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# INSTITUTIONAL STRESS AND THE FEDERAL DISTRICT COURTS: JUDICIAL EMERGENCIES, VERTICAL NORMS, AND PRETRIAL DISMISSALS

Daniel J. Knudsen\*

*This Article examines the effects of judicial emergencies on the federal district courts. The Administrative Office of the U.S. Courts declares judicial emergencies when a weighted statistic of filings and vacancy days exceeds certain thresholds. This Article presents evidence on the relationship between emergency status in a judicial circuit and the frequency of pretrial disposition in federal district courts within that circuit: a federal district court is statistically more likely to dismiss a case before trial if its corresponding circuit court is in emergency. This evidence suggests that emergency status may affect normative expectations between the federal district courts and the federal courts of appeals. Federal district courts in circuits under stress appear to increase their “gatekeeping” function by reducing the number of full trials that they hear. The evidence presented in this Article also suggests that the stability of vertical norms between the federal district courts and the federal circuit courts plays an important role in the federal district courts fulfilling their trial-like institutional role.*

## I. INTRODUCTION

The federal district courts, and federal district-court judges, remain an undertheorized and understudied part of the federal judiciary.<sup>1</sup> One important deficit is a lack of focus on institutional analysis. Indeed, “much of the existing empirical work on federal district courts has failed to take account of the institutional setting in which those judges operate.”<sup>2</sup> This institutional setting is important. The federal district courts have jurisdiction over the vast majority of claims arising under federal law. When compared with the Supreme Court in terms of raw volume, the differences in filings are stark. The federal district courts

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<sup>1</sup> See generally Pauline T. Kim et al., *How Should We Study District Court Decision-Making?* 29 WASH. U. J.L. & POL’Y 83 (2009) (detailing the lack of scholarship in this area).

<sup>2</sup> *Id.* at 84.

handle over 300,000 cases a year, compared to the federal circuit courts at approximately 50,000 cases a year, and the Supreme Court at around 75 cases a term.<sup>3</sup> Almost one thousand judges make up 78% of the federal judiciary and oversee nearly 79% of cases in federal court.<sup>4</sup>

A second important deficit that remains undertheorized and understudied is the interactions and hierarchies between the federal district courts and the federal circuit courts. The district courts constitute the first step in the process of lawmaking. By shaping factual and procedural records and taking the first pass at unsettled questions of law, the federal district courts are important determiners of what ultimately constitutes the law.

This Article diminishes both of these research deficits and contributes to a deeper understanding of the district courts and district-court judges by examining the effects of institutional stress as measured by judicial emergencies, on case outcomes. The Article finds that vertical norms, that is, institutional relationships and understandings between the district and circuit courts, matter. Institutional stress in the federal circuit courts results in federal district-court judges more frequently disposing of cases on pretrial motions. This finding bolsters scholarship suggesting that the federal district courts are fast losing their character as trial courts.<sup>5</sup> This Article's finding also suggests that the institutional relationship between the federal district courts and the federal circuit courts may matter more than previously thought for district court decision making and for the maintenance of the federal judiciary as a deliberative institution.

Despite the lack of scholarly attention, the federal district courts have unique judicial characteristics that make them important areas of study. One important difference between appellate courts and trial courts is the institutional setting in which they operate. Unlike justices on the Supreme Court or judges on federal circuit courts, federal district-court judges work alone on the bench.<sup>6</sup> Thus, the constraining aspect of panel effects is not present. This in turn has ramifications for judicial accountability: panel effects can work to dampen ideological voting, while

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<sup>3</sup> See, e.g., BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 132 (2010). The issue of the Supreme Court's shrinking docket is also much discussed and analyzed. See, e.g., Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1219, 1276-78 (2012) (finding that an ideologically fractured court is likely to hear forty-two fewer cases based on data from 1940 to 2008).

<sup>4</sup> Kim, *supra* note 1, at 84.

<sup>5</sup> See Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 749 (2010) (describing a "move towards paper courts").

<sup>6</sup> The one exception to this is the three-judge district panel, only used nowadays in legislative reapportionment cases. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 5 (1996) ("Behind the decline of the device is a desire to reduce the Supreme Court's obligatory jurisdiction.").

judges deciding alone face no such constraints.<sup>7</sup> Other scholars point to panels as potentially polarizing. Panel effects are a complex issue, but the important point for district courts is that they are absent. District judges may face other constraints from colleagues, but these effects are likely more attenuated.

The second important difference between appellate courts and trial courts is the procedural variety of federal district decision making. Federal district judges rule multiple times in the course of a lawsuit on numerous motions that affect the outcome. They also engage in fact finding more often than the federal circuit-court judges.<sup>8</sup> These differences in judicial agency mean that the decision making behavior of federal district-court judges is cumulative and decisions may be influenced by previous decisions in the same case. This also means that judges evaluate their decisions on pretrial motions and evidentiary issues in light of other variables: relationships with repeat litigants, other judges' decisions on preliminary short motions and matters, and in relation to other rulings on initial issues in disparate cases.

Lastly, the institutional signaling that federal district courts engage in is different.<sup>9</sup> Of particular interest is the institutional relationship between district-court judges and federal circuit-court judges.<sup>10</sup> The stability of this institutional

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<sup>7</sup> This idea is highlighted in CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 136 (2006) ("The presence of a potential dissenter—in the form of a judge appointed by a president from another political party—creates a possible whistleblower, who can reduce the likelihood of an incorrect or lawless decision.").

<sup>8</sup> Kim, *supra* note 1, at 84–85 ("Too often, studies of the district courts rely on an implicit assumption that judging at the trial court level is fundamentally the same as judging at the appellate level . . . [T]his approach is misguided . . . [U]nlike in the typical appellate case, a district judge may rule in a single case on multiple occasions and on different types of questions, only a few of which could be dispositive but all of which affect the case's progress and ultimate outcome. Moreover, because many of the judge's actions are taken in response to motions by the parties, there is no determinate sequence in which pretrial litigation events occur.").

<sup>9</sup> For an example of this signaling, see Catherine T. Struve, *Power, Protocol, and Practicality: Communications from the District Court During an Appeal*, 84 NOTRE DAME L. REV. 2053 (2009) (demonstrating the circumstances, including when a district judge injects reasoning into a ruling, that inform the circuit court of the merits of the case's review).

<sup>10</sup> Studies that attempt to examine this institutional relationship include scholarship about chief judges of the federal courts of appeals elevating federal district judges to meet overburdened caseloads. *See generally* James J. Brudney & Corey Distlear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC'Y REV. 565 (2001); *see also* Sara C. Benesh, *The Contribution of "Extra" Judges*, 48 ARIZ. L. REV. 301, 310–14 (2006) (finding that, for the Ninth Circuit, elevated senior judges meet or exceed their expected workload relative to the sitting Circuit judges but that all elevated judges are reluctant to write separate opinions or dissent from their appellate-level colleagues).

relationship is important both from the perspective of litigants in the federal system and the judges themselves.

This Article examines federal district-court case outcomes through the lens of the effects of institutional stress, using the declaration of a judicial emergency—a function of both filings and also vacant judicial seats—as a variable capturing this stress. From 2009 to 2010, attempts to fill vacancies to the federal judiciary languished, and this trend continues.<sup>11</sup> Though the number of vacancies has since subsided, over the course of the previous three years there were often more than 100 vacancies to the federal judiciary in a given month.<sup>12</sup> The Administrative Office of the U.S. Courts (AOUSC) considers a subset of these vacant judicial seats problematic enough to warrant the label “judicial emergency.”<sup>13</sup> Vacancies have been a problem throughout the Obama administration, and given the polarized nature of the national political discourse, are likely to remain a problem in the future.<sup>14</sup>

The crisis of the recent spate of judicial emergencies is, in short, a window allowing a glimpse through institutional stress into federal district-court outcomes. Exploiting the theory that judicial emergencies represent a form of institutional stress for the federal courts, and exploiting the fact that these emergencies for the first time have systematically affected the federal district courts, this Article finds that the relationship between the federal district courts and the federal circuit courts matters in a deeper way than previously thought. In particular, a statistical analysis of decisions finds that a judicial emergency in a corresponding circuit court results in more dismissals on pretrial motions. This Article also finds that this effect is more pronounced in larger circuits. This finding paves the way for an analysis of institutional stress that focuses on district-court judges as embedded decision makers in a hierarchy. It suggests that, under stress, district-court judges will work to protect the network connections and nodes along that hierarchy.

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<sup>11</sup> Dalhia Lithwick, *Empty Chambers: Why the Judicial Vacancy Crisis Matters*, SLATE (Sept. 10, 2010), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/09/empty\\_chambers.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/09/empty_chambers.html) [hereinafter *Empty Chambers*]; Dalhia Lithwick, *The Courthouse Is Closed: Even Before the Shutdown, Federal Courts Had Already Been Crippled by the Sequester*, SLATE (Oct. 14, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/10/federal\\_courts\\_and\\_shutdown\\_the\\_sequester\\_had\\_already\\_crippled\\_american.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/federal_courts_and_shutdown_the_sequester_had_already_crippled_american.html) [hereinafter *Courthouse Is Closed*] (detailing effects of judicial vacancies with the recent federal shutdown); see also *infra* note 39 and accompanying text.

<sup>12</sup> See, e.g., *Current Judicial Vacancies*, UNITED STATES COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx> (last visited Jan. 31, 2014) (noting that as of January 31, 2014, there were ninety-six total vacancies).

<sup>13</sup> The rules for the declaration of judicial emergencies are detailed below. See *infra* Part II.B.

<sup>14</sup> Filibuster reform may increase the speed of confirmations. But to the extent that the political process overemphasizes judges’ political decision making and under emphasizes judges’ embedded decision making and institutional constraints, filibuster reform may not have as strong an immediate impact.

This Article contributes to the literature on institutional stress and judicial decision making. Institutional stress is a nascent frame used to study courts and case outcomes. The research presented in this Article thus provides an important district-court companion and counterpoint to recent work on courts of appeal. In a recent article, Professor Bert I. Huang examined the effects of institutional stress on the tendency of the federal *courts of appeals* to grant deference to lower court decisions.<sup>15</sup> By examining a period of expedited immigration board review—“a surge”—Professor Huang isolated the effects of an increased caseload on the Second Circuit and Ninth Circuit.<sup>16</sup> Professor Huang’s narrative is one of time pressure: with compressed time to decide, federal appellate courts are likely to give more deference to a lower court, especially on questions of state law.<sup>17</sup> Professor Huang posits that an increasing caseload overwhelms each judge’s decision with respect to the marginal value of spending extra time on aspects of a case, and instead the federal appellate court judge defers to a lower court’s decision.<sup>18</sup>

Earlier research also examined judicial emergencies and the process of appointing judges, but none did so in the context of empirical analysis of institutional stress. These articles mostly focused on political dynamics in Congress as part of the nominating process.<sup>19</sup> This Article expands that focus. Its findings have important implications for the role of federal district courts in a democratic and constitutional structure. The erosion of district courts as trial institutions, for example, erodes access to jury trials and consequently removes an important site for deliberative democracy. Delays and backlogs harm not only ordinary citizens but also the business community as it seeks other means to effectively and impartially resolve contract and other business disputes. This Article demonstrates that, under increasing institutional stress, these negative effects are increasing.

The Article proceeds in three parts. Part II explores the declaration of judicial emergencies by the AOUSC as an indicator of institutional stress. Examining three case outcomes—remands to state courts, remands to government agencies, and disposals on pretrial motions—this Article shows a robust statistical effect of institutional stress on disposals of pretrial motions. Part III details the statistical analysis and this effect. Part IV examines more carefully the idea of institutional stress to the judiciary within the framework of institutions and economics. Part IV then theorizes about vertical, horizontal, and chronological norms that embed federal district-court judges and how institutional stress can affect these norms. Part IV also highlights areas for additional research. Part V concludes by offering insight on how an institutional theory of judicial decision making could

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<sup>15</sup> Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011). Professor Huang also posits that judicial emergencies could be a source of institutional stress. *Id.* at 1115.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1111–13, 1118–21.

<sup>19</sup> *See infra* Part II.A.

complement psychological, utilitarian, and political theories of judicial decision making. The Appendix presents more detail on the regression analysis that confirms other statistical analyses done in the body of the paper.

## II. JUDICIAL INSTITUTIONAL STRESS AND DISTRICT-COURT OUTCOMES

### A. Existing Literature on Judicial Emergencies

Scholarly studies focused on judicial emergencies mostly reside in political-science literature. Their locus of analysis is the congressional nomination process, which is an important part of the story. One important study linking nominations to vacancies was a study of the expansion of the judiciary, and congressional intent in doing so.<sup>20</sup> In examining issues of the expansion of the judiciary and nominations to newly created seats in it, the study posits two reasons for expansion: political efficiency and institutional efficiency.<sup>21</sup> Institutional efficiency rationales call for judicial expansion because of concerns over the efficacy of judicial decision making. Rising caseloads might trigger these concerns, and calls from within the judiciary itself for reform would also employ the rhetoric of institutional efficiency rationales.<sup>22</sup> These institutional concerns thereby gesture at the effects of institutional stress internal to the federal judiciary. However, these studies do not examine the expansion's effect on case outcomes as a metric of institutional efficiency.

Vacancies in particular have been studied. But there is a tendency in earlier studies to focus on time-based outcome variables. A study regressing judicial vacancies on case disposal time and workload in the federal courts of appeals from 1971 to 2002 finds significant effects on time to disposal of cases. The study used a "vacancy rate"<sup>23</sup> measure and controls for the size of court business as measured by number of appeals filed, expansions in the number of judgeships, and percentage of newly commissioned judges.<sup>24</sup> While this finding is interesting, it is not surprising: faced with vacancies, a given court of appeals will probably take longer to dispose of cases simply because it takes longer to hear them. Moreover,

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<sup>20</sup> John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435 (1996) (arguing that judicial expansion, and thus the possibility of vacant seats, is more prevalent in periods of political alignment among the nominating House, Senate, and President, as well as the enacting Senate and President).

<sup>21</sup> *Id.* 438–39.

<sup>22</sup> *Id.* at 439–44. Though, the authors note that these calls are not often heeded by Congress. *Id.* at 442–43.

<sup>23</sup> SARAH A. BINDER & FORREST MALTZMAN, *ADVICE & DISSENT: THE STRUGGLE TO SHARE THE FEDERAL JUDICIARY* 130 (2009). The study defines vacancy rate as "[dividing] the number of vacant judgeship-months by total judgeship months each year (that is, the number of authorized judgeships multiplied by twelve months) . . ." *Id.*

<sup>24</sup> *Id.*

caseloads will necessarily rise because fewer judges result in more cases per judge. Also, lawyers could be litigating strategically because of vacancies. That is, repeat players in the courts could be filing more cases in flooded circuits in order to delay the case even further. There are no studies on vacancies focused on the federal district courts, mainly because, prior to the current political moment, nominations at the district-court level had never been so heavily politicized.

These existing studies of appeals courts provide a window into how the political process works to respond to or delay nominations in the face of vacancies. They also focus on outcomes over time, but usually do not focus their analysis through a frame of institutional stress, and especially do not focus on the interactions between different levels of institutions within the federal judiciary. To conduct this analysis, the Article now turns to a statistical treatment of the recent spate of judicial emergencies.

### *B. Judicial Emergencies and Federal District Courts*

Judicial emergencies, a label applied to both federal district courts and federal courts of appeal, is an indicator of a court under stress. The AOUSC declares judicial emergencies monthly, based on a metric composed of two measures. The first measure is a weighted caseload statistic. The second measure is the days the judicial seat has been vacant. The weighted caseload statistic is a measure composed from calendar-year data, while the days of vacancy measure is continuous. For the federal district courts, the weighted caseload statistic is weighted filings per judgeship. The weights are assigned based on the perceived time and effort that it takes a judge to resolve a case: for example, in the federal district courts, student loan default cases are assigned a weight of 0.031 and patent cases are assigned a weight of 1.9.<sup>25</sup> In the federal circuit courts the formula is less complicated: *pro se* cases are weighted at one-third of a case with counsel, reinstated cases are eliminated, and all other cases are weighted at one.<sup>26</sup> These statistical weightings change over time to reflect the underlying realities of each cause of action brought in federal courts.<sup>27</sup>

The AOUSC declares a judicial emergency in any federal circuit court where adjusted filings per panel of judges are over 700, or where any vacancy exceeds eighteen months and adjusted filings per panel of judges are between 500 and 700.<sup>28</sup> The AOUSC follows a similar formula for the federal district courts. The AOUSC declares a federal district court to be in judicial emergency if there is a vacancy where weighted filings exceed 600 per judgeship; there is a vacancy for

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<sup>25</sup> *Judicial Emergencies*, UNITED STATES COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (last visited Jan. 31, 2014).

<sup>26</sup> *Id.*

<sup>27</sup> The measures have gone through two substantial changes, once in 1993 and again in 2004. *Case Weights Get Update*, UNITED STATES COURTS (August 2004), [http://www.uscourts.gov/News/TheThirdBranch/10-10-28/Case\\_Weights\\_Get\\_Update.aspx](http://www.uscourts.gov/News/TheThirdBranch/10-10-28/Case_Weights_Get_Update.aspx).

<sup>28</sup> *Judicial Emergencies*, *supra* note 25.



more than eighteen months where weighted filings per judgeship fall between 430 and 600; or a court has more than one authorized judgeship and only one active judge.<sup>29</sup>

These judicial emergencies, though ultimately only a label, signal to the President and Congress a particular court in crisis.<sup>30</sup> Despite the label's intended external effect, there is some evidence that Congress ignores this signal in its pattern of judicial appointment.<sup>31</sup> But there is reason to think this declaration is no less an informational signal for federal judges themselves; its informational effect is perhaps even greater. To understand this, it is necessary to understand why exactly a judicial emergency is an emergency. Despite the notes of alarm sounded by the press and academic commentators over the crisis in judicial appointments,<sup>32</sup> neither judicial vacancies nor judicial emergencies are new phenomena.

But there are some unprecedented aspects of the current round of vacancies and emergencies that create institutional stress. Senate “[c]onfirmation rates at 18 months into a presidency have fallen.”<sup>33</sup> In 1982, under President Ronald Reagan, the confirmation rate was 93%, but under President Barack Obama this rate has fallen to 47%.<sup>34</sup> Another unprecedented aspect of the recent judicial emergencies is the extension of vacancies and emergencies to the federal district courts.<sup>35</sup> Never before have political actors engaged in such politicking around nominations at the federal district-court level. For example, in the Northern District of Oklahoma, Arvo Mikkanen's nomination by President Obama was blocked, allegedly due to the failure of the President to consult with the Senators from Oklahoma, in

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<sup>29</sup> *Id.*

<sup>30</sup> E-mail from Susanna Byrne, Admin. Office of the United States Courts, to Daniel J. Knudsen (Apr. 18, 2011) (on file with author).

<sup>31</sup> *See, e.g.*, RUSSELL WHEELER & SARAH BINDER, BROOKINGS INST., DO JUDICIAL EMERGENCIES MATTER? NOMINATION AND CONFIRMATION DELAY DURING THE 111TH CONGRESS 1, 4–5 (2011) (“Overall, only 35 percent of district vacancies were filled in the last Congress, with little priority apparently given to filling the most overburdened vacant judgeships.”).

<sup>32</sup> *See* Lithwick, *Empty Chambers*, *supra* note 11; Litchwick, *Courthouse Is Closed*, *supra* note 11 (“[T]he federal justice system is in deep and worsening trouble.”); *infra* note 39 and accompanying text.

<sup>33</sup> Bruce Moyer, *Vacancy Signs at the Federal Courthouse*, 57 FED. LAW. 8, 8 (2010).

<sup>34</sup> *Id.* (pointing to senatorial procedures as “secret holds” and the use of the filibuster to obstruct judicial confirmations to explain the drop in confirmations).

<sup>35</sup> ALICIA BANNON, FEDERAL JUDICIAL VACANCIES: THE TRIAL COURTS 1 (2013) (“District courts typically see brief peaks in vacancies after a presidential election, followed by a sharp decline in subsequent years. Yet, during the Obama administration, after district court vacancies spiked in 2009 they never returned to their previous level and, in fact, have grown further. For the first time since 1992, the average number of district court vacancies has been greater than 60 for five straight years, from 2009–2013.” (emphasis omitted)).

particular Senator Coburn.<sup>36</sup> There are many other examples reflecting a general trend toward obstruction under President Obama.<sup>37</sup> Clearly, a crucial dimension to the current vacancy problem is the judicial nominations problem. Analyzing the dynamics of judicial nominations has received some scholarly attention, focused partly on an institutional-level analysis.<sup>38</sup>

Prominent journalists decried these vacancies, and the emergencies that followed, as unacceptable in a country with a vaunted tradition of rule of law.<sup>39</sup> Policy institutes examined congressional failure to approve judicial nominations, sounding a cautionary note about political polarization.<sup>40</sup> Scholars have also criticized the political aspects of the nomination process, calling on the U.S. Senate to halt its delay of judicial appointments.<sup>41</sup> The executive branch itself weighed in: U.S. Attorney General Eric Holder implored that the system “move expeditiously” to fill the empty judicial seats.<sup>42</sup> Many institutional actors view these vacancies as troublesome.

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<sup>36</sup> See Andrew Cohen, *The Minakken Nomination and the White Man*, ATLANTIC (Feb. 6, 2011, 12:13 PM), <http://www.theatlantic.com/national/archive/2011/02/the-mikkan-en-nomination-and-the-white-man/70752/>.

<sup>37</sup> See generally Sheldon Goldman et al., *Obama’s Judiciary at Midterm*, 94 JUDICATURE 262 (2011) (arguing that a defiant and stubborn Republican minority in the Senate impeded most judicial nominations’ progress).

<sup>38</sup> See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 1–5* (2005); PETER C. KESTERHOFF, *COURT NOMINATIONS: ISSUES IN NOMINATIONS AND CONFIRMATION* (2009); BINDER & MALTZMAN, *supra* note 23, at 58–78.

<sup>39</sup> See, e.g., Linda Greenhouse, Editorial, *Calling John Roberts*, N.Y. TIMES (Oct. 21, 2010, 9:44 PM), [http://opinionator.blogs.nytimes.com/2010/10/21/calling-john-roberts/?\\_r=1](http://opinionator.blogs.nytimes.com/2010/10/21/calling-john-roberts/?_r=1) (noting the problem of unconfirmed judicial appointments and “look[ing] forward to waking up on New Year’s Day to this headline or its reasonable equivalent: ‘Senate Imperils Judicial System, Roberts Says’”); Dahlia Lithwick & Carl Tobias, *Vacant Stares*, SLATE (Sept. 27, 2010, 6:39 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/09/vacant\\_stares.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/09/vacant_stares.html).

<sup>40</sup> Russell Wheeler, *Judicial Nomination: Into the Home Stretch*, BROOKINGS INST. (Sept. 27, 2010), [http://www.brookings.edu/opinions/2010/0927\\_judicial\\_nominations\\_wheeler.aspx](http://www.brookings.edu/opinions/2010/0927_judicial_nominations_wheeler.aspx) (stating a “plausible explanation [for the downturn in the percentage of district court confirmations] is that political polarization is claiming one more of the unwritten rules that have traditionally sustained the federal judiciary—routine, bi-partisan approval of professionally competent district nominees whom both home-state senators endorse”).

<sup>41</sup> See, e.g., John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181, 183–89 (2004); E. Stewart Moritz, “Statistical Judo”: *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 J.L. & POL’Y. 341, 344–46, 392–94 (2006); Karl A. Schweitzer, *Litigating the Appointments Clause: The Most Effective Solution for Senate Obstruction of the Judicial Confirmation Process*, 12 U. PA. J. CONST. L. 909, 909–11 (2010).

<sup>42</sup> *Oversight of the U.S. Department of Justice; Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 19–20 (2010) (statement of Eric H. Holder, Jr., Att’y Gen. of the United States) (“There are currently 105 vacancies on the federal courts. Yet the Senate has

Congress has enacted a number of statutes to ensure that efficiency in the processing of filings and cases is maintained. For example, the Civil Justice Reform Act,<sup>43</sup> passed in 1990, mandates publication of a list of motions and cases that are being held up by judges in the district courts, both by magistrate judge and district judge.<sup>44</sup> The Civil Justice Reform Act tracks motions pending for longer than six months, cases pending for longer than six months, and bench trials submitted for decision for over six months.<sup>45</sup> Time-to-disposition is an important aspect of ensuring the federal judiciary functions correctly, and efficiency is an important part of procedural justice. However, efficiency without quality does not ensure justice.

The more interesting variables are those that detail aspects of decision making other than time. Courts and court processes are also “egalitarian political venues”<sup>46</sup> which provide a “window into the mundane” that allows for both equality before the law and also for the democratic function of restraining state power.<sup>47</sup> This is close to the same critique made against the rise of alternative dispute resolution by Professor Owen Fiss, that settlement “as a generic practice” is not to be preferred to judgment, nor “should [it] be institutionalized on a wholesale and indiscriminate basis.”<sup>48</sup> This critique has been extended to the legalization of private processes dictated by the courts.<sup>49</sup> Speed and efficiency are not the only measures of an effectively functioning federal judiciary. The one large institutional shift in the federal district courts over time has been a shift away from trials. When the federal rules of civil procedure were adopted, fifteen percent of cases ended with a trial; some sixty years later, less than three percent did, and these three percent were viewed as institutional “failures.”<sup>50</sup>

On these accounts, a judicial emergency would be a form of institutional stress that results in fewer full trials, perhaps more motions to dismiss and settlements, and fewer published opinions. Indeed, published opinions have been

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confirmed only 19 federal judges during the 15 months of this administration. That is less than 34% of the President’s judicial nominees and less than half the number confirmed during the same time period for Presidents Clinton and George W. Bush. I ask that you do everything possible to move expeditiously to fill the vacancies on our federal courts.”).

<sup>43</sup> 28 U.S.C §§ 471–82 (2012).

<sup>44</sup> *Id.* § 476.

<sup>45</sup> *Id.*

<sup>46</sup> Judith Resnik, *Courts In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 807 (2008) (noting Bentham’s phrase that the openness of court processes “keeps the judge himself, while trying, under trial”).

<sup>47</sup> *Id.* at 804.

<sup>48</sup> Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

<sup>49</sup> Judith Resnik, Essay, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 191 (2003) (arguing that “[t]he legalization of private processes brings with it professional domination and greater complexity, making these processes mimic adjudication and collapse into it”).

<sup>50</sup> *Id.* at 188–89 (noting that concepts of “right to sue” have been replaced by “obligations to use alternatives”).

proposed as one metric of what constitutes the judiciary functioning as a proper institution.<sup>51</sup> Closely related to publication is the practice of “private judging,” that is: the unpublication, depublishing, or stipulated withdrawal of opinions that result in these opinions largely disappearing from the public purview.<sup>52</sup>

### III. STATISTICAL RESULTS

The dataset used in this study is constructed from data collected annually by the Administrative Office of the U.S. Courts. This study uses data from 2006 to 2009. The unit of analysis is district court, not judge.<sup>53</sup> The data was compiled from the Interuniversity Consortium for Political and Social Research (“ICPSR”) datasets (Federal Court Cases: Integrated Data Base) from 2006 to 2009, as well as data from the Administrative Office of the U.S. Courts website on judicial vacancies. The dataset has 1504 observations, which are broken down by quarter year for each district court in the United States. It is important to note, again, that the unit of analysis is the district court itself, not each individual district-court judge. The courts range in size from small, at one to three authorized judgeships, to large, at up to twenty-eight authorized judgeships. There are ninety-four district courts in the study. Twenty-two courts, or 23% of courts in the study, never had a judicial emergency declared. By contrast, seventy-two courts, or 77% of the courts in the study experienced at least one period of judicial emergency over the study period, 2006 to 2009. Thirty-three of the district courts entered emergency status during the study period. Thirty-five district courts, by contrast, left emergency status during this period. Lastly, nineteen of the district courts experienced multiple periods of judicial emergency, entering, exiting, and entering again.

There are three dependent variables for analysis that come from the ICPSR dataset: (i) a variable called pretrial, that is, the number of cases that are disposed of on motions before trial, and its ratio relative to the number of filings in the given quarter year; (ii) a variable called state remands, that is, the count of the number of cases that are remanded to a state court and its ratio; and (iii) a variable called federal agency, that is, a count of the number of cases that are remanded to an agency. The variable pretrial will be the focus of this Article, as it relates to a

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<sup>51</sup> See generally Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1436–40 (2004) (exploring the history, procedures, and negative consequences of unpublished judicial opinions, noting that such practices give judges, clerks, attorneys, and bureaucrats the “power to declare judicial decisions of little or no precedential value and in some cases either to make them disappear from the public record or to abort them”).

<sup>52</sup> *Id.* at 1436–38. (“The apparently peculiar U.S. doctrine of precedent was created by the scandalous practices of private judging . . . : ‘unpublishing,’ ‘depublishing,’ and withdrawing judicial opinions.”).

<sup>53</sup> Finer-grained data on judges would make for a more detailed study of individual decision making.

number of institutional and legal questions concerning the district courts and adjudicative processes detailed in Section IV.

This Article looks at six different kinds of judicial emergencies, coded as binary indicator variables. These emergencies are categorized by both their place of occurrence—district court or court of appeals—and their manner of occurrence—time emergencies, defined by months of vacant judgeships, or filings emergencies, defined by raw filings data. Time emergencies involve courts that have over a certain number of filings and eighteen months of a vacant judgeship. In the district courts, the number of filings that triggers the time emergency in the given month-year is 430. In the circuit courts, that number rises to 500. By contrast, a filings emergency occurs based on pure filings alone; a district court is in filings emergency if it has over 600 filings and a circuit court is in filings emergency if it has over 700 filings. The last two emergency variables are simply combinations of these measures for the two types of courts: if a court had either type of emergency in the given quarter year.

Lastly, to disaggregate the sample and examine trends based on court size, this Article has included a measure of the district courts' size based on number of judgeships. Small courts are those with fewer than ten authorized judgeships. Large courts are those with ten or more authorized judgeships.

The summary statistics for these variables are presented in the table below.

*Table 1: Summary Statistics*

<i>Variable</i>	<i>Observations</i>	<i>Mean</i>	<i>Std. Dev.</i>	<i>Min.</i>	<i>Max</i>
Circuit	1504	6.521277	3.035312	0	11
District	1504	47.70213	27.92513	0	96
Case	1504	672.0047	1007.801	2	17317
State	1504	11.78125	16.02628	0	157
Agency	1504	14.91689	27.93849	0	449
Pretrial	1504	81.49601	83.65185	0	748
State Ratio	1504	0.022201	0.022099	0	0.229050
Agency Ratio	1504	0.022084	0.024714	0	0.481481
Pretrial Ratio	1504	0.148778	0.099651	0	0.563106
District Emerg.	1504	0.084441	0.278141	0	1
Circuit Emerg.	1504	0.499335	0.500165	0	1
District Time Emerg.	1504	0.041888	0.200400	0	1
DFE	1504	0.042553	0.201914	0	1
CTE	1504	0.323803	0.468081	0	1
CFE	1504	0.175531	0.380548	0	1
Filings	1504	3692.37	4736.458	64	48988.67
Judgeships	1504	7.212766	5.626422	1	28
Linear	1504	8.5	4.611305	1	16
Small Courts	1504	0.744680	0.436185	0	1
Large Courts	1504	0.255319	0.436185	0	1

A natural set of figures to examine is the average of case outcomes, such as pretrial dismissals or remands to state courts, over a period of time. Such a basic outcome comparison cannot by itself meaningfully answer questions related to the effect of the declared emergencies given the many confounding variables, for which the analysis does not control. But it provides the starting point for a more in-depth examination of the variables of interest. Tables 2 and 3 below provide a snapshot of the difference in means for the two types of emergencies. These tables show the difference in the means of each variable conditional on the indicator variable of emergencies.

*Table 2: Comparisons Across District Emergencies*

<i>Variable</i>	<i>District Emergency?</i>	<i>Mean</i>
Pretrial Dispositions	No	77.65214
	Yes	123.1732
Pretrial Dispositions (Ratio)	No	0.1510701
	Yes	0.1239364
State Court Remands	No	10.82789
	Yes	22.11811
State Court Remands (Ratio)	No	0.0223948
	Yes	0.0201058
Federal Agency Remands	No	13.51198
	Yes	30.14961
Federal Agency Remands (Ratio)	No	0.0219398
	Yes	0.023657

*Table 3: Comparisons Across Circuit Emergencies*

<i>Variable</i>	<i>Circuit Emergency?</i>	<i>Mean</i>
Pretrial Dispositions	No	67.70252
	Yes	95.32623
Pretrial Dispositions (Ratio)	No	0.1478736
	Yes	0.1496866
State Court Remands	No	9.398406
	Yes	14.17044
State Court Remands (Ratio)	No	0.0207019
	Yes	0.0237051
Federal Agency Remands	No	11.79947
	Yes	18.04261
Federal Agency Remands (Ratio)	No	0.0201704
	Yes	0.0240043

Stark differences between emergency and non-emergency comparisons provide an illustration of the limits of pure comparative analysis. The natural pattern, which yields large differences between the raw numbers of pretrial dismissals, state court remands, and agency remands, and small differences between the ratios, is that large courts will be more likely to be in emergency groups because they have more judgeships that are possibly vacant. Moreover, these large courts likely have more aggregate filings, driving the number of, for example, pretrial dismissals even higher. These data dynamics highlight the need to control for various differences between the emergency and nonemergency groups to be able to untangle the effects of emergency status as separate and apart from the effects of those other differences. The most rigorous means of doing this is a fixed-effects regression analysis, which examines changes in pretrial numbers and ratios within a given court as it moves to or from emergency status. Such an analysis is offered in the Appendix. A more transparent and simple approach—informed by the regression analysis and yielding results matching those in the Appendix—is to look at mean comparisons for subgroups of district courts that are at least somewhat comparable to one another. Table 4 reflects such an approach. In this table, district courts are categorized as “small” and “large” and the most robust effect from the regression analysis, the effect of circuit court filings emergencies, is highlighted.



*Table 4: Difference In Means In Pretrial Ratio For Circuit Time Emergencies*

<i>Sample</i>	<i>Circuit Emergency?</i>	<i>Mean</i>	<i>Standard Error</i>	<i>95% Confidence Interval</i>		<i>Courts*</i>	<i>Filings</i>
All District Courts	No	0.1487915	0.0031244	0.1426628	0.154920	1504	625989
	Yes	0.1487524	0.0045213	0.1398836	0.157621		
Small District Courts (Judgeships < 10)	No	0.1580434	0.0038486	0.150492	0.165594	1120	276107
	Yes	0.1319914	0.0041652	0.123819	0.140163		
Large District Courts (Judgeships ≥ 10)	No	0.1167752	0.0033378	0.1102126	0.123337	384	349882
	Yes	0.1843158	0.0104748	0.1637205	0.204911		

*\*Courts are the unit of observation*

For these large courts, more geographically concentrated between districts and circuits (i.e., the many judges—both district and circuit—who work in the same court building), there is a 7% difference in the number of cases disposed of on pretrial motions while under emergency.

These results are confirmed by the regression output, reported in the Appendix. Table A1 presents the results of regressions using a balanced district-court fixed-effects panel. The variables for district-court judicial emergencies are never statistically significant on the three independent variables: pretrial dismissals, remands to state courts, or remands to agencies. Statistically, the impacts of institutional stress are weaker as a direct effect on district-court rulings. However, the impacts of institutional stress to federal circuit courts, vertically related to the federal district courts, are statistically significant. Judicial emergencies in the federal circuit courts are statistically significant for both the pretrial-dismissal and remand-to-state-court variables, with a more robust effect in the former. This regression result suggests that federal district-court judges are more likely to dispose of cases on pretrial motions if there is a judicial emergency in their corresponding circuit court. Moreover, this effect is present when analysis controls for raw number of filings. This suggests that it is not only Huang's time-pressure vector that is changing the behavior of judicial actors under institutional stress.<sup>54</sup> Less of a pattern emerges with respect to the state-court-remand or agency-remand variables.

The difference in means, the regression analysis, and the graphical frameworks suggest that district-court judges act increasingly as gatekeepers under institutional stress. That is, they might be protecting their colleagues on the federal circuit courts from the overwhelming amounts of cases that could go up on appeal with more developed records. They also could be signaling their own stress, or, focusing on the “big” cases to the detriment of the mundane cases.<sup>55</sup> Alternatively, institutional stress may be generating a “workhorse” mentality for the judges. They may be trying to clear their own dockets knowing that their circuit in general is under stress. For one possible theory of these effects, this Article will briefly turn to an examination of the federal judiciary as an institution.

#### IV. STRESS, INSTITUTIONS, AND LEGAL THEORY

##### A. *The Institution of the Federal District Courts*

Congress established the federal district courts pursuant to the U.S. Constitution Article III, Section 1, granting a power to create “such inferior Courts

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<sup>54</sup> Huang, *supra* note 15, at 1118 (“[A] rise in time pressure might make time-saving options more attractive.”).

<sup>55</sup> See Judith Resnik, *Wither and Whether Adjudication?*, 86 B.U. L. Rev. 1101, 1149 (2006).

as the Congress may from time to time ordain and establish.”<sup>56</sup> The federal district courts are essentially trial courts, and federal district-court judges understand themselves as presiding over a trial-type institution. One current issue for the federal district courts is the erosion of this traditional role as a forum for trials. Recently these vaunted courtrooms have “gone dark”: the average federal district judge goes nearly 300 days of the year with no trials.<sup>57</sup> Concern over this trend is motivated both by the expressive importance of trials and the federal district courts’ role in protecting litigants’ constitutional rights.<sup>58</sup> Connected to this is a perceived danger of the trial courts turning into administrative agencies: becoming “indistinguishable from state highway departments.”<sup>59</sup> Federal district courts exhibit a two-fold institutional character: they conduct trials, and they also vindicate fundamental rights, often but not necessarily through the formal process of adjudication.

Another institutional characteristic of the federal district courts is their contested institutional identity as lawmaking institutions. In one survey, over 40% of federal district judges thought of themselves as “policy-makers”; but 52% did not.<sup>60</sup> Federal district judges do not see themselves as making much “public policy,” or “making the law”:

On occasion, either way the law is interpreted it will have the effect of making law, trial judges should not attempt to make the law.<sup>61</sup>

I don’t believe in judicial activism—changing the law because Congress has failed to do [so].<sup>62</sup>

Even the district-court judges that agreed with the idea that judges make policy did so with reservations:

Occasionally they do—it is inevitable.<sup>63</sup>

Where there is no binding precedent.<sup>64</sup>

To understand the federal judiciary and the district courts’ institutional characteristics first requires an understanding of what is meant by “institution.”

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<sup>56</sup> U.S. CONST. Art. III, § 1.

<sup>57</sup> Higginbotham, *supra* note 5, at 746.

<sup>58</sup> *See id.* at 762.

<sup>59</sup> *Id.*

<sup>60</sup> KEVIN L. LYLES, *THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS* 20 (1997).

<sup>61</sup> *Id.* at 23.

<sup>62</sup> *Id.* at 22–23.

<sup>63</sup> *Id.* at 23.

<sup>64</sup> *Id.*

Institutions are prominent in economics literature, and the analysis of institutions has a long historical pedigree, both in economics and also in law.<sup>65</sup> Some scholars focus on institutions both in their rule- and norm-creating aspects and also on their role of providing expectations and stability to structure coordination.<sup>66</sup> For example, through signaling, the federal district courts structure coordination amongst the judicial hierarchy, both to the circuit courts above and also to the magistrates below. The other aspect of work on institutions focuses on both formal rules, like statutory law or contracts, as well as informal rules, such as social norms.<sup>67</sup> However, this strain of scholarship focuses mostly on institutions as external constraints, or “rules of the game.”<sup>68</sup> This literature defines a separate category—organizations embodying political bodies—like the Senate, local city councils, or the judiciary.<sup>69</sup> These organizations and their structure emerge then as functions of the institutional framework.<sup>70</sup>

Moreover, individuals can be seen as institutions; or more appropriately put, individuals work within institutions which represent “the conventions, norms and formally sanctioned rules of a society.”<sup>71</sup> If the ends of behavior are only focused on maximization of individual utility, then “institutions can only take the form of external rules or constraints.”<sup>72</sup> However, a broadening perspective that takes behavior as “socially contingent” also generates “an understanding . . . of institutions as forming the individual” and this understanding becomes “not only possible[, it] is necessary.”<sup>73</sup> It is also worth noting that within the frameworks of

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<sup>65</sup> The early focus on institutional economics arose out of transaction costs and focused on legal rules to solve these problems. Later institutional work focused more on soft norms, culture, and social capital within institutions.

<sup>66</sup> See Arild Vatn, *Institutions and Rationality*, in ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT 113, 115 (2008) (“We are . . . living in a world where our actions as individuals are interdependent. Hence, what one person does influences other people’s opportunities. Certainly, if we were able to construct norms telling us how to take other people’s interests into account in specific situations, many conflicts could be avoided. Moreover, if these rules [were] built on common values, it would be easier to coordinate action. Such a process could even have the capacity to harmonize interests. Hence, norms can be seen as supporting common values.” (citation omitted)). The idea that norms, arising from institutions, support common values is key to understanding the judiciary.

<sup>67</sup> See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3–6 (1990).

<sup>68</sup> See *id.* at 4–5 (“They are perfectly analogous to the rules of the game in a competitive team sport. That is, they consist of formal written rules as well as typically unwritten codes of conduct that underlie and supplement formal rules, such as not deliberately injuring a key player on the opposing team.”).

<sup>69</sup> See *id.* at 5.

<sup>70</sup> *Id.*

<sup>71</sup> Vatn, *supra* note 66, at 114.

<sup>72</sup> *Id.* at 115.

<sup>73</sup> *Id.*

norms and rules—the institutional setting—different types of rationality are at work. For example, individuals in an institutional setting promote trust, one of the values of a tightly knit institutional structure.<sup>74</sup> Other research focuses on institutions as simply “common knowledge at equilibrium,” implying that institutional stress could upset this equilibrium and cause many unintended consequences.<sup>75</sup> Institutions also have certain “scripts,” exhibiting, among other things, overlap costs representing scripts that are embedded in organizational structure.<sup>76</sup>

The federal judiciary operates within this institutional framework as well. The judiciary is an institution, the same as an administrative agency, a local city council, a firm, or the Senate. A principle of public choice theory and institutional economics is that the institutional structure, and not necessarily the intent or ability of the individual decision maker, can incent and drive a pattern of economically inefficient or normatively undesirable decisions.<sup>77</sup> Institutional norms and structures in a given courthouse may also drive decision making. The list of institutional norms here is long: informal norms of behavior; circuit effects on the toleration of dissent; circuit size as a measure of how frequently colleagues serve with one another on panels; and the individual caseloads of the judges, which might matter for how much “time judges have to articulate disagreement with their peers.”<sup>78</sup> Greater uncertainty with regards to information about the social rules governing interactions is a function of size, and this both decreases reliance on informal rules and makes them more susceptible to shocks.<sup>79</sup>

Judicial institutional norms have been examined before, at all levels of the federal judicial hierarchy. The Supreme Court remains the most studied court, and one that most people posit as deeply political. Some argue that dissents and

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<sup>74</sup> See EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS 309 (2005).

<sup>75</sup> See Masahiko Aoki, *Endogenizing Institutions and Institutional Changes*, 3 J. INSTITUTIONAL ECON. 1, 3 (2007).

<sup>76</sup> See Gregg P. Macey, *Coasean Blind Spots: Charting the Incomplete Institutionalism*, 98 GEORGETOWN L.J. 863, 871 (2010).

<sup>77</sup> Public choice theory makes this point in a way more akin to those in the legislative branch, but it could apply equally well to judges. See Edward J. Lopez, *An Introduction to The Pursuit of Justice*, in THE PURSUIT OF JUSTICE: LAW AND ECONOMICS OF LEGAL INSTITUTIONS 1, 4 (Edward J. Lopez ed., 2010) (“The institutional structure, not the bad politician, is the root cause of economically inefficient policies such as pork barrel spending. Thus, in order to achieve fewer bad policies, public choice analysis would suggest institutional change—divorcing representation from geography, for example.”).

<sup>78</sup> VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT 38–40 (2006).

<sup>79</sup> JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 176 (1992) (“Socially shared knowledge is mainly a product of shared experience: As the number of actors increases, the likelihood that a person will have ongoing interactions with the same actors declines. The effect here is to decrease reliance on informal rules to establish expectations.”).

concurrences on the Supreme Court are shaped by informal consensual norms.<sup>80</sup> Others have found that the agenda-setting process—the policy-making function of the Court—is also shaped by informal and institutional norms.<sup>81</sup> Scholars have also made the argument that the political nature of the Supreme Court is overstated.<sup>82</sup> However, with the small number of cases that the Court takes, as well as these cases' presumed legal difficulty, it is not surprising that judgments on the Court shade toward overt political choices, or at least appear to do so.

Scholars have also studied the federal circuit courts. In studying the norms of the federal circuit courts, the two most prominent areas of focus are panel effects, in which the votes of judges are influenced by their colleagues on the panel,<sup>83</sup> and the elevation of federal district-court judges to the appellate bench. However, related to institutional norms, only recently have scholars examined the reasons that panel effects arise in the first place. Two mechanisms have been proposed to explain the existence of panel effects: deliberative and strategic explanations.<sup>84</sup> Deliberative explanations are those that occur because of “dynamics internal to the members of a panel” and can encompass persuasion through reasoned argument, the exchange of information, or conformity or group pressures.<sup>85</sup> By contrast, strategic explanations are those that occur by taking into consideration likely responses by other actors.<sup>86</sup> In the case of the federal courts of appeals the “preferences of the Supreme Court” and the “circuit as a whole” are taken into consideration rather than just the three judge panel.<sup>87</sup> Ultimately, this examination

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<sup>80</sup> Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 900 (1998) (“[W]e demonstrate that the patterns of dissents and concurrences on the Court for the past two centuries are consistent with the existence of ‘consensual norms’ which, to varying degrees over time, have restrained the justices from engaging in overt conflict.”).

<sup>81</sup> See Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis with Michael E. Solimine*, 2005 WIS. L. REV. 1421, 1440.

<sup>82</sup> Frederick Schauer, *Foreword: The Court’s Agenda—And the Nation’s*, 120 HARV. L. REV. 4, 6–8 (2006).

<sup>83</sup> FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 9 (2007) (“This collegiality effect appears to be at least as powerful as the individual judge’s own preferences.”). A series of studies have explained panel effects. Richard Revesz’s study on environmental cases in the D.C. Circuit found that a colleague’s ideology was a better predictor of a vote than the judge’s own ideology. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717–19 (1997). Subsequent studies also verified the presence of panel effects. See, e.g., SUNSTEIN ET AL., *supra* note 7, at 22.

<sup>84</sup> Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1324–27 (2009).

<sup>85</sup> *Id.* at 1325.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1326.

finds that the strategic considerations matter more than the internal dynamics.<sup>88</sup> This division, between strategic and internal dynamics, forms the penumbra of a theory of embedded judging. But these studies are nowhere extended to the federal district courts.

In the federal courts of appeals several institutional roles could also shape the opinions of judges and case outcomes. Chief judges in a position of “institutional authority” would be more wary of dissenting opinions, which differ over outcome, as a threat to “collegial relations among judges” than they would be of concurring opinions, which differ over legal reasoning only.<sup>89</sup> Moreover, younger judges or federal district-court judges elevated to serve on appellate panels may be less likely to dissent or concur.<sup>90</sup>

In viewing the judiciary as an institution, from the Supreme Court to the federal courts of appeals to the federal district courts, a key aspect becomes institutional stability. Assuming *arguendo* formal rules as well as informal rules and norms combine to compose an institutional equilibrium, then exogenous shocks to institutions can realign or alter these fundamental equilibria. Institutional change is the obverse of institutional stability, and institutional stress orthogonal to both of these.

Institutional stress, especially prolonged institutional stress of the kind signified by a judicial emergency, could interfere in important ways with these interactions. For one thing, this current round of judicial emergencies has extended, for the first time, to the federal district courts. In this sense, current judicial emergencies have upset not only the horizontal institutional equilibrium but also the vertical equilibrium. Horizontal institutional equilibrium is probably put to the test here. Judges on the federal circuit courts are likely aware that the federal district courts are also suffering from vacancy problems.

In short, under institutional distortions or stresses, informal rules proliferate and alter or replace more formal decision-making structures.<sup>91</sup> This could have an impact on institutional actors’ decision-making processes and their effective identity within the court system. A *prima facie* assumption in this analysis then becomes that individuals are not free of the constraints of their social and institutional settings when making decisions. This seems at once uncontroversial and controversial. The claim that social institutions affect decision making is uncontroversial because the counterfactual is nearly impossible to imagine:

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<sup>88</sup> *Id.* at 1375 (“Both minority and majority judges on ideologically mixed panels differ in their willingness to vote counter-ideologically, depending upon how the circuit as a whole is aligned relative to the panel members. These results are consistent with the theory that circuit judges behave strategically with an eye to circuit en banc review.”).

<sup>89</sup> HETTINGER ET AL., *supra* note 78, at 38.

<sup>90</sup> *Id.*

<sup>91</sup> See FURUBOTN & RICHTER, *supra* note 74, at 28–30 (“For formal institutions (so-called made orders) key questions are: what set of informal rules will grow into the gaps in the formal institutional framework and how long will the spontaneous growth process continue?”).

everyone is embedded within a set of social structures, both subtle and powerful, and an individual makes many decisions in the context of these structures. The claim that social institutions affect decision making is controversial because individuals often resist the notion that their decisions are in any way shaped by institutions we occupy.

### *B. Federal District Judges as “Embedded”*

Though not a central focus of this research, this Article also demonstrates the incompleteness of judicial decision-making literature. Much of this literature either analyzes judges as political decision makers or, in the case of panel effects, as psychological decision makers who are affected by their colleagues. However, this Article also highlights the idea that judges decide as embedded individuals. That is, any attempt to isolate judges as purely atomistic decision makers fails to take into account an important determinant of their decision making. To take just one example, on the Supreme Court, perhaps the most political court in the country, there is a surprisingly complex camaraderie, and the institution itself likely shapes and alters the justices’ own perceptions and exercise of choice.<sup>92</sup> Federal circuit courts and federal district courts display this institutional character as well.<sup>93</sup>

On this theoretical view, judges are “embedded” actors in both their respective circuits and in the judiciary as a whole.<sup>94</sup> This embeddedness affects how the judges may make decisions, and institutional stress could alter this embeddedness in a variety of ways.<sup>95</sup> In thinking about the judiciary as a social

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<sup>92</sup> Consider the numerous stories of Justice Brennan’s influence on voting. *See generally* HUNTER R. CLARK, *JUSTICE BRENNAN: THE GREAT CONCILIATOR* (1995). Consider also the recent health-care case, where Chief Justice Roberts is posited by many to be voting not purely on political lines but also with an important focus on the institutional character of the Supreme Court. *See* Lyle Denniston, *Argument Recap: It Is Kennedy’s Call (FINAL UPDATE 3:14 pm)*, SCOTUSBLOG (Mar. 27, 2012, 5:41 PM), <http://www.scotusblog.com/2012/03/argument-recap-it-is-kennedys-call/> (noting that Chief Justice Roberts might find “institutional imperatives for going along if a majority were formed to uphold [the Affordable Care Act]”).

<sup>93</sup> For example, the Ninth Circuit and the Seventh Circuit, to pick just two, have vastly different institutional characters.

<sup>94</sup> *See* Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595, 595–600 (2000) (defining four levels of institutional economics).

<sup>95</sup> For example, Professor David Dequech articulated the following influences on institutions:

At least three types of influence can be identified. The first, which may be called the restrictive function of institutions, consists in their role as constraints on economic behavior. This is the type of influence emphasized by neoclassical economists and many new institutional economists. I therefore agree with DiMaggio’s description of most economists as being among those who prefer to



institution, it is helpful to think about the different interactions in the judiciary along which institutional and individual preferences can shape one another. Briefly, there are three ways to organize and understand embeddedness: horizontal embeddedness, vertical embeddedness, and chronological embeddedness.

These three interactive categories constitute a nascent framework for linking the literature on institutional stress with the literature on judicial decision making. The first interactive category might be *horizontal*, that is, connections that form between colleagues inside the institution itself. This is best exemplified by the concept and study of panel effects.<sup>96</sup> Another example of this relationship might be collegiality; for example, some have argued for splitting the Ninth Circuit Court of Appeals because the large number of active judgeships—twenty-eight—discourages the judges from making good faith efforts to deliberate with each other to reach outcomes.<sup>97</sup> The second interactive category might be *vertical*, that is, salient relationships with other institutions that are directly above or below one's own. In the context of the judiciary, it might be the case that there are important formal, informal, political, and procedural relationships between the various "inferior" courts established by Congress. For example, the relationship between the traditionally liberal Ninth Circuit Court of Appeals and the Supreme Court has been detailed as particularly contentious, yet no doubt permeated by informal

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stress how culture, in its regulatory forms, constrains behavior. The second type of influence refers to the cognitive function of institutions, which is related to the (strictly) cognitive aspects of culture. The cognitive function refers, first, to the information that institutions provide to the individual, including the indication of the likely action of other people. I call this the informational-cognitive function of institutions. Second, the cognitive function of institutions includes also their influence on the very perception that people have of reality, that is, on the way people select, organize, and interpret information. I call this their deeper cognitive function. Institutions perform a third function through their influence on the ends that people pursue. For want of a better term, this can be called their motivational, or teleological, function. This function is related to the valuative aspect of culture and to the identification of culture as providing values. I would now like to explicitly add a fourth function, through which institutions influence the emotions guiding economic behavior. This emotional function is related to the expressive, or affective, aspects of culture.

David Dequech, *Cognitive and Cultural Embeddedness: Combining Institutional Economics and Economic Sociology*, 37 J. ECON. ISSUES 461, 463–64 (2003) (emphasis omitted) (citations omitted).

<sup>96</sup> Panel effects are defined as the "votes of judges [being] significantly influenced by the party affiliation of the president who appointed the other two judges on the panel." SUNSTEIN ET AL., *supra* note 7, at 22.

<sup>97</sup> E.g., Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 660 (2007).

expectations on both sides.<sup>98</sup> *Verticality* can also be permanent or temporary. When a federal district-court judge is temporarily elevated to a seat on the federal circuit court, they sit with circuit judges. Federal district-court judges are elevated in this way, in part, on a rationale of encouraging “orientation to the circuit.”<sup>99</sup> Each circuit, it would seem, has its own institutional character. These types of relationships also exist between courts and agencies, especially in repetitive situations. For example, the EPA might have a particularly important relationship with the D.C. Circuit Court of Appeals, in which it litigates a majority of its cases. The elevation of district-court judges explicitly authorized to sit on appellate benches embodies this horizontal interaction, quite literally, in its movement. The third interactive category might be *chronological*: Not only are judges embedded in space but they are also embedded in time. Institutions have memories and inertias and judges judge in these chronological spaces as well.

These interactive categories, perhaps, inform a different kind of institution that lies between two well-established categories. Currently, some economists distinguish between economic and political institutions.<sup>100</sup> Economic institutions are categorized as “those that really shape the economic incentives” and “create opportunities or incentives for investment and innovation.”<sup>101</sup> Economic institutions “are crucially related to how level the playing field is,” and this leveling is often informed by “property rights and contracting institutions . . . .”<sup>102</sup> By contrast, political institutions control the “specific distribution of political power in society.”<sup>103</sup> These two categories are of course interactive, and this interaction requires thinking about “economic institutions situated in the context of the political institutions and in particular of the political institutions that support and make these economic institutions durable.”<sup>104</sup>

To these two institutional types might be added legal institutions. Legal institutions are those that embed individual decision makers into a complicated series of mutable constraints: chronological, interpersonal, and doctrinal. Legal

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<sup>98</sup> The Ninth Circuit makes up the overwhelming number of cases considered in the Supreme Court. SCOTUSBLOG, END-OF-TERM STATISTICAL ANALYSIS—OCTOBER TERM 2010, at 1 (2011), available at [http://www.scotusblog.com/wp-content/uploads/2011/07/SB\\_Summary\\_Memo\\_OT10.pdf](http://www.scotusblog.com/wp-content/uploads/2011/07/SB_Summary_Memo_OT10.pdf) (“The Court once again considered more cases from the Ninth Circuit than it did from any other court—26 of 82 cases (32%).”).

<sup>99</sup> Brudney & Ditslear, *supra* note 10, at 573 (noting a tendency also to encourage district court judges to serve on an appellate panel “within six months to a year of their appointment”).

<sup>100</sup> Daron Acemoglu, *The World Through Institutional Lenses, Conversations*, EDGE (Sept. 12, 2012), <http://edge.org/conversation/the-world-through-institutional-lenses> (noting a broad definition of institutions as “the set of humanly designed constraints that shape human behavior” and outlining efforts of two scholars to add “clarity and discipline” to the concept by distinguishing “between economic and political institution”).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

institutions thus make political institutions durable, and may also facilitate the legalization and stability of economic institutions. As this Article has shown, stress to legal institutions along these three dimensions, and perhaps others, can have an important systematic effect on outcomes. The aspects distinguishing legal institutions from political and economic institutions, while gestured at in much institutional research, deserve far greater treatment by legal academics and social scientists.

## V. CONCLUSIONS

This Article has posited that institutional stress, here measured by a court being in judicial emergency, has an effect on individual decision making, measured as case outcomes. In particular, the results of a fixed-effects regression analysis indicate that judicial emergencies in the federal circuit courts have a statistically robust effect on judicial decision making in the federal district courts. In particular, an emergency in its corresponding federal circuit court makes it statistically more likely that cases will be disposed of through pretrial motions in federal district court. A simple difference in means approach confirms this result, and suggests that this effect is actually occurring robustly in larger district courts. The size of the district courts thus affected suggests that important institutional relationships are in play.

This Article points to further fruitful directions for research. A more unique question in the context of the federal district courts would be the extent to which institutional stress affects the more prosaic decisions in the course of a trial: rulings on evidentiary motions, discovery, and similar outcome-steering choices. Another question is whether institutional stress holds true for administrative agencies, both in adjudication and in informal rule making. The bright-line rule for judicial emergencies suggests that a regression discontinuity design could serve as a potential fertile area of research. Lastly, a study that would layer judges within courts, and statistically investigate relevant characteristics of each, would be interesting and valuable.

Theoretically, this finding suggests that traditional theories of judicial decision making that focus on individual psychology,<sup>105</sup> individual political

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<sup>105</sup> The work of Professor Jeffrey J. Rachlinski is indicative of this approach. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195–97 (2009) (finding that in criminal cases “judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases”); see also Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1258–60 (2005) (using an experiment to prove that judges often cannot ignore inadmissible information outside the record).

disposition,<sup>106</sup> or judicial utility<sup>107</sup> should be augmented and refined by an emerging literature considering individual decision making in the context of institutional or social norms.<sup>108</sup> Judges are often viewed simultaneously as individuals with political and moral preferences as well as individuals necessarily insulated from public opinion and cloaked with institutional majesty in order to dispense justice and uphold the rule of law. Though a judge's decisions may be tied to political pressures, the overabundance of study of the Supreme Court may skew the perception of judges as political decision makers. Certainly, the justices on the Supreme Court decide difficult legal questions that may only have political answers dependent on highly contested versions of the public good. However, from the perspective of the federal judiciary, lower federal courts are equally important: they are the federal trial courts and record shapers. This research suggests that judges in district courts may operate in a different manner than those on the Supreme Court. In short, a model of decision making for the district courts derived from individualistic decision making models and shorn of vertical institutional context fails to capture the complex reality of lower court judicial decision making.

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<sup>106</sup> This frame for analyzing judicial decision making has a long pedigree. *See, e.g.*, Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 843–46 (1961) (exploring “empirical relationships between [political party affiliation] and fifteen areas of judicial decision-making”). For more modern work in this area, see SUNSTEIN ET AL., *supra* note 7, at 19–22 (finding “strong evidence” of ideological voting based on partisan affiliation of appointing president).

<sup>107</sup> *See, e.g.*, RICHARD A. POSNER, *OVERCOMING LAW* 135–36 (1995) (providing a formal model for judicial utility); Resnik, *supra* note 55, at 1149 (noting that the “‘big’ case” becoming the “centerpiece of adjudication” means that “many life-tenured judges [become] restless with the ordinariness of other cases and [become] reluctant to invest time and resources in them.”).

<sup>108</sup> *See, e.g.*, Daniel Martin Katz & Derek K. Stafford, *Hustle and Flow: A Social Network Analysis of the Federal Judiciary*, 71 OHIO ST. L.J. 457, 504 (2010) (“Our emphasis on judicial ‘peer effects’ is an attempt to fill the void in these respective theories, arguing the existing social structure of the hierarchical federal judiciary in part explains how an existing set of individual micro-motives map to the aggregate macro-behavioral judicial outcomes.”).

## APPENDIX — REGRESSIONS

For Tables A1 and Tables A2 below I specify the following two general regressions:

$$(1) Y_{it} = \beta_0 + \beta_1 DE_{it} + \beta_2 CTE_{it} + \beta_3 Filings_{it} + \beta_4 Linear_{it} + \alpha_i + \varepsilon_{it}$$

$$(2) Y_{it} = \beta_0 + \beta_1 DTE_{it} + \beta_2 DFE_{it} + \beta_3 CTE_{it} + \beta_4 CFE_{it} + \beta_5 Filings_{it} + \beta_6 Linear_{it} + \alpha_i + \varepsilon_{it}$$

$i$  indexes the district court and  $t$  indexes quarter-year. There are three dependent variables  $Y_{it}$ : Pretrial, State, and Agency. The variable Pretrial is a count of the number of cases that are disposed of on motions before trial. The variable State is a count of the number of cases that are remanded to a state court. The variable Agency is a count of the number of cases that are remanded to an agency. Only Pretrial is reported in the following tables, though the estimates for the others are available upon request.<sup>109</sup>

There are six independent variables: district and circuit emergencies, and disaggregated district and circuit time and filings emergencies. District Time Emergencies,  $DTE$ , is an indicator variable which takes a value of one for those district courts that are in an emergency in the given month and year because they have over 430 filings and a judicial vacancy of over eighteen months. District Filing Emergencies,  $DFE$ , is an indicator variable which takes a value of one for those district courts that are in emergency because they have over 600 weighted filings per judgeship. The variables labeled “Circuit”,  $CTE$  and  $CFE$ , have the same structure as their district-court analogues; the time variable takes a value of one for those Courts of Appeals in the relevant Circuits that are in emergency in the given month and year because they have over 500 adjusted filings and a judicial vacancy of over eighteen months. The filings variable,  $CFE$ , takes a value of one for those Courts of Appeals in the relevant Circuits that have over 700 filings. The variables  $DE_{it}$  and  $CE_{it}$  take a value of one if the federal district (circuit) court is in *either* a time or filings emergency at the start of the given quarter-year.

There are three control variables: raw filings, a linear control that starts at one and increases by one for each district court in each subsequent month and year, and a district court (or circuit court) fixed effect,  $\alpha_i$ .  $Filings$  is simply the aggregate number of filings each court received in a given month and year and attempts to control for more active and flooded courts. The variable  $Linear$  is employed to assure that the trends are not simply associated with the time period they occur in; i.e., filings are not uniformly increasing over the relevant period of study.

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<sup>109</sup> Note that these regression tables do not report the regressions for the remand to state courts or to federal agencies. These tables showed less significance in general, but are available upon request.

Following Professor Bert Huang, I will use the court as the primary unit of analysis.<sup>110</sup> There is little extant literature examining the district courts as institutions, and few studies point the way to controls. Here I have followed closely Bert Huang's *Lightened Scrutiny*. I examine only civil cases and exclude habeas and prisoner suits, and below I run the regressions with fixed effects for the federal district courts.<sup>111</sup> Parallel to Professors Binder and Maltzman, I have added a control for the size of each court's docket by adding the number of cases filed.<sup>112</sup>

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<sup>110</sup> See Huang, *supra* note 15, at 1116.

<sup>111</sup> *Id.* at 1147.

<sup>112</sup> See BINDER & MALTZMANN, *supra* note 23, at 133.

*Table A1: District Court Fixed-Effects Regressions*

<i>Independent Variables</i>	<i>Pretrial Ratio</i>	<i>Pretrial Ratio</i>	<i>Pretrial Ratio</i>	<i>Pretrial Ratio</i>
District Emergency	-0.00615	-0.00615		
	-0.00556	-0.00556		
Circuit Emergency	0.0169***	0.0170***		
	-0.00394	-0.00395		
District Time Emergency			-0.0115	-0.0115
			-0.0081	-0.0081
District Filing Emergency			-0.00344	-0.00343
			-0.00703	-0.00703
Circuit Time Emergency			0.00867	0.00884
			-0.00625	-0.00633
Circuit Filings Emergency			0.0192***	0.0192***
			-0.00417	-0.00417
Linear	-0.000367	-0.000355	-0.000295	-0.000291
	-0.00027	-0.000271	-0.000273	-0.000274
Filings		-4.88E-07		-1.95E-07
		-1.11E-06		-1.13E-06
Constant	0.144***	0.146***	0.144***	0.145***
	-0.00332	-0.00502	-0.00333	-0.00504
Observations	1504	1504	1504	1504
R-squared	0.016	0.016	0.019	0.019
Number of Districts	94	94	94	94

*Standard errors in parentheses \*\*\* p<0.01, \*\* p<0.05, \* p<0.1*

*Table A2: Circuit Court Fixed-Effects Regressions*

<i>Independent Variables</i>	<i>Pretrial Ratio</i>	<i>Pretrial Ratio</i>	<i>Pretrial Ratio</i>	<i>Pretrial Ratio</i>
District Emergency	-0.0144	-0.0114		
	-0.00884	-0.00895		
Circuit Emergency	0.0249***	0.0259***		
	-0.00723	-0.00724		
District Time Emergency			0.00713	0.0089
			-0.0122	-0.0122
District Filing Emergency			-0.0373***	-0.0337***
			-0.0121	-0.0122
Circuit Time Emergency			0.0113	0.0129
			-0.0119	-0.0119
Circuit Filings Emergency			0.0286***	0.0293***
			-0.00762	-0.00762
Linear	-0.00037	-0.000343	-0.000451	-0.000424
	-0.000517	-0.000516	-0.000521	-0.000521
Filings		-1.13e-06**		-1.01e-06*
		-5.47E-07		-5.48E-07
Constant	0.141***	0.144***	0.143***	0.145***
	-0.00622	-0.0064	-0.00624	-0.00642
Observations	1504	1504	1504	1504
R-squared	0.011	0.013	0.017	0.019
Number of Circuits	12	12	12	12

*Standard errors in parentheses \*\*\*  $p < 0.01$ , \*\*  $p < 0.05$ , \*  $p < 0.1$*