active judges, followed by the Seventh Circuit and the Eighth, both with eleven. *Id.*

283. *See* HAZELTON ET AL., *supra* note 31, at 82 (making this point about circuit size).

284. Interview with Third Circuit Judge, *supra* note 88; *see, e.g.*, Interview with Second Circuit Judge (Oct. 10, 2024).

chambers.[285] We were also told of an occasion when a dissenting judge sent a copy of his draft to the author of the majority before circulating it more broadly to other judges to ask "if anything in [the dissent] is unfair."[286]

This deliberation without a paper trail is quite valuable. It provides the luxury of not "air[ing] all of their dirty laundry" in public or getting carried away with fiery tones or external audiences.[287] In some ways it presents the "purest" form of the deliberative model at work: disagreement and dissenting views not stifled and not performative, but instead working together to reach the best outcome—spotting new issues, reframing arguments, bringing fresh perspectives—even if nobody gets to see the conversation.

These types of conversations are more likely to occur when judges know and trust one another, have worked together in the past, and know they will sit together in the future. But that informal, behind-the-scenes deliberation is not very realistic when you have twenty-eight judicial colleagues as opposed to ten or even five.[288] A large circuit has additional challenges in efforts to create collegiality because their judges are spread out across a wide area and will spend less time working with each of their colleagues. A judge on the Ninth Circuit, for example, won't even sit on a panel with every other judge on the circuit each year. By one estimate they sit with less than half of the total number of judges on the court in any given year.[289] Because many Ninth Circuit judges work alone in offices near their homes, and since there is not a full en banc process on the Ninth Circuit, there are some judicial colleagues who literally have never even met. According to the *LA Times*, in fact, "most 9th Circuit veterans have yet to have had any experience with the new [Trump] appointees, and it could take years before they serve on a panel with each of them."[290]

It is hard to build good-faith comradery with people you barely know. Moreover, the theoretical discussions about the value of collective decision-making typically assume the possibility of back-and-forth discussions—and these are hard to have with colleagues when you live thousands of miles apart.[291] The distance inevitably creates formality.[292]

Indeed, in part for these reasons discussions of splitting the Ninth Circuit have become increasingly common. Judge Diarmuid O'Scannlain, of the Ninth Circuit, has been vocal publicly about the need to break up the circuit. One of those reasons has to do with collegiality: "[T]he Ninth Circuit's lengthy judicial roster has a detrimental effect on the court's decision-making process

285. Interview with Third Circuit Judge, *supra* note 88.

286. *Id.*

287. *Id.*

288. *See* Nash, *supra* note 31, at 1635 ("[C]ourts with fewer judges, and judges housed in fewer courthouses, are more likely to be collegial courts.").

289. Diarmuid O'Scannlain, *Ten Reasons Why the Ninth Circuit Should Be Split*, 6 ENGAGE, no. 2, 2005, at 58, 59.

290. Dolan, *supra* note 23.

291. An example of this line of thinking is Condorcet's jury theorem. For discussion of this theory, see generally Ladha, *supra* note 44.

292. O'Scannlain, *supra* note 289, at 59–60.

because it inhibits the development of collegiality and fosters fractiousness."[293] Similarly, Ilya Shapiro and Nathan Harvey argue that the large size of the Ninth Circuit "undercut[s] collegiality by limiting the interactions of the entire circuit as a collective whole."[294] As Judge Richard Tallman shares, "irregular membership on [the] panels comes at a cost; it fails to foster strong personal relationships, and makes for inconsistent opinions."[295]

In appellate decision-making, therefore, circuit size matters.[296] The deliberative model (and the norms it fosters) is harder to follow on a circuit with more judges and a longer distance between them.

D. DISCOUNTING THE EXTERNAL AUDIENCE (MOSTLY)

Our final reform proposal is perhaps the most important but is also the least clear-cut and thus the hardest to implement. Several features of destructive separate opinions share a common core: the external audience.

We asked the judges we interviewed for whom they were writing when they chose to dissent or concur in a case. They explained they write for different audiences simultaneously. Some of these audiences one could call "internal" to the case: the litigants (to explain a result to the losing party), one's colleagues on the circuit (to plant a seed of thought for another day or to encourage en banc), and sometimes just for oneself (or "for my own conscience").[297]

At times, however, the judges write to audiences we call "external"—meaning to people not a part of the case or on the circuit. Examples of writing to external audiences include: encouraging a cert grant by the Supreme Court, writing for judges on different circuits who may encounter the same problem in the future, and of course writing for "groupies," as discussed above.[298]

Admittedly this is not an easy line to draw nor is it black and white in its application. But, generally speaking, when an opinion is written for someone other than the litigants or circuit colleagues there is a greater risk that it is going to erode the deliberative model. When the goal is to get noticed by an external audience (a blogger, a commentator on Twitter, the next White House counsel), the tone of an opinion changes and the objective of writing

293. *Id.* at 59; *see* Ilya Sharpiro & Nathan Harvey, *Break Up the Ninth Circuit*, 16 GEO. MASON L. REV. 1299, 1308 (2019).

294. Shapiro & Harvey, *supra* note 293, at 1308.

295. *Id.*

296. It isn't everything, of course. Recent analysis of the Sixth Circuit (a larger circuit), for example, notes that an increase of separate opinions did not correlate with an increase in partisan or contentious opinions. Even though "separate opinions have become more frequent [on the Sixth Circuit], there appears to be less friction and more policy-focused and academic dialogue about the development of the law." Colter Paulson, *Sixth Circuit Judges Still Write Lots of Dissenting and Concurring Opinions, but Appear to Be Less Partisan*, SIXTH CIR. APP. BLOG (June 9, 2023), https://www.sixthcircuitappellateblog.com/news-and-analysis/the-sixth-circuit-still-has-loads-of-dissenting-and-concurring-opinions [https://perma.cc/4WPE-WFZK].

297. Interview with Eleventh Circuit Judge, *supra* note 113; Interview with Fourth Circuit Judge, *supra* note 89; Interview with Third Circuit Judge, *supra* note 88.

298. *See* Interview with D.C. Circuit Judge, *supra* note 160.

it changes.[299] No longer is the focus on resolving the case at hand in a productive, collegial way. Instead the focus is on self-promotion or advancing the national ideological agenda of the judge's preferred party or group.

We are not the first to notice this. Nina Varsava explains that the fault actually lies outside the judiciary: The entire legal community encourages judges to write lavish, entertaining, story-like opinions that are designed to get the attention of average Americans and demonstrate a judge's unique tone and style.[300] This push toward a more individualistic tone, she argues, is a bad thing because it disrupts allegiance to neutrality and a commitment to the rule of law.[301]

We therefore recommend a rule of priority. For the judge committed to the deliberative model,[302] one's first responsibility should be to the internal audience—the litigants and one's circuit colleagues. That is the primary project: to decide cases fairly, in concert with others, and in a way that promotes the integrity and legitimacy of the circuit. This of course can include spotting issues for the circuit to address down the road in a later case.

It may be that such an internally-focused separate opinion also addresses an external audience by, for example, encouraging national development of the law. This type of coincidental effect is inevitable and may be beneficial, but it should not be pursued at the expense of priority number one.

CONCLUSION

Particularly in a moment in which all eyes are on the U.S. Supreme Court, it is easy to forget that the bulk of the Nation's appellate work comes from the 179 judges who sit below the Supreme Court Justices, on the U.S. courts of appeals. Although dissents and concurrences are to be expected from the Supreme Court Justices, the job of the lower federal appellate judge is different. In particular, by assuming that any appeals judge can sit on any panel and that any panel can set binding circuit precedent, the design of the federal courts system anticipates that appeals judges will be anonymous and collegial. Separate opinions from the lower courts thus deserve their own unique evaluation, particularly when considering judicial legitimacy.

Sometimes these separate opinions are emblematic of exactly what we want from federal judges: thoughtful, deliberate, informed decisions that of

299. This can cut in a different way too. Some have suggested that a restrained tone is part of an audition and once an audition is over, restraint will no longer be the name of the game. Cevallos, *supra* note 204 (suggesting Justice Kavanaugh's previous restraint in his judicial tone on the D.C. Circuit might have been "part of his long-game audition for the next – and final – judgeship on the prestige ladder").

300. *See* Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 112–13 (2021).

301. *Id.*

302. The deliberative model was overwhelmingly embraced by the twenty-five federal appeals judges we interviewed. *See* Interviews with Judges (2024). At the same time, we recognize that some outlier judges may not honor this model. Our hope is that the rule of priority becomes a norm that reinforces the primacy of circuit norms and traditions. For an analogous argument, see generally Larsen & Devins, *supra* note 25.

course diverge from each other but are made ultimately stronger because of those differences. Sometimes, however, these opinions reflect troubling skies up ahead—auditioning behavior, partisan team-building, and the erosion of important collegiality norms. With the arrival of the second Trump Administration, moreover, fears of costly us-versus-them partisan behavior should be abated wherever possible.[303]

The "judicial voice" embraced by then-Judge Ginsburg on the court of appeals is the singular voice of three judges working together.[304] It is a voice that seeks to find common ground and, in so doing, transcend party and ideological disagreement.[305] It is a voice in which no judge would stand out as the author of an attention-seeking opinion.[306] It is a voice which recognizes the inevitability of dissent but then takes steps to mitigate discordant dissenting opinions. It is a voice which embraces the deliberative model of judging, a voice which celebrates the "[r]ule of law virtues of consistency, predictability, clarity, and stability."[307] For reasons we have discussed throughout this Article, it is a voice that is rightly embraced by nearly all appeals judges.

The good news in all of this is that the path to preserving the deliberative model of federal appellate judging is well within reach. There are cross-ideological commitments on the bench to preserving the deliberative model we have described. Reforms are achievable, as long as the motivation to pursue them stays strong. And that deliberative model of decision-making—one that is perhaps unique to the judiciary—is an aspect of our democracy very much worth saving.

303. This would be true even if Vice President Harris had been elected. The 2024 elections were a vivid illustration of the rise of divisive "partyism" and the corresponding ill will between Democrats and Republicans. *Cf.* Cass R. Sunstein, *Partyism*, 2015 U. CHI. LEGAL F. 1, 1–2 ("The central idea is that merely by identifying with a political party, a person becomes hostile to the opposing party and willing to believe that its members have a host of bad characteristics.").

304. *See* Ginsburg, *supra* note 7, at 1188–96.

305. *See id.* at 1191–92 (noting how Democrat and Republican appointees typically converge).

306. Indeed, then-Judge Ginsburg proposed that unanimous panel decisions be issued per curiam—so that the author would not be disclosed. *See id.* at 1192.

307. *Id.* at 1191.