Saint Louis University School of Law
Scholarship Commons

All Faculty Scholarship

2007

Early Panel Announcement, Settlement and Adjudication

Samuel P. Jordan

Follow this and additional works at: https://scholarship.law.slu.edu/faculty

Part of the Courts Commons

EARLY PANEL ANNOUNCEMENT, SETTLEMENT AND ADJUDICATION

Samuel P. Jordan[†]

(Forthcoming in the B.Y.U. Law Review)

ABSTRACT

Federal appellate courts have significant discretion to set the internal policies that govern the appeals process, and they have used that discretion to institute policies designed to combat increasing caseloads. This Article takes a close look at one such policy: early announcement of panel composition in the D.C. Circuit Court of Appeals. In stark contrast to every other circuit, the D.C. Circuit announces panel composition to litigants in civil appeals well in advance of oral argument, and it does so at least in part to encourage settlement and control the court's workload. This Article concludes that although there are indications that the policy is serving its intended purpose, the effect is far from dramatic. To understand the limited effect, the Article first considers various barriers created by the content of the court's cue and by the ways that litigants respond to that content. The Article then explores how those barriers might alter the pool of cases that proceed to a merits decision.

INTRODUCTION 2

I. THE D.C. CIRCUIT PROCEDURE: THEORY AND EFFECT 9

A. Theory: Panel Announcement, Informational Cues and Settlement 10

B. Effect: Intercircuit Comparison and Intracircuit Analysis 18
1. *Intercircuit Comparison of Voluntary Dismissal Activity* 18
2. *A Closer Look at the D.C. Circuit* 24

II. BARRIERS TO EARLY ANNOUNCEMENT EFFECTIVENESS 26

A. Cuing Failure 26
1. *Ineffectiveness due to lack of strength* 27
2. *Ineffectiveness due to lack of relevance* 30
3. *Ineffectiveness due to insufficient cost savings* 30

[†] Climenko Fellow and Lecturer on Law, Harvard Law School. J.D. and M.P.P., 2004, University of Chicago. For helpful conversations and comments at various stages of this project, I thank Jack Goldsmith, Daryl Levinson, Tracey Meares, Gerald Rosenberg, Dan Schwarcz, Matthew Stephenson, and Sean Williams. For general support, I thank the Climenko Fellowship at Harvard Law School. Finally, thanks to Diego Baron for helpful research assistance.

B. Response Failure 32
1. Ignorance errors........ 33
2. Perception errors........ 36

III. DISTORTIONS CREATED BY EARLY ANNOUNCEMENT 38

A. The Predictability Distortion 38
B. The Sophistication Distortion 46
C. The Motivation Distortion 55

CONCLUSION........ 56

INTRODUCTION

Over the past quarter century, the United States Courts of Appeals have been experiencing a well-publicized caseload crisis.[2] Filings increased from 47,000 in 1992 to almost 68,500 in 2005 while the number of authorized judges has remained constant.[3] Unlike the Supreme Court, which by virtue of its discretionary jurisdiction[4] has a highly effective internal mechanism for regulating its workload,[5] the appellate courts are in many respects powerless to combat the rising tide. Instead, their primary source of relief is legislative action, through measures like the tightening of jurisdictional requirements[6]

---

[2] *See*, *e.g*., RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-93 (1985); Martin J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WISC. L. REV. 11, 25-26 (1996) (discussing federal caseload crisis); Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 Tex. L. Rev. 1485, 1487-91 (1995) (same).

[3] Appellate Judicial Caseload Profile, *available at* http://www.uscourts.gov/cgi-bin/cmsa.pl.

[4] Although not unlimited, the Supreme Court has significant ability via the writ of certiorari to control the cases it hears. *See, e.g.,* Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*. 79 NOTRE DAME L. REV. 1891, 1896 -1900 (2004); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

[5] The Supreme Court's discretion to accept cases has resulted in a substantial decline in the number of published opinions in the last 60 years. *See*, Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV 31, 66 (2005).

[6] Between 1935 and 1981, at least sixty-four bills were introduced that proposed stripping federal jurisdiction over various categories of cases and recently Congress has debated four new bills limiting or removing jurisdiction of the federal courts. Travis Christopher Barham, *Congress Gave and Congress Hath Taken Away: Jurisdiction Withdrawal and the Constitution*, 62 WASH & LEE L. REV. 1139, 1143-

and the addition of new judicial positions.[7] No such measure has been used sufficiently to overcome the increases in case filings, and other legislative action has effectively counteracted their limited use.[8]

The lack of direct methods of caseload control has not stopped the appellate courts from taking various steps to address the problem. In recent years, most appellate courts have instituted or enhanced their mediation and settlement programs in an effort to remove cases from the docket[9]; many have increased their use of unpublished opinions to dispose of cases with greater efficiency[10]; and some have aggressively promoted arbitration as an alternative to litigation.[11]

1148 (2005). Many of these bills were motivated by political considerations rather than judicial workload concerns.

[7] Congress added 35 judgeships in 1978, 24 judgeships in 1984 and 11 judgeships in 1990. Congress also created the Federal Circuit in 1982 with 12 judges. U.S. Court of Appeals, *Additional Judgeships Authorized by Judgeship Acts*, *available at* http://www.uscourts.gov/history/tablec.pdf.

[8] Most significantly, Congress has expanded federal jurisdiction over time by creating new federal causes of action. *See, e.g.,* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 388 (2004); J. Harvie Wilkinson, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 1148-49 (1994). Another problem has been the increased politicization of court appointments, which has led to many authorized judgeships sitting unfilled for lengthy periods of time. *See* David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479 (2005). *See also,* Carl Tobias, *The Federal Appellate Courts Conundrum*, 2005 UTAH L. REV. 743 (2005). And the courts themselves have played a role in increasing the scope of federal jurisdiction by recognizing new or expanded causes of action. *See* Stern, 6 U. PA. J. CONST. L. at 388-89.

[9] All thirteen circuit courts have instituted alternative dispute resolution programs pursuant to Fed. R. App. P. 33, which provides for alternative means of settling disputes at the appellate level with the assistance of a court appointed neutral party. ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS 2 (1997). The Ninth Circuit instituted its appellate mediation program in 1984 and in 1994 achieved a 73% disposition rate by settling 598 cases. Ignacio J. Ruvolo, *Appellate Mediation – "Settling" The Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177 (2005).

[10] The dramatic rise of unpublished opinions comes as of the result of a push in the 1970s to establish criteria for when opinions should remain unpublished. Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 201 (2001). Since then unpublished opinions have increased from 11.5% of total opinions in 1981 to 81.6% in 2005 with the number increasing each year and consistently reaching over 90% in the Fourth Circuit. *See id.* at 203 *and* U.S. COURTS OF APPEALS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2005 ANNUAL REPORT OF THE DIRECTOR tbl. S-3 (2005), *available at* http://www.uscourts.gov/judbususc/judbus.html). *See also,* Posner,

This article focuses on a different kind of approach used by appellate courts to alleviate the caseload crunch. The body of procedures that govern an appeal in the federal courts is comprised of several sources, of which the Federal Rules of Civil Procedure, Criminal Procedure and Appellate Procedure are only the most obvious and visible. Each of those sets of rules is mandatory and fixed, and courts have little power to change them.[12] By contrast, a court's internal rules and procedures are far more malleable. Federal Rule of Appellate Procedure 47 permits appellate courts to introduce local rules and procedures, so long as they are consistent with the mandatory procedural rules and an opportunity for notice and comment is provided.[13] 28 U.S.C. § 2077(b) further requires each court of appeals to establish an advisory committee "for the study of the rules of practice and internal operating procedures of such court."[14] Notice and comment periods and advisory committees aside,

---

supra note 2, at 162-71. However, the effectiveness of unpublished opinions as a time-saving measure may well be undercut by the recently adopted Fed. R. App. P. 32.1, which allows citation to unpublished opinions as precedential authority. Pierre N. Leval, *Citation of Unpublished Opinions, Panel Discussion, The Appellate Judges Speak*, 74 FORDHAM L. REV 1, 14 (2005) (arguing that permitting citation to unpublished opinions will require judges to spend more time on those opinions).

[11] Courts are upholding arbitration awards with narrow review to ensure that arbitration is an alternative step, not another layer in litigation. B.L. Harbert International v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006). *See also*, Cyctyc Corp. v. DEKA Products Ltd. Partnership, 439 F.3d 27, 33 (1st Cir. 2006) (emphasizing that court review of arbitral awards is narrower than review of lower court decisions by appellate courts).

[12] I say little power rather than no power to account for obvious caveats. First, courts and judges can (and do) promote modifications to the rules, either by writing opinions that point out perceived weaknesses in the rules as constituted or by engaging in more informal advocacy such as giving speeches, writing articles, or placing phone calls. This may be viewed as power to change the rules, but it is power of an indirect and uncertain variety. Second, courts can control the formal procedural rules to the extent that their terms are open to interpretation. But interpretations that deviate too far afield are likely to be noticed and policed by the Supreme Court. A prominent recent example of judicial efforts along these lines was the attempts by lower courts – followed by rejections by the Supreme Court – to impose heightened pleading requirement in certain contexts. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 1163 (1993); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

[13] Fed. R. App. P. 47; see also 28 U.S.C. § 2071 (providing statutory authority for courts of appeals to introduce rules and procedures).

[14] 28 U.S.C. § 2077(a) adds the further requirement that a court's rules and procedures be published.

Rule 47 clearly places the ultimate authority for rulemaking in the hands of the judges themselves.[15]

Local rulemaking authority is not limitless by any stretch, but it does provide a space in which courts can act directly and with relative ease. And there is some evidence that courts are maneuvering within that space to address caseload concerns. This article takes a close look at one example of such an effort. In 1986, the District of Columbia Circuit Court of Appeals used its rulemaking authority to alter the internal procedure for announcing the composition of merits panels to litigants.[16] Prior to that year, all federal circuits announced the composition of appellate panels only shortly before a scheduled oral argument. Under the D.C. Circuit's modified procedure, panel announcement instead comes within sixty days of filing and accompanies the initial scheduling of oral argument.[17] As a result, litigants receive panel composition information up to six months in advance of oral argument.

No official explanation accompanied the introduction of the new procedure, but at least one judge then serving on the court has provided an informal account. According to Judge Harry T. Edwards, the primary motivation was the convenience of the parties.[18] But a secondary motivation also existed:

---

[15] Fed. R. App. P. 47(a)(1) (requiring only a majority vote by active regular service judges to promulgate local rules and procedures).

[16] The versions of Fed. R. App. P. 47 and 28 U.S.C. § 2077 applicable in 1986 were different from the current versions, but not appreciably so. An advisory committee was still required for the courts of appeals (although not for district courts), and

[17] "Ordinarily, the Court discloses merits panels to counsel in the order setting the case for oral argument." United States Court of Appeals for the District of Columbia Circuit, *Handbook of Practice and Internal Procedures*, § II.B.8(a), in 5 FEDERAL LOCAL COURT RULES (West 2d ed. 1997; rev. April 1999). "[I]n civil cases, oral argument dates and panels are usually set before the briefs are filed." *Id.* at § IV.A.3. *See also* Patricia M. Wald, . . . *Doctor, Lawyer, Merchant, Chief*, 60 GEO. WASH. L. REV. 1127, 1138 (1992) ("We took a chance on disclosing the identities of merits panels, as well as the dates of oral argument, within sixty days of filing."). As Judge Wald's comment makes clear, the D.C. Circuit policy is applicable only in civil cases.

[18] Harry T. Edwards, Letter to Robert Brown and Allison Lee, quoted in J. Robert Brown, Jr. & Allison Herren Lee, *Appendix: The Neutral Assignment of Judges at the Court of Appeals*, at http://www.law.du.edu/courts/Jones_article_webmaterial_2000.htm (accessed January 24, 2006).

> It occurred to us that this false assumption [that panel composition permitted prediction of the outcome] might lead some parties to settle their claims to avoid certain panels. We were happy to accommodate those who might thus settle their cases and thereby reduce our caseload.[19]

For almost twenty years, no other circuits followed the D.C. Circuit's move toward earlier announcement. Then, in 2004, the Federal Circuit provisionally adopted a rule change that moved the announcement of panels to an earlier stage in the proceedings. Rather than announce panel assignment on the morning of the argument, the new rule provided for that announcement one week in advance of the argument.[20] Shortly before the actual adoption of this procedural change, Polk Wagner and Lee Petherbridge discussed it in hypothetical terms and concluded – echoing Judge Edwards – that earlier announcement "would be a simple, cost-free way for the court to increase the settlement rate."[21] There were early signs that the new procedure was indeed affecting litigant behavior. Most notably, the parties informed the court during oral argument in *Apotex v. Pfizer*[22] that Pfizer had executed a covenant not to sue for patent infringement.

---

[19] Id. *See also* Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 Wis. L. Rev. 837, 853-54 ("[I]n the D.C. Circuit, the names of the judges who are assigned to hear an appeal are announced well in advance to encourage … settlements. By blaming their withdrawal on the composition of judicial panels, rather than on the merits of their cases, lawyers are able to save face while simultaneously freeing the court system of unnecessary burdens. If this provides a palatable excuse and thus increases settlements, then the false image of a politicized judiciary may have some salutary effect.").

[20] Although this change is noteworthy for present purposes because it shifted panel announcement to an earlier point in the appeals process, even it does not come close to replicating the D.C. Circuit's extreme policy. Instead, the provisional rule brought the Federal Circuit's policy in line with the policies of many circuits that announce panels shortly before the scheduled argument. *See* Howard J. Bashman, *Who's on the Argument Panel: Why Ignorance Isn't Bliss*, available at www.law.com (April 3, 2006) (describing announcement policies).

[21] R. Polk Wagner and Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1175 (2004). Unlike Judge Edwards, however, Wagner and Petherbridge ultimately cautioned against adoption of an early announcement procedure – despite its promise as a caseload-reducing tool. For further discussion of their reasons for sounding cautionary notes, see *infra* Part III.A.

[22] 125 Fed.Appx. 987 (Fed. Cir. April 11, 2005).

The covenant not to sue rendered the appeal moot, and the court promptly issued a short opinion dismissing the case for lack of jurisdiction. There is good reason to believe that Pfizer's action was in direct response to panel announcement.[23] But rather than being viewed as an indication of success, at least one member of the panel lamented the result, remarking during argument that "maybe posting paneling is a very, very bad thing."[24] And it would appear that Judge Mayer was not alone in that sentiment; as of February 6, 2006, the court has reverted to its original procedure of announcing panels on the day of a scheduled argument.[25]

The recent Federal Circuit experimentation with – and rejection of – early announcement, along with the ever-increasing pressures for courts to find ways to handle cases efficiently, occasions a new examination of the effectiveness and effect of early announcement rules in particular and of local rules designed to address caseload concerns in general. Part I.A begins by situating the D.C. Circuit procedure as a form of "cue and response." The belief that early panel announcement will generate increased settlement activity is based on assumptions that litigants will perceive the announcement as a relevant cue and that they will respond to the cue by pursuing settlement. The rise of theoretical and empirical accounts of the "attitudinal model" of judging provides support for the cuing assumption because it has led to a growing perception that the identity of the judge matters to the outcome of the case. In the context of appeals, that translates to a perception that the composition of judicial panels matters, due either to a simple aggregation of the individual effects of judicial characteristics or to the combined effect of group characteristics. Support for the response assumption comes from the conventional law and economics theory of settlement, which posits that settlement decisions are responsive to information regarding likely

[23] In *Apotex*, the issue related to whether the filing of an Abbreviated New Drug Application (ANDA) by itself creates a reasonable apprehension of suit. In an earlier case, *Pfizer v. Teva*, the Federal Circuit had held that it does not. Judge Mayer, who dissented in *Teva*, was assigned to the *Apotex* panel, a sign that perhaps the *Pfizer* holding was insecure. The covenant not to sue was entered into after the panel was announced. *Patently-O*, patentlaw.typepad.com (March 14 and April 11, 2005).

[24] *Patently-O*, patentlaw.typepad.com (March 14, 2005).

[25] According to Howard Bashman, the reversion to the original announcement procedure was also motivated by a "negative reaction to an increased amount of attorney pandering at oral argument." *See* Bashman, *supra* note 20.

outcome and that settlement is more likely when the probable outcome is more certain. If the court's cue equates to new information that makes the probably outcome more certain, litigants should respond, and their response should lead to settlement in at least some cases.

Despite the fairly straightforward case for a settlement effect, Part I.B concludes that the D.C. Circuit rule has been only weakly effective in those terms. I begin by comparing rates of voluntary dismissal in civil non-administrative cases filed in the Second, Seventh and D.C. Circuits, and find no significant difference between the circuits. If anything, the rate of voluntary dismissal appears lower in the D.C. Circuit than in the other circuits studied, even when controlling for subject matter and governmental involvement. Of course, an inter-circuit study may mislead if other differences in practice or procedure contribute to general variances in the rate of voluntary dismissal across circuits. To account for that possibility, I look instead at voluntary dismissal activity within the D.C. Circuit alone. Of 63 cases in which a panel was assigned, 13 were dismissed voluntarily prior to oral argument. Although there is no way to assess from docket sheet information whether these dismissals were directly responsive to panel announcement, that number provides at least weak support that the announcement rule affects behavior in some cases.

Part II discusses various barriers that limit the effectiveness of early announcement as a settlement-promoting tool. Some of these barriers stem from failures in the content of the court's cue, while others owe to failures in the way litigants respond to the cue. Content barriers arise when the actual panel composition information does not produce significant updating relative to a litigant's pre-announcement outcome prediction. This is true, for example, when the announced panel is ideologically close to the panel that would be expected given the court's overall composition. It is also true when litigants do not perceive the outcome to be affected by the particulars of panel composition – in other words, when litigants do not view the attitudinal model as operational in practice. Response barriers arise when litigants do not perceive and respond to the court's cue rationally. Some litigants may simply fail to notice the cue. More likely, many litigants may notice the cue but then make mistakes interpreting and incorporating its content. To the extent they occur, all of these barriers are largely intractable. This is because the actions necessary to overcome them would require the court to take an unacceptably active role in the dissemination and interpretation of the

announcement cue. In the end, the stubbornness of these various barriers means that the early announcement procedure can only hope to have a limited effect.

Part III explores how the barriers that limit the early announcement procedure's effectiveness may also introduce distortions into the body of cases that ultimately proceed to oral argument. As an example, consider the barrier created by the fact that some panels are not particularly predictable. This barrier is also the source of a distortion because it means that relatively more cases involving predictable panels will settle, and conversely that the panels hearing the cases that proceed to oral argument will be relatively more unpredictable. Other distortions include overrepresentation among oral argument cases of appeals that involve unsophisticated litigants, are motivated by an interest in a judgment per se, and that are relatively non-responsive to panel composition. Each of these distortions has the potential to create serious problems in terms of the court's ability to perform its adjudicative functions adequately. Those serious problems arise only in the extreme case, however, and the extreme case is unlikely because the existence of other barriers contains the severity of any one distortion. Even so, caseload distortions as a by-product of the early announcement procedure deserve careful attention. Similar distortions are possible whenever a court introduces a "cue and response" procedure, and full consideration of the desirability of any such procedure should account for them.

I. THE D.C. CIRCUIT PROCEDURE: THEORY AND EFFECT

Why would Judge Edwards believe that early announcement will increase settlement activity? The basic theory is one of cue and response: Early announcement constitutes a cue to litigants, who respond because they believe that the content of the cue is relevant. In basic terms, early announcement is deemed a relevant cue because litigants are assumed to perceive a relationship between the identity of judges assigned to hear the appeal and the likely outcome of the appeal. And litigants are expected to pursue settlement in response because settlement decisions are related to expectations about likely outcome. If the cue and response theory holds up in practice, we should expect that the degree of pre-argument settlement activity will be higher when the cue is provided than when it is not. In other

words, we might expect the rate of voluntary dismissal in the D.C. Circuit to be higher than in other circuits. I find no evidence to support this expectation. But that result might be misleading; other unmeasured forces may contribute to inter-circuit differences in settlement activity that mask the effect of the early announcement procedure. In an attempt to better isolate the procedure's effect, I conclude this section with a closer analysis of D.C. Circuit cases. That analysis suggests that the procedure may be achieving its intended effect in some cases.

A. *Theory: Panel Announcement, Informational Cues and Settlement*

There is a strong predisposition in the American legal system toward the formalist notion that judges perform their function without recourse to personal ideology or past experience. That view is a predictable corollary of our democratic ideals of blind justice and equality under the law.[26] So understood, the judge is "one who objectively and impersonally decides cases by logically deducing the correct resolution from a definite and consistent body of legal rules."[27] Judges themselves have been among the most vigorous defenders of the formalist model.[28] In a very recent example, then-Judge Roberts

---

[26] *See, e.g.,* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255-64 (1997); Doreen McBarnet & Christopher Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*, 54 MOD. L. REV. 848, 871 (1991) ("[T]here is a fundamental formalism inherent in the very idea of legal control in the liberal democratic state which makes formalist argument difficult to resist or easy to justify."); EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 74-75 (1973).

[27] John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 87 (1995). For a classic enunciation of the formalist approach, *see* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that "legal analysis . . . can and should be free from contaminating political or ideological elements").

[28] The judicial defense of formalism has a distinguished pedigree. *See, e.g.,* Osborn v. Bank of United States, 22 U.S. 738, 866 (1824) ("Courts are the mere instruments of the law, and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge.") (Marshall, C.J.). For a more recent Supreme Court articulation of formalist ideals, *see* Liteky v. United States, 510 U.S. 540, 561-62 (1994) (Kennedy, J., concurring) ("Judges, if faithful to their oath, approach every aspect of each case with a neutral and objective disposition.").

testified in his Supreme Court confirmation hearings that "judges wear black robes because it doesn't matter who they are as individuals. That's not going to shape their decisionmaking. It's their understanding of the law that will shape their decision."[29] And Judge Edwards has argued that "it is the law – and not the personal politics of individual judges – that controls judicial decision-making in most cases resolved by the courts of appeals."[30]

Over the past century or more, this formalist vision of judges has come under sustained attack by legal scholars and social scientists.[31] Legal realists and critical legal theorists have long argued that, far from being impersonal, judging is an endeavor acutely affected by the personal ideology and experience of those holding the office.[32] In response to the formalist model, legal realists developed the "indeterminacy argument," which asserts that judicial decisions cannot be rationally deduced because of conflicting rules within the law and because of the susceptibility of those rules to conflicting interpretations.[33] Rather than rational deduction, the legal realists

---

[29] *Hearing before the Committee on the Judiciary, United States Senate,* J-109-37 at 178 (2005) (testimony of Hon. John G. Roberts). Similarly, Patricia Wald has urged that "[t]he black robes we wear on the bench unite us in their lack of distinguishability; they make a simple but striking point: We are neither Democratic judges nor Republican judges but, simply, United States judges." Patricia M. Wald, *Colloquy: A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 240 (1999).

[30] Harry T. Edwards, *Public Misperceptions Concerning the 'Politics' of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 620 (1985). See also *Bartlett v. Bowen*, 824 F.2d 1240, 1243-44 (D.C. Cir. 1987) (Edwards, J., concurring in the denial of rehearing en banc) (defending the "integrity of panel judges, who are both intelligent enough to know the law and conscientious enough to abide by their oath to uphold it").

[31] For early formulations of the argument that judicial attitudes affect decisionmaking, *see* JEROME FRANK, LAW AND THE MODERN MIND 116 (1930); Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431, 443 (1930); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 277-78 (1929).

[32] *See, e.g.*, Orley Ashenfelter, Theodore Eisenberg, & Steward J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 257 (1995)("Since the rise of legal realism, it has been axiomatic that the background and worldview of judges influence cases.").

[33] For a good discussion of the development of the indeterminacy argument, *see* Hasnas, *supra* note 27, at 86-98. Critical Legal Theorists revived the realist indeterminacy argument in the 1980s. For an example of such a revival, *see* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152, 1152-53 (1985)(arguing that application of legal rules is necessarily informed by both policy considerations and political considerations).

contend that legal decisions are the result of judicial choices regarding which rules to apply and how to apply them. Those choices are in turn determined by value judgments and judicial beliefs about the propriety of certain outcomes.[34]

Social science studies developing an "attitudinal model" of judicial behavior lend general credence to the realist view.[35] These studies attempt to establish links between various judicial characteristics and voting outcomes. The link most often studied is that between voting behavior and ideology. Studies of this sort typically measure ideology by reference to the party affiliation of the nominating President,[36] although studies using other ideological indicators also exist.[37] In addition to ideology, studies have analyzed correlations between voting behavior and various other judicial

---

[34] *See, e.g.,* Posner, *supra* note 5 (articulating a similar realist explanation of the Court).

[35] *See generally,* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). The "attitudinal model" moniker is not universally accepted, but it is prevalent and will be used throughout this article for the sake of simplicity and clarity. *See also* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? (2006).

[36] *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1770-71 (1997) (discussing the District of Columbia Circuit in particular); Donald R. Songer, *The Circuit Courts of Appeals*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 35, 42-43 (John B. Gates & Charles A. Johnson eds., 1991); Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955-1986*, 43 W. POL. Q. 317, 322-23 (1990); Richard J. Pierce, *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 303-07 (discussing the District of Columbia Circuit in particular); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 51-54 (1986); ROBERT A. CARP & C.K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 51-83 (1983); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355, 362-63 (1981); Sheldon Goldman, *Voting Behavior on the U.S. Courts of Appeals, 1961-64*, 60 AMER. POL. SCI. REV. 374, 376-83 (1966); Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AMER. POL. SCI. REV. 843, 845 (1961).

[37] *See, e.g.*, Jeffrey A. Segal, et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 818 (1995)(using newspapers editorials to establish ideological values). Indeed, even Judge Wald has conceded that "subtly or unconsciously, the judge's political orientation will affect decisionmaking." Patricia M. Wald, quoted in LAWRENCE BAUM, AMERICAN COURTS 13 (3d ed. 1994).

characteristics, including geography,[38] age,[39] gender,[40] religion,[41] tenure,[42] and past experience.[43] Most – although certainly not all – of these studies claim to find positive correlations between judicial characteristics and voting patterns. And although the methodology employed has been the source of some debate,[44] their cumulative effect – together with the theoretical work of the legal realists and their successors – has been to solidify the notion that judicial characteristics matter to legal outcomes. In short, even if not accurate, the attitudinal model of judging has become prevalent, and prevalence is good enough to support the claim that litigants might view the identity of the judge as a relevant factor in the prediction of a case's outcome.[45]

---

[38] *See, e.g.*, Songer & Davis, *supra* note 36.

[39] *See, e.g.*, Sheldon Goldman, *The Effect of Past Judicial Behavior on Subsequent Decision-Making*, 19 JURIMETRICS J. 208, 212 (1979)(finding age a relatively important factor for Civil Liberties voting).

[40] *See, e.g.*, Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759 (2005); G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985)(female judges tend to be less supportive of personal rights claims and minority policy positions than male judges, and tend to demonstrate greater deference to positions taken by the government); *but see* Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, 14 SOC. SCI. J. 77, 86 (1977)(female judges behave no differently than their male colleagues in sentencing criminal defendants).

[41] *See, e.g.*, Goldman, *supra* note 39; Joel B. Grossman, *Social Backgrounds and Judicial Decisionmaking*, 79 HARV. L. REV. 1551 (1966).

[42] *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1190 (1991); Goldman, *supra* note 39.

[43] *See* Eisenberg & Johnson, *supra* note 42 (finding a correlation between voting in racial equal protection cases and prior prosecutorial experience); Goldman, *supra* note 39.

[44] *Compare* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) *with* Frank Cross, Michael Heise & Gregory Sisk, *Above the Rules: A Response to Epstein and King,* 69 U. CHI. L. REV. 135 (2002) *and* Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal* Scholarship, 69 U. CHI. L. REV. 153 (2002). *See also* H.W. Perry, *Taking Political Science Seriously*, 47 ST. LOUIS U. L.J. 889, 891 (2003) (claiming that most political scientists would not believe that attitudes are the sole determinant, or that they play as singular a role as propounded by the so-called "attitudinal model").

[45] Of particular relevance here is the explicit connection some have made between the attitudinal model and effective lawyering: Because judicial characteristics affect outcomes, those characteristics (and other external factors that might influence decisions) should be accounted for and integrated into the lawyer's

If lawyers believe that judicial characteristics affect the decisions of individual judges, then it is no great stretch to conclude that they might also believe that the combined characteristics of a panel of judges will affect collective judicial decisions. That conclusion follows a simple application of the attitudinal model to three-judge panels, and it has led some to criticize the current practice of randomly assigning judges to appellate panels.[46] More generally, it

---

decisionmaking process. So, for example, Hasnas has urged that lawyers "would be better able to predict the outcome of cases and correctly advise their clients if they studied the social factors that influence[] judges' behavior." Hasnas, *supra* note 27, at 89; *see also* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 581 (1993)("Not surprisingly, according to the realist, the ideal lawyer is the one who is in the best position to counsel his clients about what to expect from litigation. That lawyer will need to know what leads judges to decide as they do, not what legal reasons, if any, would justify their decisions.... The best explanation of judicial decisions may include the set of binding legal reasons, but cannot be limited to them. Instead, explanations will point to psychological and sociological facts about judges as part, if not all, of the causal story.").

[46] Although not required by statute, every circuit of the United States Court of Appeals now uses some form of random assignment to compose the three-judge panels who hear and decide cases. *See* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 630 (1994)(describing random assignment as a central characteristic of federal judicial procedure). For a description of the specific assignment procedures used by the various circuits, *see* J. Robert Brown, Jr. & Allison Herren Lee, *Appendix: The Neutral Assignment of Judges at the Court of Appeals*, at http://www.law.du.edu/courts/Jones_article_webmaterial_2000.htm (accessed May 15, 2006).

Random assignment arguably contains an implicit endorsement of judicial formalism because it assumes that "all judges act with reasonably equivalent motives," such that random assignment is neutral with respect to case outcomes. Emerson H. Tiller & Frank B. Cross, *Colloquy: A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 217 (1999). But if the attitudinal model is correct, then random assignment will not necessarily guarantee neutrality and a non-random assignment procedure might be required to achieve neutral panels. For further discussion of proposals for introducing neutral but non-random assignment procedures, see *infra* note 117.

Two additional points related to random assignment and neutrality merit brief mention. First, the practice of random assignment might be defended on grounds other than neutrality. That is, it may be that courts fully realize that panel composition will affect case outcomes, but that they nevertheless feel that random assignment is the best way to deal with that fact. However, given the strong defense of judicial formalism by most judges, it is reasonable to conclude that random assignment would be defended instead on neutrality grounds. For an enunciation of the contrary interpretation, see J. Robert Brown, Jr. & Allison Herren Lee, *Neutral*

has generated concern about the influence of panel composition on case outcomes. As expressed by Michael Hasday, "[w]inning a case in the U.S. courts of appeals hinges too much on luck, and not enough on the merits. The system produces slot machine justice, in which the outcome crucially turns on the three judges selected to hear the case."[47] Given the numerous attitudinal studies, and the clear logical connection between those studies and the conclusion that the composition of panels is an important determinant of case outcomes, the prevalence of this concern is hardly surprising.

Recently a second argument has been developed that provides additional support for the notion that panel composition affects case outcomes. Building on insights from the psychology of group decision-making, Richard Revesz, Cass Sunstein and others have argued that the interplay of characteristics among the three judges on a panel affect voting patterns in ways that are different than a simple aggregation of individual characteristics might suggest.[48] For example, both Sunstein and Revesz have concluded that, at least in certain contexts, the ideology of *other* judges on a panel is as good or better a predictor of a judge's vote than his or her own ideology.[49]

Assignment of Judges at the Court of Appeals, 78 TEX. L. REV. 1037, 1066-69 (2000)(arguing that "the system can do no more than ensure that, whatever biases judges bring to the decisionmaking process, they play no role in the assignment process"). Second, formalistic ideals are by no means the only rationale for random assignment. To the contrary, random assignment also serves to "prevent[] judge shopping by any party, thereby enhancing public confidence in the assignment process," and to "ensure[] an equitable distribution of the case load" among judges of a court. United States v. Mavroules, 798 F.Supp. 61, 61 (D.Mass. 1992).

[47] Michael Hasday, *Ending the Reign of Slot Machine Justice*, 57 N.Y.U. ANN. SURV. AM. L. 291 (2000). Similarly, Emerson Tiller and Frank Cross have argued that partisan imbalances in panel composition "often lead to case outcomes that reflect partisan interests." Emerson H. Tiller and Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215.

[48] Cass R. Sunstein, David Schkade, & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 337-46 (2004); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168-72 (1998); Revesz, *supra* note 36.

[49] Sunstein et al., *supra* note 48, at 317; Revesz, *supra* note 36, at 319 (looking specifically at environmental regulation cases in the District of Columbia Circuit, and noting that "the party affiliation of the other judges on the panel has a greater bearing on a judge's vote than his or her own affiliation"). *See also*, Thomas J. Miles and Cass R. Sunstein, *Do Judges Make Regulatory Policy*, (forthcoming 2006) (*draft available at* http://www.ksg.harvard.edu/cbg/rpp/Sunstein%20Realism%20Chevron.pdf).

And both have concluded that ideologically uniform panels behave differently than those that are ideologically diverse.[50] There is more to be said about these studies,[51] but for present purposes it is enough to note that arguments concerning "panel dynamics" reinforce the basic notion that predictions as to outcome can be meaningfully updated and improved if the identity of judges assigned to reach the outcome is known in advance.

It remains to establish a connection between predictive updates regarding likely outcome and a litigant's subsequent decision to continue the appeal or to pursue voluntarily dismissal, either through settlement or – in the case of an appellant – through a unilateral motion to dismiss. This connection is a natural extension of the well-accepted proposition that decisions regarding litigation and settlement are affected to a great extent by expectations about outcome. More than twenty years ago, George Priest and Benjamin Klein argued that the "the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement."[52] Relevant considerations that inform the likelihood of success at trial should include the "predilections of a judge" as well as the "application of a legal rule."[53]

Those basic conclusions also apply at the appellate level. In most cases, the economic calculus of the parties should primarily

---

[50] Sunstein et al., *supra* note 48, at 343; Tiller & Cross, *supra* note 47, at 220-221. *See also* Cross & Tiller, *Judicial Partisanship*, *supra* note 48, at 2169-74.

[51] See *infra* notes 108-121 and accompanying text for a further discussion of panel dynamics.

[52] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984). Further studies have softened – or at least clarified – the strong Priest-Klein assertion in certain limited cases where at least one of the parties is motivated by an interested in a judgment per se. *See generally* Steven Shavell, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 434 (2004). In such cases, settlement may not result even if both parties understand that the plaintiff is very likely to win. This possibility highlights the fact that "the information that parties possess about the likelihood of success at trial" is not the only relevant factor to litigants, and that the "expected costs to parties of favorable or adverse decisions" may dominate in some instances. And they explain why I have hedged a bit by saying that "decisions regarding litigation and settlement are affected *to a great extent* by expectations about outcome." For a discussion of how an interest in a judgment per se might limit the effectiveness of early panel announcement, see notes 82 and accompanying text.

[53] Priest & Klein, *supra* note 52, at 35.

determine whether an appeal is filed in the first instance.[54] But if relevant information regarding the likelihood of success (or any other economic factor related to the likely costs or benefits of the appeal) is introduced only *after* the inception of the appeal, then the economic calculus will shift and future decisions related to the ongoing appeal may be affected. For example, suppose that a decision is made to file an appeal in a particular case, and that the Supreme Court subsequently issues an opinion that clarifies one of the issues at stake. In that circumstance, the parties should be expected to update their predictions regarding the application of legal rules, and new decisions to settle or dismiss may result. Because it is perceived to bear a relation to the likely outcome of the appeal, the introduction of panel composition information at some point in the appeals process operates in similar fashion. Once that information is announced, predictions regarding outcome should be updated, and decisions regarding the desirability of settlement may be altered.[55]

In sum, the theory of a settlement effect created by early panel announcement relies is one of cue and response. Announcing panel composition at a relatively early stage provides an informational cue that litigants will view as relevant to the likely outcome of the appeal. Rational litigants will respond to that cue by updating their expectations, which may lead to settlement or voluntary dismissal if the updated expectations create a zone for mutual agreement and if the cost of pursuing that agreement is less than the additional costs necessary to pursue the appeal to completion.

---

[54] In fact, according to much of the theoretical literature on the Priest-Klein hypothesis, decisions to settle after an appeal has been filed are anomalous and occur only in instances of informational asymmetry. *See, e.g.*, Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 14 (1996).

[55] For more on the formal economic models underlying settlement decisions in response to new information introduced during the appeals process, see generally Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 24 J. LEGAL STUD. 685 (2000); more generally, *see* Joseph Grundfest and Peter Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STANFORD L. REV. ___ (forthcoming 2006).

B. *Effect:* *Intercircuit Comparison and Intracircuit Analysis*

Is the D.C. Circuit's early announcement rule producing its intended effect? I approach this question from two directions. First, I look at the rate of voluntary dismissal in the D.C. Circuit relative to other circuits. I find that the D.C. Circuit does not have a higher rate of voluntary dismissal, and that this is true even when accounting for differences in subject matter and government involvement in the appeal. This finding is suggestive, but certainly not determinative. If other unmeasured factors contribute to general differences in the rates of voluntary dismissal across circuits, then the apparent lack of an announcement effect could be misleading.[56] To account for that possibility, I take a close look at the effect of the panel announcement procedure in the D.C. Circuit and conclude that the procedure appears to be at least weakly effective in terms of promoting settlement activity.

1. *Intercircuit Comparison of Voluntary Dismissal Activity*

The data set for this comparison consists of 600 appeals filed in the Second, Seventh, and District of Columbia Circuits beginning on March 1, 2000. Those circuits were selected because they exemplify the panel announcement variations that are typical across circuits. Regardless of the internal procedures used for panel composition and case assignment, most circuits do not announce panel composition to litigants until shortly before the oral argument is scheduled. The policy of the Second Circuit is representative in this regard, with panel assignments announced on the Thursday before the argument.[57] The Seventh Circuit is the most extreme, releasing the panel information only on the morning of the argument.[58] In both circuits, the identity of the panel is not known until after all briefs are filed.

---

[56] Another way to get a suggestive finding would be to compare voluntary dismissal rates within the D.C. Circuit before and after adoption of the rule. This approach has the benefit of eliminating the potential for inter-circuit differences in the underlying rates of voluntary dismissal, but it runs the risk of simply substituting inter-temporal differences.

[57] Revesz, *supra* note 55, at 688.

[58] *Id*.

The start date was selected basically at random, although an effort was made to choose a date sufficiently early that all appeals considered in the study had reached a final disposition. For each circuit, the data consist of the first 200 qualifying appeals filed on or after the start date.[59] A qualifying appeal is defined for these purposes as a civil,[60] non-administrative case that is appealed from a federal district court[61] and that does not involve a prisoner.[62] In addition, appeals that were consolidated with other appeals already in the data set were not separately considered.[63]

---

[59] This meant that the last appeal considered in the study was filed on: April 14, 2000 in the Second Circuit, April 26, 2000 in the Seventh Circuit, and June 29, 2001 in the District of Columbia Circuit.

[60] Criminal appeals are not included primarily because the D.C. Circuit's early announcement procedure does not apply to those appeals. *See Handbook of Practice*, *supra* note 17, at § II.B.8(a) ("[I]n criminal appeals, unlike most civil appeals, the panel will not be disclosed until after the parties have filed briefs."). But the exclusion of criminal cases is sensible for other reasons as well. The traditional settlement calculus, discussed *infra* Part I.A, does not cleanly apply to criminal appeals because those cases are not characterized by symmetrical stakes, cost savings from settlement, and error characteristics. *See* Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 15 n. 49 (1990). Exclusion of criminal appeals should not inhibit the ability of the study to test for an early announcement effect; if anything, study of civil appeals alone should *over*estimate the overall effect of an early announcement procedure on caseload reduction.

[61] That is, appeals from bankruptcy and tax courts, as well as those from administrative agency adjudications, are not considered. Unsurprisingly, this led to the highest percentage of excluded cases in the D.C. Circuit. These cases were excluded in an effort to maintain some degree of consistency in the cases, such that reliable comparisons across circuits could be made. Since most of the literature concerning the Priest-Klein hypothesis centers around its effect on civil actions, the analysis in this article is confined to civil appeals.

[62] Prisoners generally proceed *informa pauperis* and their appeals – most often in the form of habeas corpus or mandamus claims – are not susceptible to settlement in the same way as private civil appeals. In addition, the economic calculus that underlies the Priest-Klein hypothesis does not apply to prisoner appeals. Because the stakes of the appeal are very high and the costs are very low, prisoners are not likely to be responsive to changes in information regarding probable outcomes. For further discussion, *see generally* Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989). As with the exclusion of criminal appeals, see *supra* note 60, the exclusion of prisoner appeals should lead, if anything, to an *over*estimation of the overall settlement effect of an early announcement procedure.

[63] Cross-appeals that led to a different disposition from the original appeal were included, however.

Information from the court docket sheets was used to code the data.[64] Although the docket sheet does not contain any categorization relating to disposition, it does include the relevant information necessary to create such a categorization. Therefore, I coded the disposition of each appeal using the following categorization: Oral Argument (OA), Merits Decision Without Oral Argument (DWOA), Dismissal by Court (D/C), and Dismissal by Parties (D/P). Table 1 shows the basic results.[65]

---

[64] Docket sheets are available through the Administrative Office of the U.S. Courts' PACER (Public Access to Court Electronic Records) system, accessible online at www.pacer.psc.uscourts.gov. Of course, political scientists prefer the use of standardized data sets rather than individually coded data, and have criticized legal empirical research on that basis. *See, e.g.,* Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS U.L.J. 783, 807-09 (2003). Although generally sympathetic to this concern, I am aware of no standardized data source that includes data of the sort used here.

[65] One noteworthy finding from Table 1 – the disproportionately high percentage of OA cases in the Second Circuit – merits a brief explanation. With few exceptions, the Second Circuit hears oral argument in every case that proceeds to the merits stage, and so the DWOA category is essentially a null category in that circuit.This is an obvious example of how local court practice and procedure can affect the way that appeals progress. In this case, the Second Circuit's strong preference for oral argument means that many appeals proceed to oral argument that would be decided in other circuits without one. The Second Circuit might justify its preference in two ways. First, the court may view universal oral argument as a decision-enhancing mechanism. Even in cases that appear straightforward on the briefs, oral argument may alter the way the panel views the case. In some small body of cases, it may even result in a change in the direction or the terms of the court's ultimate decision. Alternatively, the court may view universal oral argument as a perception-enhancing mechanism. That is, even if the court feels that the oral argument provides no actual benefit in terms of the decisions it reaches, it may prefer them even so because it is a low-cost way to attain a valuable benefit in the form of an improved perception of fairness by litigants. This would be true if litigants view oral argument as an important symbol that the court is taking its case seriously and considering it carefully. In either case, the rule is in place precisely because the court expects that it will have some effect on outcome or perception of outcome. There is a final possibility that is independent of any such anticipated effect. The court may think that the time and resources necessary to identify cases that would be candidates for decisions without oral argument exceeds the savings in time and resources that are gained by deciding them in that manner. Given the relative ease of issuing an order to dispose of a case without oral argument, however, this explanation seems quite unlikely.

Table 1: Disposition of Appeals, by Circuit	Second Circuit	Seventh Circuit	D.C. Circuit
Oral Argument	100 (50.0%)	66 (33.0%)	50 (25.0%)
Merits Decision without Oral Argument	4 (2.0%)	31 (15.5%)	69 (34.5%)
Dismissal by Court	36 (18.0%)	41 (20.5%)	40 (20.0%)
Dismissal by Parties	60 (30.0%)	62 (31.0%)	41 (20.5%)
Total	200 (100.0%)	200 (100.0%)	200 (100.0%)

A logical analytical starting point is a consideration of the overall rates of voluntary dismissal for each circuit. The D.C. Circuit had a significantly *lower* number of cases dismissed by parties than either of the other two circuits.[66] This is unexpected given the theory that early announcement will encourage parties to settle and therefore voluntarily dismiss cases. In very basic terms, then, there is no support for the notion that the cue and response mechanism is generating its intended effect.

But of course other characteristics of the cases included in the data set may be contributing to differences in the rates of voluntary dismissal. In an attempt to account for such characteristics, I coded two additional variables for each case: subject matter and the involvement of a governmental entity. The docket sheet includes a categorization of the appeal by subject matter, which I used to create the following general categories of appeals: Employment and Labor (EL), Other Civil Rights (OCR),[67] Personal Injury (PI), Other

[66] A comparison of the sample frequency of voluntary dismissals for the District of Columbia Circuit and the Second Circuit produced a one-sided t-value of 2.2 and a corresponding p-value of .01. A similar comparison between the District of Columbia and Seventh Circuit frequencies produced a one-sided t-value of 2.4 and a p-value of .01.

[67] This does not include civil rights-based employment claims, which are included instead in the EL category.

Statutory Actions (OS), Contract (CN), and All Other Appeals (O).[68] Involvement of a governmental party is not generally noted explicitly on the docket sheet.[69] Rather, I coded the data by reviewing the listed parties. The inclusion of *any* governmental entity on either side of the appeal was sufficient to warrant affirmative coding on the "Government" variable.[70]

Subject matter might skew the overall data if the allocation of cases by subject matter varies across circuits and if the underlying rate

---

[68] "All Other Cases" includes: Securities, Real Property, Intellectual Property, Antitrust, Environmental, and those characterized by the court as "Other." The following table shows the subject matter distribution of cases for each circuit.

	Second Circuit	Seventh Circuit	D.C. Circuit
Employment & Labor	54 (27.0%)	73 (36.5%)	51 (25.5%)
Other Civil Rights	56 (28.0%)	47 (23.5%)	39 (19.5%)
Contract	30 (15.0%)	20 (10.0%)	15 (7.5%)
Personal Injury	18 (9.0%)	17 (8.5%)	14 (7.0%)
Other Statutory	17 (8.5%)	18 (9.0%)	63 (31.5%)
All Other	25 (12.5%)	25 (12.5%)	18 (9.0%)
Total	200 (100.0%)	200 (100.0%)	200 (100.0%)

[69] The exception to that is the D.C. Circuit practice of giving cases involving the United States government a docket number series that is distinct (XX-5000) from other civil appeals (XX-7000). So involvement of the federal government as a party is explicitly categorized by the court, but involvement of other governmental entities must still be manually extracted from the XX-7000 appeals.

[70] That is, suits involving the United States Government as well as the Chicago Police Department are included as "Government" cases. The following table shows the distribution of the government involvement variable for each circuit.

	Second Circuit	Seventh Circuit	D.C. Circuit
Government Party	55 (27.5%)	73 (36.5%)	133 (66.5%)
No Government Party	145 (72.5%)	127 (63.5%)	67 (33.5%)
All Cases	200 (100.0%)	200 (100.0%)	200 (100.0%)

of voluntary dismissal varies across subject matter categories. This latter requirement seems plausible. For example, appeals involving contracts might lead to a higher rate of voluntary dismissal than those involving civil rights.[71] Similarly, government party involvement may skew the data if there are variations in that involvement across circuits and if underlying voluntary dismissal rates vary according to involvement. Again, it seems at least plausible that settlement may be more or less likely based on whether a government party is involved.[72]

But the voluntary dismissal rate in the D.C. Circuit is not significantly higher even when accounting for these variables. To get at this, I ran a binomial logistic regression on the 600 cases in the data set, using voluntary dismissal as the dependent variable and case location, subject matter and government involvement as independent variables. The D.C. Circuit was the default location and All Other Cases was the default subject matter. The regression results are shown in Table 2.

Table 2: Binomial Logistic Regression Results

Omnibus Tests of Model Coefficients

		Chi-square	df	Sig.
Step 1	Step	30.690	8	.000
	Block	30.690	8	.000
	Model	30.690	8	.000

---

[71] Individuals asserting civil rights claims are often seeking to have a dignitary harm formally recognized, and may thus be more resistant to a monetary settlement. Individuals suing based on contract claims are seeking financial redress, and settlement may thus be more agreeable. But the direction of the effect is unimportant to the point being made here, which is that a subject matter effect in *any* direction may skew the results based on all data, given the variations in subject matter distribution across circuits.

[72] As an intuitive matter, the presence of a governmental entity should make settlement less likely because the governmental entity is more likely to be a repeat player interested in the rule value of having a judicial decision on the books to guide its future behavior. But the intuition could go the other way. If the governmental entity is more concerned about the reputational or publicity effects of an adverse judgment, it may be more willing to settle. As in the case of subject matter effects, however, the directionality is not the primary concern here. Rather, the existence of an effect in either direction suggests that the presence of a government party is a variable that should be controlled in order to get a full understanding of the data.

Variables in the Equation

		B	S.E.	Wald	df	Sig.	Exp(B)
Step 1	Seventh	.543	.254	4.553	1	.033	1.721
	Second	.452	.262	2.982	1	.084	1.571
	Government	-.561	.229	5.999	1	.014	.570
	EL	-.416	.309	1.810	1	.179	.660
	OCR	-.770	.346	4.956	1	.026	.463
	CN	-.107	.373	.083	1	.774	.898
	PI	.016	.400	.002	1	.968	1.016
	OS	.214	.350	.375	1	.540	1.239
	Constant	-.871	.340	6.558	1	.010	.419

These results indicate no support for the proposition that the D.C. Circuit has higher rates of voluntary dismissal than either the Second or the Seventh. Were that proposition true, the coefficients for the Seventh and Second variable should be negative. But the results are just the opposite – both coefficients are positive, and at least in the case of the Seventh Circuit, the finding is statistically significant.

2. *A Closer Look at the D.C. Circuit*

A simple comparison of voluntary dismissal rates across three circuits fails to show that the D.C. Circuit is generating higher rates of voluntary dismissal. But some other reason may explain why voluntary dismissal rates are naturally lower in the D.C. Circuit relative to the Second and Seventh. Perhaps the D.C. Circuit has historically had a much lower rate of voluntary settlement, and the rule has had the effect of closing the gap. Were that the case, then the comparison of rates across circuits during a single time period may not capture the effect of the rule. To account for that possibility, this section looks at the D.C. Circuit data in isolation.[73] Of 200 cases filed, 41 were voluntarily dismissed by parties – a rate of 20.5%. If all of those voluntary dismissals were attributable to the early announcement rule, then the impact in terms of caseload reduction would fairly be considered significant. That kind of attribution is surely problematic, however; it simply cannot be the case that all

[73] A different methodological approach that would address this possibility is a differences-in-differences analysis. But such an analysis is complicated here by the difficulty of compiling the initial time period data.

dismissals are generated by the rule. Indeed, the pool of cases for which that explanation is even plausible is substantially smaller. To state the obvious, early panel announcement is a plausible explanation for voluntary dismissal only when an announcement has actually been made prior to dismissal. Of the 41 voluntarily dismissed cases, only 13 satisfy that condition. Relative to the total number of filings, the rate shrinks from 20.5% to 6.5% when the numerator is adjusted to account for this timing condition.

But there might be a denominator problem as well. If the goal is to assess the extent to which an announcement rule influences litigants, it does not make sense to include other cases where no panel has been announced. Instead, the denominator should consist only of cases where the composition of the panel has been revealed to the parties. Thus, all cases involving an oral argument should be included along with the 13 cases voluntarily dismissed after a panel announcement. Beyond that, some but not all of the cases that are decided without oral argument could be included. Appeals decided without oral argument take one of two forms. In some cases, the court grants a motion for summary affirmance; this is done by a panel, but there is no advance announcement of the composition of that panel prior to the issuance of the court order. Alternatively, the court may notify the parties that no oral argument is necessary to decide the case. In that situation, the panel is revealed to the parties at the same time that the order to decide the case without oral argument is issued. Cases of the latter sort meet the announcement condition, but I have excluded them for several reasons. To begin, the early announcement procedure is not technically involved in those cases because the panel is not revealed in association with an oral argument scheduling order. More importantly, the panel composition is disclosed at the same time that another, more powerful informational cue is revealed. The fact that the court plans to decide the case without oral argument is a strong indication that a judgment affirming the lower court's decision is forthcoming. To the extent that any dismissal activity is generated by a "no oral argument" order, it is likely to be the result of the substance of the order itself rather than the names of the judges who issue it.[74]

[74] But it is hardly surprising that very little dismissal activity actually occurs. Because the overwhelmingly typical action after a "no oral argument" order is a judgment without memo affirming the lower court opinion, the direction and the terms of the court's forthcoming decision are essentially known. As a result, the

If the analysis is narrowed to the cases voluntarily dismissed after an oral argument order relative to the total number of cases in which an oral argument order was issued, what remains are 13 cases potentially affected by the rule out of 63 cases involving a panel announcement. That represents a maximum rate of 20.6% of announced cases dismissed in response to the rule. To be sure, it is almost certainly the case that the actual rate is somewhat lower than this maximum because some cases that settle after panel announcement may do so for an unrelated reason. There is no way to disaggregate these cases from those dismissed in direct response to the panel information. Still, the existence of this pool of 13 cases provides some tentative support for the notion that some litigants respond to the early announcement rule and that some settlement activity results.

II. BARRIERS TO EARLY ANNOUNCEMENT EFFECTIVENESS

Despite the presence of a pool of dismissed cases for which early panel announcement might provide a plausible explanation, the general impact of the D.C. Circuit's procedure does not appear overwhelming. This Part explores two broad explanations for why this might be so. The first is cuing failure, which occurs when the informational cue being provided may not actually be valuable to litigants in the way that the court expects. The second is response failure, which results when litigants either ignore or misinterpret panel announcement information. Modifications to the announcement procedure that account for these failures should enhance the settlement effect. But because the court will almost certainly view effective modifications as unpalatable, information and litigant failures create intractable barriers to effectiveness in many cases.

A. Cuing Failure

The D.C. Circuit's early announcement procedure will generate new settlement behavior only if it provides an effective informational

---

party standing to benefit from the pending judgment would only accept a settlement on the same terms as the lower court opinion. Both parties might pursue such an approach were there savings to be recouped that would outweigh the costs of negotiating the settlement. But of course, at the point that a "no oral argument" order is issued, there are basically no litigation costs to be saved by dismissing the case because all briefs have been filed, and no additional resources need be devoted to preparation for oral argument.

cue. Effective in this context means three things. First, the information contained in the cue must be strong in the sense that it permits significant updating of expectations regarding likely outcome. Second, the information contained in the cue must be relevant to the litigants' settlement calculations. Third, the information must be released early enough to provide an opportunity for cost savings. If any of those conditions does not hold in a given case, then the information being conveyed will not trigger a response from litigants. This section discusses situations in which panel announcement represents an ineffective cue and concludes that few procedural modifications are available to improve the cue's effectiveness.

1. Ineffectiveness due to lack of strength

Absent specific panel composition information, litigants should form a generalized assessment of their prospects based on the overall composition of the court hearing the appeal. This initial prediction can be expressed as an expected success calculation of $q_R*p_R + (1-q_R)p_D$, where q_R is the probability of receiving a majority-Republican panel, and where p_R and p_D are the anticipated probabilities of success under majority-Republican and majority-Democratic panels, respectively.[75] After the court announces panel composition, the expected success calculation collapses to either p_R or p_D. The amount of updating that panel announcement permits is thus determined by the gap between $q_R*p_R + (1-q_R)p_D$ and p_R or p_D. Where that gap is small, panel announcement represents an informational cue with weak content.

Panel composition will often be a weak cue when one ideological group dominates the court's overall composition. In this situation, a litigant's pre-announcement assessment will be based on an expectation that the panel will be comprised of a majority from the dominating party. In most cases, announcement of the actual panel composition will simply confirm that prediction and will not provide enough additional information to significantly alter expectations. For example, imagine a court dominated by Republican judges, such that q_R is very high. A litigant's pre-announcement expectation in this case closely resembles p_R, and the disclosure of a Republican panel triggers only a slight modification in expected success. Put differently, panel composition information leads to greater updating when the expected panel based on overall court composition is relatively uncertain. As

[75] *See* Revesz, *supra* note 55, at 692.

the level of certainty increases, the value added by announcing panel composition decreases.

As a practical matter, there is not much reason to believe that informational failure of this sort played a significant role in the D.C. Circuit, at least not during the time period covered by the data. During that time, the D.C. Circuit was composed of six active judges appointed by Republican presidents and four active judges appointed by Democratic presidents. Given that distribution, the probability of getting a majority-Republican panel – that is, q_R – was .67.[76] Introduction of accurate panel composition information in that situation should lead to significant updating with respect to predicted outcomes that would be useful to litigants.[77] In any event, the court is not in a position to combat this particular form of informational weakness because it can not easily alter its ideological composition.[78]

Two other forms of informational weakness are more plausible in the context of the D.C. Circuit. First, panel announcement represents a weak informational cue when the panel itself is not particularly predictable. Early announcement is valuable because it clarifies the likely outcome. But certain panels are likely to be quite unpredictable, and in those cases the clarification provided by panel announcement is minimal. Second, panel announcement conveys weak information when litigants do not perceive the outcome of their appeal to be particularly sensitive to panel composition. These are cases in which p_R and p_D are very similar, meaning that the bold

[76] If n_R is the number of Republican judges in a ten judge pool, then the probability of receiving a majority-Republican panel is given by $n_R(n_R-1)(14-n_R)/360$. Admittedly, this number is not entirely accurate, because senior judges are part of the assignment pool as well, although they sit with less frequency than active judges.

[77] The expected outcome would shift from the pre-announcement expected success calculation, $q_R*p_R + (1-q_R)p_D$, to either p_R or p_D, depending on the panel announced. Since q_R is only .67 here, this shift should be significant in cases where p_R and p_D are not very close. And where p_R and p_D are very close, panel announcement is unlikely to generate much settlement activity for reasons described later in this section.

[78] Of course, judges can contribute to a change in the overall composition of the court by retiring or by taking senior status, either of which would permit the nomination of a new judge. But this is obviously a limited and blunt instrument for changing the court's ideological composition. Judges might also change their own ideology to create greater ideological diversity. Although ideological shifts are not unprecedented, it seems far-fetched indeed to imagine that a judge would consciously choose this course in order to improve the effectiveness of early panel announcement.

predictions of the attitudinal model are not borne out in the actual expectations of litigants. The pool of such cases might be sizable. An overwhelming percentage of appellate decisions are unanimous, which seems to imply that composition does not matter all that much in the run of cases.[79] If litigants understand the prevalence of unanimity, their expectations regarding outcome may not be responsive to panel composition.[80] If the appellee and appellant expect outcomes that are significantly different, then appeals may still be filed. But the addition of panel announcement information will result in minimal updating.

If these forms of informational weakness are widespread, the court might strengthen its cue by encouraging a greater variance between pre- and post-announcement predictions. Producing decisions that are more predictable and less unanimous should achieve this goal. But aside from the possibility of disingenuousness, this approach imposes a cost on judges, who would have to write more dissents. The court's goal of managing judicial workload would thus be undermined. Another alternative is to convince litigants through less costly means that panel composition actually matters in most cases. But for reasons discussed shortly, such efforts are unlikely.[81]

---

[79] A focus on unanimous voting may underestimate the actual extent of ideological disagreement on the court because some portion of unanimous cases reflect "getting along" behavior by judges who disagree slightly but not enough to expend the effort and the goodwill to register that disagreement in a formal dissent. *See* Jason J. Czarnezki and William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 Maryland L. Rev. ___ (2006) (forthcoming).

[80] From the litigant's perspective, the prevalence of unanimity may be a signal that although the attitudinal model explains some judicial behavior, it doesn't explain much. What's more, because it may be difficult for a litigant to predict before the fact *which* cases will be explained, the attitudinal model may not be operative in practice as a basis for litigant decisionmaking. Even so, I am not claiming here that the reality of unanimity requires litigants to reach such a conclusion. Quite to the contrary, it is almost certainly true that many litigants perceive significant panel distinctions regardless of reality. My only point is that there may be a body of cases for which litigants do *not* perceive panel effects, and for those cases the impact of the panel announcement cue will be minimal.

[81] For a fuller discussion of the court's almost certain hesitance to embrace an active role in promoting the attitudinal model of judging, see text accompanying notes 89-91.

2. *Ineffectiveness due to lack of relevance*

In the paradigmatic case, a plaintiff seeks something from the defendant that the defendant could provide but would prefer not to. Money is a fitting example of the thing at issue, although demands such as promotions in employment cases or admission to school in affirmative action cases also fit. Ultimately, settlement is plausible because both parties have an interest in minimizing costs and because the plaintiff does not particularly care whether the thing sought is provided by agreement or by court order. But some cases are different. Consider for example a plaintiff who wants a judgment officially entered against a defendant to satisfy a desire to have wrongdoing publicly and officially acknowledged. The key difference here is that the defendant is not in a position to readily provide that which the plaintiff seeks. The plaintiff is not interested in a thing that can be awarded by judgment, but is instead interested in a judgment per se. Settlement may not be possible in such cases even if both parties agree on the likely outcome and even if significant costs can be saved.[82] As a result, the disclosure of panel information will produce no effect – even if it clarifies the likely outcome – because it is not relevant to the litigant's decisions. As with weak cues, the court cannot easily remedy an irrelevant cue because nothing short of a judgment will satisfy the parties.

3. *Ineffectiveness due to insufficient cost savings*

A final possibility is that panel announcement has limited effect due to the timing of its release. Even though announcement in the D.C. Circuit comes very early in relative terms, it still may not come early enough in the process to make significant cost savings available. As Richard Revesz has pointed out, if the ratio of pre-announcement litigation costs to total litigation costs is sufficiently high, then "announcing the panel before all the litigation costs have been expended is equivalent to announcing it after all such costs have

---

[82] To be clear, I am not making a general claim here about cases involving non-monetary remedies. In many such cases a plaintiff will readily accept money instead of the non-monetary remedy being sought. Rather, the point is that some litigants may be hesitant to do so, and that an interest in a judgment per se can make settlement less likely. *See generally* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 434 (2004).

been expended."[83] The question then is whether the announcement comes early enough to offer the prospect of cost savings that will outweigh the costs of negotiating the settlement. The D.C. Circuit's procedure generally reveals panel composition before briefing is completed, and in these instances appreciable cost savings should be available. But occasionally the announcement is made after briefs have been filed, and in those cases the available cost savings may be quite low (primarily the costs of preparing for and conducting oral argument).

To improve the impact of the panel composition cue, the court could move the announcement to an earlier stage of the appeals process. This would increase the savings that post-announcement settlement provides. At a minimum, the court should ensure that announcement always precedes the completion of briefing. Other more dramatic options include announcing panel composition at the time that a notice of appeal is filed or even at the time that a lower court reaches a final judgment. Although these latter approaches would maximize available cost savings, they have the potential to backfire. Very early release of panel composition presents an opportunity for prospective appellants to obtain valuable information about likely outcome at a very low price, and that may draw parties into the appeals process who would otherwise steer clear.[84] Put differently, early announcement produces two countervailing effects. Many cases that would appeal regardless of the announcement procedure may settle after the panel is announced, reducing the number of cases that the court must decide. But some cases that are appealed precisely because of the announcement procedure may *not* settle after the panel is announced, thereby increasing that number of cases. If the latter group is larger than the former, the move toward

[83] *See* Revesz, *supra* note 55, at 697. In cases where relatively few costs would be saved by pursuing a settlement, a party may decide to carry out an appeal notwithstanding the announcement of an unfavorable panel. That decision could result because the cost of conducting the settlement negotiations is equal to or greater than the cost of completing the appeal, or because the party makes a calculated decision to pay the relatively minimal additional fees to carry out the appeal to purchase an option on the possibility that the appeal will defy prediction.

[84] *See id.* at 696-97. Indeed, Revesz suggests that as a theoretical matter this effect should already be occurring. *Id.* at 709 ("[T]he D.C. Circuit practice induces the litigation of cases that would not be pursued at all under the majority practice."). But it is difficult to assess whether theory has been translated into practice based on the data discussed in Part I.B because there is no reliable way to discern whether a given appeal would have been filed in the absence of the announcement regime.

earlier announcement will ultimately make the judges' adjudicative burden worse rather than better.[85]

B. *Response Failure*

The previous section discussed conditions in which the court's informational cue may fail to alter litigant behavior because the cue itself is ineffective. This section addresses conditions under which settlement activity may fail to occur even where the cue qualifies as effective in the abstract. The conventional model of settlement behavior discussed in Part I.A assumes that both sides of a dispute treat information rationally.[86] When new information is introduced, both sides are expected to process it accurately and integrate it into an updated outcome prediction. But the assumption of rational behavior that pervades economic models of litigant behavior has been the subject of steady attack over the past twenty years. If the rationality assumption does not hold, then the introduction of new information may not contribute to increased settlement activity.

Three things must occur for a litigant to rationally process the informational cue that the D.C. Circuit provides. The litigant must first notice that a cue has been provided, must then recognize that the cue contains relevant information, and must finally integrate that information accurately to form a new prediction of likely outcome. Errors that occur in the first two steps can sensibly be grouped together, and I will refer to both as ignorance errors. Litigants making

---

[85] As noted by Revesz, there is no way to predict theoretically which group of cases will be larger. *See id.* at 708. Also, it is important here to distinguish between the burden on the judges in particular and the burden on the court more generally. Even if earlier announcement leads to fewer cases that proceed to merits panels, the shift to earlier announcement might still increase the burden on the *court* due to the increased number of appeals filed in response to the cheap availability of relevant information. But increasing the overall burden on the court while reducing the burden on judges might be a sensible tradeoff, given that it is relatively easier (and less expensive) to modify non-judge staffing levels.

Ultimately, I am not as concerned with the particulars of the relative magnitudes of these effects as I am with discerning whether the cue and response model produces effects at all. If Revesz is right, then the early announcement procedure may have the effect of increasing the number of appeals filed. But there still should be settlement activity generated, and that settlement activity will be influenced by the barriers discussed here and will create distortions of the sort discussed in Part III.

[86] *See* Priest & Klein, *supra* note 52, at 4 ("The most important assumption of the model is that potential litigants form rational estimates of the likely decision.").

ignorance errors do not respond to the informational cue, either because they do not notice it or because they wrongly consider it beside the point.[87] In contrast, errors that occur at the final step arise because parties attempt to respond to the informational cue but make mistakes when doing so. Missteps made while processing new information are common, and here they may inhibit the cue's effectiveness by contributing to skewed interpretations of its impact on likely outcome.

1. *Ignorance errors*

Ignorance errors result when a party does not notice that a cue has been provided, or when the party notices the cue but fails to recognize that it contains relevant information. The manner in which the court's informational cue is conveyed contributes to the existence of ignorance errors. Three general models are possible, which I will refer to as models of availability, disclosure and publicity. In an availability model, the court makes information available but leaves it up to the parties to acquire the information. In a disclosure model, the court makes the information available and takes the additional step of affirmatively providing that information to the litigants. In a publicity model, the court not only discloses the information to the parties but also emphasizes its importance and relevance.

As an intuitive matter, ignorance errors presumably decrease as the court becomes more active in transmitting the informational cue. A relatively attentive and engaged litigant who constantly and rationally updates expectations regarding likely outcome may nevertheless miss a cue if it is only available upon inquiry. This is particularly true if the litigant is unfamiliar with the peculiarities of a court's practice and procedure and therefore unaware that a source of potentially relevant information exists. Disclosure in these cases would remedy ignorance errors. Similarly, publicity may cure

[87] In some cases, it may be true that the composition of the panel is unrelated to the outcome of the appeal; for instance, in cases clearly governed by a binding Supreme Court precedent. If parties in those cases fail to update their outcome predictions in response to panel announcement, they should not be considered irrational (although some other source of irrational behavior might explain why an appeal was filed at all in those circumstances). Instead, the irrational moniker applies only in those cases where updating would be possible, but is not even attempted because of a failure to recognize the informational cue provided by the panel announcement.

ignorance errors if there is a class of litigants who would update predictions in response to relevant information but who fail to recognize the relevance of a given piece of information.

The D.C. Circuit's early announcement procedure is an example of a disclosure-style cue. The cue is conveyed by including the names of the judges who will compose the panel in the order scheduling oral argument. Because the parties receive that order directly, the cue is affirmatively presented rather than simply made available. But because the court does not highlight the information or explain its potential importance, litigants themselves must draw appropriate conclusions from the disclosure.

An obvious way for the D.C. Circuit to improve the procedure's effectiveness is to shift from a disclosure model toward a publicity model. This shift might take various forms. The most subtle change would disclose the information in an isolated order. When many pieces of information are conveyed at once, there is an increased likelihood that some of the information will be overlooked or misunderstood by the recipient.[88] Here, litigants may focus on other information conveyed in the oral argument order – e.g., the date of the argument and the time allocated to each side – and thus may fail to take proper notice of panel composition. Conveying composition in an isolated order should therefore improve the likelihood that litigants will detect the cue and consider its potential relevance. This shift is attractive because it costs very little and because judges are unlikely to view it as objectionable on other grounds. Realistically, however, the class of litigants who would notice and respond to panel composition when conveyed in isolation but who fail to notice and respond when conveyed along with other information is almost certainly quite small. For that reason, isolated disclosure ultimately looks like a modification that is agreeable but without much bite.

To have more bite, the shift toward publicity needs to be more drastic. One possibility is to accompany disclosure of panel composition information with a court notice indicating that litigants may find the disclosure useful in settlement negotiations. A second possibility is disclosure accompanied by a detailed report of how the

---

[88] For discussions of this phenomenon in other contexts, *see* Richard Craswell, *Taking Disclosure Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VIRGINIA L. REV. 565, 581-86 (2006); Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U. L. Q. 417, 441-44 (2003).

assigned panel has voted in past cases. Either of these options would take the court firmly into the territory of a publicity model and would improve the extent to which litigants notice the composition information and recognize its importance. Indeed, either of the approaches just discussed should come close to eliminating existing ignorance errors.

Even so, the D.C. Circuit is unlikely to embrace such alternatives because they are unattractive for other reasons. As discussed in Part I.A, judges are generally careful to publicly adopt formalist stances and to resist any admission that judicial characteristics affect judicial decisions. In the context of the federal courts of appeals, there are at least two reasons to explain that behavior. First, judges may consider the formalist view as crucial to public acceptance of the independent judiciary. Along these lines, Judge Wald has emphasized that "[f]or our citizens to have confidence in the courts' decisions, they must be convinced that judges are impartial as to litigants, including the state, and that we are not embarked on personal ideological crusades."[89] A second reason is unique to the appellate context. Appeals courts alone in the federal system must support a fiction of a unified court composed of judges who decide individual cases in randomly assigned panels.[90] Intuitively, that distinction seems a likely source of pressure to keep up appearances of formality because acknowledgments of attitudinal effects can destabilize the fiction of the unified court.

Indeed, even Judge Edwards's support for the early announcement procedure is hedged by a simultaneous desire to maintain a formalist posture. Rather than arguing that early announcement should promote settlement because it will *actually* provide useful information to litigants, Judge Edwards bases his support on a claim that litigants will *mistakenly perceive* that the

[89] Patricia M. Wald, *Some Real-Life Observations About Judging*, 26 IND. L. REV. 173, 182 (1992).

[90] The district courts lack the characteristic of a unified court because they are not bound by decisions reached by other judges in the same court. The Supreme Court lacks the characteristic of permutation because it is composed of a single panel that hears all cases. Having said that, the Supreme Court confronts this difficulty to some extent because the composition of its single panel changes over time. But the passage of time itself provides a natural alternative explanation for the Court to explain different outcomes that are reached in similar cases without having to acknowledge that differences in Court composition may be at least equally influential.

information is useful.[91] By crafting the argument in this way, Judge Edwards can support both the early announcement procedure and the formalist model of judging. But this argument makes sense only if the court limits its role to the disclosure of the panel announcement cue. If the court instead becomes actively involved in instructing litigants about the cue's potential relevance, it becomes nearly impossible to keep up the ghost of judicial formalism. In short, the court is likely to view a meaningful move toward publicity as an acknowledgment that the attitudinal model has merit. Such an admission would almost certainly constitute an unacceptable price to pay to improve the operation of the early announcement procedure, regardless of its potential effect.

2. *Perception errors*

Perception errors result when litigants notice the informational cue and respond to it, but make mistakes when doing so. As an example, numerous studies demonstrate that individuals have a "persistent tendency to integrate new information in a self-serving fashion."[92] As a result of this confirmatory or self-serving bias, the disclosure of identical information may not lead to updated predictions in different directions. Law students, for instance, interpret factual information related differently if they are assigned a hypothetical side to represent before the information is disclosed.[93] Under the traditional law-and-economics theory, appeals are filed when there is a

---

[91] *See supra* note 19 and accompanying text (referring to a "false assumption" or "false image" as the basis for procedure's effect).

[92] Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265, 1285 (2002). For a more general discussion of the self-serving bias, *see, e.g.,* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CAL. L. REV. 1051, 1093 (2000); Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1342 (1995); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 157-59 (1993). For psychological studies detailing the "self-serving bias," see Charles G. Lord, et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979); Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411 (1992).

[93] Babcock et. al., *supra* note 92, at 1342; Loewenstein et. al., *supra* note 92, at 151-52.

difference between the appellant and appellee regarding likely outcome.[94] The theory underlying the D.C. Circuit procedure is that disclosure of panel composition information may close that gap and thus make settlement between the two parties possible in some cases. But if the self-serving bias affects integration of panel information, then the gap between the parties may be unchanged and may even expand after the court provides an informational cue.[95]

As with ignorance errors, the most obvious way for the court to address these errors is to move toward publicity. Again, the court might accompany the disclosure of panel composition information with a detailed analysis of what the information might imply. That analysis might itself be subject to a self-serving bias, but the potential for that bias should decrease when the space to interpret new information in varying ways shrinks. In other words, if the implications of new information are made explicit when disclosed, litigants are less able to create an interpretation that simply confirms pre-existing preferences. Instead, the greater risk would be that litigants may fall victim to an overconfidence bias that would lead them to believe that their case is an outlier.[96] A different approach that may avoid these problems is to couple disclosure of panel composition information with a required settlement conference. This requirement would contribute to a more objective interpretation of the information because it would force litigants to confront alternative interpretations of the information that they might otherwise neglect.[97]

In either case, the court is again thrust into a position of combating errors by adopting a more active role in the dissemination of its informational cue. This highlights a general difficulty. Because a publicity model provides the greatest opportunity for the court to control how litigants interpret and respond to its cue, it is the optimal approach for minimizing perception errors, however they arise. At the

---

[94] *See* Priest & Klein, *supra* note 52, at 12; *see also* Robert D. Cooter & Daniel Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 3 J. ECON. LITERATURE 1067 (1989).

[95] *See* Issacharoff, *supra* note 92, at 1285 ("Rather than bringing parties together, mutually shared common information can provide a fertile environment for disagreement and inefficient impasses.").

[96] For a discussion of the overconfidence bias, *see* Korobkin & Ulen, *supra* note 92, at 1091-93.

[97] *See* Korobkin & Ulen, *supra* note 92, at 1094 (suggesting that the self-serving bias "provides support for legal structures that require litigating parties to view the facts of a dispute through the eyes of their opponents").

same time, for reasons previously explained, a move toward a publicity model is not viable because it requires a level of interventionism beyond that which the court will accept. In short, the court is almost certainly unwilling to move beyond a disclosure model, and that unwillingness means that the court must leave the interpretation of the cue almost entirely in the hands of litigants – and must accept perception errors when they occur.

In sum, the D.C. Circuit might address both ignorance and perception errors by changing the way it conveys panel announcement information. But significant movement from the status quo toward a publicity model is unlikely. A slight move in the form of isolated disclosure would be potentially acceptable but ineffective. Any greater move is likely to butt up against the court's interest in maintaining a perception of panel neutrality, and is thus potentially effective but unacceptable. Accordingly, existing ignorance and perception errors are an intractable hindrance to the success of an early announcement procedure, at least in terms of settlement promotion. The implications for that intractability are taken up in Part III.

III. DISTORTIONS CREATED BY EARLY ANNOUNCEMENT

The preceding discussion suggested various barriers that impede the effectiveness of the D.C. Circuit's early announcement cue, and concluded that procedural modifications to address those barriers are likely to be either ineffective or unacceptable. This Part examines how those barriers might affect the procedure's operation in practice. In particular, it describes and evaluates three ways that the procedure distorts the body of cases reaching oral argument. None of these distortions are likely to be dramatic or extreme. But each may have marginal effects on the content of cases that proceed to a merits decision, and on the way that those cases are presented to and decided by their assigned panels.

A. The Predictability Distortion

If early announcement works at all, it works best and most often in cases where the cue is strong, that is, where the panel announcement gives litigants a strong indication of likely outcome. Predictability distortions exist because the strength of panel information is not uniform and varies based on the predictability of the

judges and the predictability of the legal issues involved. Because of these irregularities, the procedure affects the types of cases that proceed to oral argument and the composition of the panels who hear them. In particular, early announcement maximizes updating and the creation of new settlement zones when litigants perceive the announced panel to be particularly predictable. Conversely, settlement is less likely when the announced cue is perceived to be unpredictable. As a result, an early announcement procedure should be expected to increase the extent to which oral argument cases involve unpredictable panels.[98]

Polk Wagner and Lee Petherbridge have articulated precisely this expectation. After analyzing voting patterns and approaches to claim construction in the Federal Circuit, Wagner and Petherbridge first conclude that although many members of the court are predictable, about half do not have "predictable effects on outcomes when empanelled."[99] Based on this predictability divide, they then predict that an early announcement procedure would result in a "larger proportion of opinions [would be] decided by panels (and written by judges) that are less predictable." [100] And because they believe that this by-product of the procedure "could have long-term negative effects on the overall performance of the court," they ultimately caution against its adoption.[101]

Wagner and Petherbridge do not provide an account for their jurisprudential concern, instead asserting the "long-term negative effects" as something of a given. But it is easy to imagine such effects in the extreme case. If the effect of the procedure is very dramatic, the court will appear to be pre-announcing results in many cases when it announces panels. This is efficient, perhaps,[102] but unsatisfactory in light of the two traditional aims of a judicial system.[103] To begin,

---

[98] To be a bit more precise, what should really be expected is that oral argument cases should involve relatively more panels that are *perceived by litigants* to be unpredictable.

[99] Wagner & Petherbridge, *supra* note 21, at 1175.

[100] *Id*.

[101] *Id.*

[102] It may not even be efficient, for reasons discussed *infra* at notes 85.

[103] Virtually every theory of adjudication recognizes that a judicial system must serve two general goals, which Chad Oldfather has recently referred to as "points of fundamental agreement" in contemporary discussions of adjudication and adjudicative duty. Chad M. Oldfather, *Defining Judicial Inactivism,* 94 GEO L.J. 121, 137 (2005). First, a judicial system must provide an outlet for dispute resolution. *See, e.g.,* Kenneth E. Scott, *Two Models of the Civil Process*, 27 Stan. L.

when the court resolves disputes by pre-announcing results, there is no caselaw created to guide behavior and reduce the need for future resort to the legal system. More importantly, the manner of resolving disputes is itself problematic because litigants will view it as random and unfair. Although fairness has been viewed as "of secondary importance" relative to the need for the system to guarantee resolution that is peaceful,[104] perceptions of unfairness can be devastating because litigants are unlikely to submit to an unfair system voluntarily.[105] Over time, the procedure threatens to cultivate a perception of illegitimacy because litigants are deprived of a meaningful opportunity to participate in the dispute resolution process.[106]

For the reasons discussed in Part II, however, this concern is unrealistic because the procedure will almost certainly never produce

---

Rev. 937, 937-38 (1975). The judicial system can act only when presented with a dispute, and as a result resolution of disputes is in many ways a court's archetypal function. I will refer to this function as the court's "dispute resolution function." But of course that is not all that a judicial system does, nor all that we expect it to do. Instead, courts – and particularly appellate courts – issue opinions not only to formalize the resolution of the dispute (and perhaps to legitimize that resolution by convincing the litigants that their participation was regarded, *see* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978)), but also to establish legal rules that will shape and govern the behavior of parties not privy to the specific dispute being resolved. *See* Oldfather, *supra* at 137-38. I will refer to this as the court's "caselaw production function." Disagreement – sometimes fierce disagreement – exists as to the relative importance of these two functions, but the dual nature of adjudication is not in much dispute. *See, e.g.,* Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 1-7 (1985).

[104] *See*, Scott, *supra* note 103, at 937 ("[I]t is more important for society that the dispute be settled peaceably than that it be settled in any particular way.").

[105] *See* Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 304 (1989) (noting that a system that resolves disputes in an arbitrary way would not be perceived as fair, and that "[c]itizens would not voluntarily submit to such a system"). To be sure, the resolution of disputes here is not quite as random as the proverbial coin flip because the outcome does bear some relationship to the overall composition of the court, which might in turn be related to some notion of public representation. Even so, the resolution is random enough to raise unfairness concerns.

[106] Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 277-81 (2004). To be sure, formal participatory rights exist here, and we might not credit claims of illegitimacy from those who have opted not to exercise them. At the same time, there is cause for concern if the reason that litigants are opting out is that they perceive no possibility that their input will influence the court's decision.

an extreme effect. And indeed these kinds of extreme difficulties do not appear to be what Wagner and Petherbridge are getting at when they decry the increased influence of unpredictable judges and panels. Instead, their claim seems subtler. Predictability is commonly viewed as one of the "essential factors in the proper operation of the rule of law."[107] If the rule increases the number of cases decided by unpredictable panels and judges, we might expect the level of unpredictability in the caselaw to rise as well. In other words, the claim is that the announcement procedure would ultimately threaten the stability and coherence of the caselaw, which outweighs any possible benefit the procedure might have in terms of caseload reduction.

Despite the intuitive appeal of that account, there is reason to question its legitimacy. Consider again the "panel effects" studies by Revesz, Sunstein and others discussed in Part I, and particularly the impact of "group polarization."[108] Group polarization describes the process by which groups of like-minded individuals reinforce and amplify each other's judgments. When this occurs, the result of deliberation is that "groups end up adopting a more extreme version of their predeliberation tendencies."[109] Applied to the context of appellate decisionmaking, group polarization may help to explain why panels consisting exclusively of members of one ideological group vote in ways that are more extreme than those containing an ideological mix. If no panel effects existed, we would expect there to be no difference in outcomes between one panel composed of three predictable conservatives and another composed of two predictable conservatives and a predictable liberal (or an unpredictable). In both cases, the two predictable conservatives should outvote the remaining member, thereby making that third member irrelevant. But as an

---

[107] Larry D. Thompson Jr., *Adrift On A Sea Of Uncertainty: Preserving Uniformity In Patent Law Post-Vornado Through Deference To The Federal Circuit*, 92 GEO. L.J. 523, 589 (2004). *See also* Henry J. Friendly, *Indiscretion About Discretion,* 31 EMORY L.J. 747, 758 (1982).

[108] *See supra* notes 48-51 and accompanying text.

[109] Sunstein et al., *supra* note 48, at 340. Three primary explanations for the group polarization phenomenon have been suggested: (1) People inclined to a position will have that position reinforced and head in a more extreme direction when all members of the group share a similar initial position; (2) Members of a group seek the approval of the other members and will air their opinion in a way favorable to the other members of the group; and (3) The similarity of view points in a group lends confidence to an individual member's ideas and therefore enables a more confident assertion of extreme ideas. *Id.* at 341-343.

empirical matter, that third member seems to matter after all, as ideologically split panels vote differently than ideologically uniform ones.

The impact of ideological amplification is not limited to voting. Although extremely difficult to measure, the suspicion is that the content of written judicial opinions may be affected by ideological amplification as well.[110] Along those lines, Emerson Tiller and Frank Cross have suggested that the presence of a non-uniform viewpoint can significantly affect the terms of an opinion, even if that viewpoint is not expressed in the form of a formal dissent.[111] Part of the explanation for that may be that the writing judge responds to the threat of a dissent, and consciously moderates the opinion from a more extreme form in order to achieve unanimity. But perhaps even more plausible is that no conscious moderation occurs; instead, the opinion is less extreme because the presence of ideological diversity naturally moderates the decisionmaking of the drafter. In either case, the end result is that ideological amplification may impact the performance of a panel's dispute resolution function (by affecting the direction in which a dispute is decided) as well as its caselaw production function (by affecting the terms of the opinion expressing that decision).

The possibility of group polarization and ideological amplification forms the basis for Cass Sunstein's recent arguments in favor of ideological diversity on panels.[112] Panels composed of judges representing varying viewpoints are more likely to identify the correct outcome in cases where one outcome is clearly preferable, and are more likely to reach a moderate outcome in cases where no clearly preferable outcome exists. In cases where there is a clearly correct outcome, "[t]he existence of diversity on a three-judge panel is likely to bring that fact to light and to move the panel's decision in the direction of what the law actually requires. The existence of politically diverse judges, and of a potential dissenter-whistleblower, increases the chance that the law will be followed."[113] In cases where the correct outcome is less clear, we might also benefit from ideological diversity, either because "through that route more

[110] *See* Cross & Tiller, *supra* note 48, at 2156-2157. *See also* Sunstein et al., *supra* note 109, at 309.

[111] *See* Cross & Tiller, *supra* note 48, at 2174.

[112] *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003); Sunstein et al., *supra* note 48, at 353.

[113] Sunstein et al., *supra* note 48, at 185. *See also* Cross & Tiller, *supra* note 48, at 2172.

(reasonable) opinions are likely to be heard,"[114] or because the varying viewpoints will have a "moderating effect" that is desirable in cases of genuine uncertainty.[115] In short, diversity of viewpoints improves the accuracy and consistency of the court's decisionmaking when viewed as a whole.

But even if ideological diversity on panels is considered desirable in theory, it is difficult to guarantee in practice. The fundamental problem is that a project of creating ideologically diverse panels is in direct tension with the current practice of random assignment.[116] Although serious proposals have been suggested that deviate from random assignment in the pursuit of ideological diversity,[117] garnering support for those proposals is difficult because

---

[114] Sunstein et al., *supra* note 48, at 186.

[115] *Id.* ("[I]f we are genuinely uncertain about what judges should do, we have reason to favor a mix of views merely by virtue of its moderating effect. In the face of uncertainty, sensible people choose between the poles.").

[116] As an alternative solution to systematic deviation from random assignment, Sunstein has suggested that the Senate step up its "advice and consent" role in an effort to promote diversity in the federal judiciary. *Id.* at 189-90. In the current climate, this seems politically implausible. But plausibility aside, Sunstein's suggestion remains unsatisfactory at the level of the appellate courts because an ideologically diverse pool of appellate judges can still generate ideologically uniform panels (although it is true that a diverse pool is less likely to do so). In short, imposition of ideological diversity at the nomination and confirmation stage is best suited for the Supreme Court, where the pool and the panel are identical.

[117] Two possibilities have been suggested. Emerson Tiller and Frank Cross have proposed an assignment procedure that explicitly takes account of judicial ideology in an effort to create balanced panels. Tiller & Cross, *supra* note 48. The authors note that in 1992 the chance of getting a politically split panel by random assignment was only 58%. *Id*. at 227. The probability of getting a three-Republican panel was 41%, while the probability of getting a three-Democrat panel was only about 1%. Furthermore, they cite recent studies indicating that ideological voting is especially pronounced in cases where the "circuit court panel is unified with like-minded partisans (3-0 panels of Democratic or Republican appointees)." Tiller & Cross, *supra* note 47, at 215, *citing* Cross & Tiller, *supra* note 48, at 2168-72. To counteract these effects, they suggest a method for selection that would guarantee at least one member from each party on every appellate panel. This method entails selecting one judge from each political party – again, as measured by the party of the nominating President – and then choosing a third judge from all of the remaining judges. "The result would be all split panels, with the ratio of majority party panels dependent on the ratio within the circuit as a whole." Tiller & Cross, *supra* note 47, at 232-234. For a criticism of this proposal, *see* Patricia M. Wald, *Colloquy: A Response to Tiller and Cross*, 99 COLUM. L. REV. 235 (1999).

Alternatively, Michael Hasday has suggested a complex assignment system based on the expressed preferences of the litigants. Hasday, *supra* note 47, at 291.

they require the court itself to play an active part in addressing the problematic influence of attitudinal effects.[118]

The distortion created by non-uniform panel predictability may offer a roundabout solution. Because the announcement of less predictable panels is less likely to lead to settlement, and because those less predictable panels are more likely to be ideologically diverse, the procedure should encourage ideological diversity on panels that ultimately decide cases and write opinions.[119] And it

---

That proposal avoids an explicit recognition that the politics of judges matter, but might still lead to panel assignments that are more neutral than random assignment. In her criticism of the Tiller & Cross proposal, Judge Wald expressed concern that the explicit acknowledgment of a politicized judiciary would "change[] radically the public's and the judge's own perception of her role." Wald, *supra* at 254-55. By contrast, Hasday's approach attempts to "avoid[] any explicit mixing of politics with the judiciary." Hasday, *supra* at 306.

Technically, the goal of those proposals is to achieve neutral panels rather than ideologically diverse ones. But the two goals would almost certainly overlap. In the Tiller and Cross proposal, the overlap is explicit, at least to the extent that ideological diversity is achieved by composing panels of judges from both parties. *See* Tiller & Cross, *supra* note 43. In the Hasday proposal, the overlap is not explicit but is very likely. By responding to litigant preferences, which if rational and accurate should be as ideologically opposed as possible, the proposal should promote ideological diversity. *See* Hasday, *supra* note 47.

[118] The Tiller and Cross proposal requires the most explicit acknowledgment, and that aspect of the proposal was an important basis for Judge Wald's criticism. *See* Wald, *supra* note 117. Given the strong judicial defense of formalism and neutrality, *see* text accompanying notes 30-30, other judges are likely to react similarly. The Hasday proposal is perhaps less problematic in this regard because it consciously avoids explicit recognition of ideological effects through the mechanism of "matching" panels based on expressed party preferences. *See* Hasday, *supra* note 47. Even so, the proposal must be administered by the court, and the basis (or at least the likely perceived basis) for using its complex assignment mechanism rather than random assignment would be as a means of addressing ideological effects.

[119] A difference between composition in the voluntary dismissal cases and oral argument cases would support the concept of a predictability distortion. Along those lines, consider again the data discussed in Part I.B. The following table shows the panel composition of D.C. Circuit cases dismissed by party and those proceeding to oral argument, as well as the expected distribution given the overall court composition.

should do so without requiring excessive active participation by the court.[120] If so, the concern expressed by Wagner and Petherbridge is misplaced. In short, the distortion created by non-uniform panel predictability may ultimately provide a jurisprudential benefit in the form of opinions that are more accurate, more restrained, and more consistent from the perspective of the court as a whole.[121]

	Dismissed by Party	Oral Argument	Expected
RRR	2 (15.4%)	5 (10.2%)	16.7%
RRD	6 (46.2%)	25 (51.0%)	50.0%
RDD	5 (38.5%)	13 (26.5%)	30.0%
DDD	1 (7.7%)	6 (12.2%)	3.3%
Total	13 (99.9%)	49 (100.0%)	100.0%

Obviously, the sample size is small enough that these results are not statistically significant; a larger scale study might provide a better sense of the existence and practical effect of a predictability distortion.

[120] Obviously the court is still required to participate in the form of announcing the panel composition. But this level of participation is not likely to be considered as problematic, perhaps because the court can plausibly claim to be providing the information for unrelated reasons (e.g., Edwards' "convenience of the parties" explanation, *supra* note 18), or perhaps because the court is not altering its assignment practices in response to attitudinal effects.

[121] Richard Revesz has suggested yet another possibility: In some cases, announcement of a very predictable panel may not lead to greater settlement activity at all. Instead, the favored party may opt to pursue the appeal and make more extreme arguments in the hope of getting a particularly favorable opinion that will be useful in future cases. *See* Revesz, *supra* note 55, at 700-01. This would imply that the expectation of a predictability-based distortion is misguided. But this response is more likely where the favored party is a repeat player with an interest in the rule value created by an appeal. A one-time player interest only in the judgment should maximize utility by pursuing settlement. In other words, what Revesz' insight really captures is differences in the way litigants will respond to panel announcement based on their ultimate interest in the appeal. For more on this, see *infra* Part III.C.

At least two other effects created by the predictability distortion are possible. First, the distortion can mislead potential litigants. When cases settle in response to the announcement of a predictable panel, the panel's vote on the legal issues represented by the appeal is effectively not recorded. In essence, the panel performs its conflict resolution function without getting a chance to perform its caselaw production function. The effect is similar to a panel choosing to file a short

B. *The Sophistication Distortion*

A second distortion is created by the existence of ignorance and perception errors,[122] and more specifically by the fact that those errors are not likely to be evenly distributed across litigants. Instead, litigants that I will call sophisticated are more likely to use the cue

---

nonprecedential opinion to dispatch an appeal on the merits, but the difference is that the panel here does not control the choice. And while this is always true of panels assigned to hear appeals that settle prior to a merits decision, in most cases the settlement activity it is safe to assume that there is no systematic effect created because the activity is not responsive to the panel itself. Here, the situation is quite different. Decisions are not being entered precisely because of the panel composition, and the distribution of those excluded panels is not random. This is potentially misleading because parties might reasonably consult the recorded decisions of the court either to determine whether to file an appeal or to guide their behavior in the hopes of avoiding the litigation process altogether. That consultation might lead to distorted predictions if certain votes of the court are essentially invisible because they led to settlement rather than some more formal judicial action.

Second, the potential for a predictability distortion may affect the way that judges themselves behave. For example, some judges may motivated by a desire to minimize the amount of work that they must perform on the court. Judges interested in shirking might seek to make themselves as predictable as possible. Predictable judges are most likely to sit on predictable panels, and predictable panels lead to more settlement and less judicial effort. But the process of becoming predictable itself requires judicial effort because the judge can no longer simply minimize participation on panels by writing majority opinions when assigned and simply going along with the majority in all other cases. Instead, the shirking judge must cultivate a perception of predictability by writing (presumably short) dissents in some cases. In sum, whether an early announcement procedure creates an opportunity for a shirking judge depends on whether the effort saved by being perceived as predictable outweighs the effort required to create that perception.

Other judges may be interested in maximizing their influence on the caselaw. A predictability distortion might encourage an influence maximizer to become unpredictable, which would maximize her placement on unpredictable panels. But again, the actions required to become unpredictable threaten to undermine the overarching goal of maximizing influence on the caselaw. As a result, the influence maximizer might instead choose to write strong and consistent opinions, even though that consistency may have the auxiliary effect of reducing the number of panels on which she sits. The choice between these two options should depend on the overall effectiveness of the early announcement procedure and on the number of other predictable members of the court. A choice to become unpredictable makes sense only if the effect of the procedure is dramatic. Because of the various barriers discussed in Part II, that condition is unlikely to be met; the predictability distortion is therefore unlikely to affect the behavioral incentives of influence maximizing judges.

[122] *See supra* Part II.B.

more accurately and more often. As a result, the early announcement procedure will select those litigants out of the oral argument pool at a higher rate than unsophisticated ones. Over time, the cases that proceed to panel decisions on the merits will involve relatively greater numbers of unsophisticated litigants.[123]

The question is whether this sophistication-based distortion should be viewed as problematic. The answer depends in part on whether sophisticated and unsophisticated litigants behave differently in other relevant respects. If they do not, the distortion would not matter at all. But this is unlikely. Instead, sophisticated litigants are likely to differ from unsophisticated ones in terms of the quality of the claims brought and the manner in which those claims are presented. Consider first the quality of claims. Unsophisticated parties may be expected to appeal relatively weaker cases. Ordinarily, rational actors should file appeals only if the expected outcome from doing so exceeds the cost of the appeal, and that is most likely to happen when the quality of the appeal is high.[124] But what makes parties unsophisticated under this definition is that they are for some reason

---

[123] Assuming a simple two-party dispute, three different party arrays are possible: Sophisticated vs. Sophisticated (SS), Sophisticated vs. Unsophisticated (SU), and Unsophisticated vs. Unsophisticated (UU). The reaction to the announcement of a highly predictable panel is not uniform across these arrays. In an SS dispute, both sides will use the information to settle, and the case will not proceed to a merits decision. In a UU dispute, no settlement will result, either because the parties will not react at all or because they will interpret the information in a self-serving way. In an SU dispute, the results are mixed. If the panel favors the sophisticated party, no settlement will result because the settlement demands of the sophisticated party will appear too steep to the unsophisticated party. If the panel instead favors the unsophisticated party, settlement may occur because the sophisticated party's offer will look attractive relative to the unsophisticated party's expected outcome. Of course, a party unsophisticated in the sense of not making use of panel announcement information may also be unsophisticated in the sense of making an accurate outcome prediction absent that information. If so, and if the unsophisticated party has a distorted "expected outcome," then settlement may not occur because the offer may yet appear unsatisfactory. Moreover, if the sophisticated party is aware that the other party is unsophisticated, the *terms* of the settlement may be affected. Whereas the terms for an SS dispute should be very close to the *new* (and mutually held) expected value, the settlement for an SU dispute may be close to the unsophisticated party's *old* expected value.

[124] *See generally* Shavell, *supra* note 52, at 401-11. But not all appeals will involve a positive expected value; for discussions on the possibilities for negative value suits, see *id.* at 419-423; *see also*, Lucian A. Bebchuk, *Suits with Negative Expected Value*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 551-54 (Peter Newman ed., 1998).

unwilling or unable to engage in the expected outcome assessment that would lead to a post-cue response. Because the original decision regarding the quality and likely success of the appeal is based on a similar assessment, the lack of sophistication will sabotage both. In short, appeals that present low quality claims are frequently a function of misguided notions about chances for success, and unsophisticated litigants are more likely to be misguided.

Even in cases where the underlying quality of the appeal is identical, a second sort of difference might exist: Sophisticated parties may present their appeal in a different manner than unsophisticated parties. These differences might take various forms. One significant possibility relates to how the issues in the case are framed for the court. Issues related to an appeal can be presented or defended in any number of ways. Suppose, for instance, that twelve plausible sources of error exist, but that only three stand a significant likelihood of success. Some litigants will choose to include all twelve issues in an attempt to convince the court that something was amiss, while others will choose instead to focus only on the three potential "winners" on the theory that inclusion of the other nine may undermine their credibility in the eyes of the court. Differences of this sort are not limited to contrasting views on litigation strategy. In a given record, there may be numerous ways to theorize the legal claims involved. A paradigmatic example is the choice between contract and tort theory as a basis for relief. Whether related to strategy or to legal theory, sophisticated parties may make different framing choices than unsophisticated ones. And because the ability to make those choices optimally may be related to the ability to successfully integrate new information, sophisticated parties may do a systematically better job of shaping arguments that will persuade an appellate court.

Finally, there may also be differences in the quality of briefing as between unsophisticated and sophisticated litigants. These differences might exist even if the merits of the underlying claims are identical, and even if the conception of how to frame those claims for purposes of the appeal is also identical. Again, the intuition is that unsophisticated litigants are likely to file briefs that are of lower quality. The basis for that intuition is that failure to respond to panel announcement might be viewed as a sign of incompetence, and

incompetence in that respect may be accompanied by incompetence in others.[125]

Because there is reason to believe that sophisticated and unsophisticated litigants will bring appeals that are different in quality and in presentation, a sophistication distortion may affect the court's performance of its primary functions. At the extreme, the distortion creates tension between the need for the court's action to reflect the participation of the litigants, and the need for the court to resolve disputes and create legal rules in accordance with public values. The need to reflect litigant participation is connected to the norm of strong responsiveness developed by Lon Fuller in his posthumously published article *The Forms and Limits of Adjudication*.[126] In order to preserve and guarantee participation by the parties, which he views as "the distinguishing characteristic of adjudication,"[127] Fuller concludes that judges should assume a passive role and should – to the extent possible – structure their disposition of cases according to the way they have been presented by the parties.[128]

In an article published concurrently with Fuller's, Melvin Aron Eisenberg strengthened the norm by arguing that responsiveness to parties – and not just party participation alone – is what defines adjudication as a tool of dispute resolution. A court fulfills its dispute resolution function only to the extent that it resolves the dispute that

[125] A fourth difference might be that sophisticated and unsophisticated litigants file different types of appeals. So for example, perhaps contract cases are likely to involve sophisticated parties while employment cases are likely to involve unsophisticated ones. This difference is likely to cause an effect only if it is very extreme, so much so that it results in very few cases of particular types surviving to the merits stage. Defining how many would qualify as "very few" would depend on the importance of incrementalism and adaptiveness in a given "type" of case. If very few cases in a particular type are filed, the court may find it difficult to perform its caselaw production function adequately because it would not have sufficient occasion to issue opinions that would clarify the law for external actors. This would be particularly so if the court feels constrained by notions of minimalism. *See* CASS SUNSTEIN, ONE CASE AT A TIME, (2001). *See also* Christopher J, Peters, *Assessing The New Judicial Minimalism,* 100 COLUM. L. REV. 454 (2000).

[126] *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

[127] *Id*. at 364.

[128] *Id.* at 388. Fuller acknowledges that it is not always possible to structure disposition in this way, but he nevertheless urges courts to "work toward an achievement of the closest approximation of it." *Id.*

the parties have perceived and presented, and to that end it does well to respond as directly as possible.[129]

Although implicit in the work of both Fuller and Eisenberg, more recent arguments in favor of the norm of strong responsiveness have been explicitly rooted in terms of legitimacy. For instance, Larry Solum has explored the link between strong responsiveness and perceptions of legitimacy by participants in the adjudicative process.[130] Participants will view the resolution of their dispute as legitimate only if they participate in the resolution process in a meaningful way, and responsiveness is one sure way to assure parties that that condition has been met. Systematic deviations from strong responsiveness threaten to disrupt legitimacy on the part of those who rely on the courts to resolve disputes. Because parties will not voluntarily submit to illegitimate forms of adjudication, instability would follow.

Strong responsiveness may also be necessary to secure legitimacy in the eyes of non-participants. Christopher Peters has defended strong legitimacy as a guarantor of the democratic legitimacy of rules created and imposed by the judicial branch.[131] Responding to criticisms of adjudication as a fundamentally nondemocratic enterprise, Peters emphasizes the involvement throughout the adjudication process of interested parties,[132] who perform valuable functions including: initiating a case, framing the issues it presents, and representing the various interests implicated by those issues.[133] Each of those functions limits the court's discretion in fashioning a decisional rule that will bind other parties, but those limits are effective only to the extent that the court actually respects the parties' input. Strong responsiveness thus emerges as an essential

---

[129] *See* Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller,* 92 HARV. L. REV. 410, 413 (1978) (arguing that strong responsiveness is a necessary component of the court's dispute resolution function "insofar as the parties contemplate that the court will settle *their* dispute on the basis of the issues as the parties see them").

[130] Solum, *supra* note 106, at 275**.**

[131] Christopher Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997).

[132] To ensure that the parties to disputes are indeed interested, Peters understandably encourages strict application of existing justiciability doctrines. *Id.* at 428.

[133] Indeed, in Peters' view, parties effectively "serve as interest representatives of subsequent litigants in much the same way that we expect our elected legislators to serve as interest representatives of their constituents." *Id*. at 347.

component of the court's legitimate exercise of its caselaw production function.[134]

Whatever its merits in the abstract, strict adherence to a norm of strong responsiveness is not always desirable. Of particular relevance here, the norm makes sense only when the quality of the appeals being decided is high. Consider first dispute resolution. Fuller proposes that courts are primarily engaged in the arbitration of claims presented by competing parties. That is all well and good, but precisely how are those competing claims to be resolved? On one view, that is a question of minimal significance; so long as the parties are provided the opportunity to participate, and so long as the resolution is accepted by the parties themselves, the nature and manner of the resolution is irrelevant. Indeed, this seems to be Fuller's view, and his norms of attention, explanation and strong responsiveness are most consistent with that model of dispute resolution. But perhaps dispute resolution requires something more. On this broader view, proper resolution of competing claims must draw on, and be representative of, public values. This is particularly so in so-called "public law" cases, where interests other than those presented by the two sides may be implicated and may need to be accounted for.[135] But it may be true in more traditional cases as well. According to Owen Fiss, perhaps the most ardent proponent of this view, "all rights enforced by courts are public."[136] If so, then the nature of the dispute resolution is a matter of concern after all; we feel confident that the

---

[134] Peters identifies two further components that are essential to his model of adjudication as representation. First, courts must correctly apply the doctrines of stare decisis such that a decision binds "only those future parties who are similarly situated to the original litigants in every meaningful way." *Id.* at 375. Second, the "conduct of the parties litigating the precedential case [must] meet a threshold standard of adequacy." *Id.* at 376.

[135] The public law model of adjudication is most closely associated with Abram Chayes. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[136] Owen Fiss, *The Supreme Court, 1978 Term – Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 35-36 (1979). Fiss's view of adjudication led him to grossly minimize the court's dispute resolution function. *Id.* at 30 ("[C]ourts exist to give meaning to our public values, not to resolve disputes."). For that reason, he is often described as being concerned primarily with the court's "lawmaking" function rather than its dispute resolution function. S*ee* Oldfather, *supra* note 103, at 148-49. But of course courts must be in the business of resolving disputes at least at some nominal level, since by constitutional mandate there must be a dispute before there can be any court action at all. And the emphasis placed on public values by Fiss can easily be framed in terms of a conception of how that resolution ought to occur.

dispute has been resolved properly only if the resolution reflects public values, and that is most likely to occur when those values have been adequately represented. This view of dispute resolution is not wholly inconsistent with strong responsiveness, but it does impose a natural condition: The quality of representation must be adequate.[137] When that condition is met, the nature of the adversarial structure will ensure that the court is informed of the public values implicated.[138] But when it is not, a court runs a risk of imposing an undesirable resolution if it considers the case strictly as it is presented and framed by the participants.

The problem in terms of caselaw production is similar. Tension between strong responsiveness and caselaw production has long been recognized. As described by Chad Oldfather, the tension exists "for the simple reason that whatever rules the court generates as a result of its resolution of the specific dispute before it must be of the sort that can be applied to similar disputes in the future. If the dispute before the court is somehow not representative of the broader category of disputes of which it is a part, or if the parties' arguments fail to address issues that are critical to the formulation of a rule that must be applied across a range of future disputes, then strong responsiveness could lead to a decision that is based on an incomplete set of inputs and thus generate law that is inappropriate to the needs of future disputants."[139] Critics of strong responsiveness have pointed to this tension as a reason to abandon the norm altogether.[140] Defenders of the norm have predictably been less categorical, but have recognized that deviations may be necessary where the potential for tension is particularly acute.[141] The most commonly recognized deviation of this sort is in pure public law cases, but the potential for tension is also

---

[137] In pure "public law" cases, even this condition may not be enough to permit resolution through responsiveness. In these situations, the large number of public interests involved may not be adequately represented by the nominal parties to the dispute, and the court may therefore need to "construct a broader representational framework" to ensure that those interests are considered. Fiss, *supra* note 136, at 26.

[138] Chayes, *supra* note 135, at 1308.

[139] *See* Oldfather, *supra* note 103, at 142.

[140] Eisenberg, *supra* note 129, at 413-14**.**

[141] Again, the classic deviation is in "public law" cases, which by their nature affect a large group of parties not directly involved in the dispute. *See* Eisenberg, *supra* note 129, at 428 (concluding that in public law cases, "the judge may subordinate the norm of settling the dispute that has been put to him, on the basis of the issues put to him, in favor of the function of making rules that are responsive to public needs").

acute where quality is low. In Eisenberg's formulation, "[t]he force of this norm [of strong responsiveness] may . . . vary according to the nature of the inquiry and the *quality of the parties' participation*."[142]

The demands of both dispute resolution and caselaw production suggest that a quality condition must be met before a norm of strong responsiveness is imposed. If that condition is not met, the court must make a choice. One option is to adhere to the norm of strong responsiveness and to take on the risk that the outcome would be problematic in terms of caselaw production or dispute resolution (at least if the proper performance of those tasks is understood as encompassing some notion of public values). The other option is to forego the norm of strong responsiveness in order to perform the dispute resolution and caselaw production functions effectively. When low quality appeals appear only periodically on a court's docket, neither option is fraught with peril; occasional deviations from strong responsiveness are unlikely to generate systemic turbulence, and adherence to the norm even where the court views the case far differently is made palatable by the availability of non-precedential opinions.[143]

But the situation may be quite different if the sophistication distortion operates to reduce the general quality of both the claims presented and the advocacy on behalf of those claims. At a certain point, that denigration will threaten the court's ability to perform its functions while remaining strongly responsive. Faced with appeals of consistently low quality, a court may opt to hold fast to the norm of responsiveness, although one suspects that adherence would be purely formal. In other words, the court may decide based on considerations not presented by the parties and then artificially frame the decision instead in the parties' terms. Such an approach would tend to preserve

---

[142] *Id.* at 413 (emphasis added). Peters also recognizes that his model of adjudication that calls for strong responsiveness as a guarantor of legitimacy is desirable only when the quality of representation has been adequate. *See* Peters, *supra* note 131, at 376.

[143] Courts may choose to adhere to the litigants' conception of a case even when they disagree with it if they feel that there is little to be gained by a deviation from the norm. The availability of the nonprecedential opinion makes this artificial adherence relatively costless – it preserves legitimacy in the eyes of litigants without interfering with the court's caselaw production function, precisely because the court chooses to forego its caselaw production function in appeals that it denotes as nonprecedential. This approach is acceptable largely because the court is still able to perform its caselaw production function effectively while deciding the other appeals on its docket.

legitimacy in the eyes of participants, and it might even be viewed as satisfactory in terms of dispute resolution because the true resolution of the dispute would reflect public values. But the disconnect between the true basis for the decision and its formal terms – or, put differently, the absence of judicial candor – is problematic in terms of the court's caselaw production function, at least in the sense that it frustrates the ability of future litigants to predict how courts will behave going forward.[144] An even more likely scenario is that courts faced with consistently low quality appeals would begin to systematically deviate from the norm of strong responsiveness. But such deviations would come at a price. Parties involved in disputes would begin to view the court's resolution as illegitimate if the court's output does not reflect their input. More importantly, the rules created by the court may be viewed as less legitimate by external actors because they do not grow out of a representational process.

The sophistication distortion is similar to the distortion created by non-uniform panel predictability in the sense that both have the potential to create serious jurisprudential problems in the extreme case. But the two are also similar in the sense that the extreme case is very unlikely. In terms of the sophistication distortion, the extreme case is created not by an abundance of low quality appeals, but by the dearth of high quality ones. So long as a court is presented with a sufficient number of high quality appeals, it can use those cases to satisfy the demands of caselaw production while remaining responsive to litigant participation. As for the low quality appeals, it can simply minimize them by issuing narrow (and, if the mechanism is available, nonprecedential) opinions. Put differently, the extreme case will arise only if the rule works extremely well among the pool of sophisticated litigants – so well that cases involving those litigants become scarce. That is unlikely because of the existence of the other intractable barriers discussed in Part II. For example, so long as a minimum condition of unpredictability among the panels is met, the early

[144] *See* Richard A. Posner, THE FEDERAL COURTS: CHALLENGE AND REFORM 147 (1996) ("Prolixity and lack of candor are not mere inelegances in judicial opinions. They increase the time required of reading . . . [a]nd they reduce the opinion's usefulness as a guide to what the judges are likely to do in future cases."). The lack of candor may create additional problems in terms of the court's legitimacy or integrity. For defenses of a requirement of judicial candor in these terms, *see, e.g.,* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 401-02 (1989).

announcement policy will not winnow the pool of sophisticated appeals to a problematic level. The court may find itself dealing with a relatively larger percentage of low quality appeals, but it will avoid large scale problems of legitimacy and caselaw production.

C. *The Motivation Distortion*

A final distortion stems from the fact that cases involving litigants who are interested in a judgment per se may be relatively less responsive to the introduction of new information regarding likely outcome. For litigants who view the judgment as instrumental – for example, as a way to extract or withhold money from the other party – panel announcement may offer a valuable cue and permit settlement. But this is so because these litigants view a reliable prediction about the judgment as the functional equivalent of the judgment itself. In contrast, litigants who are interested in the judgment per se do not view the two as interchangeable, and they are therefore less likely to respond to panel announcement.

The motivational differences between these two types of litigants should mean that those seeking judgments per se are overrepresented among the pool of cases that proceed to oral argument, even absent an early announcement procedure. But that overrepresentation will be even more pronounced after such a procedure is introduced. If these two types of litigants are evenly distributed among cases, the overrepresentation does not matter much. But one suspects that the distribution is not even. Rather, litigants seeking judgments per se may be overrepresented in certain classes of cases (employment discrimination, say).[145] If that is so, then the motivation distortion can affect the content mix of the oral argument pool.

---

[145] For a discussion about how the selection of cases at the trial level is affected by differences in plaintiffs' "taste for litigiousness," and more specifically how those differences may relate to the subject matter of the dispute, *see* Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. S92 (1997).

CONCLUSION

The theoretical case for a settlement effect generated by early panel announcement is based on a straightforward model of cue and response. The court provides an informational cue to litigants when it discloses panel composition, and it assumes that some litigants will seek settlement in response because they will perceive the information as relevant to the appeal's likely outcome. In practice, the cue and response mechanism appears to be operating in some cases, although not in overwhelming fashion. This article has attempted to accomplish two goals: to explore barriers that prevent the mechanism from having greater effect, and to explore ways that those barriers make the mechanism's limited effect non-random.

In terms of barriers, some are created by weaknesses in the cue, while others are created by weaknesses in litigants' ability to interpret and respond to the cue. Recognizing that these barriers exist could lead the way to procedural modifications designed to alleviate them, but in this case effective yet acceptable modifications are difficult to imagine. Improving effectiveness would require the court to embrace or acknowledge the attitudinal model, and that almost certainly represents an unacceptable cost. Instead, the barriers seem intractable, and their intractability suggests various distortions generated by the procedure's limited effect.

So what does all of this say about whether an early announcement procedure is worthwhile? The answer to that question depends to some extent on further empirical study of the contours of the various distortions described here, and to some extent on a subjective evaluation about the value or danger of those distortions. For my part, I am doubtful that the procedure is effective in terms of decreasing the court's overall workload, although it may create a welcome shift in the allocation of that workload away from judges and toward the court's administrative staff. Moreover, at the margins it may well promote panels that are more diverse, and that seems a benefit worth the costs of increased pandering during argument and an increase in unsophisticated appeals. But my primary intention here is not to resolve that question definitively; rather, it is to suggest that a full understanding of the procedure's tradeoffs is considerably more complicated than a simple choice between attorney pandering and decreased caseload.

This connects to a final, larger point. As the appellate caseload continues to rise, and as other mechanisms for dealing with the caseload crunch come under pressure,[146] courts can be expected to consider new ways that they might exercise control over internal rules and procedures to procure relief. But such efforts are fraught with peril. Maneuvering within the space created by local rulemaking authority in an effort to generate caseload reductions can be a dangerous business with jurisprudential implications. Indirect maneuvers such as cue and response mechanisms are particularly problematic because they are not self-executing; instead, the court must rely on litigants to receive the cue, process it accurately, and react to it rationally. But if parties do not receive, process and react uniformly – and it is a near-sure bet that they do not – then the court's decision to provide information alters the pool of cases that remain. In short, courts should think carefully about how the introduction of local rules and procedures, and particularly those that depend on litigant response, may ultimately affect the cases they hear and the way they decide them.

---

[146] As mentioned *supra* at note 10, the oft-used technique of filing a short unpublished opinion to dispose of straightforward appeals will lose some of its luster when the new Federal Rule of Appellate Procedure 32.1 goes into effect later this year. In addition, the Supreme Court has recently been creating pressure on lower courts to use abstention doctrines – which can be used by courts to dispose of cases in certain contexts – more sparingly. *See*, *e.g.,* Marshall v. Marshall, 547 U.S. ____ (2006) (narrowing the probate exception to federal jurisdiction); ExxonMobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005) (reading the *Rooker-Feldman* doctrine narrowly).