

DRAFT MANUSCRIPT

GOING PROCEDURAL: STRATEGIC OPINION WRITING IN THE U.S. COURTS OF APPEALS

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ABSTRACT

This paper makes use of a simple strategic model to shed light on why judges “go procedural” in the content of their opinions. A model of judicial behavior depicting Courts of Appeals judges as playing a long-term law-making game predicts that judges in ideologically diverse circuits will make more use of procedural law in their opinions. Empirical data supports the theory. Appellate panels issue decisions that avoid the substance of a dispute in favor of a procedural resolution when the circuit in which they work is characterized by ideological heterogeneity. Additionally, the paper explores how conflict between the appellate panel and the lower court judge affects the content of appellate opinions, illustrating that in this situation too, conflict leads to procedural appellate decisions: conservative appellate panels use procedure to control ideologically distant district judges. Overall, the evidence supports the theory that procedural decisions in law result from strategic behavior and long-term goals in the presence of horizontal and vertical ideological conflict.

Introduction

In the highly publicized 2004 case *Elk Grove Unified School District v. Newdow*, the Supreme Court was faced with deciding whether or not requiring students in public schools to recite the Pledge of Allegiance (including the “under God” phrase) violated the Establishment Clause of the U.S. Constitution. The case was highly controversial and public, receiving much press coverage in the weeks and months prior to the Court’s ruling. The majority opinion issued by the Court, however, shed no light on the constitutional question that had engaged the public’s interest. Rather, the majority opinion (authored by John Paul Stevens) ruled that the man bringing the suit on behalf of his child lacked *standing* to bring the case because he did not have custody of the child. “Standing” is a procedural requirement that a plaintiff have a sufficient interest in the outcome of the case to be allowed to bring the case before the courts and obtain a binding decision. On this ground, the case was dismissed from federal court without the majority of the Supreme Court reaching the hard substantive questions about the meaning of a controversial constitutional provision.

This paper seeks to understand why judges sometimes choose to issue a procedural opinion rather than one that explicitly addresses the substantive issues raised in the case. The evidence presented here indicates that proceduralism is born of conflict combined with the long-term goals of judges. The theory of this paper has two related components. The first is that casting a decision in procedural terms is a way of managing otherwise unmanageable amounts of conflict among colleagues charged with making decisions and creating law as a group. From a rational choice perspective, forward-thinking judges deciding a case know that related issues will be decided in the future by their colleagues. A strategic model that takes into account the future behavior of judicial colleagues suggests that circuit-level heterogeneity will encourage rational

judges to elide policy questions, issuing narrower procedural decisions instead—thereby avoiding a suboptimal policy battle within the circuit. While this outcome can be predicted using a rational choice approach, the same result could also be predicted simply by thinking about group dynamics and the inevitable interpersonal dynamics within the small group of circuit judges who would like, presumably, to remain on speaking terms—even with those holding divergent political preferences.

The evidence presented in this paper supports the theory that appellate judges make strategic decisions about the content of their opinions based on the expected future behavior of other judges who will share in shaping the law of their appellate circuit. In particular, judges make strategic choices about the choice to issue a narrow, procedural opinion as opposed to a broader, substantive opinion (that explicitly addresses the policy issue) in the cases they hear. If one views judicial decision making by appellate judges as an iterated game in which the preferences of the future players must be estimated by the structure of preferences in the appellate court as a whole, the evidence is consistent with judges maximizing their long-term payoffs due to the evolution of the law rather than simply maximizing their satisfaction with a given case's outcome.

The second component of this paper moves to cross-hierarchy (vertical) relations and explores how appellate judges frame their opinions in light of conflict between the panel and the lower court judge to whom they are addressing the opinion. At least since Walter Murphy's *Elements of Judicial Strategy* (1964), scholars have acknowledged the problem of bureaucratic control within the judiciary. Murphy himself suggested that sometimes an appellate judge would have to engage in persuasion and bargaining, possibly even requiring “tact and graciousness” in dealing with lower court judges with preferences that diverge from the appellate court's

preferences. This paper tests that insight by considering whether appellate judges are more likely to couch their decisions in more formal, procedural terms when addressing lower court judges with whom they disagree. Murphy's ideas suggest that conflict between the panel and the lower court judge also might, in theory, lead to more procedural decisions. The evidence presented here is supportive of this theory for conservative appellate judges. For these judges, procedural law is a tool of hierarchical control that they use when interacting with lower court judges with divergent preferences from their own.

Overall, the evidence suggests that judges strategically decide when to explicitly enter the policy arena and that this decision rests not on a myopic view of the single case at hand but also on the judges' predictions about future cases. Some judicial decisions are more sweeping in their policy content while other decisions are more modest. Conflict among judges appears to be an important force in leading them to issue procedural opinions rather than engage directly and explicitly in a policy debate. In a way, then, this paper is about rhetoric. While taking as a starting point that judges care about policy, this paper argues that they achieve policy goals through the content of their opinions. Accompanying an outcome with a reasoned explanation (an opinion) gives judges the ability to achieve their preferred long-term policy objectives as part of an iterated collegial law-making game.

Background

Much work has gone before illustrating that judges can and do engage in strategic behavior and, in general, behavior influenced by the presence of their colleagues on the bench or at other levels of the judicial hierarchy. In the Supreme Court, where the justices explicitly have control over when they enter a policy arena (because they decide whether to grant cert.), much evidence indicates that the justices' votes reflect strategic behavior with an eye toward the likely

vote on the merits (e.g., Caldeira, Wright and Zorn 1999; Epstein and Knight 1998).

Additionally, work focused on the activity of Supreme Court justices has illustrated that the collegial nature of judicial decision making at the appellate levels affects the content of opinions because opinion writers pay attention to the preferences of their colleagues in drafting the opinion, sometimes creating compromises over the grounds of an opinion to achieve desired outcomes (see Epstein and Knight 1998; Maltzmann, Spriggs and Wahlbeck 2000; Hansford and Spriggs 2006). The debate about “issue fluidity” (see, e.g., McGuire and Palmer 1995; 1996; Palmer 1999; and Epstein, Segal and Johnson 1996) further suggests a strategic component to the content of Supreme Court opinions. McGuire and Palmer found evidence both of issue creation and issue suppression on the Supreme Court. Epstein, Segal and Johnson argued that the evidence, reexamined, showed that virtually all issues discussed in opinions were raised in a brief submitted by the parties. Regardless of who is correct about the incidence of issue creation, it appears to be the case that issue suppression occurs quite commonly in the Supreme Court.¹ Judges may choose to base an opinion on one issue rather than another for many different reasons, including strategic responses to the preferences of other judges with whom they work.²

¹ Palmer estimates this occurs in nearly 60% of cases before the Warren Court. In Epstein and Knight (1998), they find evidence of this type of agenda manipulation by the Chief Justice in about 17% of cases during the 1983 term.

² In addition to the forces from colleagues on the court, there is reason to believe that the content of opinions may be influenced by judges in other positions in the hierarchy. Evidence from Schanzenbach and Tiller (2007) suggests that trial judges are capable this type of behavior. They showed that trial court judges mask their sentencing discretion through the legal characterization (read: framing) of their decision. Thus, the grounds for a given sentence were different

The choice to issue a decision that avoids the substance of the case entirely, relying instead upon a procedural dimension (such as the *Newdow* decision mentioned in the Introduction), is an extreme form of issue suppression. It is also a type of issue fluidity that is not plagued by concerns about legal norms that the court is not supposed to address issues not raised by parties. To the contrary, the law *requires* that judges address procedural issues related to jurisdiction regardless of whether or not the parties raise the issue. Nevertheless, few scholars have considered the choice judges face between deciding a case on its substance versus moving to a procedural dimension. One exception is work by Epstein and Knight (1998), who considered Supreme Court case histories that suggested strategic behavior by justices who tried to interject a procedural dimension into individual cases in order to achieve more preferred outcomes. This paper takes that reasoning one step further by considering the lawmaking game engaged in by appellate judges interested in shaping the policy statement of the circuit across more than one case, and testing that theory quantitatively.

At the appellate level, work by Cross and Tiller (1998) and Sunstein et al. (2006) indicates that appellate judges are also often affected by collegial concerns in their decision making (see also Boyd, Epstein and Martin 2020). The evidence indicates that judges modify their behavior in systematic ways (as measured by votes on outcomes) when deciding cases in panels with mixed partisanship; recent work by Kestel (2007) indicates that this behavior may be caused by strategic responses to the possibility of Supreme Court review. In general, the

depending upon the judge's expectation of hostile review by appellate judges. Similarly, several scholars have suggested that the Supreme Court may craft opinions that are intentionally vague or indeterminate in response to their sense of the willingness of lower court judges to comply (Staton and Vanberg 2008; Posner 1997; Jacobi and Tiller 2007; McNollgast 1995).

evidence is consistent with the idea that appellate panels work as a group to create outcomes as a summative measure of ideology is a better predictor of outcomes than the median (Cross 2007; see also Kestel 2008). All of this suggests that appellate opinions are at least in part the result of the collegial environment. This article posits that the influence of that environment may extend not just to outcomes but also to the explanation and reasons given for those outcomes, and that the environment is best characterized not just by the particular panel but rather that the entire circuit plays a role in affecting how opinions are written.

Decisions in the Courts of Appeals are made by panels of three judges. Each decision is, then, collegial in the sense that three judges participate at a time and at least two judges must agree to each outcome. Panels are drawn randomly from the set of circuit judges—meaning that all the judges on the circuit sit with each all the other judges on the circuit with some frequency.³ The courts are also collegial in the sense that the circuit as a whole operates together to create the law that governs their geographic district. Issues come before the appellate court repeatedly, and each time a new panel hears and decides the issue. This collegial setting suggests that judicial behavior may be characterized by strategic decisions—decisions that take into account the contemporaneous or future behavior of their colleagues. In the following discussion, four hypotheses about proceduralism are developed from the basic idea that judges make the decision about how to frame an opinion strategically. The first hypothesis results from thinking about the iterative quality of legal decision making, considering the larger game of “making law” as distinct from the more specific game of deciding cases. The second hypothesis, rooted in the

³ The frequency will, of course, depend upon the number of judges in the circuit. In a large circuit like the Ninth, with 29 active judges, judges will not sit together as often while in a small circuit like the First, with only five active judges, judges will sit together quite often.

single case model of collegial compromise, follows more directly from the literature discussed above about strategic decision making by judges. Finally, the third and fourth hypotheses relate to strategic considerations that occur across levels of the judicial hierarchy.

The Role of Horizontal Conflict

The game of law (as played by judges) may not best be captured by a case-by-case model—as though judges are incapable of anticipating future cases. Rather, judges are also interested in the big picture, the law itself, which emerges from a series of cases more often than a single case. Thus, the law-making game is better characterized as consisting of multiple cases on a given topic, where each case just creates one portion of the law of that issue area. Legal scholar Ronald Dworkin has analogized judicial decisions to a chain novel, where each author takes what has gone before and adds his or her chapter with an eye toward the fact that other authors will complete the novel (Dworkin 1986): “In this enterprise a group of novelists writes a novel seriatim; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity.”⁴

⁴ This paper is, of course, not the first to use Dworkin’s ideas as a starting point for an empirical look at judicial behavior. In Lindquist and Cross (2005), they tested the notion that precedent becomes increasingly constraining with each chapter laid down by prior “authors.” They found, in contrast to Dworkin’s idealized picture of law-making, that greater numbers of precedent only constrained judges to a certain point. After too much had been written, discretion actually increased. These findings are consistent with the theory proposed here about what happens when

While Dworkin almost certainly did not intend to evoke the idea of judges behaving strategically to achieve policy goals, the basic idea of the chain novel can illustrate the complexity of the strategic task in front of judges. Not only do they write with what has gone before in mind. They must also write with an eye toward what will come after their contribution.

Imagine that judges are playing a strategic game in which they only care about policy, but that their policy goals have a dominant long-term component. Further imagine that the words in an opinion—not just the outcome—matter to achieving long-term policy goals, an assumption that takes the content of the law seriously. A judge may achieve short-term policy goals by making an ideological statement in a particular case. The longer-term goal, however, must be achieved with the help of their colleagues in future cases. With these concerns in mind, the panel must choose how to write each opinion, and in particular what kind of a policy statement to issue. The theory of this paper is rooted in the idea that these decisions about opinion content engage judges' long-term goals about how the overall policy statement of the circuit will evolve.

One decision that the panel may make about how the opinion's content relates to the narrowness or broadness of the policy statement in the opinion. Thus, for example, they can frame the decision as one that is the result of narrow application of procedural rules (as the Supreme Court did in the Pledge case) or instead they can frame the outcome as flowing explicitly from the substantive policy concerns at issue. Consideration of this choice suggests three possible types of long term situations. First, the circuit's decisions in a given issue area may all explicitly address the policy substance of the area. Second, the circuit's decisions may all avoid the policy area, preferring instead to be grounded in procedural rules and formality.

too many judges with disparate viewpoints issue policy-based decisions—leading to incoherent law that is no guide to anyone.

Third, the circuit's decisions may be a mix of procedural and substantive decisions. The model presented here suggests that the expected payoff for these long term outcomes will vary depending upon the presence or absence of ideological conflict in the circuit.

For purposes of simplicity, let us assume that a procedural decision is essentially without policy weight beyond how it might affect the particular case outcome at hand. Only substantive decisions matter in the long term policy game. We also assume that a given panel of three appellate judges can be characterized as having an identifiable policy preference along a standard left/right dimension and that there is a roughly symmetric distribution of panel preferences around some neutral point. While this abstracts away for the moment the internal dynamics of the panel itself, it is useful for simplifying the nature of the iterated game of law-making. Only considering the discrete distinct situations that can arise, panel preferences are assumed to take the following order:

1. The cases in the circuit can all directly address the policy issue, making a strong coherent policy statement with which the panel AGREES.
2. The cases in the circuit can avoid the substance of the policy area, thereby leaving the long-term policy statement of the court essentially non-existent.
3. The cases can all directly address the policy issue and contain (evenly-balanced) opposing things about it, leaving the long-term policy statement of the court essentially neutral but incoherent.
4. The cases can all directly address the policy issue, making a strong coherent policy statement with which the judge DISAGREES.

The above-described ranking is fairly intuitive. It assumes that the panel is interested both in achieving their favored policy statement for a given issue area and that the panel is also

interested in preserving the integrity of the institution such that it continues to have policy credibility. Thus, the panel prefers outcome 2 to outcome 3 because they are essentially equivalent in terms of the net long term policy statement of the court, but outcome 2 leaves the integrity of the court intact and the circuit's policy stance coherent. In a way, then, the ranking includes a weakly-held preference for institutional goals like coherence and consistency. While the judges prefer coherence and consistency to inconsistency, they are not happy to sacrifice their policy preferences to this goal. Rather, they choose consistency only when it is compared to inconsistency with the same net policy statement.⁵ Note, of course, that the model is not intended to perfectly capture the reality of judging, but instead is supposed to be a simplified model of that reality. In keeping with that notion, in addition to the preceding ranked preferences, the model assumes perfect and complete information about the preferences of the other judges in the circuit and at least rough symmetry to the distribution of preferences.

As noted above, the predicted payoffs to panels playing this game depend upon the ideological heterogeneity in the circuit as a whole. To see this, consider two very simplified examples. First, consider a circuit with two possible panels whose preferences are perfectly opposed to one another. Imagine that the first panel is hearing a case on a new legal issue. They are therefore given an opportunity to write the policy statement of the court according to their preferences. However, the panel knows that other judges in the circuit will eventually be able to weigh in on the topic as well in future cases. In choosing the content of the opinion, the game that unfolds primarily involves the choice between whether to issue an explicit policy statement or to decide the case on narrower, procedural grounds. Judges' strategic decision about how to frame the decision depends upon their predictions about future panels. In a circuit where there

⁵ Thus, the norm of *stare decisis* is not considered to be particularly binding.

are only two possible panels, one made up of all liberals and the other made up of all conservatives, the game looks like Figure 1(a) for the first two cases:

[Figure 1 HERE]

Recall that Panel 1 knows that Panel 2 understands the game too, and so Panel 1 will take into account the future behavior of Panel 2 in making the first decision. Working backwards, then, it is clear that the best decision for Panel 1 to make is to issue a narrow, procedural decision. The logic is as follows. If Panel 1 starts out by issuing a substantive policy decision, Panel 2 will not choose to issue a procedural decision in the second step. To do so would leave Panel 2 in their least-preferred outcome—with the circuit’s policy statement consistent and opposed to their preferences. Therefore, Panel 1 knows that instead Panel 2 will respond with their own substantive policy decision. Because we have set up the hypothetical such that Panel 2 has opposed policy preferences, we know that their statement will conflict with Panel 1’s statement on the subject, leading to the sub-optimal (third-best) outcome of net-neutral policy statement and general policy incoherence. This is the policy-battle outcome. Once engaged in a policy battle, it is difficult to emerge. Rather, the outcome perpetuates itself as each subsequent panel is faced with the choice of adding their policy view to the balance or letting the other side “win.” If, on the other hand, Panel 1 initiates with a narrow, procedural opinion, they can expect a better outcome for both themselves and Panel 2 in that both panels can achieve their second-best outcome of essentially no policy statement on the topic. This is, of course, assuming that Panel 2 cooperates. However, Panel 1 should be able to trust that Panel 2 will cooperate because the game continues indefinitely into the future. At the time of the second decision, Panel 2 is in

exactly the same situation as Panel 1 at the first decision. In other words, Panel 2 knows that Panel 1 will likely get another shot at things. If Panel 2 chooses to go down the substantive path, then the only thing for Panel 1 to do is to respond in kind, again leading to the policy battle outcome. This means that in the second case, Panel 2 is facing really exactly the same game as faced Panel 1 in the first case so long as Panel 1 issued a procedural decision. In this game, then, there are really only two possible outcomes that can be reached from the starting panel's perspective. One is that of a policy battle, where each side keeps issuing opinions with their own policy preferences—leading to incoherent policy statements⁶ and a generally nasty situation collegially. The other possible outcome is that of a series of narrow, procedural decisions. In this simple example of perfect information and perfectly opposed preferences shown in Figure 1, then the choice for all panels is obvious. They should choose to avoid the nasty policy battle and

⁶ Note that such incoherence is undesirable even if a particularly talented lawyer could come up with an argument that sounded as though all the opinions were, in theory, not inconsistent. This is particularly so because when the law contains many competing statements about a policy area, a particularly talented lawyer (or district judge) can likely come up with an argument that sounds as if the decisions are consistent in favor of *either side* of a given dispute, thus reducing the appellate court's control over the outcomes of lower court decisions. Recall, for example, the finding by Lindquist and Cross (2005) that too many precedents on a topic tended to work against constraint over lower court judges. Presumably that would not be true if all the precedents said the same thing.

instead settle on a series of narrow, procedural opinions—the best outcome possible under the circumstances.⁷

Now, imagine a second imaginary circuit—one again made up of two potential panels, but this time everyone involved is a liberal (or conservative) with identical preferences. In this circuit, the game strategy is quite different. There will be no policy battles because everyone agrees on the policy outcome. In this circuit, really, the content of a decision is not constrained. Rather, so long as eventually a panel gets around to writing a substantive decision, the circuit's policy statement will be everyone's favorite policy, so everyone gets to reach their first-choice option of a consistent, strong policy statement with which they agree. Indeed, in a world where judges also value reaching the outcome quickly, the first panel will issue the substantive policy statement so that the circuit issues its policy stance sooner rather than later. Subsequent panels may do whatever they like in terms of the content of their decision. (See Figure 1(b)).

Of course, the above analysis is oversimplified in several ways. First, it ignores entirely the possibility that a panel WANTS to engage in a policy battle in order to engage the involvement of another player, the Supreme Court. The possibility that this additional player

⁷ Note that this example has assumed no discounting of the future benefits—hence, the dominance of long-term goals. In reality, the choice between the perpetual policy battle and the cooperative solution of proceduralism will be affected by each panel's weighting of the future—along with, of course, many other complications that are ignored in this simplified model. Note that the strategy associated with this type of infinitely repeated game is referred to as a “trigger strategy” to capture the idea that there are only two paths the game can take: the punishment profile and the cooperative profile. The fate of the game depends upon how much the players care about future rewards. See Watson (2007: 263-66).

may affect decisions is captured in the quantitative model, discussed in more detail below, by controlling for the direct ideological orientation of the panel deciding the case. In the time period under study here, the Supreme Court was a relatively conservative entity. Thus, one would only expect fairly conservative appellate panels to purposefully *try* to engage Supreme Court involvement by issuing substantive decisions and entering a policy battle with their colleagues. On the other hand, liberal panels might be incentivized in general to avoid the Supreme Court's attention, perhaps being more likely to issue more procedural decisions, holding everything else constant. Observing this additional strategic complication, however, is hindered by the possibility of competing direct ideological effects. In particular, reliance on procedural issues may well be a tool preferred by conservative judges—because these decisions generally bar access to court for plaintiffs, they may be seen as doctrines that favor a conservative viewpoint. Ways of controlling for this complication are discussed in more detail below.

As presented, the model is overly-simplified in other ways as well. The example discussed above posits a set of discrete outcomes and choices when in reality the choices facing judges as well as the preference structures of their colleagues are continuous and multidimensional. Additionally, of course, it assumes that judges can expect an issue to repeatedly come before the appellate court—probably a reasonable assumption in some areas of the law though less reasonable in others. Nevertheless, the simplified picture allows us some insight into circumstances that encourage appellate panels (on average) to issue decisions that rely on procedural reasoning rather than explicitly engaging in the policy debate. The bottom line is that one should anticipate that circuits with more preference heterogeneity will issue more procedural decisions than circuits with more homogeneous preferences because of the constraints

imposed by the anticipated future response of their colleagues on the court and the judges' long term policy goals. This is Hypothesis 1.

H1: Panels in circuits with more preference heterogeneity will issue more procedural decisions than panels in circuits with more homogeneous preferences

Hypothesis 1 is distinct from much of the prior literature in that it posits that the *circuit's* characteristics should be important in determining panel behavior rather than just the characteristics of the panel itself. Finally, before moving on it is worth pointing out that Hypothesis 1 does not rely upon appellate judges consciously making complex strategic calculations about the future. Rather, as noted in the Introduction to this paper, the story could equally well unfold through interpersonal dynamics and experience working together with time. An all-out policy battle in a circuit would not only be suboptimal from the point of view of a rational actor interested only in policy outcomes, but it would also be (presumably) suboptimal from the point of view of a person who likes to chat in the elevator with his or her colleagues.

As should be evident from the above discussion, most of the prior literature about strategic opinion writing has considered constraints imposed by judicial colleagues in the single case situation where one takes the individual judges in the panel and considers how they act together to reach a decision. This paper would be remiss if it were to ignore the possibility that intra-panel dynamics also affect the content of a judicial decision. In making the choice between a substantive and a procedural decision, one way of thinking about strategic responses to one's colleagues is to consider the appellate panel as an independent decision making body, deciding each case separately, where the members must agree not just on an outcome but also on the

content of the opinion. The evidence from the Supreme Court, discussed above, supports the idea that sometimes judges make compromises about the grounds for a decision in order to achieve a particular outcome. Thus, Epstein and Knight's qualitative work showing that sometimes a justice will interject a procedural element into a case to achieve a desired outcome might suggest that the same type of bargaining would occur on appellate panels where preferences were unusually divergent. Additionally, work by Staudt, Friedman and Epstein (2008) indicates that ideological homogeneity among the justices joining the majority opinion is correlated with more important constitutional decisions, perhaps evidence that a tighter-knit group will reach bigger issues.⁸ Thus, the literature leads fairly naturally to Hypothesis 2, that more ideologically heterogeneous panels will tend to issue more procedural opinions.

H2: Panels with more preference heterogeneity will issue more procedural decisions than panels with more homogenous preferences.

⁸ Note that it is more difficult to gain leverage over this problem using evidence from the homogeneity of the majority opinion at the Supreme Court level, however, because of the fact that the composition of the majority may well be endogenous to the issues raised by a given case. Thus, it is difficult to separate out causal stories about the composition of a majority coalition on the Supreme Court. An "important" case may well lead to strong ideological sorting of the justices who join an opinion, thus leading to causation flowing both ways in the model. The same is not true if one uses a measure of heterogeneity that exists independently of the case at hand, such as one of the appellate panel (which is chosen without regard to the particular cases) or the circuit as a whole.

It is important to test this alternative hypothesis in part because omitting this variable could be expected to lead to biased conclusions about the role of circuit-level heterogeneity—in particular because circuit-level variance directly causes panel-level variance (plus a large degree of randomness) so the two will be correlated. The theory of Hypothesis 1 requires that circuit-level variance have an effect above and beyond any effects that operate through the composition of the particular panel deciding a case.

Vertical Conflict: Strategic Responses Across the Judicial Hierarchy

In addition to considering conflict among colleagues on the same court, the literature also suggests that strategic behavior occurs between members of courts at different levels of the judicial hierarchy. So, scholars have presented theoretical models suggesting that the specificity of an opinion at the Supreme Court level may be influenced by concerns of hierarchical control (Staton and Vanberg 2008; Posner 1997; Jacobi and Tiller 2007; McNollgast 1995). In particular, the argument made in these pieces suggests that Supreme Court justices are incentivized to write vague, broad opinions when they anticipate recalcitrant lower court judges, In this way, the Court at least avoids obvious disobedience, which could harm its institutional stature. Notably, it is not just the appellate courts that can engage in strategic opinion writing. Empirical evidence from the district courts suggests that choices about how to frame opinions in the lower courts may be influenced by concerns of higher court monitoring (Tiller and Spiller 1999; Schanzenbach and Tiller 2006). In other words, lower courts choose the grounds of their opinion with an eye toward the response of a higher court. Here, the argument is effectively a combination of these two prior stories about cross-hierarchy strategy. The argument is that

appellate courts choose the grounds for their opinions with an eye toward the response of the relevant lower court judge.

In thinking about strategies for appellate judges interested in controlling recalcitrant district judges, it must be remembered that the appellate judges are not in a position where it is easy to exert control over the lower court judges. They have no control over any of the concrete benefits received by district judges, such as compensation or advancement. Indeed, like appeals court judges, district court judges hold their positions with life tenure. Further, most cases are not appealed and so the district judges have the last say in the outcome when that is the case. As was observed long ago by Walter Murphy (1964: 97), appellate judges must convince and cajole lower court judges into doing their bidding when their preferences are not aligned—“reinforce[ing] command with persuasion, with threats, with bargaining” Indeed, at the end of the day Murphy’s suggestions about how to deal with divergent preferences across a judicial hierarchy tend to boil down to basic lessons in how not to irritate lower court judges, making use of personal charm and the occasional “warm note” (Murphy 1964: 102-03). On the other hand: “Where the interests of lower court judges coincide with those of a Supreme Court Justice, the Justice need do nothing to influence the judges’ behavior, except perhaps to inform them of the situation and alert them to the necessity for action” (Murphy 1964: 97).

This aspect of Murphy’s book has not often been studied in the years following its publication, with most scholars preferring to consider the issues of hierarchical control from the perspective of how to best achieve substantive monitoring (e.g., Cameron, Segal and Songer 2000). At the Supreme Court level, this line of work has been quite fruitful, suggesting that, indeed, the Court does appear to engage in strategic monitoring of appellate judges. However, appellate judges might be in a somewhat different position, as the middle managers of the federal

courts—with, perhaps, a stronger insight into the importance of personal relationships in creating the conditions for long term compliance, and a weaker incentive to publicly declare policy statements (since the public and the media pay less attention to the lower courts).

One way of maintaining smooth relations with lower court judges who have divergent preferences might be to issue procedural, formal-sounding opinions when there is a lot of policy divergence between the appellate court and the lower court judge. Taking the issue out of the space of substantive policy and placing it into a formal, procedural frame may be much more effective in ensuring long-term compliance by a judge whose preferences are not aligned with the panel's. In other words, appellate judges may be fully capable of exercising some management psychology in trying to maintain the power of the circuit in establishing the rule of law. For these reasons, I expect to see appellate panels relying upon procedural threshold issues more often when the lower court judge is ideologically distant from the panel. This, then, makes up Hypothesis 3.

H3: Panels that are ideologically distant from the lower court judge working on the case will rely upon threshold procedural issues more often than panels that are ideologically close to the lower court judge.

Conservative versus Liberal Panels

While it is true that a court may make use of a procedural threshold issue liberally or conservatively, with more liberal judges ruling in favor of liberal causes on these issues just as they do on more substantive issues (e.g., Pierce 1999; Staudt 2004; Rowland and Todd 1991), nevertheless there are reasons to believe that there may be a conservative slant to decisions that rely on procedural issues. Cross (2007) showed that judicial decisions that rely on procedural

rules to terminate cases tend to be more conservative than those that do not. To the extent that reliance on a procedural issue generally bars access to court for plaintiffs, the conservative slant is perhaps not surprising. This direct effect on the outcome variable can be controlled for by including a measure of the panel's ideological preferences in the model. However, such a straightforward control might not be strong enough under the circumstances. If it is believed, for example, that proceduralism is a type of tool that itself has ideological content, one should not expect all judges to strategically employ it to achieve ideological goals. Rather, the tool might only be used strategically by those judges whose views align with the general ideological content of the tool. In this case, that group would be conservative judges. In particular, if the use of procedural doctrine has conservative slant, then one would not expect it to be used by liberal judges as a mechanism for hierarchical control. Liberal judges might not want to instruct conservative lower court judges to not hear plaintiffs' claims. If this is so, then there would be problems for the analysis that would not be fixed merely by including the panel's ideology as a direct effect in the model. Rather, one would need to consider separate models of strategic behavior for liberal judges and conservative judges. For these reasons, the analysis will consider whether liberal panels and conservative panels behave differently with regard to this strategic tool, with the expectation that the effects will be strongest for conservative panels. This is Hypothesis 4.

H4: Strategic use of procedural law will be stronger for conservative panels than for liberal panels.

Data and Measurement Issues

This study makes use of the update to the U.S. Appeals Court Database completed by Ashlyn K. Kuersten and Susan B. Haire (original database created by Donald R. Songer). The database includes a wealth of information about published decisions issued by the U.S. Courts of Appeals.⁹ The database codes the grounds for decisions, including whether or not the outcome of the case turned on a procedural threshold issue, such as standing or timeliness,¹⁰ for cases decided in the years 1997 through 2002. Using this information, it is possible to track the tendency of courts to rely on these types of issues in their opinions. Figure 2, below, summarizes this information across time and for different appellate circuits. The figure shows four types of decisions: those that do not mention a threshold issue at all, those that mention it but do not discuss it (as, for example, if a court indicates the grounds for jurisdiction but the issue is not really a question in the case), those that discuss the threshold issue but do not rely on the

⁹ Note that the data are limited to published decisions, which, as noted by many prior researchers, introduces a selection problem into the analysis. This is particularly problematic here, where the object of study involves judges who choose to issue narrower decisions. The decision to publish a decision might be expected to be negatively correlated with reliance on procedural issues. However, this selection problem would operate against finding the hypothesized results here. Therefore, the analysis here can be seen as a conservative test given the selection problems.

¹⁰ There are ten types of issues characterized as “threshold” issues by the coders. These are: jurisdiction; failure to state a claim or no proper cause of action; standing; mootness; exhaustion; timeliness; immunity; frivolousness; political question doctrine; and “other,” which includes collateral estoppel.

threshold issue for the outcome, and, finally, those that rely on the threshold issue to decide the case (such as what the Court did in the Pledge of Allegiance case).

In the quantitative analysis, the categories illustrated in Figure 2 are captured in two different ways. First, the tendency to rely on a threshold issue for the outcome is modeled using a dichotomous variable that codes the other three treatments of the threshold issue (from no mention to discussion) as “0”. In this model, it is assumed that judges are capable of interjecting or relying upon a dispositive procedural issue on their own, rather than being fully constrained by the issues raised by litigants or the trial court decision. As discussed in the foregoing pages, there are reasons to believe that judges can and do behave in this manner. In subsequent models, however, the cases in the data are broken down into two groups. One set of cases includes all those where there is no mention of a procedural issue or where the issue is mentioned but not discussed. The other set of cases includes those cases where there is discussion of the procedural issue or the issue is relied upon for the outcome. These two subsets of the data are then analyzed separately in an attempt to control for whether or not the issue has been raised. The basic idea is that in the first set of cases, the issue was likely not raised whereas in the second set, the issue was more likely to have been raised by a litigant or the trial court judge. Although splitting the cases this way limits the number of cases available for analysis, it can help answer concerns about controlling for whether the issue was raised or not.

The key explanatory variables for this theory each must be derived from a measure of judicial policy preferences. The preferences of appeals court judges are measured here using Judicial Common Space scores (Giles et al. 2001; see also Epstein et al. 2007). These measures of ideology are based on the preferences of the appointing president in combination with senatorial courtesy. Though not perfect measures of ideological preferences, they have been

shown to have face validity and are widely recognized in the literature to be the best measures of preferences available for appellate court judges. The preferences of the district court judges, used to test Hypothesis 3, are slightly rougher—taken only from the Common Space score of the appointing president (Poole 1998; Poole and Rosenthal 1997).¹¹ Nevertheless, although there may be somewhat more error in the preference measures for district court judges, they do occur in the same space and so can be used to estimate ideological distance between the appellate and district judges.

Judicial Common Space scores are, then, used to calculate the appellate panel's preference point, using the mean judge score as suggested by prior work by Cross (2007), which indicates that a summative measure is better than a median for capturing the policy preferences of an appellate panel. This measure is captured by the variable, *Panel liberalism*.¹² The standard measure of population variance is used to measure preference heterogeneity among both judges on a circuit (for a given year) and judges on a particular appellate panel. In the data used in the analysis, *Circuit ideological variance* ranges from 0.049 to 0.293, with a mean of 0.124. For *Panel ideological variance*, the range of values is from 0 to 0.281, with a mean of 0.103.¹³

¹¹ Note that the scores were downloaded from Keith Poole's website at <http://voteview.ucsd.edu/basic.htm> March 10, 2009.

¹² In the data used in the analysis, the panel-level measure of liberal preferences ranges from -0.567 to 0.513, with a mean of -.12.

¹³ The measure used for variance at the circuit level is the variance of the judicial common space score of the author of each opinion in the data for the year in question. The circuit-level mean is the mean of the judicial common space score of the author of each opinion in the data for the year in question.

Of course, *Circuit ideological variance* and *Panel ideological variance* are causally related to one another, suggesting there may be some problems due to multicollinearity in a model that includes both measures. For this reason, the model will be estimated considering each separately as well as together in order to better understand the likely causal structure. The conflict between an appellate panel and the lower court judge is captured by the variable *Appellate-district dissonance*, which is measured as the Euclidean distance between the mean Common Space score of the appellate panel and the Common Space score of the lower court judge. *Appellate-district dissonance* ranges from 0-1.113, with a mean of about 0.43. “0” means that the district court judge has the same ideology score as the mean of the panel; thus, there is no dissonance between the two. At the other end of the range, a dissonance score near “1” indicates that the district court judge is at the opposite end of the spectrum of ideology scores from the appellate panel.

Several controls are included in the models in addition to the concepts of interest. One control is a variable that reflects whether a state governmental entity is a party to the case: *State entity party*. This variable is an important control because the law itself instructs federal courts to defer to state governments by using threshold issues,¹⁴ and so one can expect a positive relationship between a state being party to a case and the use of procedural threshold issues. In addition, the model controls for the type of case by including a dummy variable for *Criminal issue*, as criminal cases are expected to be resolved less often through the types of procedural

¹⁴ Sovereign immunity is one such doctrine. Additionally, federal law suggests that federal courts may decline to hear cases if concurrent proceedings are going on in state court—a prudential limitation on jurisdiction to avoid conflict between state and federal courts.

threshold issues captured by the appellate courts data because doctrines such as standing and other jurisdictional concerns are more likely to arise in a civil setting.

Evidence and Analysis

Models 1-3 are presented in Table 1, below. Each of these models predicts the tendency of an appellate decision to rely upon a procedural threshold issue rather than reaching the substantive policy issue at stake in the case.¹⁵ Thus, these models can be seen as attempting to capture behavior like the Supreme Court's decision in the Pledge of Allegiance case—avoidance of the substance in favor of a more narrow, procedural resolution. Model 3 includes both measures of ideological variance: *Panel ideological variance* and *Circuit ideological variance*. Models 1 and 2 consider each separately. The models presented in Table 1 indicate that effects due to within-court ideological conflict are related to the variance of ideology at the circuit level rather than at the level of the particular panel. *Panel ideological variance* is not significant in a model by itself or when included with *Circuit ideological variance*. On the other hand, *Circuit ideological variance* is positively related to the discussion and use of procedural threshold issues in opinions in the model by itself, and is also significant in the model that includes *Panel ideological variance*. The analysis suggests, then, that it is the circuit's variance that affects the decision to issue a procedural decision, not the panel's variance. It is not that judges use

¹⁵ A logistic regression model is estimated using a random effects model such that each circuit-year is allowed to have a distinct intercept. This creates a simple multi-level model (see Steenbergen and Jones 2002) where the lower level of analysis is the individual case and the upper level is the circuit-year. This approach is used in order to not over-estimate significance of relationships, which might occur due to possible autocorrelation within the natural groupings in the data.

procedural resolutions to resolve conflict in a given dispute, but rather that judges are playing a longer-term game in thinking ahead about the actions of their colleagues on the court. In crafting opinions, then, judges seem to be concerned with the big picture of the evolution of the law—not just the outcome of a particular case. In terms of the above-described hypotheses, Hypothesis 1 is well-supported by the data whereas Hypothesis 2 is not.

[Table 1 About HERE]

Model 4, shown in Table 2, extends the model of the dichotomous decision to rely upon a threshold issue to include a measure of the ideological dissonance between the appellate panel and the district judge who heard the case, *Appellate-district dissonance*. In Model 4, only *Circuit ideological variance* is included, though the results are the same when both measures of preference heterogeneity are included. Model 4 is suggestive that dissonance between the appellate panel and the district judge increases the likelihood of a decision reliant on procedural issues. However, the significance level is somewhat marginal so Hypothesis 3 is only weakly supported by this evidence. However, when one looks separately at the behavior of liberal and conservative panels, a different story emerges. In Table 2, Model 5 is identical to Model 4 except the data are restricted to panels with a mean liberalness score below zero (the neutral point). When the data are confined to conservative-leaning panels, the effect of ideological dissonance between the panel and the lower court judges is larger and is statistically significant at conventional levels. Contrarily, when one looks only at liberal-leaning panels, the coefficient is not even marginally significant ($z=0.90$) and is actually signed negatively (results not shown). So, the data confirm the suspicion that the strategic control effects are much more pronounced

for conservative panels, supporting Hypothesis 4.¹⁶ It appears to be the case that the use of procedural issues in appellate opinions is a tool used by conservative panels to control dissonant district judges more than a tool used by liberal panels to control dissonant district judges. Nevertheless, the data supports the theory that at least some group of judges strategically uses procedural issues as a tool of hierarchical control.

Evidence from a Split Dataset

As noted above, some might argue that the analysis presented here ignores the chief cause of reliance on a procedural issue: whether the issue was raised by a litigant or the lower court. The data used in this paper does not include coding of issues raised in the briefs to the court. Nevertheless, it is difficult to imagine why this omitted variable would cause the relationships observed in this paper—unless one believed that whether litigants raised the issue was influenced by the ideological heterogeneity of the circuit court. Because that possibility is not completely far-fetched, however, a rough attempt is made here to control for whether the issue was raised or not. This is done by splitting the data into two subsets. The first subset includes all those cases without mention of a procedural issue or where the issue was mentioned but not discussed. In this subset of cases, we can feasibly claim that the issue was not raised by the litigant. The second subset includes all those cases in which a procedural issue was either discussed or relied upon by the appellate court. This second subset of cases probably at least approximates the cases in which the issue was raised by a litigant. Of course, this drops the numbers available for analysis somewhat. However, the results are interesting and help give additional confidence that the trends observed here are real. The results from the split data

¹⁶ Running a model with an interaction term gives an interaction coefficient that is signed as expected and marginally statistically significant ($z = 0.086$).

analysis are presented in Table 3, below. Note that the data are again limited to conservative-leaning panels as in Model 5, above.

[Table 3 about here]

First, turning our attention to the court's tendency to rely upon a threshold issue as compared to merely discuss it (Table 3, Model 6), we notice that the effect due to variance of the appellate circuit continues to exert the same type of influence in this more limited set of cases and is again statistically significant. Additionally, the hierarchical control variable (*Appellate-district dissonance*) is also in the expected direction and is strongly statistically significant. So, the basic trends discussed above continue to manifest even in this smaller set of cases where we can expect that the issue was put before the court by a litigant or the lower court decision.

Next, and perhaps even more interestingly, consider the subset of cases where a threshold issue is either not mentioned at all or only mentioned in passing—modeling the tendency of the court to mention the threshold issue in the opinion. While merely mentioning such an issue is not the same as relying on it and avoiding the policy question, one can imagine that if the above-described trends evolve through habit and experience with their peers (as opposed to explicit strategizing), judges on conflict-ridden circuits might be more likely to have procedural threshold issues on the tip of their tongues, so to speak. Thus, even when the facts of the case (or the litigants) really don't give the panel a reason to rely upon a procedural threshold issue, one can imagine that the judges mention it anyhow because they are in a circuit in which it is more common to discuss such issues in general. In fact, the evidence is quite strong that decisions written in high-variance circuits are far more likely to mention a procedural threshold issue (such

as jurisdiction) than decisions written in more homogenous circuits. The results are presented in Table 3, Model 7. Note that the magnitude of the coefficient is larger than in the other models and that the significance level is very high. No other variable is significant in this model—perhaps not surprisingly given that the tendency to mention a procedural issue in passing might be seen as likely to be random.

Before moving on, it is worth commenting on a few other features of the data analysis. Overall, the control variables operate as expected, with participation by a state entity creating more procedural decisions and criminal cases resulting in fewer. Notably, no consistent, direct effect is observed in the models due to ideology of the panel. This is in part, however, due to the limitation of several of the models to conservative-leaning panels. In Model 6, for example, if the analysis includes all panels there is a significant negative trend associated with increasingly liberal panels, as would be expected given the fact that relying on a threshold issue may generally be expected to bar plaintiffs from access to court. Thus, in that model only one can see the direct influence of ideology. Additionally, all of the models are a statistically significant improvement over a null of no model. Finally, the magnitude of the above-discussed effects is not inconsequential. Using the means of continuous variables and the modal values of discrete variables, Model 1 predicts a change in the likelihood of relying on a threshold issue (among all cases) from 0.13 to 0.29 over the range of circuit court variance. Recall, however, that relying on a threshold issue is not a common event among all cases, with the background expected value of only about 0.19. In Model 5, the effect among conservative panels as one moves from a perfectly non-dissonant lower court judge to a perfectly opposed one, the effect is even larger, moving the predicted probability of reliance on a threshold issue from 0.13 to 0.41. Finally, in Model 7 a different version of the dependent variable is modeled—that which tries to control for

whether the issue was raised by the parties. Among the cases where the threshold issue was at least discussed, appellate courts relied on it for the outcome in about 46 percent of cases overall and about 52 percent of cases decided by conservative-leaning panels. However, the effect on conservative panels due to ideological dissonance with the trial judge was significant, moving the expected probability of reliance on procedure from about .25 in the situation of an ideologically-aligned judge to about 0.83 when the lower court judge was quite dissonant with the appellate panel. Overall, however, there is still clearly a large component of the decision about opinion content that is not captured in this analysis as even in Model 7 the model's prediction is inaccurate in about a third of the cases and only reduces the error by about 25 percent. Nevertheless, this paper illustrates that there are systematic patterns to the content of appellate decisions; like outcomes, these decisions are not immune to quantitative analysis.

Discussion

This paper develops a model of judicial “proceduralism” that relies on a simple notion of judicial preferences and the idea that judges care about long-term policy goals—which must be achieved through a series of opinions—rather than only caring about one case at a time. The evidence presented in this paper indicates that there is a clear and interesting pattern to the procedural content of judicial decisions. Judges working in a climate of ideological conflict have an increased tendency to issue procedural opinions even in panels that do not themselves have to negotiate a lot of political conflict. Further, conservative appellate panels make use of procedural doctrine in an attempt to better control ideologically distant lower court judges.

Importantly, while the model is developed from the notion of explicitly strategic judges who take the future into account, it is also perfectly consistent with the idea that judges learn

from their experience making law in their circuit. Without being explicitly and consciously strategic, judges in conflict-ridden circuits probably realize reasonably quickly that insisting on strident policy statements in decisions does not win them the whole policy grab-bag. Rather, such behavior likely irritates other judges and provokes a response. Such negative feedback would, of course, not occur in a circuit of like-minded judges. Thus, while this paper is framed in terms of rational strategic behavior, the story is easily retold as one of social dynamics and group behavior. Indeed, the evidence here about long term collegial effects within the circuit is perhaps most consistent with a social/cultural explanation in that the pattern is seen not just in the court's decision to rely on a procedural issue for an outcome, but also in the tendency to bring up a procedural issue even when it is not seen as particularly relevant. This trend smacks of habit-based behavior, proceduralism unconsciously ingrained through experience rather than as a carefully thought-out response to the anticipated behavior of one's colleagues.

Regardless of the level of conscious thought that goes into the trend toward increased proceduralism, the evidence presented here indicates that one part of the story about why such behavior occurs in groups charged with making policy sequentially relates to how much anticipated conflict is present in the group. This is so both within the group and between the group and its underlings. In both situations, conflict leads to proceduralism. However, as a tool of hierarchical control, the tendency to rely on procedural threshold issues is primarily used by conservative appellate panels to control ideologically distant lower court judges. The tendency to use procedure as a form of hierarchical control may be related to the need to cajole lower court judges into compliance, perhaps by framing the issue as a procedural, formal issue that does not engage policy discretion.

Overall, then, this paper suggests that a diverse judiciary is a procedural judiciary, one that will increasingly rely on procedural rules to prevent substantive decisions from occurring. From a normative perspective, it is not entirely clear whether increased proceduralism is a good or bad outcome for the courts. Legal scholar Cass Sunstein (1996) argues that agreement on outcomes or low-level principles while leaving higher level decisions to democratically-accountable branches of government or (at least) for academics to piece together using a long timeline of judicial decisions is a key component of judicial legitimacy and rule of law. He describes such behavior as “incompletely theorized agreements,” in which judges agree on low-level principles and outcome but may not agree on higher-level abstractions. Incompletely theorized agreements may allow groups of judges to resolve cases without working out all their differences. While Sunstein only briefly refers to a procedural decision as an example of this behavior, using procedure to decide a case without reaching the merits is quite possibly the most extreme form of an incompletely theorized agreement. Judges from the left and the right may be able to agree that a case is procedurally flawed in some way when they cannot agree on a substantive rule to govern the area. It is easy enough to see why proceduralism might help in at least the appearance of rule of law, as Sunstein’s argument suggests. Nevertheless, there is almost certainly an upper bound to the level of procedural decision making desirable in any decision body. At some point, it can become a tool to drive discretion underground and make the contours of the policy debate hopelessly obscure and daunting for the neophyte. Further, to the extent that these doctrines work overall to limit access to judicial resolution of disputes, increased proceduralism could lead to citizen dissatisfaction with government dispute resolution mechanisms. While some might have access to private forums for their grievances with one another (e.g., through private arbitration), other types of disputes might simply not be resolved.

The procedural morass that governs prisoner lawsuits is an example of how procedural doctrines can grow in complexity to the point where litigants cannot achieve meaningful access to the courts. None of this is to suggest that diversity in the courts is a bad thing, but only to suggest that it is important to pay attention to (potentially) unwanted side effects of political conflict in the courts.

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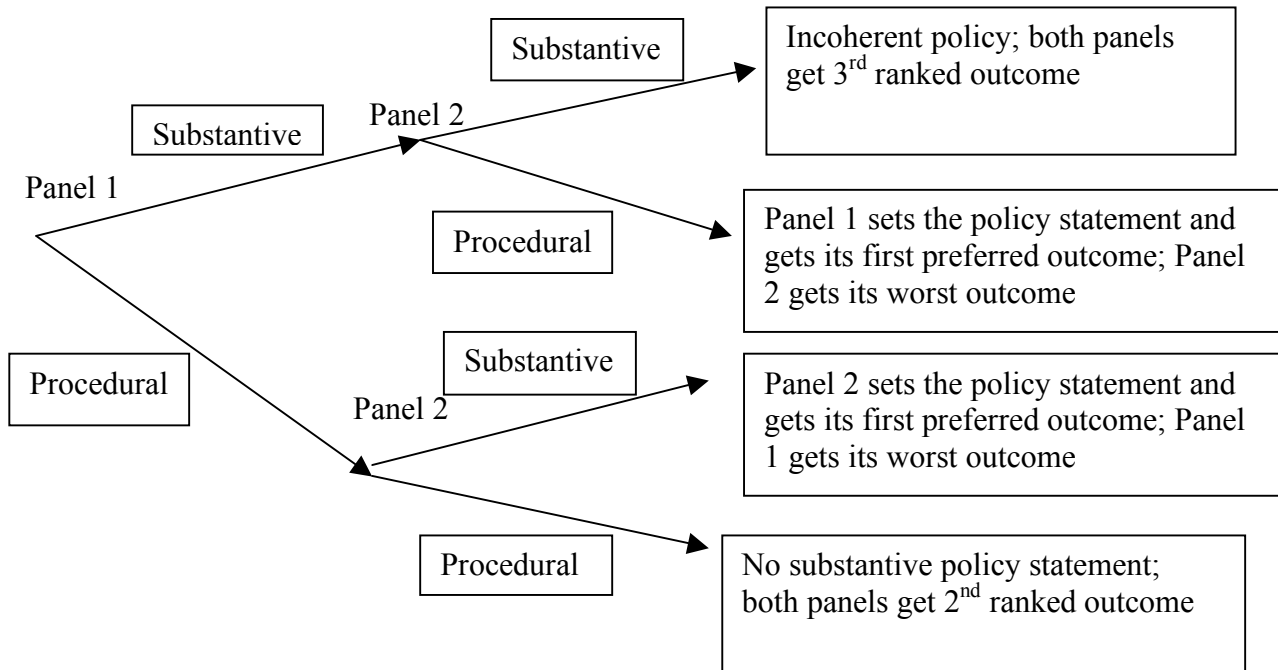
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Figure 1 (a): 2-case iterated game in a court with completely opposed panels



(b): the same game with identical preferences across panels.

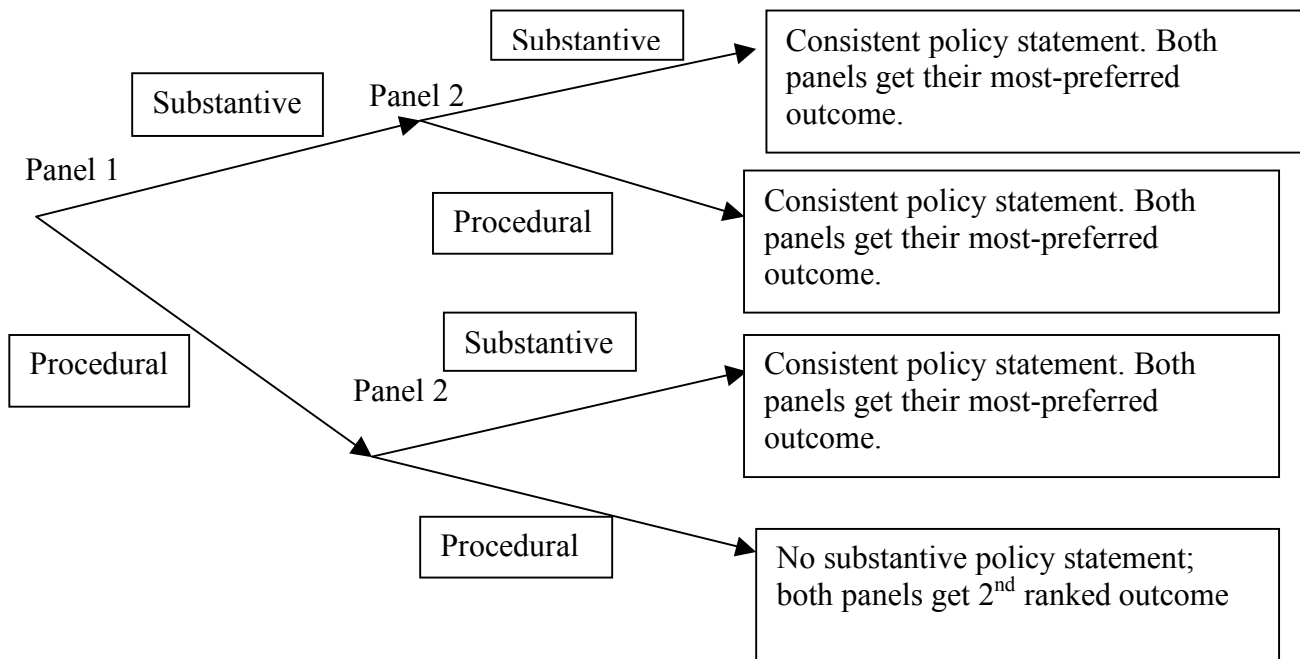


Figure 2: A look at the use of procedural threshold issues across time and circuits

YEAR	Not Mentioned	Mentioned	Discussed	Outcome “Turns” on the Threshold Issue
1997	130	97	65	67
1998	139	82	72	67
1999	118	94	77	71
2000	122	92	81	65
2001	106	90	99	64
2002	124	95	73	67
Total	739	550	467	401

CIRCUIT	Not Mentioned	Mentioned	Discussed	Outcome “Turns” on the Threshold Issue
D.C.	7	72	55	46
1 st	9	94	34	43
2 nd	28	70	49	32
3 rd	53	41	47	37
4 th	107	22	25	26
5 th	96	18	33	33
6 th	58	50	36	36
7 th	119	5	30	26
8 th	107	13	40	19
9 th	66	38	46	30
10 th	67	56	34	23
11 th	21	71	38	50

Table 1: Logit Models of the Tendency to Rely on a Theshold Procedural Issue using Different Measures of Internal Conflict

	Model 1: Circuit-level Ideological Variance/Mean	Model 2: Panel-level Ideological Variance/Mean	Model 3: Both Measures of Ideological Variance/Mean
Circuit Ideological Variance	4.107 *** (1.316)	--	4.333 *** (1.641)
Panel Ideological Variance	--	1.55 (1.24)	-0.316 (1.371)
Criminal Issue	-0.392 * (0.216)	-0.429 ** (0.218)	-0.396* (0.217)
State Entity Party	0.840 *** (0.223)	0.803 *** (0.226)	0.840 *** (0.223)
Panel Liberalness	-0.455 (0.425)	-0.650 (0.460)	-0.425 (0.441)
Constant	-2.139 *** (0.241)	-1.758 *** (0.202)	-2.133 *** (0.243)
N	829	829	829
Number of Level 2 Units (Circuit-Years)	68	68	68
Log Likelihood	-387.58 ***	-390.73 ***	-387.56 ***

*p<0.10; **p<0.05; ***p<0.01

Table 2: Extending the Model of Reliance on a Threshold Issue to Include a Measure of Ideological Dissonance Between the Panel and the Lower Court Judge

	Model 4	Model 5—Data Restricted to Conservative Panels
Circuit Ideological Variance	5.01 *** (1.780)	7.075 *** (2.535)
Criminal Issue	-0.574 ** (0.245)	-0.700 ** (0.317)
State Entity Party	0.669 *** (0.266)	0.617 ** (0.317)
Panel Liberalness	0.026 (0.503)	1.617 (0.992)
Appellate-District Dissonance	0.769 * (0.460)	1.389 ** (0.585)
Constant	-2.490 *** (0.380)	-2.626 (0.492)
N	610	425
Number of Level 2 Units (Circuit-Years)	68	62
Log Likelihood	-277.59	-191.389

* p < 0.10; ** p < 0.05; *** p < 0.01

Table 3: Logistic Models of the More Procedural Action in Two Subsets of the Data—(data restricted to conservative-leaning panels)

	Model 6: Dependent Variable: Mentioning Threshold Issue = 1; No Mention of Threshold Issue =0	Model 7: Dependent Variable: Relying on Threshold Issue = 1; Discussing Threshold Issue=0
Circuit Ideological Variance	34.04*** (11.95)	8.05 ** (3.658)
Panel Liberalness	0.861 (1.63)	0.765 (1.433)
Criminal Issue	-0.483 (0.464)	0.459 (0.431)
State Entity Party	-1.28 * (0.759)	0.186 (0.398)
Appellate-district dissonance	0.316 (0.963)	2.391 *** (0.818)
Constant	-5.40 *** (1.75)	-2.067*** (0.672)
N	273	155
Number of Level 2 Units (Circuit-Years)	58	53
Log likelihood	-115.45	-98.93

*p<0.10; **p<0.05; ***p<0.01