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Strategic Publication

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Under the standard account of judicial behavior, when a panel of appellate court judges cannot agree on the outcome of a case, the panel has two options. First, it can publish a divided decision with a majority opinion and a dissent. Panels usually do not take this route because a dissent dramatically increases the probability of reversal. The second and more common option is for the panel to bargain and compromise over the reasoning of the decision and then publish a unanimous opinion.

This Article argues that a divided panel has a third option: strategic publication. The panel can choose not to publish any opinion at all and thus sap its decision of precedential weight and insulate it from further scrutiny by higher courts. This Article also reports the results of a novel empirical analysis of case-level data on published and unpublished decisions in one federal circuit court. While it finds little empirical evidence that majority-Democrat panels in the sample engage in strategic publication, it finds evidence that majority-Republican panels do. The Article concludes by offering several policy proposals to diminish strategic publication by separating the publication decision from judicial negotiations over the merits.

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I. INTRODUCTION

At Justice Sotomayor's confirmation hearings, her most controversial judicial opinion was a one-page summary order. Certain senators objected to the outcome of the case. Others objected to its reasoning. But what really bothered people was that it was an unpublished summary order.[1]

Indeed, *Ricci v. DeStefano* had once appeared likely to produce an important published decision. White firefighters sued the City of New Haven for throwing out the results of a promotional exam due to racial disparities.[2] The District Court ruled in favor of the city in a lengthy opinion.[3] On appeal to the Second Circuit, the case was assigned to a merits panel consisting of Sotomayor and two other judges. The parties submitted over 100 pages of briefs and 1800 pages of appendices, two groups filed amicus briefs, and the oral argument lasted over an hour.[4] And the case raised novel and important constitutional questions about the role of race in government hiring decisions.[5]

Yet, a few months after oral argument, the panel issued an unpublished summary order that devoted just 162 words to deciding the case. The panel explained that it was affirming "substantially for

1. *See, e.g., Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 91 (2010) [hereinafter *Confirmation Hearing*]. During questioning, Senator Hatch stated, "I am very concerned about [*Ricci*] because of a variety of reasons . . . . [I]t was a summary [order], meaning it didn't have to be distributed to the other judges on the Court." *Id.* Similarly, Senator Cornyn stated, "I was shocked to see the sort of treatment that the three-judge panel you served on gave to the claims of these firefighters by an unpublished summary order." *Id.* at 331.

2. Ricci v. DeStefano, 530 F.3d 88, 94-95 (2d Cir. 2008) (Cabranes, J., dissenting from denial of rehearing en banc).

3. *See* Ricci v. DeStefano, 554 F. Supp. 2d 142 (D. Conn. 2006).

4. *Ricci*, 530 F.3d at 95-96 (Cabranes, J., dissenting from denial of rehearing en banc).

5. *See id.* at 94-96.

the reasons stated" by the court below.[6] Because unpublished decisions do not establish binding precedent[7] and are typically reserved for well-settled questions of law, they almost never receive further judicial scrutiny.[8]

Not so here. First, by chance, Second Circuit Judge Jose Cabranes read about the summary order in a local newspaper and then requested a vote for rehearing en banc by the entire court.[9] Cabranes narrowly lost—seven votes to six.[10] His blistering dissent, which was signed by all the other judges on his side, excoriated the panel for resolving the case by summary order.[11] Second, a few months later, the United States Supreme Court granted the plaintiffs' petition for certiorari and reversed.[12] This outcome is rare in cases disposed by an unpublished opinion and only reinforces the oddity of resolving *Ricci* by summary order.[13]

What explains the behavior of Sotomayor and the rest of the panel? Why did they issue a summary order in such an important case? For her part, Sotomayor has denied any funny business, stating

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6. Ricci v. DeStefano, 264 Fed. App'x 106, 107 (2d. Cir. 2008) ("We affirm, substantially for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below.").

7. 2D CIR. R. 32.1.1(a).

8. *See* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1441, 1483-86 (2004) (arguing that unpublished opinions insulate judicial decisions from Supreme Court review); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1202-03 (1978) (explaining that the Supreme Court is unlikely to review decisions with no precedential value); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995) [hereinafter Wald, *Rhetoric of Results*] ("I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent. We do occasionally sweep troublesome issues under the rug . . . ."); Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 500-01 (1986) [hereinafter Wald, *Changing Course*] (noting that unpublished opinions are "rarely en banced").

9. Stuart Taylor Jr., *How Ricci Almost Disappeared,* NAT'L J.: NINTH JUST. (July 10, 2009, 6:30 PM), http://archive.li/2I4SY. After the vote, the three-judge panel withdrew its summary order and filed a published per curiam opinion with similar language. *Ricci*, 530 F.3d at 88. That opinion had the effect of establishing the district court's decision as binding Second Circuit precedent.

10. *Ricci*, 530 F.3d at 88.

11. *See, e.g., id.* at 101 ("[The panel] failed to grapple with the questions of exceptional importance raised in this appeal.").

12. Ricci v. DeStefano, 557 U.S. 557, 593 (2009).

13. *See* Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1071 (2009) (providing empirical evidence that the Supreme Court is less likely to grant certiorari in lower court cases disposed by unpublished opinions).

that the legal questions in *Ricci* were fully answered by prior Second Circuit precedent.[14]

But others disagreed. The *New York Times* reported that the panel "had difficulty finding consensus" and ultimately "agreed to use a summary order rather than a full decision in an effort to find common ground."[15] If so, the panel may have breached the Second Circuit's internal operating procedures, which only permit summary orders when the "decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion."[16] Cabranes' dissent went a step further, implying that the panel was trying to bury the case to insulate it from further judicial scrutiny.[17] At the confirmation hearings, some members of the Senate Judiciary Committee raised the same concerns.[18]

The use of a summary order in *Ricci* maps poorly onto the conventional understanding of judicial behavior. Under the standard account, a panel that disagrees about the reasoning or outcome of a case has two options.[19] First, it can file a divided decision with a majority opinion and dissent. Scholars of judicial behavior have observed that panels usually do not take this route because dissenters serve as "whistleblowers,"[20] dramatically increasing the probability of

14. Sotomayor signed onto Judge Katzmann's concurrence to the denial of rehearing en banc, which stated that legal questions in *Ricci* were resolved by "controlling authority" in the Second Circuit. *Ricci*, 530 F.3d at 90.

15. Adam Liptak, *New Scrutiny of Judge's Most Controversial Case*, N.Y. TIMES (June 5, 2009), https://nyti.ms/2BvccmC.

16. 2D CIR. I.O.P. 32.1.1(a); *see also* Taylor, *supra* note 9 (stating that "it might be difficult to square the panel's action" with the local rules).

17. *See Ricci*, 530 F.3d at 101 ("It is arguable that when an appeal raising novel questions of constitutional and statutory law is resolved by an opinion that tersely adopts the reasoning of a lower court—and does so without further legal analysis or even a full statement of the questions raised on appeal—those questions are insulated from further judicial review."); *see also* William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 581 (1981) ("If '[s]unlight is said to be the best of disinfectants,' then limited publication may permit sores to fester." (alteration in original) (quoting LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914)).

18. Senator Cornyn noted that he was "shocked" by the summary order at least partially because it was unlikely "to be reviewed or even caught by other judges on the Second Circuit." *Confirmation Hearing*, *supra* note 1, at 331. Sotomayor's response clearly shows she understood the implication, explaining that "addressing an issue by summary order . . . doesn't hide a party's claims from other judges. . . . [S]o regardless of how a circuit decide[s] a case, it's not a question of hiding it from others." *Id.* at 332.

19. *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2169-70 (1998) (developing the whistleblower theory).

20. *See id.* at 2158-62.

reversal.[21] They also increase the time and resources required to write the majority opinion, which typically responds to the dissent's objections.[22] Thus, under the standard account, the second and more common option is for the panel to negotiate and compromise over the reasoning of the decision and then publish one unanimous opinion.[23]

This Article argues that a divided panel has a third option, which I call *strategic publication*: as in *Ricci*, it can choose not to publish any opinion at all and thus sap its decision of precedential weight. Indeed, some circuit court judges may care more about precedent than about the outcome of the particular case before them. When the judges cannot reach a compromise, they may exchange precedent for unanimity.

Of course, if *Ricci* were just a one-off case, then strategic publication would be little more than a political curiosity. But this Article presents empirical evidence that it isn't. Judges may engage in the practice quite frequently.

Using case-level data from the Third Circuit, I apply a standard methodological approach and compare outcomes—in this case, whether a decision is published—across judicial panels with different ideological compositions.[24] While I find little evidence that majority-Democrat panels in the Third Circuit engage in strategic publication, I find significant evidence that majority-Republican panels do.[25] Indeed, panels with three Republican judges publish substantially more often—43% more—than panels with two Republicans and one

21. *See* Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 267 (1999) (reporting that the odds of reversal for circuit court opinions with a dissent were thirty-nine times higher than for unanimous opinions).

22. *See* Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 102 (2011) (finding that majority opinions accompanied by a dissent are 20% longer).

23. *See* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 25-29 (2008); Cross & Tiller, *supra* note 19, at 2170-72; *see also* Ryan C. Black & Ryan J. Owens, *Bargaining and Legal Development in the United States Courts of Appeals*, 41 AM. POL. RES. 1071, 1083-93 (2013) (examining how frequently judges request changes to a draft opinion authored by another panel member and how frequently the authoring judge accepts the change).

24. *See, e.g.*, Cox & Miles, *supra* note 23, at 18-29 (examining the effect of panel ideology on case outcomes); Cross & Tiller, *supra* note 19, at 2169-70; Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 829-69 (2006); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1751-56 (1997).

25. For ease of reference, I refer to judges appointed by Democratic presidents as "Democratic judges" and judges appointed by Republican presidents as "Republican judges."

Democrat. These results are consistent with the practice of strategic publication.[26]

Due to the large sample size of my dataset, I also improve on prior research designs by examining the behavior of individual judges across different panel compositions. The judge-specific analysis confirms my primary results: many Republican judges in the Third Circuit publish far less frequently when sitting on a panel with one Democrat than when sitting with no Democrats.

What explains the political asymmetry in the results? While I lack the data to probe this question empirically, I suggest that the whistleblower effect of a potential dissenter may be diminished when the ideology of the en banc court is similar to that of the panel majority such that the en banc court is unlikely to reverse.[27] Majority-Democrat panels in the data may not have engaged in strategic publication because Democrats held a majority of the active seats in the Third Circuit for nearly all of the study period.[28]

Strategic publication has several important normative implications. First, it reinforces existing fears that unpublished opinions may impair judicial accountability. The standard criticisms of unpublished opinions are that they insulate poor decisions from reversal[29] and that judges are unable to apply the standards of publication consistently.[30] If judges engage in strategic publication then the status quo may be even worse: they may sometimes issue an

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26. *See infra* Part V.A.

27. *See* 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, 1334-35 (2009) (finding that circuit court decisions are influenced by the distance between the ideology of a circuit panel and the en banc court).

28. There are good reasons to expect that the en banc court casts a darker shadow on this process than the Supreme Court. *See* discussion *infra* Part VI.

29. *See* Pether, *supra* note 8, at 1441, 1483-86 (arguing that unpublished opinions "imperil the legitimacy of the judicial system"); Reynolds & Richman, *supra* note 8, at 1202-03 (arguing that "limited publication/no-citation regimes significantly diminish the accountability" of circuit court panels to the Supreme Court, en banc courts, and the public).

30. Donald R. Songer et al., *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 975-80 (1989) (finding based on an empirical analysis of the Eleventh Circuit cases that judges apply the publication criteria inconsistently); Wald, *Rhetoric of Results*, *supra* note 8, at 1374 ("[I]n my experience the criteria are vague and infinitely maneuverable. In a study of the D.C. Circuit's unpublished decisions several years ago, a bar committee . . . questioned the decision not to publish in 40 percent of the cases."); *see also* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 420-22 (2013) (cataloguing scholarly arguments that concerns raised by unpublished opinions are exacerbated by other case management practices, including delegation to clerks and staff attorneys).

unpublished opinion precisely because it insulates the decision from reversal and because the decision meets the criteria for publication.[31]

Second, strategic publication may polarize circuit precedent. If diverse panels publish fewer decisions on controversial legal issues, then those issues will be decided disproportionately by homogeneous panels, which are more likely to write ideologically extreme opinions. In other words, strategic publication may hollow out the moderate voice.

To address these potential problems, I offer several policy proposals that would push the publication decision to earlier phases in the appellate process, before a panel has the chance to discuss and vote on the merits of its cases. For example, many circuits use screening panels to identify which cases require oral argument.[32] Cases that do are assigned to full merits panels for adjudication. To diminish strategic publication, the circuit courts could enact local rules requiring screening panels to also decide which cases require a published opinion. This procedure would remove publication from the bargaining table when panels negotiate over the outcome and reasoning of their decisions.

Strategic publication also has important theoretical implications for our understanding of judicial behavior. One of the most widespread empirical findings in the literature is that diverse panels write more moderate published opinions.[33] As a result, many scholars

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31. *See, e.g.*, Plumley v. Austin, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari) ("It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit."); Wald, *Rhetoric of Results*, *supra* note 8, at 1374 ("I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent."); *see also* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 223 (1999) ("If . . . a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser. . . . Or if, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug.").

32. *See, e.g.*, LAURAL HOOPER ET AL., FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 19, 64, 89, 110-11, 166, 173, 187, 190, 203-05 (2d ed. 2011) (describing oral argument screening panels in the First, Third, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits).

33. *See, e.g.*, LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 191 (2013) ("Confirming the earlier empirical literature, we find that the presence on a panel of a judge appointed by a President of a different party from that of the President (or Presidents) who appointed the other judges on the panel tends to

have concluded that diversity produces moderated reasoning, either by changing how panel members view their cases or by incentivizing strategic bargaining over reasoning.[34] Strategic publication calls that interpretation into question, suggesting that the correlation between panel composition and reasoning may represent *selection*, not *causation*. If judges engage in strategic publication, then published opinions issued by diverse panels may be moderate not because diversity moderates reasoning but because some ideologically extreme decisions are issued in unpublished opinions, which are excluded from most empirical work on judicial behavior.[35]

This selection process also has methodological implications for empirical research on judicial behavior. For decades, scholars believed that, at least in some circuits, it was "harmless to ignore unpublished opinions, simply because they [were] easy."[36] Strategic publication suggests that it is a mistake to ignore unpublished decisions, particularly when examining voting behavior.[37]

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moderate the voting of those judges."); Cox & Miles, *supra* note 23, at 25-29; Miles & Sunstein, *supra* note 24, at 853-54, 863-65; Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 739-40 (2008) (finding that mixed panels produce more moderate decisions); Cross & Tiller, *supra* note 19, at 2170-72.

34. *See* Cox & Miles, *supra* note 23, at 36 ("[W]hy might a white judge vote differently when he sits with an African-American judge in a section 2 case? One possibility is that the white judge's sincere view of the merits of the case changes when he deliberates with an African-American judge. . . . Strategic behavior is a possibility here as well."); Cross & Tiller, *supra* note 19, at 2159 ("The minority member may threaten to highlight the disobedience externally to a higher court or to Congress, producing exposure and possible reversal. Alternatively, the minority may expose the subconscious disobedience internally, causing the majority to acknowledge its disregard or unintentional manipulation of doctrine.").

35. *See, e.g.*, EPSTEIN, LANDES & POSNER, *supra* note 33, at 155 (analyzing published opinions); Cross & Tiller, *supra* note 19, at 2159; Revesz, *supra* note 24, at 1767.

36. CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 18 (2006); *see also* Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 681 n.6 (1994) ("We limited our analysis to the published decisions in part because . . . the problems of agency will be less important in unpublished cases.").

37. *See* Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 215 (2009) ("By analyzing published case decisions exclusively, judicial scholars . . . may be drawing conclusions . . . that do not accurately describe the motivational forces behind the majority of judicial decisions."); Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 330 (2001) ("[M]ost of the growing number of political scientists' studies of the United States Circuit Courts of Appeals are based only on the sample of *published* opinions available in the new Court of Appeals Database. This resource . . . leads to a 'drunkard's search'—the drunk looks for money not where it is dropped, but under the street light.").

The remainder of the Article proceeds as follows. Part II provides a brief background on the history and public debate of unpublished opinions. Part III lays out the theoretical framework for strategic publication. Part IV describes the study's methods and data, and Part V reports the results. Finally, Part VI discusses implications for theory, policy, and future research.

II. UNPUBLISHED OPINIONS IN THE FEDERAL COURTS

Historically, the federal circuit courts issued very few unpublished opinions.[38] But in the middle of the twentieth century, the judiciary experienced a surge in caseload. As a result, judges were required to write lengthy opinions in far more cases.[39] And, in turn, the growth in case law increased the "practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities."[40]

Unpublished opinions offered a solution to both problems. They would take far less time to write because they would only apply to the parties in the case and thus would not require a lengthy discussion of the facts or law.[41] They would also relieve libraries of the need to maintain a copy of every judicial opinion because unpublished decisions would have little precedential weight.[42] Advocates also argued that unpublished opinions would not stunt the development of the common law because they would only be appropriate in cases involving straightforward applications of existing precedent.[43]

Thus, the practice of unpublished opinions spread quickly.[44] Since 1964 when the Judicial Conference first formally encouraged

38. *See* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990) ("It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small."); Wald, *Rhetoric of Results*, *supra* note 8, at 1374 ("When I came onto the D.C. Circuit in 1979, we rarely if ever disposed of a criminal appeal without an opinion; [by 1995,] we handle[d] 72% that way.").

39. *See* FED. JUDICIAL CTR., FJC RESEARCH SER. NO. 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE 5 (1973).

40. ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

41. *See* Wasby, *supra* note 37, at 333.

42. *See id.*

43. *See id.*

44. The history of unpublished decisions in the federal circuits has been told and retold many times before. For a detailed discussion, see Robert A. Mead, *"Unpublished" Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals*, 93 L. LIBR. J. 589, 590-95 (2001); Pether, *supra* note 8, at 1442-73.

judges to limit publication to opinions with "general precedential value,"[45] the circuit courts have experimented with a variety of publication rules.[46] Some, including the Third Circuit, have required the approval of two judges to publish an opinion.[47] Others allow the authoring judge to decide.[48] Most circuits have also established specific criteria for publication, which may include whether the opinion establishes new law, reverses the decision below, is accompanied by a dissent or concurrence, creates a circuit split, applies a rule to a new set of facts, involves an issue of public or legal interest, or contains "a significant contribution to legal literature through historical review or resolution of an apparent conflict."[49] A minority of circuits have provided significantly less formal guidance.[50]

Recognizing that unpublished opinions could give an unfair advantage to repeat players who have greater access to them, the circuit courts also promulgated rules limiting citation to unpublished opinions. Some circuits prohibited parties from citing unpublished opinions as a source of law.[51] Others created an exception where "the opinion ha[d] persuasive value on a material issue and no published opinion . . . would serve as well."[52] But, subject to great controversy,[53]

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45. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 40, at 11.

46. Mead, *supra* note 44, at 591.

47. HOOPER ET AL., *supra* note 32, at 92 ("[In the Third Circuit, a] majority of the panel determines whether an opinion is designated as precedential or not precedential . . . ."); *see also, e.g.*, 9TH CIR. R. 36-5 ("An order may be specially designated for publication by a majority of the judges . . . ."); 11TH CIR. R. 36 I.O.P. 6 ("A majority of the panel determine whether an opinion should be published.").

48. *See, e.g.*, 4TH CIR. LOCAL R. 36(a) ("Opinions . . . will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication . . . ."). *But see* 5TH CIR. R. 47.5.2 ("An opinion will be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication.").

49. HOOPER ET AL., *supra* note 32, at 157; *see, e.g.*, 1ST CIR. R. 36(b); 4TH CIR. LOCAL R. 36(a); 5TH CIR. R. 47.5; 9TH CIR. R. 36-2; D.C. CIR. R. 36(c).

50. *See, e.g.*, 11TH CIR. R. 36 I.O.P. 6 ("Opinions that the panel believes to have no precedential value are not published.").

51. *See, e.g.*, 1ST CIR. LOCAL R. 32.1.0 (noting that unpublished cases may be cited but that the court will consider them "for their persuasive value but not as binding precedent"); 5TH CIR. R. 47.5.4 (describing "[u]npublished opinions issued on or after January 1, 1996" as "not precedent" but allowing such opinions to be cited); 9TH CIR. R. 36-3 (allowing the citation of unpublished dispositions, which are "not precedent," only in limited circumstances); D.C. CIR. R. 32.1(b) (disallowing citation to unpublished orders issued before a certain date as precedent).

52. 8TH CIR. R. 32.1A.

53. Judges, attorneys, scholars, and legal organizations submitted 504 comments on the proposed rule, "the second-most ever submitted on a proposed amendment to a rule of . . . procedure." Patrick J. Schiltz, *Much Ado About Little: Explaining the* Sturm Und Drang *Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1432, 1463

the Federal Rules of Appellate Procedure were amended in 2006 to permit parties to cite any unpublished opinions issued after January 1, 2007.[54] This change was motivated by the widespread availability of unpublished opinions online today. The local rules described above still govern citation of unpublished opinions issued before that date.[55]

While unpublished opinions are a valuable tool to conserve limited judicial resources, they have also been a source of controversy.[56] Critics have argued that the standards are too vague for judges to apply them consistently.[57] They have also argued that unpublished opinions harm the development of the common law. In doing so, they have pointed to empirical evidence that at least some unpublished opinions should have been published,[58] and they have noted that "even routine cases may have fact patterns that are useful

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(2005); *see also* Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 36 (arguing against the proposed rule).

54. FED. R. APP. P. 32.1(a)(ii).

55. FED. R. APP. P. 32.1 advisory committee notes to 2006 adoption.

56. *See, e.g.*, Schiltz, *supra* note 53, at 1429 (stating, as the Reporter to the Advisory Committee on the Federal Rules of Appellate Procedure, that "the issue of unpublished opinions was the most controversial issue on the Advisory Committee's agenda" in the 1990s and 2000s); *id.* at 1433 (reporting that one federal judge once said that talking to his colleagues about unpublished opinions "was like trying to talk to them about sex or religion" (internal quotation marks omitted)).

57. *See* Reynolds & Richman, *supra* note 8, at 1192 ("From the beginning there has been some skepticism concerning judges' ability to distinguish correctly between dispute-settling and lawmaking opinions."); Wald, *Rhetoric of Results*, *supra* note 8, at 1374 ("[I]n my experience the criteria are vague and infinitely maneuverable."); Edwin R. Render, *On Unpublished Opinions*, 73 KY. L.J. 145, 153 (1984-85) ("The 'precedential importance' of an opinion . . . cannot be predetermined by its author" because "[a] case that does not seem particularly important today may become important in the future for reasons that are entirely unknown to the court at the time the decision is made."); *see also* Songer, *supra* note 38, at 312-13 (showing significant variations in publication rates across judges in the same circuit).

58. *See* Reynolds & Richman, *supra* note 8, at 1193 n.135 (reviewing 100 unpublished opinions in the Fourth Circuit and concluding that "[s]everal appear to merit publication"); Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 315-16 (1977) (finding that roughly one-fifth of a sample of 150 unpublished orders from the Seventh Circuit merited publication); James N. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224, 1226 (1975) (providing several examples of unpublished Ninth Circuit cases that decided novel questions of law). *But see* Philip Shuchman & Alan Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 EMORY L.J. 195, 224 (1980) ("[T]he judges of the Fifth Circuit were in fact able to discern which civil appeals could be summarily affirmed without great concern for the effect that the omission of those opinions would have on the development of case law."). These studies rely on the subjective evaluation of the authors. One exception is a study of publication decisions in the district court, which surveyed attorneys in 330 district court cases. Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 792 (1992). It reported that only 9% of cases that presented legal issues that were "important for any broader social constituency [other] than [the] immediate client" were published. *Id.*

for litigants in similar situations."[59] Critics have also contended that the use of unpublished opinions encourages sloppy decision making because judges devote far less time to thinking and writing about them.[60] And they have claimed that unpublished opinions harm judicial accountability and transparency by dramatically decreasing the probability of review and, in turn, reversal by a higher court.[61] As a result, judges can "hide inconsistencies in circuit doctrine" and "avoid having to spell out the rationale of rulings."[62]

Some critics have also argued that non-precedential opinions are unconstitutional.[63] Most notably, in an opinion authored by Judge Richard Arnold, the Eighth Circuit held ever-so-briefly that the federal courts violate the separation of powers when they do not give precedential weight to unpublished opinions.[64] According to Arnold, the framers understood that the "duty of courts to follow their prior decisions . . . derive[d] from the nature of the judicial power itself" and was intended to "separate [judicial power] from a dangerous union with the legislative power."[65] Thus, he concluded, federal judges exceed the limits of Article III when they ignore prior judicial decisions, even unpublished ones.[66] Sitting en banc, the Eighth Circuit later vacated the opinion on mootness grounds but made clear it was not deciding this constitutional question.[67]

The criticisms described above are reinforced by the circuit courts' apparent fervor for unpublished opinions. Figure 1 displays the percentage of merits cases in the federal circuit courts resolved by a published opinion since 1985. In that year, published opinions

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59. Mead, *supra* note 44, at 598.

60. *See* Reynolds & Richman, *supra* note 17, at 604-07; William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES, Mar. 14, 1999, at 1 ("[Unpublished opinions are] sort of a formula for irresponsibility . . . . Most judges, myself included, are not nearly as careful in dealing with unpublished decisions." (quoting then-Chief Judge of the Seventh Circuit Richard Posner)).

61. *See* Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 783 n.41 (1983) ("[Unpublished opinions have] an obvious bearing on judicial accountability. Although unpublished opinions may indeed save time, they limit the public's ability to evaluate the correctness of judicial actions and give rise to uncertainties about the integrity of the courts."); *see also* Mead, *supra* note 44, at 595-600 (reviewing the classic arguments against limited publication).

62. Wasby, *supra* note 37, at 328; *see also* Gardner, *supra* note 58, at 1224-25 (providing examples of doctrinal inconsistencies in unpublished cases in the Ninth Circuit).

63. *See, e.g.*, Charles R. Eloshway, Note, *Say It Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers*, 70 GEO. WASH. L. REV. 632, 638-45 (2002).

64. Anastasoff v. United States, 223 F.3d 898, 899-905 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

65. *Id.* at 903.

66. *Id.* at 905.

67. Anastasoff v. United States, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

accounted for about 40% of cases.[68] Since then, the publication rate has fallen at a rapid and constant rate, and in 2015, the circuit courts published in just 13% of cases.

Figure 1. Publication Rates for Merits Terminations Nationwide, 1985-2015[69]

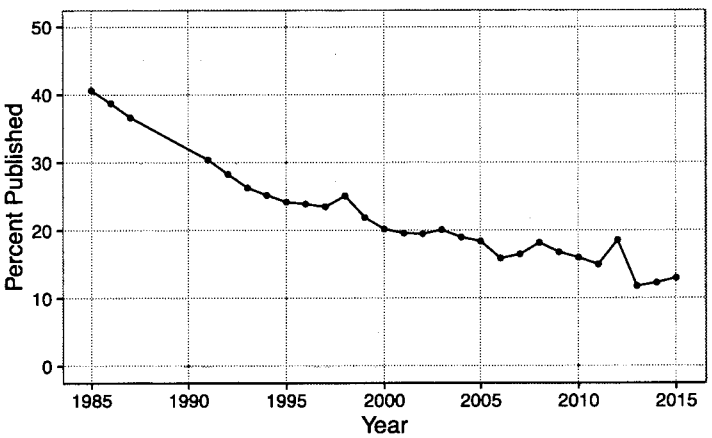


Figure 2, which breaks down the publication rate for each circuit court from 1997 to 2015, reveals two additional trends. First, the publication rate is low across the country. In every circuit in 2015, a majority of cases were resolved through unpublished opinions. Seven circuits—including the Third—had publication rates at or below 10%. Another two had publication rates below 25%. The First, Seventh, and D.C. Circuits each published at a higher rate but still resolved more cases by unpublished opinions than published ones.

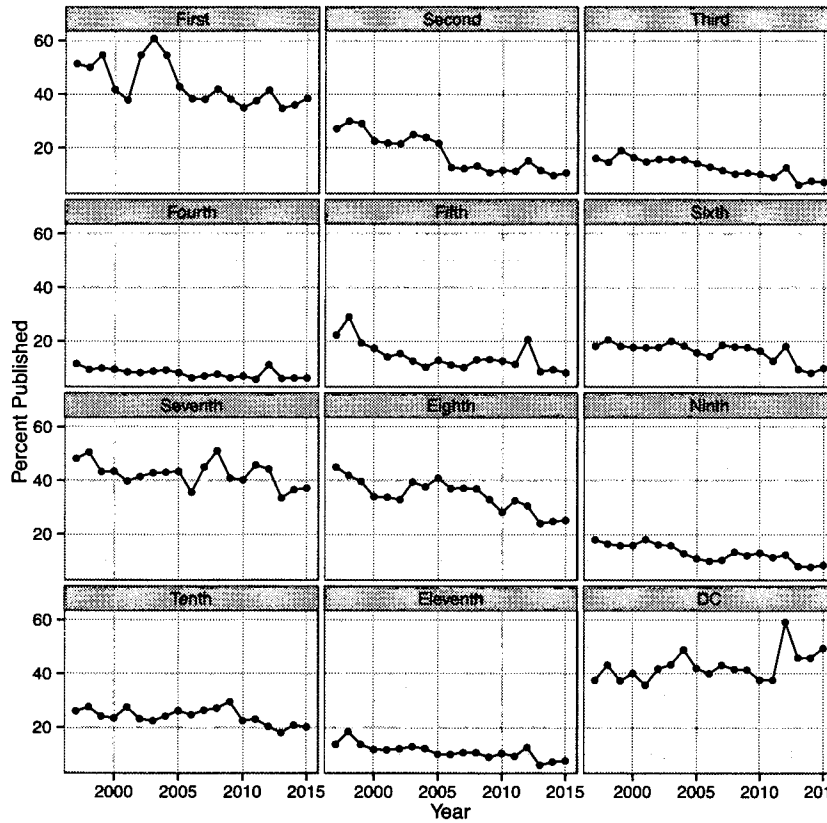
The second pattern is that since 1997 the publication rate has decreased in every court but the D.C. Circuit. The First, Second, Third, Fifth, Eighth, and Ninth Circuits experienced especially

68. The official data go back even further to 1981, and if the data is accurate, the decline is even starker. *See* Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 204-05 (2001). Indeed, the Administrative Office of the Courts reported that the circuit courts published in 90% of cases in 1981, far more than the 40% of cases they published in 1985. While the rapid drop in the publication rate between 1981 and 1985 might reflect a real change in judicial practice, it more likely represents a change in data collection procedures over time.

69. The data on 1997 to 2015 was obtained from reports issued by the federal courts. *See, e.g.*, *Judicial Business of the United States Courts*, USCOURTS.GOV: STAT. & REP. [hereinafter *Judicial Business*], http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts (follow "Judicial Business Report" hyperlink; then "Judicial Business Tables" hyperlink; then "Type of opinion or Order Filed in Cases Terminated on the Merits" hyperlink) (last visited Feb. 22, 2018). The pre-1997 data is from Hannon, *supra* note 68, at 204. Data was not available for 1988-1990. *See id.* at 205.

dramatic decreases. Taken together, these patterns provide little evidence that the downward trend will not continue into the future.

Figure 2. Publication Rates for Merits Terminations by Circuit Court, 1997-2015[70]



III. STRATEGIC PUBLICATION

Under the standard academic account of judicial behavior, a circuit court panel that cannot agree on the outcome of a case has two options. First, the judges can choose to express their sincere beliefs by publishing a divided decision with a majority opinion and dissent. Panels usually do not take this route,[71] however, because a dissenting

70. The data were obtained from statistical reports issued by the federal courts for 1997 to 2015. *See, e.g.*, *Judicial Business*, *supra* note 69.

71. *See* Songer, *supra* note 38, at 311 (finding that "virtually all of the decisions are unanimous" in the Fourth, Eleventh, and D.C. Circuits); Daniel Hemel & Kyle Rozema, *Decisionmaking on Multimember Courts: The Assignment Power in the Circuits* 15 (Univ. of Chi. Coase-Sandor Working Paper Series in Law & Econ., Paper No. 822, 2017),

judge functions as a "whistleblower," dramatically increasing the probability of reversal by spotlighting problems in a poorly reasoned or ideologically extreme majority opinion.[72] A dissent also increases the time and resources required to write the majority opinion, which typically responds to the dissent's objections.[73] Thus, under the standard view, the second and more common option is for the panel members to engage in strategic bargaining: the majority agrees to moderate the reasoning of the opinion in exchange for unanimity, and the panel then publishes one opinion.[74]

Several empirical findings support the view that circuit court judges frequently bargain over reasoning. To begin with, it is relatively rare for a circuit court judge to file a dissent, even when sitting alongside others with very different ideological views.[75] Moreover, several studies have found that individual judges and panels are more likely to vote inconsistently with their ideology when the panel is ideologically diverse.[76] Another study found that the ideology of other judges on a panel are better predictors of the voting behavior of a judge than his or her own ideology.[77] And one study further showed—based on the timing of circuit court decisions—that these results are better explained by strategic bargaining than by sincere changes in the judges' views of cases.[78]

As *Ricci* shows, however, the standard academic account of judicial behavior—in which the panel either publishes a divided opinion or publishes a more moderate unanimous one—is incomplete. The panel has a third option: strategic publication. It can resolve the case without publishing the opinion and thus avoid establishing any binding legal precedent. In other words, when the judges cannot reach a compromise, they may exchange publication for unanimity.

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2965880 (reporting that the dissent rate in published opinions from the federal circuit courts ranged from roughly 1-2% from 1993 to 2007).

72. *See* Cross & Tiller, *supra* note 19, at 2169-70; *see also* George, *supra* note 21, at 267 (reporting that the odds of reversal for circuit court opinions with a dissent was thirty-nine times higher than for unanimous opinions).

73. *See supra* note 22.

74. *See supra* note 23 and accompanying text.

75. *See supra* note 71 and accompanying text.

76. *See, e.g.*, SUNSTEIN ET AL., *supra* note 36, at 17-45; (finding that mixed panels produce more moderate decisions); EPSTEIN, LANDES & POSNER, *supra* note 33, at 191; Cox & Miles, *supra* note 23, at 25-29; Cross & Tiller, *supra* note 19, at 2170-72.

77. *See* Revesz, *supra* note 24, at 1767.

78. *See* Thomas J. Miles, *The Law's Delay: A Test of the Mechanisms of Judicial Peer Effects*, 4 J. LEGAL ANALYSIS 301, 304-05 (2012).

There are sound theoretical reasons for panels to bargain over publication. For the majority, the incentives are similar to the incentives to bargain over reasoning: unanimity and non-publication decrease the probability of reversal,[79] and a unanimous unpublished opinion takes far less time to write than a divided and published one.[80] The minority judge also has an incentive to bargain over publication: if she primarily cares about preventing the panel from establishing undesirable precedent, she can achieve that outcome if the panel's decision is not published.

The incentives to engage in strategic publication likely vary by case, panel composition, and institutional context. Indeed, panels are more likely to bargain over publication when the majority cares relatively more about the outcome of the particular case before it and the minority cares more about precedent.[81] And the fear of reversal is likely stronger when the ideology of the reviewing court is further away from the majority.[82]

Aside from *Ricci*, what existing empirical evidence is there of strategic publication? First, a number of judges have publicly acknowledged that it happens. Perhaps most candidly, former D.C. Circuit Judge Patricia Wald "s[aw] judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls" and also "s[aw] wily would-be dissenters go along with a result they d[id] not like so long as it [was] not elevated to a precedent."[83] Justice Thomas recently wrote in dissent to a denial of certiorari that it was "hard to imagine a reason that the Court of Appeals would not have published [the opinion in the case] except to avoid creating binding law for the Circuit."[84] Other judges have also described the incentives

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79. *See* Black & Owens, *supra* note 13, at 1071 (providing empirical evidence that the Supreme Court is less likely to grant certiorari in cases disposed by unpublished opinions); Wald, *Changing Course*, *supra* note 8, at 500-01 (noting that unpublished opinions are "rarely en banced").

80. *See* Epstein et al., supra note 22, at 102 (finding that opinions accompanied by a dissent are 20% longer).

81. Choi & Gulati, *supra* note 33, at 742.

82. *See* Morgan Hazelton et al., *Sound the Alarm? Judicial Decisions Regarding Publication and Dissent*, 44 AM. POL'Y RES. 649, 651-54 (2016); discussion *infra* Part VI.

83. Wald, *Rhetoric of Results*, *supra* note 8, at 1374; *see also* Donna S. Stroud, *The Bottom of the Iceberg: Unpublished Opinions*, 37 CAMPBELL L. REV. 333, 334-36 (2015) (asserting that judges sometimes agree to sign onto an opinion they disagree with if the opinion is not published).

84. Plumley v. Austin, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari) ("[T]he decision below is unpublished and therefore lacks precedential force in the Fourth Circuit. But that in itself is yet another disturbing aspect of the Fourth Circuit's decision, and yet another reason to grant review. The Court of Appeals had full

to engage in strategic publication even if they did not report observing it directly.[85]

Second, some unpublished decisions carry the hallmarks of opinions that merit publication. A significant fraction of unpublished decisions involve a reversal of the lower court.[86] Moreover, some unpublished opinions grapple with important, nonroutine, or difficult questions of law.[87] Indeed, as in published decisions, the outcomes of unpublished decisions are often correlated with panel ideology.[88] The publication rates of judges within the same circuit also vary widely, suggesting that judges do not apply publication rules consistently.[89] And finally, there is evidence that one state intermediate appellate court in the 1990s began publishing fewer of its reversals to "avoid creating the impression that the trial courts were getting it wrong

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briefing and argument on Austin's claim of judicial vindictiveness. It analyzed the claim in a 39-page opinion written over a dissent. By any standard . . . this decision should have been published." (citation omitted)).

85. *See, e.g.*, Arnold, *supra* note 31, at 223 ("If . . . a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser . . . . Or if, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug.").

86. *See* Songer et al., *supra* note 30, at 975-76 (finding that 12% of unpublished opinions in the Eleventh Circuit reversed the lower court and that more than a third of all reversals appeared in unpublished opinions); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 107 (2001) (finding that 15% of the unpublished opinions in a sample of National Labor Relations Board cases reversed the lower court).

87. *See supra* notes 58-59 and accompanying text; *see also* Stroud, *supra* note 83, at 357 (reporting that "[o]ne Fourth Circuit judge noted that 'hardly a week goes by without finding an unpublished opinion that decides a matter of first impression'" (quoting an anonymous survey response)).

88. *See* Songer et al., *supra* note 30, at 977 (finding evidence of ideological panel effects in unpublished opinions from the Eleventh Circuit); Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235, 250-251 (1992) (finding a broadly similar effect of panel ideology in published and unpublished decisions); Merritt & Brudney, *supra* note 86, at 110 (finding that "judges with different backgrounds and demographic characteristics reach different results" in a sample of unpublished decisions in NLRB cases); David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 843 (2005) (finding evidence of ideological panel effects in unpublished opinions from Ninth Circuit asylum cases). *But see* Keele et al., *supra* note 37, at 232-33 (finding little evidence of ideological panel effects in unpublished United States Forest Service cases).

89. Songer, *supra* note 38, at 312-13; *see also* Wald, *Rhetoric of Results*, *supra* note 8, at 1374 ("[I]n my experience the criteria are vague and infinitely maneuverable. In a study of the D.C. Circuit's unpublished decisions several years ago, a bar committee . . . questioned the decision not to publish in 40 percent of the cases.").

more often than right."[90] This example shows how the publication decision can be influenced by "concerns unrelated to the true publication-worthiness of the case at hand."[91]

Finally, there is some limited evidence that a circuit court panel is less likely to publish a decision when its ideology is further from that of the reviewing en banc circuit court.[92]

Not all published data supports the existence of strategic publication, however. Two studies found no statistically significant correlation between panel ideology and the publication decision.[93] It is difficult, however, to draw clear implications from their results. To begin with, both papers studied narrow samples of cases—National Labor Relations Board disputes in one and asylum disputes in the other—which limits their generalizability to a broader swath of cases. Both studies also relied on relatively small sample sizes. The reported logistic regression model in the first paper estimated a relatively substantial effect of panel ideology, but the estimates were not statistically significant, at least in part due to the small sample of about 500 cases.[94] The sample size in the second paper was larger, but the near-zero publication rate likely decreased the precision of its estimates substantially.[95] The remainder of this Article conducts a direct test of strategic publication on a larger sample and broader swath of cases.

IV. STUDY DESIGN

This Part describes the methods and data used to test for evidence of strategic publication. The Third Circuit was chosen as the study site for several reasons. First, as I explain below, my test of strategic publication assumes that judges are randomly assigned to panels. A recent article by Adam Chilton and Marin Levy found

90. Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719, 1726 (2015); *see id.* at 1742-46 (showing that, after the Illinois Supreme Court capped the number of published opinions the intermediate appellate courts could issue per year, the rate of published opinions reversing the lower court fell to the same rate of published opinions affirming the lower court).

91. *Id.* at 1727.

92. *See* Hazelton et al., *supra* note 82, at 651-54.

93. *See* Law, *supra* note 88, at 861; Merritt & Brudney, *supra* note 86, at 106, 112.

94. Merritt & Brudney, *supra* note 86, at 80-81, 106 tbl.IX.

95. A publication rate of 4.7% for all-Republican panels, for example, yielded just thirteen published opinions issued by all-Republican panels. *See* Law, *supra* note 88, at 832, 861. The paper did not provide information about the magnitude of the estimated effect or the size of the standard error. *See id.* at 862 (reporting only the p-value).

evidence of nonrandom assignment in four of the twelve federal circuit courts[96] but found no such evidence in the Third Circuit.[97]

Second, to ensure random assignment of cases to panels, I need to exclude opinions that were not issued by merits panels. My own institutional knowledge of the Third Circuit was helpful in identifying such opinions for exclusion.[98] Moreover, among the eight remaining circuits for which Chilton and Levy found no evidence of nonrandomization, only the Third publishes historical calendar sheets that indicate all cases assigned to full merits panels, including those decided without oral argument. As I discuss below, this data is helpful in assessing whether the right cases have been excluded.[99]

Finally, the Third Circuit is relatively typical of other circuits, which strengthens the generalizability of my findings. For one thing, the court is ideologically moderate. Indeed, for much of the study period, Democrat-appointed judges held just over half of the active seats in the court. For another, the court is typical in size: it has fourteen authorized judgeships, just under the national average of fifteen.[100] The court's caseload is also typical both in terms of the number and types of cases it decides.[101] And, perhaps most importantly, the Third Circuit's historical publication rate is relatively typical of most other circuits.[102]

A. Analytic Strategy

My primary analytic strategy is to examine publication rates across panels with different ideological compositions under the standard assumption that ideological diversity increases the probability of disagreement.[103] I use the most common measure of

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96. *See* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 39-40 (2015).

97. *Id.* at 40 ("For the ... Third [Circuit] ... we did not find any statistically significant evidence of nonrandomness."); *see also* HOOPER ET AL., *supra* note 32, at 92 ("The [Third Circuit] clerk randomly assigns all fully briefed counseled cases ... to three-judge panels.").

98. I served as a clerk on the Third Circuit in the 2014-2015 term.

99. *See infra* Part IV.B.

100. Excluding the Ninth Circuit, which has twenty-nine judges, the average number of judgeships is 13.6. *See* HOOPER ET AL., *supra* note 32, at 165.

101. *See* U.S. COURTS, TABLE B-1. U.S. COURTS OF APPEALS—APPEALS COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2013 (2013), http://www.uscourts.gov/statistics/table/b-1/federal-judicial-caseload-statistics/2013/03/31.

102. *See supra* Figure 2.

103. *See, e.g.*, Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 133

judicial ideology—the political party of the judge's appointing president. While scholars have developed other measures of ideology, most notably judicial common space scores, they perform only marginally better at predicting judicial decisions.[104] I compare the publication rates of panels with three Republicans; two Republicans and one Democrat; one Republican and two Democrats; and three Democrats. If judges and cases are randomly assigned to panels,[105] then strategic publication predicts that panels will publish less frequently if they are ideologically diverse than if they are homogeneous.

B. Data

The vast majority of studies in the judicial behavior literature have examined published opinions, primarily due to the lack of data on unpublished decisions. In recent years, however, this problem has diminished as the circuit courts have made far more of their unpublished decisions available online. I downloaded 14,250 published and unpublished Third Circuit decisions from the Government Printing Office (GPO) website, which receives the documents from the United States Administrative Office of the Courts. To analyze the opinions, I developed a series of regular expressions to code the date of submission, whether there was oral argument, the date of oral argument, the judges on the panel, whether the opinion was published, and whether the case was criminal or civil in nature.[106]

Two additional variables raised special coding difficulties. First, unlike some other circuits, the Third does not state the judgment (i.e., affirm, reverse, vacate) in capital letters at the end of each opinion. I therefore developed a series of regular expressions to parse the opinion for information on whether the panel affirmed the lower court.[107] As a validation check, I hand coded this variable in 100 randomly selected opinions—roughly half of them published, the other half unpublished. In total, fifty-three of the fifty-four opinions coded as an affirmance (98%) and thirty-five of the forty-two

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(2004) ("[A]s th[e] ideological distance [between a judge and the majority opinion writer] increases, the likelihood of writing a dissent likewise increases . . . .").

104. Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 J.L. & POL'Y 133, 196 (2009).

105. *See* Chilton & Levy, *supra* note 96, at 40-41.

106. A case is coded as criminal if one of the parties is listed as "United States." All other cases are coded as civil.

107. An opinion that reversed, vacated, or remanded to the district court was coded as a non-affirmance.

opinions coded as a non-affirmance (83%) were coded correctly.[108] The regular expressions were unable to code 4 of the 100 hand coded opinions (4%).[109] Taken together, these results suggest that judgment information was coded with reasonable accuracy.

Second, I created a variable to identify which opinions were issued by merits panels. As is common in the federal courts, a substantial number of cases are diverted to and decided by motions, pro se, immigration, and other special panels.[110] Because these diverted cases are not pooled with merits cases for random assignment, it is important to exclude them from the analysis. To identify opinions issued by a merits panel, I computed the number of opinions with oral argument or submission dates within a two-week period by every judge-triad sitting together in the data.[111] I then labeled as merits cases any opinions issued by a two-week-triad that issued five or more opinions and held at least one oral argument. Of those cases, 233 were relabeled non-merits because they were (1) the second opinion issued in the case, which is typically an amendment to a prior opinion; (2) an order, which is rarely issued by merits panels in the Third Circuit; or (3) an opinion clearly issued by an immigration or pro se panel.

To confirm that this was a reasonable approach for identifying opinions issued by merits panels, I collected calendar lists from the Third Circuit website for the last six months of 2013, a period that overlaps with my case-level data. The calendar lists identify all cases—both those submitted on the briefs and those with oral argument—for each merits panel. They provide some assurance that I am reliably identifying merits cases. Indeed, of all 330 cases that I identify as terminated by a full merits panel in the relevant period, only three (1%) do not appear in the merits lists. And of all 386 case numbers I identify as *not* terminated by a full merits panel, only fifty-three (14%) are on a merits list.

After dropping all opinions that were not issued by a merits panel, 5702 published and unpublished decisions remained in the

108. As a second validation test, I computed the affirmance rate for published and unpublished opinions separately. The affirmance rate in unpublished opinions is 84%, while the affirmance rate in published opinions is 45%, which is consistent with the view that circuit courts are far more likely to issue reversals in published opinions. *See* Wasby, *supra* note 37, at 338.

109. In the complete sample of cases, information on this variable was missing far less often—in just 2% of cases.

110. *See* HOOPER ET AL., *supra* note 32, at 87 (using the Third Circuit as an example).

111. In 1% of opinions, no dates for submission or oral argument were available.

dataset.[112] Table 1 shows the number of published and unpublished opinions issued by merits panels by the year of submission or oral argument. From 2008 to 2013, there were between 700 and 1100 opinions per year.[113] Throughout that period, the publication rate hovered around 17%.[114]

Table 1. Number of Opinions by Year of Submission or Oral Argument, 2008-2013

Year	Total	Published	Unpublished	% Published
2008	1102	183	919	16.6
2009	1080	171	909	15.8
2010	966	171	795	17.7
2011	1013	169	844	16.7
2012	810	145	665	17.9
2013	731	130	601	17.8
All Years	5702	969	4733	17.0

V. RESULTS

A. Main Results

Strategic publication predicts that ideologically homogeneous panels publish opinions more frequently than diverse panels. Each column in Table 2 depicts the proportion of cases resolved by a published opinion across the four possible panel compositions. The numbers in parentheses indicate sample size. A dagger or star next to a coefficient indicates that it is statistically significantly different from the coefficient to its left.[115] The table reveals preliminary evidence of

112. I also excluded certain opinions based on other considerations: (1) opinions that were perfect duplicates; (2) opinions submitted in or after 2014 to avoid temporal censoring; (3) decisions with fewer than three judges; (4) opinions in which the precedential status was unclear; and (5) opinions for which there was no submission or oral argument date.

113. It is unlikely that the decrease in opinions in 2012 and 2013 represents censoring rather than an actual drop in issued opinions. First, sixteen months elapsed between the last day of 2013 and May 2015, when the opinions were downloaded from the GPO website. It is rare for a Third Circuit panel to take sixteen months after submission or oral argument to issue an opinion. Second, if there were censoring in the 2012 and 2013 data, we would expect the average date of submission or oral argument in opinions from those years in the data to be earlier than the average date for prior years. Instead, the average dates are quite similar. The average for 2008 to 2011 is 177.5, while the average date in 2012 was 175, and the average date in 2013 was 182.3. Even if the decrease in opinions in 2012 and 2013 represents censoring, the results are substantively similar when those years are excluded from the analysis. *See* Appendix Tables 1-2.

114. This rate is significantly higher than the rate depicted in Figure 2 because it excludes cases diverted to pro se, immigration, and other panels.

115. All significance tests are two-sided t-tests.

strategic publication: panels with two Republicans and one Democrat publish just 15.1% of the time, while all-Republican panels publish 21.6% of the time. This difference, which is statistically significant at the .01 level, implies that panels with three Republicans publish 43% more often than panels with two Republicans and one Democrat. In contrast, the publication rates for majority-Democrat panels were stable. Panels with three Democrats and panels with two Democrats and one Republican published roughly 17.5% of the time.

Table 2. Aggregate Publication Rate by Panel Composition

	RRR	RRD	RDD	DDD
All Cases	0.216	0.150**	0.175*	0.173
	(787)	(2465)	(2120)	(330)

Notes: † p<0.1, *p<0.05, **p<0.01

Table 3 disaggregates the publication rates for criminal and civil cases. For both kinds of cases, the story is similar. For civil cases, panels with two Republicans and one Democrat publish just 20.2% of the time, while panels with three Republicans publish 26.7% of the time. This means that all-Republican panels publish 32.2% more than panels with two Republicans and one Democrat. The difference is even starker for criminal cases, where panels with two Republicans and one Democrat publish just 7.4% of the time, while panels with three Republicans publish 14% of the time. All-Republican panels thus publish 89.2% more in criminal cases than panels with two Republicans and one Democrat.

Table 3. Aggregate Publication Rate by Panel Composition & Case Type

	RRR	RRD	RDD	DDD
Civil	0.267	0.202**	0.232†	0.222
	(472)	(1473)	(1243)	(207)
Criminal	0.140	0.074**	0.096†	0.089
	(315)	(992)	(887)	(123)

Notes: †p<0.1, *p<0.05, **p<0.01

I next examine the publication rate of individual judges across panel compositions. Table 4 shows the publication rate for each Democrat in the Third Circuit who issued at least thirty opinions from each panel composition. Consistent with Table 1, the Democratic judges published at relatively similar rates when on all-Democrat

panels versus panels with one Republican judge. Compared to their publication rates on all-Democratic panels, three judges published more frequently with one Republican on the panel (Ambro, Sloviter, Vanaskie), but none of the differences are statistically significant. More importantly, six judges published less frequently on panels with one Republican judge, but none of the differences are statistically significant, and the differences for four of those judges are very small (Barry, Greenaway, McKee, Rendell).

Table 4. Judge-Specific Publication Rate by Panel Composition, Democrat Judges

Judge	RRD	RDD	DDD
Aldisert	0.212	0.208	0.245
	(33)	(183)	(49)
Ambro	0.171	0.171	0.156
	(467)	(449)	(96)
Barry	0.097	0.117	0.127
	(373)	(428)	(71)
Fuentes	0.186	0.171†	0.294
	(376)	(621)	(34)
Greenaway	0.175	0.189	0.207
	(228)	(228)	(82)
McKee	0.108*	0.165	0.182
	(288)	(474)	(99)
Rendell	0.134	0.149	0.165
	(298)	(558)	(91)
Sloviter	0.185	0.192	0.174
	(216)	(547)	(195)
Vanaskie	0.133†	0.209†	0.133
	(105)	(302)	(113)

Notes: †p<0.1, *p<0.05, **p<0.01

Table 5 shows the publication rate for each Republican judge in the Third Circuit with at least thirty opinions in each panel composition. The results contrast starkly with the results for Democratic judges. All but one of the Republican judges (Greenberg) published more frequently on a panel with two other Republicans than on a panel with one Democrat. The difference is statistically significant for six judges at the 0.05 level, and for another one at the 0.1 level. And many of the effect sizes are very large. The relative change is between 29-55% for five judges (Cowen, Fisher, Hardiman,

Jordan, Smith) and between 60-100% for another three (Chagares, Roth, Stapleton).

Taken together, the results in Tables 2 through 5 are consistent with asymmetric strategic publication. While adding a Republican judge to an all-Democrat panel in the Third Circuit had no effect on the publication rate, adding a Democrat to an all-Republican panel consistently reduced it.

Table 5. Judge-Specific Publication Rate by Panel Composition, Republican Judges

Judge	RRR	RRD	RDD
Chagares	0.197	0.121*	0.154
	(228)	(447)	(364)
Cowen	0.222	0.172	0.054
	(153)	(122)	(56)
Fisher	0.249	0.167*	0.179
	(414)	(568)	(84)
Greenberg	0.237	0.242	0.233
	(59)	(194)	(103)
Hardiman	0.215	0.142*	0.183
	(242)	(530)	(240)
Jordan	0.217	0.159†	0.193
	(277)	(422)	(296)
Nygaard	0.175	0.141	0.107
	(97)	(290)	(75)
Roth	0.226	0.117*	0.190*
	(115)	(360)	(232)
Scirica	0.174	0.15	0.143
	(190)	(427)	(182)
Smith	0.215	0.157*	0.196
	(270)	(567)	(225)
Stapleton	0.26	0.127*	0.186
	(96)	(79)	(59)

Notes: †p<0.1, *p<0.05, **p<0.01

B. Alternative Theoretical Mechanisms

There are at least two other potential explanations for these results other than strategic publication. First, because Democratic judges in the Third Circuit appear to publish slightly less frequently than Republican judges,[116] it is possible that adding a Democrat to a

116. *See supra* Table 2.

panel decreases publication not due to strategic publication but simply because Democrats in the Third Circuit have a lower propensity to publish. While I cannot fully rule out this alternative explanation, I note that the general pattern of results is not consistent with its other predictions. Indeed, if the propensity theory were right, we would expect the publication rate to decrease as more Democrats are added to the panel. But, as Table 2 shows, the publication rate for panels with one Democrat is lower than the publication rate for panels with two, and the publication rate for panels with two Democrats publish at a similar rate to panels with three.

Second, if Democrats reverse less frequently than Republicans and reversals generally merit publication, then adding a Democrat to a Republican panel may decrease publication not through strategic publication but by decreasing the probability of reversal.[117] There are two reasons to reject this alternative explanation. To begin with, the premise is false. Majority-Democrat panels in the sample do not reverse less frequently than majority-Republican panels. Indeed, as Table 6 reveals, the affirmance rate across panel compositions is statistically indistinguishable, and if anything, panels with more Democrats affirm less frequently.

Table 6. Aggregate Affirmance Rate by Panel Composition

	RRR	**RRD**	**RDD**	**DDD**
All Cases	0.774	0.780	0.764	0.724
	(787)	(2465)	(2120)	(330)

Notes: † p<0.1, *p<0.05, **p<0.01

Even more convincing, Table 7 attempts to control for the outcome of the case by presenting publication rates for affirmances and non-affirmances separately. As the table reveals, regardless of case outcome, panels with two Republicans and one Democrat publish substantially less frequently than all-Republican panels. Thus, taken together, the pattern of results supports the theory of asymmetric strategic publication.

117. *See* Law, *supra* note 88, at 861-63.

Table 7. Aggregate Publication Rate by Panel Composition & Judgment[118]

	RRR	RRD	RDD	DDD
All Cases	0.216	0.150**	0.175*	0.173
	(787)	(2465)	(2120)	(330)
Non-Affirmance	0.457	0.370*	0.415	0.494
	(175)	(533)	(492)	(89)
Affirmance	0.147	0.090**	0.105	0.051*
	(598)	(1887)	(1596)	(234)

Notes: †p<0.1, *p<0.05, **p<0.01

As one final robustness check, Table 8 presents the results of a regression model of publication on each of the independent variables and with fixed effects for year. All-Republican panels serve as the baseline. Thus, unlike in prior tables, the coefficients and p-values for each panel-composition variable are computed by reference to all-Republican panels. The results confirm that, controlling for case type and outcome, all-Republican panels publish more frequently than panels with two Republicans and one Democrat. The difference between panels with three Democrats and panels with two Democrats and a Republican is not statistically significant.[119]

Table 8. Multivariate Regression Model of Publication

	B	SE
Constant	0.475**	0.018
RRD	-0.064**	0.015
RDD	-0.041**	0.015
DDD	-0.065**	0.024
Criminal	-0.092**	0.010
Affirmance	-0.288**	0.011
Year Fixed Effects	Yes	

Notes: †p<0.1, *p<0.05, **p<0.01

118. Sample sizes for the non-affirmance and affirmance rows do not add up to the total because of missing data on the affirmance variable for ninety-eight cases.

119. For parsimony, the model for this result is not shown.

VI. IMPLICATIONS & CONCLUSION

The evidence presented here suggests that federal circuit court judges may engage in strategic publication quite frequently. Indeed, I found that Third Circuit panels with three Republican judges published far more frequently—roughly 43% more—than panels with two Republican judges and one Democrat. These results are consistent with the practice of strategic publication.

What explains the political asymmetry in the results? Why do majority-Republican panels in the Third Circuit appear to engage in strategic publication but not majority-Democrat panels? The most plausible explanation is that Democratic judges held a majority of the active seats in the circuit for nearly all of the study period. As a result, majority-Republican panels may have perceived a higher chance of reversal and thus had stronger incentives to trade publication for unanimity. Majority-Democrat panels, by contrast, may have perceived a lower chance of reversal and therefore had less incentive to publish strategically.

Admittedly, the Supreme Court leaned conservative during the study period, which might suggest that even the majority-Democrat panels in the Third Circuit should publish strategically in fear of reversal by that Court. But the composition of the en banc Third Circuit may matter more because it reviews every published opinion by the circuit and every unpublished opinion with a concurrence or dissent.[120] The Supreme Court, in contrast, only sees cases for which a party files a petition for a writ of certiorari, and even then it has stringent criteria for whether to grant plenary review. Additionally, the judges on a given circuit panel have to sit on future panels with other members of the en banc court. Thus, their relationships with fellow circuit judges are at stake in each published opinion in a way that may have no parallel with respect to their relationships with the Supreme Court justices.[121]

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120. *See* 3D CIR. I.O.P. 5.5.4 ("Drafts of not precedential opinions that contain a dissent circulate to non-panel judges. . . . Drafts of precedential opinions and not precedential opinions that are not unanimous are circulated to all active judges of the court . . . .").

121. The empirical evidence regarding the relative importance of the en banc court and the Supreme Court in predicting circuit court behavior is inconclusive. With respect to the ideological outcome of the case, one study has found that the ideology of the en banc court "influence[s] panel effects," while the ideology of the Supreme Court does not. *See* Kim, *supra* note 27, at 1367-70. Another paper found that both the en banc court and the Supreme Court have an effect. *See* Jonathan P. Kastellec, *Hierarchical and Collegial Politics on the U.S. Courts of Appeals*, 73 J. POL. 345, 356-58 (2011). With respect to the probability of dissent, two papers have found that the ideology of the en banc court has no effect. *See* Hazelton et al., *supra* note 82, at 667; Hettinger et al., *supra* note 103, at 132-34.

In the next two subparts, I consider broader normative and theoretical implications of my findings.

A. Policy Proposals

If strategic publication occurs frequently, then the practice may have significant normative implications for the judiciary. Perhaps most importantly, strategic publication would reinforce existing fears that unpublished opinions impair judicial accountability by enabling judges to insulate difficult or controversial decisions from judicial and public scrutiny.[122] It would also polarize circuit precedent. Indeed, if diverse panels publish few decisions on controversial legal issues, then those issues will be decided disproportionately by homogeneous panels, which are more likely to write ideologically extreme opinions.

Several procedural reforms are available to diminish strategic publication by pushing the publication decision to earlier phases in the appellate process, before a panel has the chance to discuss and vote on the merits of its cases. To begin with, a court could link the decision to hold oral argument with the publication decision. Under this system, when a panel decides to hold oral argument it would also commit to issuing a published decision in the case. The problem, of course, is that sometimes oral argument may be valuable, but a published decision would not be (or vice versa). In these cases, it would make little sense to require a panel to write a lengthy published decision just so that it could hold oral argument. Indeed, over the last few decades, oral argument has become much rarer in the federal circuit courts, and there is little reason to encourage this trend further.[123]

A second and better option is to rely on screening panels to make an initial decision about publication. In many circuits, screening panels of one or more judges are used to determine which cases require oral argument.[124] Cases that do are then assigned to full merits

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One paper counterintuitively found evidence of an effect in the reverse direction. *See* Hazelton et al., *supra* note 82, at 662-69. A final study found that the ideological composition of the en banc court influenced the citations and treatment of prior precedents by the panel. *See* Rachael K. Hinkle, The Role of the U.S. Courts of Appeals in Legal Development: An Empirical Analysis 45, 47-49 (May 2013) (unpublished Ph.D. dissertation, Washington University), https://openscholarship.wustl.edu/etd/1104/.

122. *See supra* notes 61-62 and accompanying text.

123. *See* David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 119-20 (2012) ("In 2011, only one quarter of all federal appeals were orally argued, down from nearly two-thirds in the early 1980s . . . ." (footnote omitted)).

124. *See supra* note 32.

panels for adjudication. The circuit courts could require screening panels to also flag cases for publication, which would attach a presumption of publication.

Of course, as the appellate process unfolds the court will sometimes learn new information that justifies revisiting the screening panel's initial publication decision. Where the screening panel deemed publication unnecessary, a merits panel should generally be free to publish if it believes publication is merited. The more complicated question concerns cases that are initially flagged for publication, but the merits panel believes publication is unnecessary. Perhaps the best solution would be to require the panel to explain in its decision why the publication presumption has been rebutted.

If this requirement does not create sufficient friction to discourage panels from reversing the publication decision of screening panels, a few other commitment mechanisms could help. One option is to limit the kinds of reasons that are valid for reversing the decision of the screening panel—for example, the reason must constitute new information not available to the screening panel at the time of its decision. Another option is for the clerk's office to communicate to the parties that the case has been flagged for publication at the same time they are informed whether the case will receive oral argument. And one more possibility is to require the panel to obtain approval from the screening panel in order to reverse its decision regarding publication.

B. Understanding Judicial Behavior

Strategic publication also has important theoretical implications for our understanding of judicial behavior. Empirical scholars of judicial behavior have consistently found that diverse panels write more moderate published opinions. Scholars have therefore concluded that diversity promotes moderated reasoning, either by changing how panel members view their cases or by incentivizing strategic bargaining over reasoning.[125] Strategic publication calls that interpretation into question, suggesting that the correlation between panel composition and reasoning may represent *selection* rather than *causation*. If judges engage in strategic publication, then published opinions issued by diverse panels may be moderate not because diversity moderates reasoning but because diverse panels issue

125. *See supra* note 34.

ideologically extreme decisions in unpublished opinions, which are excluded from most empirical work on judicial behavior.[126]

This selection process also has an important methodological implication for empirical research on judicial behavior. For decades, scholars of judicial behavior focused almost exclusively on published decisions because unpublished decisions were not widely available. This methodological choice was justified by the belief that unpublished decisions were simple, easy, and non-contentious, and therefore, less worthy of study.[127] Strategic publication suggests that scholars should not ignore unpublished decisions any longer.[128]

126. *See supra* note 35.
127. *See supra* note 36 and accompanying text.
128. *See supra* note 37.

APPENDIX

Table 1. Aggregate Publication Rate by Panel Composition & Case Type, Excluding 2012-2013

	RRR	**RRD**	**RDD**	**DDD**
All Cases	0.211	0.146**	0.168†	0.212
	(592)	(1830)	(1555)	(184)
Civil	0.265	0.199**	0.223	0.261
	(366)	(1105)	(928)	(119)
Criminal	0.124	0.066**	0.088	0.123
	(226)	(725)	(627)	(65)

Notes: †p<0.1, *p<0.05, **p<0.01

Table 2. Aggregate Publication Rate by Panel Composition & By Substantive Outcome, Excluding 2012-2013

	RRR	**RRD**	**RDD**	**DDD**
All Cases	0.211	0.146**	0.168†	0.212
	(592)	(1830)	(1555)	(184)
Non-Affirmance	0.438	0.362	0.42	0.604*
	(128)	(401)	(357)	(48)
Affirmance	0.148	0.087**	0.096	0.068
	(453)	(1394)	(1168)	(132)

Notes: †p<0.1, *p<0.05, **p<0.01