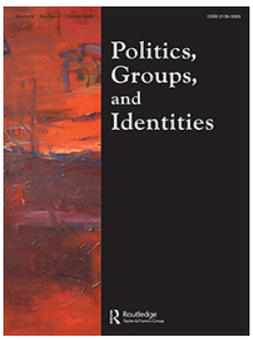

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DIALOGUE: DIVERSITY IN THE JUDICIARY

Diversity, consensus, and decision making: evidence from the U.S. Courts of Appeals

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ABSTRACT

In this article, we identify key theoretical perspectives from the literature in social and organizational psychology on diversity and workgroups and apply these concepts to an analysis of decision making in the U.S. Courts of Appeals. Using data from twelve circuits over two decades, we leverage the diversification of the federal appellate bench to investigate the nature of the relationship between changes to a court's gender and racial composition and levels of consensus. The results suggest that the impact of a diversified court depends on the size of the court.

KEYWORDS

Judicial behavior; judicial decision making; gender; race; diversity; consensus; dissent

A central assumption underlying empirical arguments about diversifying judiciaries has been that institutions with a diverse makeup will be more likely to incorporate differing perspectives than those that are homogeneous in their composition (Kang et al., 2020).[1] For instance, President Obama's White House counsel Kathryn Ruemmler argued that,

> Diversity in and of itself is a thing that is strengthening the judicial system. It enhances … the performance of the bench and the quality of discussion … to have different perspectives, different life experiences, different professional experiences, coming from a different station in life. (Quoted in Rucker 2013)

However, when those of differing perspectives are tasked to make collective decisions, as is the case on appellate courts or on juries, it is likely to have an effect on the ability of a court to reach a consensus (Bowie, Songer, and Szmer 2014).

In this paper, we identify key theoretical perspectives from the literature in social and organizational psychology on diversity and consensus in workgroups and make an argument for how they can be utilized by judicial scholars. We test these perspectives on the U.S. Courts of Appeals with a dataset of court outputs, aggregated by circuit, that extends from 1997 to 2016, allowing us to leverage large and historic gains in diversification from appointments made by three presidents: Bill Clinton, George W. Bush, and Barack Obama. Specifically, we investigate how changes to a court's gender and racial composition are related to one key indicator of consensus: a circuit's dissent rate.

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Consensus on appellate courts

Because of the practice within American courts of both identifying the majority opinion author and allowing for signed concurring and dissenting opinions, studying judicial decision making on collegial courts has the potential to reveal forces that shape consensus and disagreement among the judges. The importance of consensus is often tied to judicial legitimacy. As Hettinger, Lindquist, and Martinek (2006, 19) observe, "unanimity among judges may promote institutional legitimacy and effective implementation of individual decisions by providing a unified voice behind judicial policies." [2]

A variety of factors influences levels of consensus on collegial courts. For example, scholars often point to norms when explaining varying levels of dissent across different courts (Lindquist 2007; Hettinger, Lindquist, and Martinek 2006) or on the same court over time (Caldeira and Zorn 1998). In general, "internal or 'cultural' norms are the product of institutional equilibria among participants that produce stable rules of behavior" (Lindquist 2007, 663). Norms also influence other aspects of the judicial process including those that are related to a circuit's proclivity to reverse a court below, grant oral arguments, and publish an opinion (Lindquist 2007).

Overall, it is well established that norms of consensus dominate the U.S. Courts of Appeals (Hettinger, Lindquist, and Martinek 2006), and circuit court judges develop shared expectations that they should work toward unanimous decisions (Bowie, Songer, and Szmer 2014). In contrast to the U.S. Supreme Court, the U.S. Courts of Appeals have relatively low dissent rates (Hettinger, Lindquist, and Martinek 2006), though dissent rates do vary across individual circuits, as well as over time (Epstein, Landes, and Posner 2011). The frequency of dissent in a circuit may also be a function of a court's workload (Epstein, Landes, and Posner 2011), the degree of ideological similarity among judges (Epstein, Landes, and Posner 2013), and reversal rates (Lindquist 2007).[3]

A new line of research also suggests that physical proximity of judges in a court setting can affect judicial behavior (Harris, 2018.; Hazelton, Hinkle, and Nelson 2017; Epstein, Landes, and Posner 2013). Similarly, the rotating panel system of the Courts of Appeals has different implications in circuits with fewer judges than in circuits with many judges. For instance, one study found that the frequency of mixed-sex panels was related to increased support for plaintiffs in civil rights cases, even after controlling for ideology (Moyer 2013). Anecdotally, Cohen (2002, 161) quotes a federal appellate judge who contends that courts with fewer judges may have "a bit more of a day-to-day collegiality in the sense that you are going to deal with a judge for many years, and they are right around the corner." In contrast, on larger courts, "you don't sit with any particular other judge with sufficient frequency for his views or her views to affect yours much" (Cohen 2002, 161). To investigate further these anecdotal observations and empirical findings on circuit level variation in consensus, we next turn to theoretical perspectives and research from psychology and the organizational sciences.

Perspectives on diversity and its relationship with consensus

Within the field of psychology, one major school of thought on diversity and group dynamics focuses on differences related to power and status and historically disadvantaged groups (King, Hebl, and Beal 2009; Prasad, Pringle, and Konrad 2006). While other

perspectives consider any differences across individuals (Van Knippenberg, De Dreu, and Homan 2004), for the purposes of this paper, we focus on the former, emphasizing the characteristics of gender, race, and ethnicity.[4]

A central debate in the scholarly literature on group composition and consensus is over the question of whether diversity is beneficial for group performance (King, Hebl, and Beal 2009). On one side, the informational perspective (e.g., Janis 1972) emphasizes the positive cognitive processes that may flow from having different perspectives represented: "compared to homogeneous teams, heterogeneous teams may debate key questions longer, discuss unique information or dissenting opinions more frequently, and avoid reaching consensus prematurely" (King, Hebl, and Beal 2009, 272). Consistent with this perspective, existing work has identified a relationship between the gender and racial makeup of a panel and the number of points of law discussed in the majority opinion (Haire and Moyer 2015; Haire, Moyer, and Treier 2013).

In contrast to the informational perspective, the social categorization perspective predicts that more diversity within workgroups will result in increased interpersonal conflict, tension, and decreased cooperation (Mannix and Neale 2005; Jehn, Northcraft, and Neale 1999). One mechanism through which this may occur is the differential levels of influence afforded women and racial/ethnic minorities in groups (Correll and Ridgeway 2006). Individuals are often predisposed to favor those they view as more similar to them (Tajfel and Turner 1986), creating in-groups and out-groups (Brewer 1999; Hogg, Turner, and Davidson 1990) which can, in turn, affect the allocation of tasks like opinion assignment (Tillman and Hinkle 2018). Patterns of interactions, particularly interruptions, also reflect power dynamics in ways that can minimize the equal participation of women in group decision-making settings (Karpowitz, Mendelberg, and Shaker 2012; Patton and Smith 2017).

Given our interest in levels of consensus in circuits staffed by judges with life tenure, we also note that research finds these effects are not static, as conflict among group members often changes with the life of the group (Jehn and Mannix 2001). A number of studies emphasize that time may affect how social category diversity impacts workgroups, with repeated interactions diminishing observable effects of heterogeneity. Specifically, characteristics like the racial and gender makeup of the group may exhibit a stronger effect early in a group's "life" compared to later on (Harrison et al. 2002; Chatman and Flynn 2001). If intergroup contact over a period of time reduces reliance on stereotypes, it may subsequently diminish differences associated with social categories. This also has implications for collegial courts like the U.S. Courts of Appeals, which utilize random assignment to rotating panels, have vastly different numbers of judges assigned to each circuit, and have differing workloads across circuits.

In the next section, we draw from the theoretical foundations discussed above to lay out our expectations about the impact of diversifying courts with respect to race and gender.

Diversity in the federal appellate courts

Beginning with Jimmy Carter, Democratic presidents have attempted to carry out campaign pledges to nominate more qualified women and minorities to the federal bench (Goldman 1997; Slotnick, Goldman, and Schiavoni 2015). During Bill Clinton's administration, 52% of judges who filled seats on the U.S. Courts of Appeals were women and/or

nonwhite.[5] President Obama later accelerated the pace of diversification with over 70% of his circuit court appointments going to women and/or minorities. Compared to his Republican predecessors, George W. Bush named a record number of nonwhites and women to the circuit courts, 35% of the total appointed during his administration. Underlying the overall trend of diversification in the U.S. Courts of Appeals over time, however, is substantial variation by circuit.

In Figure 1, we plot the percentage of the active appeals court bench who are white males, by circuit, from 1997 through 2016. At the start of the period, the most diverse circuits (the First, Third, and Sixth) were those in which white males constituted around 60% of the active bench. By comparison, the relative numbers of white males were much higher in other circuits, particularly the Fourth and Eighth. Over time, the composition of the Fourth Circuit changed substantially, shifting from a bench that was 84% white male in 1997 to one that was 54% nonwhite and/or female in 2016. In contrast, the Eighth Circuit's demographic composition remained overwhelmingly white and male over the twenty-year period. One reason for this court's lack of diversification is the timing of vacancies. Of its eleven judges, George W. Bush named seven, and Obama appointed one. By 2016, the Eighth Circuit continued to be the least diverse circuit, with 70% of the bench made up of white males. In contrast, by the end of the Obama administration, at least half of the judges on active service in eight of the twelve geographic circuits were women and/or nonwhite.

As a circuit moves away from the status quo – predominantly white male judges – the informational perspective suggests that the likelihood of disagreement should increase.

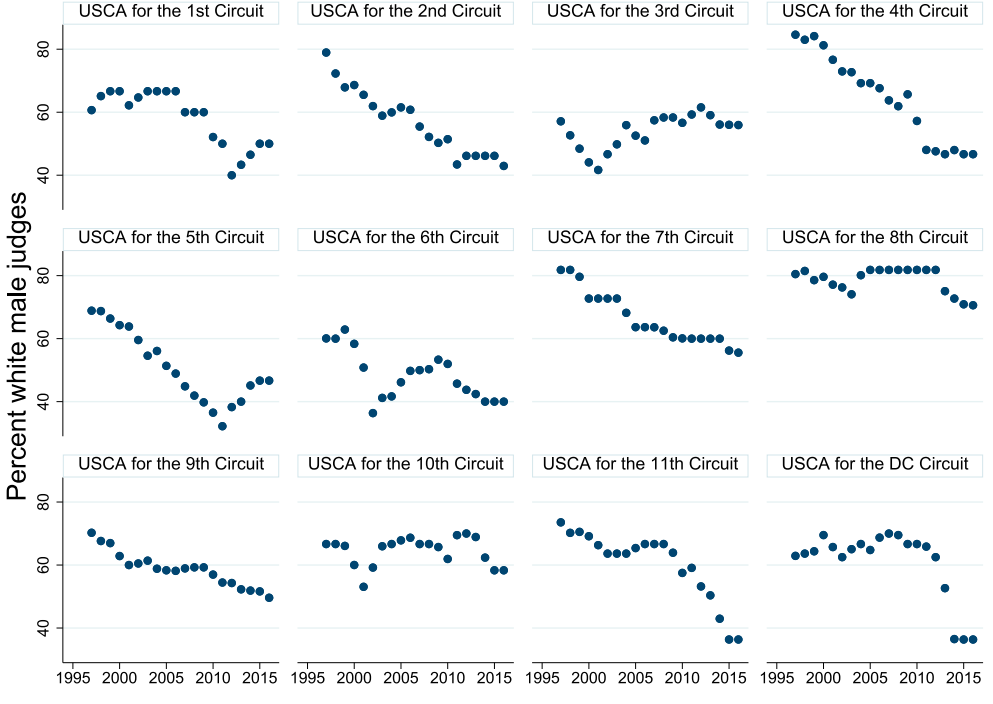

Figure 1. The changing makeup of the U.S. Courts of Appeals. Percent of active judges who are white men, by circuit (1997–2016).

The social categorization perspective would also predict less cooperation. If more diversity results in more dissenting opinions, one would expect that increased conflict will also be reflected in each circuit's organizational culture and norms, particularly those that affect consensus (Lindquist 2007). However, broader institutional features can moderate the influence of diversity on individual and group behavior within policymaking organizations (Karpowitz and Mendelberg 2014). As noted above, research on group heterogeneity finds that diversity effects diminish with repeated interactions. Because smaller circuits allow for all the judges within the circuit to be seated with each other more often, small circuit size (an institutional trait) should allow for quicker acclimation and less conflict. Taken together, this leads us to the following expectation:

Hypothesis: In smaller circuits, increases in diversification will be associated with lower levels of dissent than in larger circuits.

Data and methods

To test our hypothesis, we draw on two decades of data from the Federal Judicial Center, the Administrative Office of the Courts, and previous scholarship on the Courts of Appeals (Epstein, Landes, and Posner 2013; Lindquist 2007). As shown in Figure 1, this time frame is one in which a dramatic transformation of the federal judiciary occurred, prompted by presidents of both parties.

Table 1 summarizes the measurement of all variables and indicates our expectations for each independent variable. While there are a number of ways to conceptualize conflict within a circuit (Christensen and Szmer 2012), we focus on the logged *circuit dissent rate*, calculated as the log of the number of dissents from Westlaw divided by the total

Table 1. Variable descriptions.

Variable (Expected sign)	Description	Min, Max	Mean (SD)
Circuit dissent rate (DV)	Number of dissents from Westlaw divided by total merits terminations (logged) (Source: Calculated using Epstein, Landes, and Posner (2013) method)	−5.25, −2.85	−3.92 (0.59)
% nontraditional judges (+)	Percent of active judges who are not white males (Source: Federal Judicial Center)	15.4, 67.8	39.8 (11.7)
Number of judgeships (+)	Number of authorized judgeships	6, 29	13.9 (5.24)
Turnover (–)	Number of months in year *t* that there is a judicial vacancy (summed over each vacancy) (Source: U.S. Courts Federal Court Management Statistics)	0, 95.4	17.1 (17.6)
Workload (–)	Number of signed opinions on the merits, per judge (Source: U.S. Courts Federal Court Management Statistics)	12, 264	55.7 (45.3)
Reversal rate (+)	Percentage of cases decided by the circuit that reversed the lower court, by year (Source: U.S. Courts Federal Judicial Caseload Statistics)	1.10–21.9	9.13 (3.48)
SD of circuit ideology (+)	Standard deviation of circuit Judicial Common Space score	0.215 – 0.583	0.410 (0.071)

Notes: Summary statistics are provided for the eleven numbered circuits plus the DC circuit for the years 1997–2016. The variable for percent nontraditional judges accounts for whether judges served the entire year or only part of the year. For example, if a judge took her seat 6 months into the year, she would be counted as serving .5 rather than 1.0.

merits terminations from that year.[6] Our key independent variables tap into the demographic makeup of a circuit, as well as the circuit size (and the interaction of the two). Beyond our central explanatory variables, we also include controls for ideological heterogeneity in the circuit (Epstein, Landes, and Posner 2013), judicial workload, turnover, and reversal rate (Lindquist 2007).[7] Because of the distribution of the dependent variable, we follow previous work that uses the log of the dissent rate and estimate a log-linear regression model with robust standard errors (Epstein, Landes, and Posner 2013).[8]

Findings

In Table 2, the variables for both the percent of nontraditional judges and circuit size are significant, but because of our focus on the interaction term, we opt not to discuss the main effects separately. With respect to our control variables, ideological dispersion in the circuit exerts an extremely large influence on dissent rates. Indeed, a one-standard-deviation change yields almost a 1000% increase in dissent, underscoring the impact that lacking a shared perspective can have on consensus. This is consistent with earlier work (Epstein, Landes, and Posner 2011, 2013). Greater workload pressures in a circuit also are associated with a decrease in dissent rates, as indicated by both the caseload and turnover coefficients. Increasing the caseload in a circuit by one standard deviation produces a 26% decrease in the dissent rate.

Table 2. Log-linear model of circuit dissent rate with unconditional fixed effects. U.S. Courts of Appeals (1997–2016).

	Coefficient (RSE)
% nontraditional judges	−0.046** (.012)
Number of judgeships	−0.079* (0.036)
% nontraditional x number of judgeships	.003** (0.001)
Turnover	0.006* (.002)
Workload	−0.002* (0.001)
Reversal rate	0.024** (0.008)
SD of circuit ideology	2.380** (0.473)
Constant	−3.477** (0.537)
	Adjusted $R^2 = 0.242$
	$N = 240$
	$p < .001$

Notes: ** $p < .01$ (two-tailed test). * $p < .05$ (two-tailed test). Year dummy variables not shown. Analysis excludes Federal Circuit.

Moving to the conditional effect of circuit size and diversity, the coefficient on the interaction term is positive and statistically significant, consistent with our expectations. To provide a fuller picture of how the effects of judicial diversity within a circuit are conditioned by circuit size, we graphed the marginal effects in Figure 2. Overall, the graph shows that as circuit size grows larger, the marginal effect of judicial diversity on dissent increases, as hypothesized. However, for circuits with between 16 and 23 judges, zero is contained in the confidence interval, and the effect is no longer statistically significant. It is worth pointing out here that this implicates two circuits during our time period: the Fifth (with 17), the Sixth (with 16). Interestingly, the marginal effects are positive when the number of judgeships is greater than 23; this includes one circuit, the Ninth (with 29).[9] Because the Ninth Circuit is an outlier in many ways (Moyer and Key 2018), we also estimated alternative models that omitted it or that included a dummy variable for the court, but our results about the relationship of diversity and court size to dissent were robust to those specifications.

We also explore the possibility that our results are affected by the exclusion of district court judges sitting in designation and senior status judges, both of which are used by circuits to ease workload pressures (among other reasons). Because we are interested in the effects of judicial diversity on institutional norms, infrequent participations by individual district court judges should exert little influence on norms, particularly because these judges rarely dissent (Benesh 2006). Although senior status judges serve more frequently than lower court judges (Hooper, Miletich, and Levy 2011), and thus may have more of an

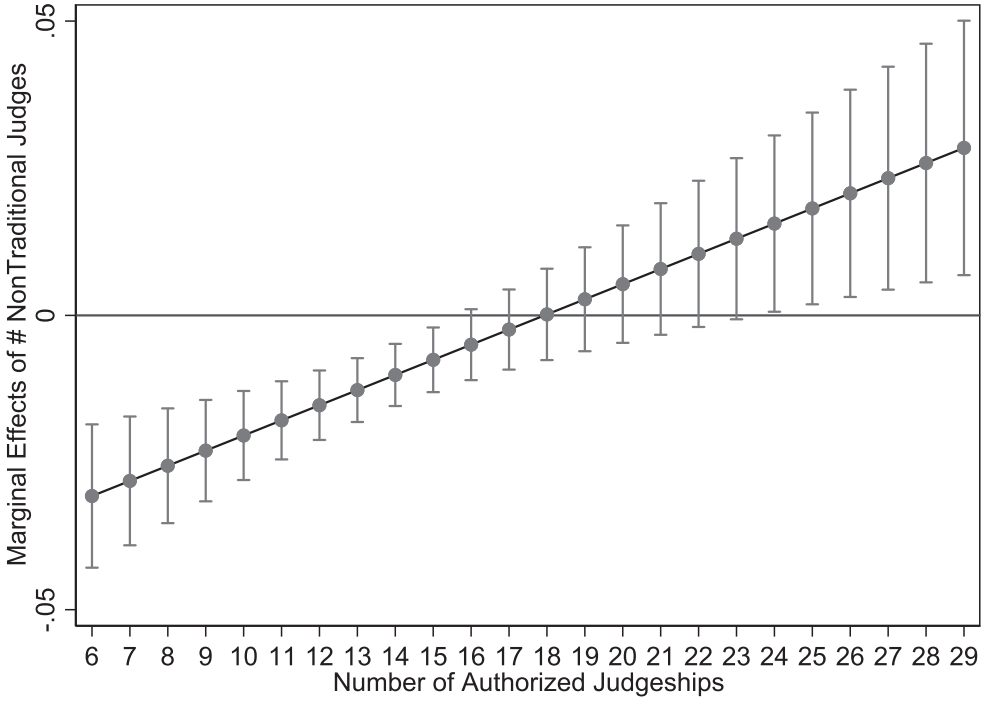

Figure 2. Marginal effects of the number of nontraditional judges on logged circuit dissent rates, by number of authorized judgeships.

opportunity to affect court norms, we think there are important reasons to exclude them.[10] Nonetheless, we created a control variable for the percentage of senior judges per circuit-year who were women and/or non-white. The measure ranges from 0 (i.e., all senior judges were white males) to 50% when aggregated across all circuits. Looking at each court over the time period, the senior judge composition was consistently diverse in one circuit (the Ninth), entirely homogeneous (white male) in two others (the First and the Seventh), but varied considerably in the rest. When we estimate a new model that adds this control, we find that our initial results from Table 2 remain substantively unchanged.

Conclusion

Judicial scholars can benefit immensely from those who study diversity in other types of organizations. To be sure, scholars must be mindful that they are utilizing theories of group behavior that reflect the kind of court setting being modeled, but incorporating these perspectives can be fruitful. We argue that, although the federal appellate judiciary certainly possesses many distinctive features, the interdependent way in which judicial decisions are reached meshes especially well with experimental work on small groups that investigates the relationship between different kinds of diversity and how group members interact, make decisions, and react to their experiences.

In this paper, we take one small step toward integrating these theoretical perspectives by examining whether the level of consensual decision making within a circuit could be a product of the level of racial and gender diversity on the court. Our findings underscore the importance of considering the court context. Specifically, larger courts with a higher percentage of women and/or nonwhite judges are generally associated with higher dissent rates. One possible interpretation of our findings is that larger and smaller courts may need to take different approaches into integrating new judges into the work and culture of the circuit. Norms that emphasize the importance of the collective may help to reduce conflict, even on courts with more judges. For instance, earlier work on the federal appellate courts had observed that some circuits utilized the practice of circulating draft opinions to non-panel judges before publication (Hooper, Miletich, and Levy 2011). Beyond tasks directly related to deciding cases, the development of court social traditions that foster an inclusive, collegial court culture may help mitigate interpersonal tension related to differences in social categories and accelerate how quickly group interactions move past the early, uncomfortable phase where reliance on status expectations and stereotypes is most likely (Haire and Moyer 2015).

The present study does, of course, have limitations. The hypothesized conditional relationship does not hold for circuits in the middle of the size range, namely the Fifth and the Sixth Circuits. While it is admittedly speculative, there are some reasons why these two circuits behaved differently than other courts during this time period. For instance, in the Fifth Circuit, the decline in the circuit's percentage of white men between 1995 and 2000 was due to retirements, not new appointments; then, from 2001 to 2016, every new woman was appointed by President George W. Bush. Throughout the 1997–2016 period, the median JCS score for the Fifth Circuit remained consistently conservative, decreasing the likelihood of dissent. Meanwhile, the Sixth Circuit was the target of a protracted battle over appointments under both Presidents Clinton and Bush that led to severe case processing delays that may have affected circuit norms about the

time costs of dissenting (Tobias 2003). Examining different periods of time or other courts might reveal different findings than the ones we uncover for court size and diversity. With respect to conceptualizing consensus, it will be important for future research to look for indicators that tap into morale, as well as emotional responses, to gauge more broadly how a court is responding to diversification.

Going forward, this line of research should turn its attention to the impact of social category diversity in light of the Trump administration's judicial appointees (see Kirkpatrick 2020). According to the Federal Judicial Center, by the end of 2018, the Senate had confirmed 30 of President Trump's nominees to the U.S. Courts of Appeals. These judges are a far more homogenous group than those appointed under Presidents Obama, G.W. Bush, or Clinton: 90% were white, and more than three-fourths of his appointees were male. None were African American or Latino/a (see also Johnson 2018). The influx of these judges into courts that had been transformed by President Obama and previous presidents will likely change intracircuit consensus. As such, diversity in federal court appointments will be a fruitful area of inquiry for some time to come.

Notes

1. Another perspective (Dovi 2020) argues that "[j]ustice demands that one group not possess exclusive control over the judiciary." Kirkpatrick (2020) argues that the study of descriptive representation has often overlooked the ways in which all judges (including white men) engage in descriptive representation, not simply judges from underrepresented groups. With practical application to specific policy areas, Boyd and Rutkowski (2020) examine whether women and racial minority judges are more likely to exercise discretion in favor of disability claimants' positions, relative to white and male judges.
2. This is not to say that dissents cannot serve positive purposes. Indeed, Justice William Brennan (1985) argued that dissents hold accountable the majority in the instant case, while serving as a clarion call to future courts that may revisit and overrule the initial decision.
3. At the case level, dissent may also serve a signaling function, depending on the composition of the panel and the dynamics of the judicial hierarchy (Beim and Kastellec 2014). The presence of a dissenting opinion may be best thought of as the tip of the iceberg, disagreement that rises to the level where incurring additional work is worth the cost, though other disagreements may lie beneath the surface (Bowie, Songer, and Szmer 2014). Indeed, reduced efficiency in disposing of cases is also an indicator of group conflict (Christensen and Szmer 2012).
4. This conceptualization is often referred to as "social category diversity." As Kang et al. (2020) note, social categories also operate in an intersectional way, because of the multiple and overlapping ways that privilege and disadvantage are produced. Similarly, indicators of task diversity like differences in professional backgrounds and legal training may affect the ability of panels to reach consensus. Previous work has noted that the career trajectories of white male judges have often been different from women and minorities, who tend to have more public sector and judicial experience (Haire and Moyer 2015; Slotnick 1983–1984). Thus, task diversity and social category diversity may sometimes work in tandem.
5. Information on judges comes from the Federal Judicial Center. The calculations are restricted to judges on active service in the U.S. Courts of Appeals, excluding the Federal Circuit.
6. Westlaw searches for dissents only include sitting judges from the circuit. While visiting judges certainly do file dissents, this occurs at levels less than the already-low dissent rates of sitting judges (Epstein, Landes, and Posner 2013).
7. Lindquist (2007) uses a slightly different measure of workload but finds that it is not significantly related to circuit dissent rates. We also test whether docket composition affects

consensus, following other work (Posner 1996; Lindquist 2007). In supplemental models (not shown), the inclusion of a variety of different measures of the percentage of criminal, administrative, and bankruptcy cases on the docket did not affect the statistical or substantive results for the main independent variables.

8. We interpret our substantive findings consistent with Cameron and Trivedi's (2010, 88) guidelines for log-linear models. We also estimated the untransformed dissent rates using beta regression. The results were consistent with those presented here, except that the coefficient for the number of judgeships was only significant at the 0.07 level.
9. With the exception of the First Circuit, the Fifth Circuit, the Sixth Circuit, and the Ninth Circuit, the remainder of the circuits had between 11 and 15 seats during the 1997–2016 period.
10. The responsibilities and workload of senior judges differ substantially from active judges, as dictated by federal law and court policy. By taking senior status, judges gain more control over the quality and quantity of their workload. Unlike active judges, they may decide which months of the year they will decide cases (Yoon 2005) and, according to one senior judge, "can decide that they no longer wish to preside over certain types of cases" (Block 2006, 540). Senior judges also have different obligations about participation in court governance activities (Yoon 2005; Hooper, Miletich, and Levy 2011). Second, senior judges as a group are not uniform in terms of their judicial participation. There is wide variation in merits terminations by senior judges both within circuits and across circuits (Benesh 2006; Hooper, Miletich, and Levy 2011). Whether and how senior judges participate in the en banc process also can vary quite a bit by circuit, as well as over-time within circuits (Hooper, Miletich, and Levy 2011).

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