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Policy Agendas and Procedural Avoidance in the Lower Federal Courts

Shelley Pierce Murphey
University of Colorado at Boulder, smurphey@gmail.com

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POLICY AGENDAS AND PROCEDURAL AVOIDANCE IN THE LOWER FEDERAL COURTS

by

Shelley Pierce Murphey

B.S., University of Arizona, 1999
J.D., University of Chicago, 2002
M.A., University of Colorado, 2008

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Written by Shelley Pierce Murphey

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Vanessa Anne Baird

John Paul McIver

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Murphey, Shelley Pierce (Ph.D., Political Science)

Policy Agendas and Procedural Avoidance in Lower Federal Courts

Thesis Directed by Associate Professor Vanessa Anne Baird

ABSTRACT

This thesis explores tools used by federal lower court judges when deciding cases in the face of divergent political preferences. I show that judges make use of procedural “outs,” doctrines to do with judicial power, as a means of dealing with political conflict. This manifests both as a response to collegial conflict, allowing judges to come to agreement on a single opinion, and also as a response to hierarchical conflict, allowing lower court judges to assert power over the policy agendas of higher court judges by limiting issues before the court.

Analysis of behavior in appellate panels supports the theory that judges avoid ideological conflict with colleagues by writing procedural decisions instead of reaching the substantive issues in the case. Thus, appellate panels with a wide range of ideological views more often refuse to reach the merits of a dispute than ideologically aligned panels. This avoidance behavior leads to opinions based in procedural law. These findings indicate that procedural law plays an important role in collegial court decision making by allowing judges with conflicting political preferences to resolve disputes in a way that sidesteps conflict. Further, district court judges sitting beneath ideologically “hostile” appellate courts are far more likely to render narrow “procedural” decisions that sidestep the substantive issues posed by a case than district court judges who are ideologically aligned with the relevant appellate circuit. This behavior has consequences for the availability of issues to higher courts as appellate judges will generally refrain from
reaching the merits of a dispute unless the district court has already done so. In sum, then, this thesis provides empirical support for the idea that political conflict may lead to one form of judicial minimalism; however, such conflict may also account for incoherence and inconsistencies in the application of the rules about judicial power. Overall, a goal of this thesis is to begin to explain the complex set of forces that govern the content of opinions rather than maintaining a hard focus on outcomes alone.
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CHAPTER 1

INTRODUCTION

In this thesis, I consider political dynamics that promote or discourage judicial
“minimalism” through the selective use of procedural avoidance—the use of procedural law to
avoid addressing the substance of a lawsuit. Unlike much of the work about judicial
minimalism, the goal of this work is to help us understand what judges do do, not what they
should do. In particular, what leads them to issue a narrow, procedurally-oriented decision in
place of a broad policymaking decision? This work is concerned with the scope of the judicial
policy agenda and how it is affected by judicial decisions made within the content of an opinion
(as opposed to through more direct tools, such as discretionary cert., that are only available at the
Supreme Court). I argue that judicial decisions about the scope of an opinion, like their
decisions about the ultimate outcomes, are influenced by their political and strategic context. In
general, I argue that political conflict leads to decisions grounded in procedural law and
threshold issues—leading to the development of legal doctrines to do with judicial power, such
as jurisdiction or standing, rather than development of the substantive law.

I look to two sources of political conflict, collegial conflict and hierarchical conflict, to
explain the decision judges make to write a narrow “minimalist” opinion. The findings indicate
that in appellate courts, collegial conflict predicts such behavior while in the district courts,
hierarchical conflict leads to minimalism. Before moving onto the details of the theoretical
expectations and the empirical evidence, however, in this Introduction I explore the reasons why
this topic is of interest and normative importance.
Procedural avoidance behavior should be of interest to the scholarly community for two reasons. First, and perhaps most importantly to those interested in the policy power of the courts, such behavior is a tool of judicial “minimalism” and therefore relates to the reach of the judiciary’s policy agenda. That is the primary emphasis of this thesis and is the thread taken up for the most part in the following paragraphs. However, there is a second (and, I argue, incidental) effect that may engage the interest of the legal community in particular. That is the effect on procedural law itself.

American procedural law has grown and increased in complexity over the years—leading to an increasingly institutionalized legal system where only experts can hope to participate meaningfully. Judicial rulings that turn on arcane procedural doctrines can make the judiciary seem highly technical and out of touch with societal concerns. Such rulings can also increase uncertainty in the legal system by effectively adding another degree of freedom to any case that involves these issues. While, as I argue below, procedural decisions are often narrow in their scope—only applying clearly to the particular facts at hand—nevertheless the accumulation of such rulings over time creates many possible arguments to procedurally terminate a case in court, slowly creating barriers to access to court that can only be navigated by an expert.

Understanding the forces that contribute to increased legal proceduralism is an important aspect of understanding the development of American law. To the extent that this work helps to highlight how the evolution of proceduralism in the judiciary emerges as a result of underlying political conflict, that helps us to turn a behavior that may seem arbitrary and unpredictable into one that can be understood in much the same way as the rest of American politics—as a fairly straight-forward ideological phenomenon.
These two normative implications of the topic of this thesis topic reflect the two (competing) normative concerns at stake in general in any discussion of judicial minimalism.¹ According to Jonathon Molot, a Georgetown University law professor, there are two “branches” that must be considered in talking about judicial minimalism and these two branches are, by their nature, in conflict with one another (Molot 2004). One branch relates to the notion of principled, rule-bound decision-making (Molot 2004). This work relates to that branch of minimalism only in that it may help to explain unpredictable and apparently unprincipled procedural decisions by understanding such decisions as part of an ideological agenda-setting game. Hence, I argue here that judges may use minimalism strategically, basing their decisions on doctrines like standing or exhaustion in order to manage ideological conflict. This may result in unprincipled application of procedural doctrines. Clearly, I do not assume that judges are motivated by concerns about principled decision making. The other branch of thought about judicial minimalism, according to Professor Molot, relates to whether or not decisions are “small”—i.e., those that are not

¹ Note that one might consider minimalism to be the opposite of activism, another term of contested meaning when discussing the courts. Political scientists have studied one form of judicial activism quite a bit: scholars have considered the frequency with which the Supreme Court overturns a decision made by another branch of government—one way of thinking of judicial activism (Baum 2003; Casper 1976; Dahl 1957; Cross and Lindquist 2007). The type of minimalism I study here cannot be directly contrasted with challenging the other branches of government. It relates to the reach of the decision within the judicial sphere more than the conflict of the decision with other branches of government. However, a narrow decision is, by its nature, less likely to make political waves—as exemplified by the Newdow decision, discussed in more detail below.
intended to lay down rules that govern a great many other cases. This work relates directly to this second “branch” of minimalism in that I assume that judges make their decisions about procedural avoidance based on effects that the behavior has on the scope of the judicial policy agenda. Hence, my argument rests on the idea that judges are motivated by their ability to come to agreement in a way that is contingent upon the scope of the decision, rather than principles, in their choice between procedural and substantive rulings. Like Professor Molot argues, these two potential uses of minimalism are inherently in conflict with one another. This thesis represents one way of illustrating that agenda-related goals dominate over principled decision making—at least insofar as the choice between narrow and broad judicial rulings is concerned.

It is easy to see why these two competing normative approaches to minimalism conflict with one another: the more judges limit their decisions to a single case at hand, the less they are applying broad principles that constrain future outcomes. In the following pages, I treat the scope of the judicial policy agenda as the primary effect of interest when considering judicial behavior. In other words, I assume that judicial minimalism is motivated by the consequences it will have on the judicial policy agenda rather than on the principles of procedural law. I relegate negative effects on the principled (or unprincipled) application of procedural law as an unintended side effect—not the chief concern of judges.

Even setting aside potential tradeoffs between principled decision making and “small” decisions, however, there is a great deal of normative debate about how far into the policy agenda the federal courts ought to roam. Bickel (1962) is perhaps the most well-known early advocate of judicial use of procedural tools to avoid engaging in policy issues, to limit the scope of the judicial agenda. In his book, *The Least Dangerous Branch*, he wrote about the “passive virtues” of the courts, and argued that the Supreme Court should seek to rule narrowly when
possible, thus allowing for greater democratic deliberation. Although at the time Bickel was criticized on the ground that his approach was unprincipled (for the same reasons as discussed above), in recent years his advocacy of judicial modesty has gained a larger group of apostles (Molot 2004). For example, legal scholar Cass Sunstein (1996) argues that agreement on outcomes or low-level principles while leaving higher level decisions to democratically-accountable branches of government or (at least) for academics to piece together using a long timeline of judicial decisions is a key component of judicial legitimacy and rule of law. He describes such behavior as “incompletely theorized agreements,” in which judges agree on low-level principles and outcome but may not agree on higher-level abstractions. Incompletely theorized agreements may allow groups of judges to resolve cases without working out all their differences. In defending his normative point about the benefits of incompletely theorized agreements, Sunstein writes: “Silence—on something that may prove false, obtuse, or excessively contentious—can help minimize conflict, allow the present to learn from the future, and save a great deal of time and expense” (Sunstein 1996, 39).

On the other hand, there are also many normative scholars who argue that the courts have a moral duty to engage with the political controversies of the day. In other words, some scholars have argued that judges simply ought to address controversial political issues. For example, Supreme Court Justice Breyer has gone on record defending this type of judicial activism. In a recent speech for the New York Historical Society, Justice Steven Breyer opined on the courts’ duty to reach hard issues, and defend the Constitution, rather than rely on technical decisions that fail to affect the world—for good or bad.2 He couched the discussion in the context of what is

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perhaps U.S. history’s most repugnant Supreme Court decision, *Dred Scott v. Sanford*, a case in which the Court’s opinion decides, first, that the Court lacks jurisdiction, and second, that no African American could become free by virtue of travel to a free state. The Court was under no obligation to reach the second, more controversial question given its jurisdictional ruling.

Indeed, there were other ways of using formal rules to avoid the underlying question about slavery. Nevertheless, the Court did reach the merits of the dispute, issuing an opinion that many say sparked the Civil War. Was the Court correct to do so? This is the question Justice Breyer addressed in his speech. He concludes:

Finally, *Dred Scott* tells us something about morality’s relation to law. A famous and good novel of the day, *Uncle Tom’s Cabin*, well describes the moral incoherence of slavery. And a contemporary personal experience showed me the relation between that moral incoherence and judicial decision-making. When discussing *Dred Scott* at a law school conference, I asked the audience to consider a hypothetical question. Suppose you were Benjamin Curtis.3 Imagine that Chief Justice Taney comes to your chambers and proposes a narrow ground for deciding the case. He asks if you will agree to a single paragraph unsigned opinion for the entire Court, in which the Court upholds the lower court on the ground that the matter is one of Missouri law in respect to which the Missouri Supreme Court must have the last word. He will agree to this approach provided that there is no dissent.

Should you agree? If you do, the majority will say nothing about citizenship, nothing about the Missouri Compromise, nothing about slavery in the territories and the Due Process Clause. As a result the Court will create no significant new law; it will not diminish its own position in the eyes of much of the Nation; it will not issue an opinion that increases the likelihood of civil war; and, since no one knows who would win such a war (the North almost lost), the prospects for an eventual abolition of slavery will be unaffected, perhaps increased.

Not a bad bargain. The audience was uncertain. Then a small voice came from the back of the room. “Say no.” And the audience broke into applause. That applause made clear the moral nature of the judge’s legal obligation in that case. A close examination of the *Dred Scott* opinion, then, can teach us something about rhetoric, reason, politics, constitutional vision, and morality — these lessons still might apply to the work of a Supreme Court judge.

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3 Justice Curtis penned one of the stronger dissents to the Taney opinion in *Dred Scott*. 
Justice Breyer’s point in the above excerpt is that judges have a moral obligation to address issues. Even when they issue what may in hindsight be a terrible opinion, he still argues that it is better that they engage with the issues than that they sidestep them. In a related vein, legal scholar Marty Redish has argued that it is inappropriate for judges to refuse to decide issues after Congress has granted them the power to do so (Redish 1990, 1984). He argues that judges have a duty to exercise the powers given them and that, perhaps somewhat paradoxically, to refuse to do so is its own form of blame-worthy “activism.”

Regardless of one’s normative take on the appropriate scope of the judicial policy agenda, it is worth exploring what actually causes judges to expand or contract that agenda in the content of their opinions. That is the goal of this thesis. In this work, I consider a particular form of judicial minimalism, a behavior I term “procedural avoidance.” Procedural avoidance behavior occurs when judges choose to sidestep the merits of a dispute, instead resolving a case on narrower, more fact-specific grounds. Perhaps the most commonly discussed recent example is the 2004 Supreme Court decision in *Elk Grove Unified School District v. Newdow*. In *Newdow*, the Supreme Court was faced with deciding whether or not requiring students in public schools to recite the Pledge of Allegiance (including the “under God” phrase) violated the Establishment Clause of the U.S. Constitution. The majority opinion issued by the Court did not resolve this important and controversial constitutional issue. Rather, the opinion concluded that the man bringing the suit on behalf of his child lacked *standing* to bring the case because he

4 Note that, however, some scholars (e.g., Redish 1990), would not agree with the characterization of this behavior as minimalism. I use the term minimalism here in order to situate this work in the literature, not to express a normative judgment on whether the behavior is appropriate or not.
lacked custody of the child. “Standing” is a jurisdictional requirement that a plaintiff have a sufficient interest in the outcome of the case to be allowed to bring the case before the courts. Because the man did not have custody, the court ruled that he was not the appropriate party to sue on his daughter’s behalf; the case was dismissed from federal court in an opinion that remained silent about the larger issues raised by the case. It left the questions about the Pledge of Allegiance unresolved for the time being while at the same time vacating the lower court decision (which had held that inclusion of “under God” violated the U.S. Constitution). Hence, the Court achieved a new outcome without reaching the broader issues. This is exactly the type of behavior Sunstein (1996) advocates when he writes:

Institutional arguments in law—especially those involving judicial restraint—are typically designed to bracket fundamental questions and to say that however those questions might be resolved in principle, courts should stand to one side. The allocation of certain roles has an important function of allowing outcomes to be reached without forcing courts to make decisions on fundamental issues. Those issues are resolved by reference to institutional competence, not on their merits.” (Id., 40).

The Court was able to evade the central issue in Newdow, while still affecting the outcome of the case, because American law has myriad complex and often unclear (or explicitly discretionary) procedural rules that can determine the fate of a court case without seeming to address the underlying substance of the matter. Thus, a person claiming employment discrimination with otherwise a very strong case may have that case dismissed from court because he or she did not first pursue claims with the EEOC and thus did not “exhaust” administrative remedies. Similarly, a prisoner challenging the constitutionality of state court

5 Thus, sometimes a procedural bar is explicitly overlooked (as, for example, when a judge decides to “equitably toll” a statute of limitations or allow a plaintiff to avoid the exhaustion requirement because it would be “futile”; sometimes it is not.
proceedings may be turned away from federal court for failure to pursue all of his possible state court process. Or, if pursuing those remedies is no longer possible because, for example, the statute of limitations has passed, the prisoner may be found to have “procedurally defaulted” on those arguments, leaving him without a remedy—in the judges’ discretion, of course. Federal courts may also abstain from hearing a civil case if they determine it might infringe on something a state court is doing. They also may refuse to hear something if it seems that Congress has given power to some other body to hear that kind of issue, such as an administrative agency. Additionally, they may conclude that a suit cannot be brought because the defendant has immunity from suit, such as sovereign immunity. Or, they may conclude that a suit cannot be brought because the particular plaintiff doesn’t have enough of a stake in the outcome or isn’t the type of plaintiff the law was intended to protect. They may determine that a motion was improperly or untimely filed or that an argument was somehow waived. In sum, there are many ways for a federal court to avoid making a statement of policy by telling the parties to go away from some more technical reason.

This thesis asks two questions: 1) whether existing analytical theories of collegial decision making can account for such behavior and 2) whether, in fact, empirical evidence suggests that real judges engage in the behavior. In the following chapters, I lay out two theories discussing how political conflict can be expected to lead to procedural avoidance. First, I argue that groups of judges engaged in collegial decision making use procedural avoidance as a way of minimizing the costs of writing opinions and deciding cases. In situations where there is too much ideological disagreement, judges effectively have two choices: they can each write separately and create split opinions or they can come up with a way of sidestepping the controversy and avoiding the conflict. I argue that the latter is the lower-cost alternative,
explaining why it is that the judiciary keeps making up doctrines that allow it to not speak—a perhaps counter-intuitive, yet empirically true, fact. This idea that procedural avoidance will result as a form of conflict avoidance in groups emerges from a minor variation in a “case-space” approach to collegial decision making—treating the cost of failure to make policy as finite, rather than infinite. That change allows for the possibility that judges may not be able to effectively resolve their differences and explains why they might see advantages in avoidance tools. Second, I argue that judges across the judicial hierarchy use procedural avoidance as a form of agenda control over higher courts. When lower court judges have ideological preferences that are distant from the appellate court, they decide more issues procedurally, thereby presenting fewer substantive issues to the appellate court. Thus, I argue that lower court judges actually play an important agenda-setting role in the federal courts; they have the power to affect the scope of issues available to higher courts. If that is so, one may anticipate that they will use the power strategically, varying depending upon their ideological relationship to the appellate court. In both theoretical approaches, the basic idea is the same: increased ideological conflict leads to increased procedural avoidance. In order to test the theory empirically, I turn to evidence from the lower federal courts, including the U.S. Courts of Appeal and the federal district courts (the trial courts of the federal system).

The outline of this thesis is as follows. In Chapter 2, I outline the literature that forms a backdrop for this study, exploring the prior work on the judicial policy agenda, work that

6 Note that most of the doctrines under study in this thesis as tools of procedural avoidance are judge-made, meaning they originate not in statutory law but rather in judicial decisions. Hence, judges are responsible for creating much of the law of standing, exhaustion, and jurisdiction in general—all doctrines that serve, at least in theory, to limit their institutional authority.
explores why it is that issues are taken up by the courts at a given time. In Chapter 3, I lay out a theory of lower court agenda-setting power, positing that lower court judges use procedural avoidance strategically to limit the agenda of higher courts—relying on a basic Romer-Rosenthal agenda control model. In Chapter 4, I move to consideration of collegial conflict. Starting from existing “case-space” models of collegial rule formation in the judiciary, I explain how the model can be adjusted to account for procedural avoidance behavior as a response to collegial conflict. In Chapter 5 I test the agenda-setting theory using data from district court decisions. In Chapter 6, I explore evidence of both agenda-setting and collegial compromise using data from the U.S. Courts of Appeals. In Chapter 7, I back away from the quantitative approach and instead consider how political conflict and procedural avoidance played out in an important chapter of American judicial policymaking by looking at the lower court decisions regarding abortion rendered in 1970 and 1971—around the time of the *Roe v. Wade* district court decision. Finally, in Chapter 8 I conclude with a basic summary of the theory and evidence as well as some discussion of important avenues for future work.

To foreshadow the results a bit: the evidence broadly supports the idea that political conflict leads to procedural avoidance. Among appellate panels, those with more conflict to negotiate turn to procedural avoidance more often than those with tightly grouped preferences. In the district court data, hierarchical conflict with the appellate court causes procedural avoidance. District court judges behave in just the way one would expect if they were acting as strategic agenda setters, limiting the flow of issues to the higher court. Finally, the abortion cases appear to illustrate the power of a combined theory of agenda-setting and collegial conflict in predicting the scope of a lower court’s opinion. Further, those cases highlight the potential for
this sort of gamesmanship to have important effects on the development of American law and policy.
2.1 Agenda-Setting in the Courts is a Strategic Enterprise

The argument in this thesis is rooted in a strategic theory of judicial decision making. Hence, it contrasts with those who would argue either that judges always follow the law (their own preferences have nothing to do with it) and those who would argue that judges always behave sincerely dependent upon their ideological preferences. A strategic approach is a preference-based approach, but one that accounts for constraints on what judges are able to do in light of competing preferences of colleagues and other actors. My argument indicates that judges behave as strategic actors with respect to their agenda because they may be expected to base their agenda setting decisions on the relative positions of other actors. While the work presented here is novel in its focus on lower court decision behavior, the past work on strategic agenda setting in the judiciary supports the basic approach I suggest here. Past work supports the idea that judges behave strategically and, more specifically, that judges behave strategically with respect to their agenda decisions.

In work for the most part focused on the U.S. Supreme Court, scholars have documented that the justices make decisions about the judicial agenda with strategic goals in mind. These goals engage concerns both about collegial conflict and about conflict with those outside the immediate decision group. Scholars have in particular studied the decision at the Supreme Court level to grant discretionary cert. This is the practice by which the modern Supreme Court is, for the most part, able to accept only the cases it chooses for review. Thus, the Court receives many thousands of requests to hear cases each year; however, they grant review in only about 1% of the cases. The decision to hear a case is made after review by the justices (or, more likely, their
clerks); when four justices vote to hear a case, review is accepted (though it may later be revoked by a majority vote). Thus, currently the Supreme Court has very strong agenda control in choosing which cases to hear or not. (See generally, Segal, Spaeth and Benesh 2005).  

Many scholars have studied the decision to grant cert. from a strategic perspective, and the evidence strongly supports the idea that these decisions are made strategically. The work on this question has approached the notion of conflicting preferences and agenda control from both a personal and an institutional perspective. Thus, Caldeira, Wright and Zorn (1999) presented strong evidence that individual justices will not vote to grant cert. in a case in which their own preferences are such that they anticipate the vote on the merits will go against them. In other words, they anticipate a bad outcome and so try to avoid the issue altogether rather than end up with a decision that they don’t like. However, since a majority of the Court can always choose to hear a case, this type of strategic agenda power is likely not very effective at changing the policy output of the Court; rather, it might simply suggest that the cert. vote is a preview of the merits.

Interestingly, this has not always been true. The Court had little control over its agenda until the Judiciary Act of 1925, when Congress made the majority of its jurisdiction discretionary. This discretion was greatly increased in the mid-seventies through a series of congressional actions moving different types of cases out of mandatory Supreme Court review and into the class of discretionary review. E.g., in 1974, 15 U.S.C Section 29 made antitrust jurisdiction discretionary and in 1976 28 U.S.C. Sections 2281-82 removed review of the constitutionality of state and federal statutes from mandatory jurisdiction. The Court’s mandatory jurisdiction essentially was eliminated completely in 1988, leading to the Court’s power to almost entirely select the cases it desires to hear. Since then, the Court’s docket has declined and its power over its agenda has markedly increased.
vote. In the Supreme Court, then, collegial forces do not appear to be all that influential as an independent force affecting agenda games played out in cert. decisions. In the Supreme Court it is very common for multiple opinions to be issued for a given case, suggesting that the pressure for collegial compromise is somewhat low and almost certainly limited to the need to compromise within the majority (an idea taken up in more detail below). In the appellate courts, in contrast, there is a stronger norm of collegiality than in the Supreme Court—likely the result of greater workload pressures. This leads to strong norms of unanimity and dissent aversion, suggesting that there is greater pressure to come to a single opinion and a greater need for agenda-related compromises. Unlike in the Supreme Court, then, collegial conflict might play an important role in the agenda games that occur within the decision group—as they seek to find common ground for a single opinion from a panel. This theoretical point is discussed at length in Chapter 4 and is an important difference between the lower courts and the Supreme Court. Of course, appellate courts lack the cert. power so their agenda games must take another form, discussed in the following section.

In addition to collegial considerations, other strategic forces have been shown to play an important role in affecting the Court’s agenda from an institutional perspective. Epstein and Knight (1998) showed that the Supreme Court takes fewer cases when its preferences are opposed to the preferences in Congress. Thus, there is some evidence that the Supreme Court avoids conflict with Congress, preferring to stay silent than to enter a policy battle with the other branch of government. Later, Epstein, Segal and Victor (2002) argued that the Supreme Court reduces the number of statutory cases it hears when its preferences conflict with those in Congress, assuming that constitutional decisions would better withstand congressional disfavor. This work broadly supports the idea that the Supreme Court avoids conflict when it can, a
behavior that could result from two related causes: a) the desire to avoid congressional override (supported in particular by the work focused on statutory decisions; b) the desire to avoid open conflict with Congress in order to maintain institutional legitimacy. The two causes are interrelated in that the desire to avoid congressional override likely also implicates an institutional legitimacy concern. However, it may also implicate a workload concern as the Court does not want to have to expend energy in a costly back-and-forth with Congress. Similar forces may also be at play across the judicial hierarchy. However, I argue below in Chapter 3 that lower court judges actually have a measure of real agenda control over the issues that reach the higher courts, giving them an even clearer reason to engage in agenda games within the judicial hierarchy than the literature posits for agenda games between the Supreme Court and Congress.

Additionally, scholars have pointed to hierarchical concerns that affect the decision to grant cert. as the Court tends to grant cert. much more often when there is conflict in the lower courts or when it has reason to believe the lower court outcome is not well aligned with its preferences, suggesting that it uses its auditing power strategically to maximize compliance (e.g., Caldeira and Wright 1988; Cameron, Segal Songer 2000). This suggests that the vertical forces within the judiciary are also of great importance to their strategic calculus. The prior work tends to focus, however, on top-down compliance concerns. This work, on the other hand, considers the strategic calculation from the other side: how do lower courts anticipate higher court action? Hence, the motivations at play here likely more closely resemble those at play in the strategic games between the Supreme Court and Congress, discussed in the previous paragraph.

Finally, Baird (2007) showed that the Court participates in a signaling game with parties in setting its agenda, illustrating that actually the action of agenda setting is a game that takes
place beyond the simple cert. decision and instead takes place over a period of years. She showed that the Court signals to interest groups the types of cases it would like to hear and that the interest groups then invest time and energy into finding a case with the best fact pattern to advance the law in the way they prefer. After the signal, there is a bulge in the judicial policy agenda that moves slowly up through the courts system, culminating in increased attention by the Supreme Court after a 4-5-year lag. Baird’s work illustrates that to fully understand the evolution of the judicial policy agenda, even at the Supreme Court, one must account for decisions made by other actors months and years before the case arrives at the Supreme Court’s door.

Overall, the above-described literature can be categorized into work positing institutional explanations and work positing individual explanations for agenda decisions to do with cert. The institutional stories of strategic behavior suggest that the Court, as a whole, makes use of its agenda control with institutional goals in mind, such as legitimacy or compliance of the lower courts. The more individual stories suggest, however, that individual justices also behave strategically within the Court to achieve their own goals. The argument I make in this thesis is one rooted in individual motivations. This is particularly true when considering trial court judge decisions, where the judge acts alone. I argue that trial court judges seek to affect the overall policy content of the law by limiting the flow of issues to the appellate court when it is hostile or by expanding the flow of issues to the appellate court when it is aligned with their preferences. This story, then, is similar to the basic strategic cert. argument that suggested that individual justices would not vote to grant cert. in a case they seemed likely to end up on the losing side (E.g., Caldeira Wright and Zorn 1999). At the appellate level, I also posit a story based on individual incentives and costs associated with writing narrow opinions. However, that work also shares some features of the institutional literature in that it may in part be attributable to
judges who care about institutional values such as legitimacy in addition to individual motivations such as the desire to make binding policy decisions and simultaneously alleviate workloads.

2.2 Strategic Agenda-Setting Can Also Take Place Within the Content of an Opinion in the Form of Procedural Avoidance

Unlike the Supreme Court, lower courts do not have an explicit agenda control power. They cannot pick and choose the cases they hear. Rather, lower court judges must rely on within-opinion tools to affect the scope of their policy agenda. As with the discretionary cert. question, some prior work suggests that in the Supreme Court strategic behavior extends as well to the drafting of opinions. That literature should be highly instructive to building expectations about what agenda forces will look like in the appellate courts as they craft opinions, a key aspect of the work of this thesis.

Somewhat similar to the literature on cert., the prior literature indicates that in the Supreme Court, strategic behavior leads to compromise and bargaining over the content of the opinion itself in order to: a) obtain a majority opinion (e.g., Epstein and Knight 1998; Maltzmann Spriggs and Wahlbeck 2000; Hansford and Spriggs 2006); and b) to preemptively compromise with other branches of government (Gely and Spiller 1990; Eskridge 1991; Spiller and Gely 1992; Epstein, Knight and Martin 2001). Most relevant to the work at hand, however, Maltzman, Spriggs and Wahlbeck (2000) provided strong evidence that in the Supreme Court bargaining and negotiation over the content of the opinion increase whenever the majority coalition is heterogeneous, indicating that the pressure to reach a single majority opinion has real effects on the ultimate shape of the opinion. In other words, while collegial forces were not that
important in determining the outcome of cert. decisions, such forces do appear to play an important role in the content of the opinion itself. Variation in ideology causes increased bargaining in the Supreme Court, a process that should be expected to affect the ultimate shape of the opinion. What might these effects look like? The particular effects of the bargaining process have not been captured empirically in large scale even at the Supreme Court. The examples discussed in Maltzman, Spriggs and Wahlbeck (2000) suggest that increased bargaining should in general lead to narrower holdings; they discuss memos in which justices request changes that clearly evince a desire to limit the scope of the proposed opinion. Thus, while it is likely true (as noted above) that pressure for collegial compromise is not so great at the Supreme Court level to influence cert. decisions much, there is some existing evidence that even at the Supreme Court (where multiple opinions are common) the justices must work to create a majority opinion.

Very recent evidence confirms that this kind of bargaining also takes place in the appellate courts—a finding which is not at all surprising given the increased workloads and pressure to issue a unified decision. At the appellate level, recent work by Owens and Black (2010). examined the private paper of Judge Skelly Wright, a former D.C. Circuit judge, and concluded that panel members ideologically distant from the opinion writer were more likely to request a change to the content of an opinion than ideologically close panel members. Again, then, it is shown that ideological conflict increases bargaining over the content of the opinions. In this work, I argue that variation in ideology in a decision group causes increased bargaining and may lead to predictable types of changes in the content of opinions. Here, I argue that the changes requested likely include arguments for narrower judicial decision, minimizing the scope of a judicial opinion in the face of ideological conflict. It is only by accommodating such
requests that judges on conflict-dominated collegial courts are able to join together in one opinion rather than write separately.

In general, my argument is that strategic judicial agenda setting forces should have predictable consequences on the form of an opinion. In particular, I argue that the result should be “narrower” judicial opinions. While in subsequent chapters I will further explain why it is that I believe ideological conflict will lead to narrowness, at this juncture it is important to connect the idea of judicial “narrowness” to observable behavioral trends in an opinion and to explain what others have found who have studied these trends. Before moving to that goal, however, I must briefly mention other work that attempts to capture abstract qualities of a judicial opinion. The most commonly discussed abstract quality of judicial opinions is the opinion’s “specificity.” For example, many scholars have presented theoretical models suggesting that the specificity of an opinion at the Supreme Court level may be influenced by concerns of hierarchical control (Staton and Vanberg 2008; Posner 1997; Jacobi and Tiller 2007; McNollgast 1995). However, the models come to differing predictions about what political landscape will most favor opinion “specificity”. Further, the very concept of opinion “specificity” is rather difficult to capture as an empirical matter. How can we identify the “specificity” of an opinion? This problem may be one reason why such models have not been tested empirically. In contrast, this thesis considers the strategic forces that affect the scope of the final opinion. One might argue that I should run into the same concern as that posed by studying opinion “specificity.” How can I ever identify “narrow” judicial opinions? However, I argue throughout this thesis that procedural avoidance, or rulings grounded on threshold issues, is a good proxy for narrow opinions. This is so because procedural resolution of a case is but an extreme form of issue suppression. By electing to resolve the case on a threshold issue, judges
avoid the rest of the issues in the case. As such, procedural avoidance behavior is an instrument (albeit arguably a blunt instrument) to measure opinion “narrowness.” Procedural avoidance behavior allows us to empirically examine “narrowness” of judicial opinions by providing one manifestation of narrowness that is readily identifiable. To the extent that procedural avoidance is seen in this light, then, we should expect behavior of judges with respect to this tool to track the behaviors (discussed above) of discretionary cert. use.

To the author’s knowledge, only one other scholar has taken the idea that procedural avoidance behavior is a form of judicial narrowness and considered trends in this behavior that track those seen in the cert. literature related to conflict avoidance. Carey (2010) tested a theory of conflict avoidance using empirical evidence about the Supreme Court’s decision to engage in procedural avoidance. Her dependent variable is nearly identical to the one under study here, capturing the tendency of the Supreme Court to write an opinion confined to a question of judicial power (such as standing, etc.) or to dismiss the case on the basis that cert. was improvidently granted (D.I.G.). Indeed, Carey uses the Newdow case, discussed above, as her driving example. Her theory of conflict avoidance was rooted in the idea that the Supreme Court should use these tools to avoid conflict with the other branches of government—similar to the cert. literature. However, she found no relationship between a justice’s ideological distance from Congress and his or her tendency to vote to avoid the substance of a dispute. She did find that justices were more likely to vote to avoid the substance of a case during time periods right after increased congressional override activity and that the justices were more likely to avoid the substance of a case if Congress and the President were ideologically aligned. She did not find any effect for a justice’s preference toward the lower court opinion (the legal status quo) or the likelihood of a justice being in the majority. However, she did find that justices were less likely
to engage in avoidance behavior when the U.S. is a party (in accord with the issue suppression literature discussed below), when the case was particularly complex and, in some of her models, when the case presented a constitutional question. The presence of amicus briefs had no effect and her measure of workload appeared, paradoxically, to decrease the likelihood of avoidance behavior.

The work by Carey (2010) at the Supreme Court level suggests that judicial decisions to avoid case merits may be predictable based on strategic considerations just like the Supreme Court’s use of discretionary cert. However, the findings are somewhat mixed and inconclusive. In particular, it is problematic for her theory that she did not find the ideological distance between the justices and the Congress to be predictive, a key variable in the analogous cert. literature. However, one reason for this might be that the data comes from Supreme Court cases in which a cert. vote has already occurred. In this set of cases, then, one should expect that the agenda games would already be completed. Nevertheless, Carey’s findings that the Supreme Court engages in increased procedural avoidance behavior right after time periods of congressional override does support the idea that this is at least sometimes a tool used by judges to avoid conflict, similar to the tool of discretionary cert. In the work at hand, any complications posed by the competing tool of discretionary cert. are not present because, as noted above, lower court judges do not have the power to pick and choose cases.

2.3 Issue Fluidity and Strategic Instrument Literature

While Carey’s work is the most directly on-point to this thesis, much prior work looks more generally at the topic of issue suppression, though without positing a strategic theory of the phenomenon. This is the work on the topic of issue fluidity, including both creation and
suppression. Procedural avoidance is, of course, one type of issue suppression. As such, the findings to do with issue suppression are relevant to thinking about what should be expected in studying procedural avoidance. Therefore, I describe this work here because it highlights some of the controls that should be included in modeling this form of agenda-setting behavior and places the current work more fully in context.

Ulmer (1979, 1982) is generally credited with originally positing the idea of “issue fluidity,” the notion that justices can create or suppress issues within the content of a judicial opinion. The question of issue fluidity generated a flurry of scholarship in the mid-nineties, in the wake of a paper by McGuire and Palmer (1995) that presented evidence of both issue creation and issue suppression, and laid out models predicting both phenomena in the Supreme Court. The models were primarily rooted in notions of time constraints and pressure from outside entities for the Court to reach issues. This body of work indicates that issue suppression occurs quite commonly in the Supreme Court. McGuire and Palmer (1995) find issue suppression in 46% of cases in the Court’s 1988 term. Palmer (1999) estimates issue suppression occurs in nearly 60% of cases before the Warren Court. McGuire and Palmer

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8 In response, Epstein, Segal and Johnson (1996) argued that the evidence, reexamined, showed that virtually all issues discussed in opinions were raised in a brief submitted by the parties. McGuire and Palmer (1996) responded to the challenge, presenting evidence of issue creation. McGuire and Palmer, the justices themselves have often presented normative arguments in favor of issue avoidance (e.g., Ashwander v. Tennessee Valley Authority, 1936, in which Justice Brandeis indicated that the Court should avoid constitutional issues and striking down statutes when it is possible to resolve the case without reaching those issues).
(1995) found that several factors change the probability of issue suppression on the Supreme Court, including time pressures, the presence of amici, and several characteristics of the case. In a later paper, Palmer (1999) further explored the institutional context of issue expansion and suppression, finding (among other things) that the presence of the federal government in a case reduces issue suppression and that larger majorities are more likely to engage in issue suppression. This last finding is, of course, supportive of my basic theory that narrowness should emerge in difficult compromise situations.

There is also some prior work addressing the topic of how lower court judges, like the Supreme Court, strategically make choices about the content of their opinions. Following the leading authors of this work, I term this body of work “strategic instrument theory.” For the most part, the prior work emphasizes goals related to evading higher court monitoring. The basic idea is that judges often have choices about how to frame their decision, choices about what type of “decision instrument”\(^\text{10}\) to use, and that these decisions are affected by the likelihood of hostile appellate review. Smith and Tiller (2002) applied strategic instrument theory to appellate courts and concluded that appellate judges make choices about the grounds of their opinions that help insulate their decisions from appellate review. Additionally, empirical evidence from the district courts suggests that district court judges frame their sentencing decisions with the appellate standard of review in mind—moving decisions that conflict with

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\(^{10}\) By decision “instrument,” the authors of this work refer to the legal frame of the case. For example, a judge may characterize a sentencing decision as involving a departure from the Sentencing Guidelines or instead as a determination of the underlying offense level. There is “play” involved in how the facts of the crime are analyzed under the law. The choice of characterization affects the standard of review applied by appellate courts.
appellate preferences into frames with weaker appellate standards of review (Schanzenbach and Tiller 2007; see also Tiller and Spiller 1999). In general, these findings are consistent with the theory presented here in that they suggest that judges are strategic about the content, as well as the outcomes, of their decisions, and that ideological conflict may play an important role in those decisions. However, the decision to move an opinion into a procedural frame does not implicate a lesser appellate standard of review. Rather, procedural rulings should receive the same standard of review from an appellate court as substantive decisions so long as the decisions were issued in the same context, such as upon summary judgment. As discussed more below, therefore, while the trends are similar in nature to those predicted by strategic decision instrument theory, decision instrument theory does not best explain the underlying mechanism in this context.

Of course, some scholars have posited that decisions about procedure fundamentally track preferences about the merits—indicating a straight-forward attitudinal approach rather than a strategic decision model. Thus, for example, some scholars have shown that decisions on threshold issues track preferences about the merits of the case (e.g., Pierce 1999; Staudt 2004; Rowland and Todd 1991). Quite recently, Braman (2006) presented additional evidence of this type of “motivated reasoning” with regard to threshold issues, by showing that law students were likely to follow their substantive preferences in making standing determinations, but that such decisions were also constrained by legal precedent. This literature suggests the need to control for substantive preferences about outcomes, as discussed more below. However, while decisions about threshold issues may be influenced as well by desires about substantive outcomes, that does not foreclose additional types of uses of these doctrines. The experimental design set up by Braman, for example, did not include any role for group dynamics or hierarchical control, thus
excluding from consideration the types of forces posited here. The theory presented here is not inconsistent with the idea that sometimes reasoning about threshold issues becomes mixed up with reasoning about the merits. However, I argue that threshold issues play an important role in the context of group decision making, by allowing a common opinion to emerge from a group with divergent preferences, for example. This role might operate independently from the type of motivated reasoning suggested by Braman’s work.

2.4 Conclusions From Reviewing the Literature

Overall, then, the state of knowledge about how judges decide which issues to reach in judicial opinions is quite sparse. Nearly all the literature focuses on the Supreme Court, the body in which one might expect this behavior to be least important. Further, no work has really considered how issue suppression, and in particular procedural avoidance, might play a role in collegial compromise or issues of hierarchical power. In spite of the mounting evidence that issues addressed in judicial opinions are not completely exogenously determined, most formal models of collegial rule-making and opinion writing set aside the possibility that the issues in a given case are not fixed. Indeed, issue manipulation is not explained by any of the current formal theories of collegial decision making in courts. Instead, models of collegial rule-making tend to treat the “case-space” as fixed, and model only how the judges might reach a compromise within that fixed space (see, e.g., Lax 2007; Lax 2003; Lax and Cameron 2006). Existing models are, then incomplete.

The choice between addressing the merits of a case and avoiding them by issuing a procedural decision is an important aspect of judicial behavior. As discussed more below, procedural issues are quite common in the judiciary—occurring in at least 40% of published
appellate opinions and far more commonly in trial level decisions. Indeed, it is worth noting that in general these doctrines of procedural avoidance (which might be seen as in conflict with power maximization or policy goals) originate in the courts. They are not imposed by statute on the judiciary. Rather, they emerge endogenously within the institution. Why might that be the case? I argue here that procedural avoidance behavior makes sense within a broader decision making strategy on the part of judges. One goal of this work is to reconcile the fact of this behavior with the more formal literature about judicial strategy and collegial compromise.

In addition to helping to demystify this phenomenon, better understanding how procedural avoidance plays a role in the courts can help us to understand many judicial outcomes. The decision to render a decision on procedural grounds has real consequences in the world. Indeed, generally speaking, procedural terminations are status quo enforcing. So, the little girl in the Newdow case must continue to say the Pledge of Allegiance and the world returns to the same position it was in before the case was brought. Failure to understand why judges might choose to render a procedural decision means we fail to understand an important force in explaining how and why judges decide a great many cases the way they do. In addition, this work fills an important gap in our understanding of the timing of when issues are addressed by the courts. Timing can, of course, be critical in determining outcomes. To the extent that lower court judges delay decision on a policy issue until the makeup of the judiciary has shifted ideologically, that can have important consequences on the ultimate policy outcomes achieved in court. What if, for example, Roe v. Wade had been decided 5 years later? Would the outcome have been the same? While I cannot definitely answer that question, I think it is safe to say that in the courts, timing matters. This thesis begins the process of understanding how lower court judges set the scope of their policy agendas in the content of their decisions. What are the forces
that determine whether a lower court judge enters the policy arena? How predictable is this behavior? How do lower court decisions about the agenda affect higher courts? How does judicial agenda strategy affect the evolution of the law itself? These are all open questions in the field. The following chapters introduce some initial answers to these questions.
Actors with agenda control may use this power to prevent actors with differing preferences from making choices. In this chapter, I argue that lower court judges exert such agenda control over higher courts and that they wield this power strategically. Lower court judges can limit the agenda of higher courts by relying on procedural rules to dismiss cases. This allows lower court judges to prevent appellate courts from making substantive decisions that conflict with the preferences of the lower court judges.

Much attention in the legal scholarship community has recently been given to congressional control of the judicial agenda, and in particular to the propriety of jurisdiction-stripping legislation (e.g., Fallon 2010; Redish 2005; Pfander 2000). Such attention is warranted given the fact that control over the agenda can often translate into control over substantive outcomes and policy. However, such games play a role not just between branches, but also within them. The argument in this chapter looks instead at intra-branch agenda setting behavior. In particular, I consider here the behavior of lower court judges who elect *not to decide* issues in a case. I argue that this decision is governed in the lower courts, at least in part, by lower court judges seeking to exert agenda control over higher courts.

The basic theory of this chapter is that lower court judges strategically limit the agenda of higher courts when higher courts are ideologically distant from the lower court. This is possible through selective use of procedural avoidance behavior by lower court judges. Hence, this is a form of power that resides at the bottom, not the top, of the judicial hierarchy.
The current state of evidence about relative power of appellate courts and lower courts is somewhat mixed. There is some existing evidence of substantive compromise by lower court judges faced with a hostile appellate court. Songer, Segal and Cameron (1994) found that appellate judges were responsive to a certain extent to changing ideologies on the Supreme Court. More pertinent to this study, Schanzenbach and Tiller (2008) showed that district court judges adjust their sentencing behavior according to the preferences of the relevant appellate court. Murphey (Nd) showed that the ideological preferences of the appellate circuit affect outcomes in 4th Amendment suits even when controlling for the ideological preferences of district court judges. This may make sense given that appellate courts have the power to reverse decisions, requiring district judges to hear the case again, and so workload concerns may incentivize lower court judges to reach outcomes that are satisfying to appellate courts.

As noted in the previous chapter, some have even suggested that the influence of higher courts goes not just to outcomes, but also to the content of lower court opinions. Indeed, there may be tradeoffs to higher court power as lower court judges shield outcomes from review by making choices about opinion framing that affect the legal standards of review (Tiller and Spiller 1999; Schanzenbach and Tiller 2007). In other words, lower courts choose the grounds of their opinion with an eye toward the response of a higher court, potentially limiting that court’s ability to effectively monitor the lower court.\footnote{Additionally limiting the power of the appellate court, of course, is the fact that only about 20\% of district court decisions are appealed and of those only about 30\% of appellate decisions reverse the lower court, indicating a general preference to not disturb district court decisions.} This could be seen as one mechanism that might
influence the decision of lower court judges to issue procedural opinions rather than substantive opinions. Perhaps judges think that procedural rulings will be better insulated from appellate review and therefore less amenable to reversal? While that might be attractive as an initial instinct, it is not at all clear why we should expect appellate courts to review procedural decisions differently than substantive decisions. Unlike in the sentencing decision data used by Schanzenbach and Tiller, across the cases in this data there is no reason to expect a different appellate standard of review to be applied in a way that is correlated with the distinction between a threshold issue decision and a substantive issue decision. Thus, while it is difficult as an empirical matter to tease apart strategic behavior on the part of lower court judges who fear reversal from the mechanism suggested here, the law itself suggests that agenda-setting concerns are more likely than fear of reversal concerns. While there is no legal rule that creates a differing standard of review, the law does create the agenda-setting pressure that I suggest is operational, as discussed in more detail below.

The agenda-setting theory, unlike the “fear of reversal” theory, is a theory rooted in the idea that power can reside at the bottom of a hierarchy rather than the top. This idea, then, can be placed with some recent literature that has been emerging to consider how it might be that power flows downward in the federal judiciary, giving lower court judges the power to control policy in surprising ways. Increasingly, scholars have wondered whether power may, at least at times, originate in the lower courts, which have the advantage of being the “first mover” in the judiciary. Carrubba and Clark (2010) developed a formal theory of rule formation that starts at the lower levels of the judiciary and allows influence over the final rule to flow from bottom to top. Their argument relates to the insight that lower court judges can take advantage of “slack” due to the costliness of review so as to bring the legal rules closer to their own preferences than
the higher court’s. Further, their model suggests that lower courts can make use of the fact that sometimes they can give the higher court a preferred disposition/outcome while still announcing a rule that is preferred by the lower court, again taking advantage of the low likelihood of review—indeed a likelihood that is even lower given that the outcome is the one preferred by the high court. Carrubba and Clark highlight through this work the importance of separating opinion content strategies from disposition strategies as well as helping to illustrate the many ways in which lower courts are empowered. Carrubba and Clark’s work, then, is similar to the strategic instrument theory work in that it is interested in how lower courts can shield their decisions from review. However, it does not rely upon different standards of appellate review but rather on the strategic interplay of law, dispositions and case fact.

In this work, I extend the argument about lower court power, arguing that lower court judges have another mechanism of power—one that is actually a source of more real power than the ability to simply evade review. I argue here that a very simple agenda setting model applies to the behavior of district court judges—giving them the opportunity to strategically affect the policy agenda of higher courts by choosing whether or not their decision addresses substantive issues raised by the case. Hence, procedural avoidance in the lower courts, I argue, is used as a tool to affect the policy agendas of higher courts. Lower courts wield this power strategically when they engage in procedural avoidance more often in the presence of an ideologically hostile appellate court.

3.1 The Romer-Rosenthal Agenda Model and Strategic Behavior by Lower Court Judges

The agenda setting power of lower courts is analogous to the agenda setting power of congressional committees with respect to the whole of Congress. Romer and Rosenthal (1978;
1979) presented a simple model of agenda setting behavior that applies in any context where there is an agenda setter with the power to define issues or policy options that reach a vote in the policy-setting body. Romer and Rosenthal were interested in budgets given to bureaucracies and suggested that if bureaucrats have control over the agenda submitted to voters, they could bring budgets closer to their preferences and away from the median voter’s preferences by making strategic decisions about the budgets that were voted upon in relation to the “reversion point,” or status quo. Rationally, then, if the desire is to have a high budget, they would always submit the highest budget preferred by the median to the status quo, so that when a status quo was far from the median’s preferences, they might have the ability to swing the budget substantially in their favor (see also Niskanen 1975). Such agenda control models have been used often in the Congress literature. For example, Cox and McCubbins (2005) argued that parties control policy output in Congress by virtue of negative agenda control used by congressional committees and political parties. If the floor of Congress preferred an outcome too far from the majority party’s preferences on a given issue, the congressional committee would allow the status quo to endure by preventing that issue from reaching a vote. In general, these models are simple and intuitive. In the situation where control over the agenda is limited to control over whether a given issue reaches voting body, the logic can be expressed quite succinctly in spatial form. Hence, below in Figure 1, if M represents the median preference (the outcome that can be expected if the policy issue reached a vote without agenda constraint), SQ is the status quo, and AS is the preference of the agenda setter, then AS will only allow an issue to go to a vote whenever M is closer to its preferences than the status quo. So, in the top panel, the agenda setter will not prevent policy issues from reaching a vote, but in the bottom panel it will.
The net effect of such negative agenda control is to shift policy (in aggregate) in favor of the agenda setter’s preferences and away from the median voter’s preference. Such mechanisms are posited to explain non-median outcomes and partisan control in Congress (e.g., Cox and McCubbins 2005) and to explain ever-increasing bureaucratic budgets (e.g., Romer and Rosenthal 1979; Niskanen 1975).

Regardless of the location of the status quo, the model suggests that negative agenda control should increase as the expected “floor vote” outcome and the agenda setter’s preferences diverge from one another. As the expected new policy outcome is more distant from the agenda setter’s preferences, it becomes increasingly likely that the “status quo,” however defined, is preferable to the agenda setter than the expected new outcome. (Below I take up the discussion about how to think about the status quo in this context in more detail.)

Here, I posit that the agenda setter is the lower court judge. The expected “floor vote” may best be characterized by the expected ideological position of the relevant higher court. In the Supreme Court, this can be approximated by the Court’s median.\footnote{12 For any given case, of course, the outcome itself will depend on where the facts of the case lie on the ideological spectrum, thus creating different court splits. However, the ideological}
intermediate appellate courts, where panels are drawn randomly from the set of sitting judges, that position may best be characterized by the mean of the ideological preferences of the sitting judges.\textsuperscript{13} Hence, a simple agenda setting model would predict that as the lower court judge is content of the opinion is more fine-grained than a dichotomous outcome measure and the median is one approximation of the ideological content of the opinion’s position, although admittedly an approximation that contains error. Of course, since the cases in the appellate data do not reach the Supreme Court (in general) it is not possible to more accurately measure the Supreme Court’s position with respect to particular cases. Other possible measures include the Court’s mean or the mean of the Court’s majority coalitions for the year; however, each measure is flawed in its own way as an approximation of the Court’s output.

\textsuperscript{13} The mean of a group represents the expected value of a random draw from that group; it is the best guess one has, \textit{a priori}, of the outcome of a random draw. Because appellate panels are drawn randomly, this is a one approximation of the expected policy position of the appellate court from the district court judges’ perspective. The district judge cannot know which appellate judges will hear a potential appeal. He or she therefore must estimate the expected appellate preferences. This measure may have some amount of bias in it because panels are actually drawn in sets of three. An alternative measure would be to use the percentage of liberal judges on the appellate circuit. While that might be a somewhat more precise approximation of the expected ideological composition of a panel, it also has the problem of being in a different “space” from the ideology scores of the district judges. Ultimately, I concluded that the mean score of appellate judges is accurate enough at capturing the view from district court judges and has the advantage of existing in the same space as the measure of district court judge ideology and so was ultimately a good choice. Note that I assume that the district court judge is primarily
more distant ideologically from the expected value of the appellate court, he or she should exercise negative agenda control more often. In sum, then, to the extent that one believes that procedural avoidance behavior by a lower court judge has effects on the policy agenda of a higher court, one should expect to see more procedural avoidance in ideologically-charged cases by lower court judges when they sit underneath “hostile” appellate circuits than by lower court judges who sit beneath ideologically aligned higher courts. Note that the preceding sentence is a succinct 2-part statement of the empirical observations one should expect to see if lower court judges exert agenda control power over appellate courts by choosing when to address the merits of a case and when to engage in procedural avoidance. It is possible to separate these into two separate hypotheses:

*Hypothesis 1: As a lower court judge is more ideologically distant from the expected ideological position of the higher court, he or she will more often issue narrow, procedural opinions rather than reach the merits of a case that presents an ideologically-charged policy issue.*

*Hypothesis 2: Higher court judges will not generally reach the merits of a dispute if a lower court has not done so.*

concerned with limiting the agenda of the relevant appellate circuit, setting aside the desire to affect the Supreme Court. However, given that the data used to test this theory (presented in Chapter 5) comes from 2005-2007, a time period of Supreme Court conservatism, any strategic desires to influence the Supreme Court will be picked up in the measure of a direct ideological effect for the district judge’s preferences.
The first hypothesis is based on the idea that district court judges behave strategically in their use of procedural avoidance behaviors. Note that the hypothesis is limited to “ideologically-charged” issues. That limitation is present because one would not expect to see agenda control behavior among cases that are ideologically “uninteresting.” Rather, strategic political behavior in general should only be expected to occur amongst politically relevant cases. This hypothesis is tested below, in chapter 5, using data from district court decisions in constitutional cases and in prisoner habeas corpus petitions. In Chapter 5 I test the hypothesis by considering whether, on average, district court judges who are ideologically very distant from the mean ideological position of their appellate court tend to avoid the substance of cases by rendering procedural decisions. In Chapter 6, I test Hypothesis 1 using appellate court data and asking whether or not appellate panels that are ideologically distant from the Supreme Court are more likely to avoid the substance of a case before them. The hypothesis is also tested in Chapter 7 using qualitative evidence from district court decisions rendered in cases challenging abortion laws in the 1970s.

The second “hypothesis” is not a hypothesis that comes from the theory but rather is better characterized as a part of the construction of the theory itself. If this hypothesis is not true, one would not expect any strategic agenda behavior on the part of lower court judges. So, showing this to be true is essential to validating the theoretical ideas about agenda setting. Another way of saying this is that the second hypothesis justifies the theory of strategic behavior by positing that strategic behavior can be expected to have any effect. If the district judge cannot hope to change any behavior by the appellate court, it would be less reasonable to interpret what appears to be strategic behavior in that way. I treat this as a hypothesis because it is possible to
empirically test the truth of this statement and I do so in the following chapters. Hypothesis 2 is tested in Chapter 6, using data from the U.S. Courts of Appeals and asking whether the appellate decision to reach the merits of cases is dependent upon whether the district court did so. Hypothesis 2 is also tested qualitatively in Chapter 7, using the abortion cases.

Both hypotheses 1 and 2 are important to presenting a convincing argument that procedural avoidance is used strategically by lower court judges. If both behaviors are observed empirically, that is strong evidence that district court judges exercise an important form of power in the judiciary that has not been previously documented.

3.2 The Role of the Status Quo

To fully predict behavior using such a model, one needs to know the relative positions of the actors as well as the status quo. However, it is impractical, if not impossible, to accurately measure the status quo for each case.\textsuperscript{14} The best way of defining a status quo is the state of affairs in the world if the court does nothing. When dealing with appellate courts, this suggests there is a legal status quo in the form of whatever the lower court has done (Bonneau et al. 2007; Hammond and Maltzman, 2009). If one considers district court decisions, however, that status quo obviously does not exist. Indeed, even when considering appellate courts many scholars do not consider that definition of a status quo helpful. Indeed, Cameron and Kornhauser (Nd) effectively use the facts of the case as a status quo in modeling rule formation in appellate courts. They point out that the court really is deciding what to do with a particular fact pattern, so that

\textsuperscript{14}Some have argued that in the law there is no such thing (e.g., Westerland 2003) while others argue that decision-making is impossible without some notion of a starting point (Bonneau et al. 2007).
should be considered their starting point once they have the case before them and are therefore going to do something with it.

Because the status quo for each case depends on the particular facts of the case, it is impossible to capture the concept meaningfully in a quantitative fashion. One would have to subjectively assign an ideological value to the facts of each case. Nevertheless, this does not make empirical work impossible. Instead, one can assume that the status quo for the cases in the data is randomly distributed with respect to the concept of interest—the ideological dissonance between the district court judge and the appellate court, in this study. If this assumption holds, then one should still expect to see trends on average across the cases that support the theory. This assumption is plausible given that cases are randomly assigned to district court judges within a district, so litigants cannot effectively choose their particular adjudicators. However, of course selective settlement will create trends of non-randomness and litigants make choices about which cases to bring given circuit characteristics that are also likely non-random. All of this suggests that there may be problems with an assumption of random case fact patterns. For example, plaintiffs may choose to bring cases that push the boundaries of liberal-ness in the relatively liberal Ninth Circuit whereas plaintiffs are likely to be more moderate in the more conservative Seventh Circuit. If so, litigants themselves are playing a role similar to the effect I argue here that district judges play—anticipating the appellate outcome and strategically avoiding it. To the extent that litigants effectively engage in this behavior, we might not expect to see much of a role left for the district court judge to engage in agenda-setting. However, note that if the litigant takes its signals from the appellate court, there will still be an agenda-setting role left for conservative district judges sitting underneath liberal circuits. So, while the effect may be mitigated by litigant selection processes, we should still expect to see some role for
judges. In sum, then, I do not measure the status quo position in the cases; however, this should result in a more conservative test of the theory.

3.3 Differences Between Circuit and District Courts: The Power to “Make Law”

As suggested above, there are two possible choices of “lower court judges” to consider in testing the idea that lower court judges use procedure to limit the agendas of higher courts. One is the intermediate appellate courts. The other is the district courts—the trial courts of the federal system. The two sets of judges are similar to one another, and distinct from the Supreme Court, in that they do not have the power of discretionary cert., and so may be expected to employ procedural avoidance tools in its place. However, one should not treat all lower court judges as equivalent. A critical difference exists between district court judges and appellate judges: the power to “make law.” A district court opinion is, by law, binding upon no one but the parties. On the other hand, appellate court opinions establish binding law for the geographical area contained by the circuit. This distinction suggests that appellate court judges might face greater costs in choosing to not issue a substantive opinion. Doing so means that they sacrifice the ability to lay down a rule that binds the entire circuit. District court judges, on the other hand, do not face that cost. For this reason, one should anticipate agenda control forces to be far more powerful among district court judges, who lack competing concerns about setting policy. Further, of course, the Supreme Court hears such a tiny fraction of appellate cases (far smaller than the fraction of district court cases heard by appellate cases) that for this reason as well it is reasonable to imagine that the agenda setting forces are less powerful between the appeals courts and the Supreme Court than they are between the district courts and the appellate courts. Therefore, there may be conditionality on the position of the lower court for the
hypotheses identified in the foregoing chapter. In particular, I expect the foregoing proposed empirical findings to be much larger in the district courts (who respond to the appellate courts) than in the appellate courts (who respond to the Supreme Court). By testing the agenda setting theory at both levels of the judiciary, I will be able to determine whether the influence of these concerns is indeed more important for district judges than for appellate judges.

3.4 Conditionality Based on Competing Outcome Preferences

Throughout the judicial politics literature, it is generally assumed that judges have ideologically-driven preferences about outcomes. This is often taken to be the primary goal of judges: achieving the most ideologically-friendly outcomes. Here, however, I have for the most part set aside concerns about the outcomes in a given case in favor of the idea that judges are interested in affecting the content of the law itself. Nevertheless, there may be an important role in the model for preferences about outcomes. Terminating a case on a threshold issue is, on average at least, a conservative thing to do. That is, in general pro-plaintiff rulings are more liberal than pro-defendant rulings. Terminating a lawsuit for procedural rulings is a pro-defendant decision. Hence, it is likely to be a conservative outcome even if not a particularly ideologically-charged opinion in terms of its larger effect on the law. I am not the first to point this out. For example, Cross (2007) shows that decisions in which a procedural threshold issue are not met tend to be more conservative than those in which the issue is met.15

15 Indeed, while it may be a bit premature to talk about data, it is worth noting that in all the data sets used in this work, a procedural termination tended to be associated with a conservative ideological outcome.
Because the dependent variable is not likely to be unrelated to ideological preferences about outcome, direct ideological effects must be considered. One way to control for such an effect is to simply control for the direct effect of ideology in the model. All of the quantitative models include such a control.

Another way of addressing the idea that outcome preferences play a role is to consider whether judges with different ideological preferences actually respond to the strategic agenda context differently from one another. In particular, given that procedural avoidance leads to conservative outcomes, one might imagine that only conservative judges would make use of this tool to implement their agenda preferences. Conservative judges are, in general, the non-conflicted judges. They can reach the outcome they desire using either procedural avoidance (which will generally terminate a lawsuit) or using substantive law. So, they are free to allow other concerns, such as the agenda games posited here, to set their strategy for this choice. On the other hand, more liberal judges may not be as willing to render a procedural decision to achieve agenda goals. To the extent that such a decision will be tied with an outcome the liberal judge does not like, the outcome concerns may dominate. Liberal judges, then, may turn to other choices to engage in agenda games. Hence, it is possible that the choice under study here, procedural threshold terminations, may be strategically used only by more conservative judges. This implies that a direct control for ideology is not enough. An interaction between ideological preferences and the conflict measure might also be significant. (Or, the same phenomenon can be observed potentially by separating the data into two groups, liberal and conservative district judges, to see whether the predicted effect takes place in the same way for both groups.) Thus, I hypothesize that there may be conditionality of the strategic effect upon the outcome preferences of lower court judges. This possible conditionality, then, reflects the idea that outcome-oriented
goals may dominate lower court decisions and that the legal goals discussed here are, effectively, a secondary game that only occurs when there are not conflicts with the primary outcome-oriented game.

There is yet another reason to expect possible conditionality based upon the ideological orientation of the judge. The data for this study were taken in 2005/2006, during the presidency of George W. Bush. In that time period, conservative judges might expect the largest gains from delay strategies like procedural avoidance. After all, they should expect that the appellate courts are increasingly coming into alignment with their preferences. On the other hand, liberal judges should expect things to only get worse in the appellate courts. Hence, the tactic of procedural avoidance should be more attractive to conservative district court judges than to liberal district court judges in the time period under study. To the extent that procedural avoidance merely delays an issue, but does not prevent it from ultimately reaching the appellate courts, that game is one that will be more to the advantage of the conservative-minded judges in the time period of the data. While a larger dataset that spanned different time periods would best be able to illustrate this conditionality, nevertheless, the idea suggests the need to potentially consider conservative and liberal district judges separately from the strategic perspective. To the extent that conditionalities are found, this suggests an important avenue for further research.

3.5 Competing Mechanism: Fear of Reversal

Above, I suggested that an important consideration of lower court judges in choosing whether to terminate a case on a procedural issue or to decide the full set of issues in the case has to do with conflict with the relevant appellate circuit. I argued that this behavior would be predicted from lower court judges desirous of affecting the policy agenda of higher court judges.
Effectively, the argument is that when lower court judges don’t trust their higher court, they try to limit the higher court’s access to substantive legal issues—wielding a form of agenda control over the higher court. That mechanism, however, is not the only mechanism that might predict the trends measured in the following chapters. Indeed, some might argue that lower courts issue procedural decisions in order to avoid reversals by higher courts, in line with the basic approach of strategic instrument theory (e.g., Smith and Tiller 2002, Schanzenbach and Tiller 2007).

It is difficult to imagine how to tease out the internal motivations of district court judges. Are they responding to conflict because of fear of reversal or because of the desire to limit the agenda of the high court? The behavior may, for all practical purposes, manifest in identical trends. Indeed, it may be the case that some judges are motivated by one concern while others are motivated by the other. However, there are sound reasons that suggest that an agenda setting story is more likely the correct explanation. For example, the prior studies to do with strategic instrument theory turned on differing standards of appellate review that applied, under the law, to different categories of lower court decisions. The choice between substance and procedure, on the other hand, does not implicate a different appellate standard of review. Hence, as a logical matter it is difficult to determine why the lower court judges would think that procedural rulings insulate them from review. On the other hand, it is possible that appellate courts are more tolerant of procedural rulings than of substantive rulings because they do not as directly engage with the policy substance. So, regardless of the lack of a formal mechanism for a lower standard of review, it may be the case that such decisions are reviewed less stringently.

One way to try to parse the different mechanisms is to consider what happens in the appellate courts. If the appellate court limits its attention to the issues addressed by the district court (Hypothesis 2, from above), then it seems reasonable that district court judges are aware of
this and acting to achieve this goal. Hence, that effect supports the agenda setting theory. On the other hand, if appellate courts are more likely to affirm procedural decisions by district courts, again it seems reasonable that district court judges are aware of this and act to achieve this goal. Hence, that effect would support a “fear of reversal” mechanism. While the district and appellate court datasets used in this thesis are not linked to one another (i.e., I have not tracked a set of cases through the court hierarchy), I have gathered information on the district court decision that was rendered in the appellate data. This should allow a rough consideration of the effects of the district court judge’s choice and allow us to at least weigh the evidence about both mechanisms though it may not be possible to completely rule either out.
CHAPTER 4

USING A CASE-SPACE MODEL OF COLLEGIAL DECISION MAKING TO PREDICT PROCEDURAL AVOIDANCE CAUSED BY IDEOLOGICAL CONFLICT AMONG COLLEGIAL JUDGES

In this chapter, I move away from the previous chapter’s emphasis on hierarchical conflict to focus instead on collegial conflict—conflict within a group of judges who must decide a case. As such, of course, the theory of this chapter is only relevant to the intermediate appellate courts, where decisions are made by panels of three judges. District court judges, who render decisions alone, are not subject to any pressure due to collegial conflict. In this chapter, I explore how existing theories of collegial decision making can be modified to predict judges engaging in avoidance behavior. In particular, I argue that when groups of judges sit together to decide a case (as in an appellate panel), the more disparate their ideological preferences, the more likely they are to write a narrow, procedural opinion instead of engaging the policy substance of the case. This can be seen as a form of compromise that helps the judges manage workloads and prevent split opinions, as described in more detail below.

Political scientists have long considered that it may be more difficult to make important policy decisions in the face of ideological or partisan conflict. Scholars of congressional behavior have argued, for example, that the most important legislation occurs in times of unified government because divided government leads to gridlock and stalemate (Cutler 1988; Howell et al. 2000; but see Mayhew 1991). More recently, Rogers (2005) worked with state data to illustrate that it is not a split across branches that decreases productivity, but rather a split within the legislature itself (see also Binder 1999). Krehbiel (1998) argued that partisan composition is irrelevant but agreed that ideological heterogeneity among the players increases the likelihood of gridlock—in combination with the location of the policy status quo. Although each author varies
somewhat in the details of the story, one important thrust of the Congress literature relates to how and why conflict can limit the policy agenda. Thus, Krehbiel ignores parties and focuses on institutional veto points like each body of Congress and the President, arguing that increasing the number of veto points or the diversity of their preferences increases the likelihood of gridlock (e.g., Krehbiel 1998). Cox and McCubbins (2005) present a competing model of congressional behavior to Krehbiel’s, one that is fundamentally driven by agenda control exercised by political parties who control congressional committees. Cox and McCubbins argue that this power to limit the agenda of the main body of Congress means that the floor majority is not allowed to get its full set of preferred policy—skewing policy output toward the party median preferences by limiting the agenda. Further, they illustrated empirically that the size of the majority party’s agenda shrinks with majority-party heterogeneity (Cox and McCubbins 2005). Although congressional scholars dispute the details, for the most part most seem to agree that ideological conflict among the players will operate to decrease the policy agenda of the legislature.

However, while the idea that ideological conflict might lead to lack of policy productivity is well-trodden ground in the Congress literature, scholars of the judiciary have not paid nearly as much attention to this idea. Indeed, for the most part models of collegial judicial decision making ignore the idea that judges might have choices about the scope of their decision. One exception is a paper by Staudt, Friedman and Epstein (2008) presenting evidence from the Supreme Court that ideological homogeneity among the justices joining the majority opinion is correlated with more important constitutional decisions. That work, while perhaps suggestive, cannot be taken as strong evidence that ideological conflict affects the scope of judicial opinions. Most importantly, it is difficult to gain leverage over this problem using evidence from the homogeneity of the majority opinion at the Supreme Court level because of the fact that the
composition of the majority may well be endogenous to the issues raised by a given case. Thus, it is difficult to separate out causal stories about the composition of a majority coalition on the Supreme Court—an “important” issue area may well lead to strong ideological sorting of the justices who join an opinion, thus leading to causation flowing both ways in the model. The same is not true if one uses cases for which group heterogeneity exists independently of the case at hand. This is the situation in the appellate courts, where panels of varying heterogeneity are drawn randomly within a circuit. This suggests that evidence on this topic is best drawn from the appellate courts, as is done in the following chapter. In addition, the work by Staudt, Friedman and Epstein does not include much information about the tools used by judges in affecting the scope of their policy decisions. In this work, in contrast, a particular tool is considered: procedural avoidance.

Consider a fairly well-accepted model of collegial rulemaking, the “case-space” model (e.g., Kornhauser 1992; Spiller and Spitzer 1992; Cameron 1993; Cameron, Segal and Songer 2000; Lax 2003; Lax 2007; Kastellec 2007; and Lax and Cameron 2007). The “case-space model” focuses on rule formation in collegial courts. In this approach, a rule is a “function that establishes equivalence classes of cases to be decided similarly” (Lax 2007). A case is modeled as a point in multi-dimensional space where the dimensions represent relevant factual considerations (e.g., the intrusiveness of a search, the degree of negligence, or even the speed of a car). A rule divides the multi-dimensional “case-space” into two classes—the traditional measure of outcomes. The basic approach of this theory assumes that (in one dimension) judges have ideal “cut-points” that divide that dimension into dichotomous outcomes. In other words, the judges have ideal rules that divide case facts into outcomes. These cut-points may be expected to follow ideological expectations. So, for example, if one is discussing equal
protection law one would imagine that a liberal judge would have a “lower” cut-point for the dimension of the showing of discriminatory intent than a conservative judge would have; when the facts were less strongly indicative of discriminatory intent, he or she would still find a claim of constitutional violation proved. Thus, the liberal judge, by applying the more liberal rule about intent, would map more case facts into outcomes favorable to equal protection plaintiffs than a conservative judge. According to the theory, a collegial court establishes a rule that is a cut-point agreed upon by a majority of the judges.

Imagine a three-judge panel deciding a Fourth Amendment wrongful search case. The case before the judges has a fact pattern located at position X along a relevant dimension, such as the intrusiveness of the search. Assume that position X is a fairly non-intrusive search. Perhaps the search took place in a car, with probable cause and pursuant to a valid arrest, for example. Let us assume that the preferences of the three judges can be arranged on a line as follows for this ideologically-salient issue.

**Figure 4.1: Hypothetical issue dimension with three judges and a set of case facts, X**

| X | J1 | J2 | J3 |

Thus, J1 is the most liberal, J2 is a moderate, and J3 is the most conservative member of the group. Even the most liberal judge in the group, J1, prefers to articulate a rule that would uphold the search in this fact pattern. In this situation, then, all three judges agree on the outcome. Each of them would uphold the search. However, in order to get to a joint opinion, the judges must not only agree on the outcome; they must also agree on the statement of the rule. Perhaps J3, for example, prefers to write an opinion stating that the Fourth Amendment never
prevents the search of any property belonging to a person subject to arrest. J1 would experience losses to the extent that she signed onto such an opinion. In such a world, then, we can imagine that an initial cut at a loss function facing the three judges looks like Figure 4.2, below.

Figure 4.2: Loss functions for the three judges depending on the policy content of the opinion

Losses accruing when an opinion is issued at a point distant from a judge’s ideal point make sense from more than one perspective. Here, I argue that this loss represents a loss due to the imperfect expression of legal/policy preferences. Hence, this cost largely relates to the judge’s professional image and reputation—the desire to be seen as a good “artist,” as Judge Posner would say. I treat the question of whether or not an opinion becomes binding precedent, and therefore sets policy for future cases, separately, below. Here, then, let us confine ourselves to the expressive utility of writing or joining a “good” judicial opinion. In a recent book, a federal appellate judge, Judge Richard Posner, argues that judging is an activity that parallels art and creative writing (Posner 2008, Chapter 2). A large component of a judge’s utility function comes from the “desire to regard themselves and be regarded by others as good artists.” This comparison, he argues, is most apt for the intermediate appellate judges, like himself, who have some development over the law and whose primary product is the written opinion (Posner 2008,
63). Like artists, then, judges should care a great deal about whether they have signed onto an opinion that expresses their view of the correct legal rule. Signing onto an opinion, then, that deviates from the judge’s preferred position will cause the judge to incur increasingly losses as the distance from the preferred position grows.

The most recent case-space models take into account not just the losses associated with joining an imperfect opinion, but also the losses associated with having to go to the trouble to draft an opinion, thus explaining opinion assignment trends and pressure to draft a high quality opinion (Lax and Cameron 2007). While the formal models of rule formation have come a long way in recent years to incorporate more of the complexities present in real courts, nevertheless certain features of judicial decision-making remain unaddressed. For example, the case-space models typically assume that a majority opinion is inevitable. They do not allow the possibility of judges being unable to come to agreement with one another to form binding law. Effectively, they treat the cost of failing to generate a majority opinion as infinite. However, observation of the courts tells us that, although it is not common, occasionally a collegial court issues a split opinion with no clear majority. Further, it is fairly common for a judge to be willing to pen an opinion that is not destined to become law. As would be expected, such separate opinions are more likely to occur when judges are ideologically distant from the opinion writer (e.g., Hettinger Lindquist and Martinek 2006). In addition, the models do not allow for the possibility of issue choice. However, evidence (discussed above) suggests that courts quite

\[16\] Westerland (2003) also showed that special concurrences are more likely when the author is distant from the median of the majority (which he asserts was the ideological location of the opinion).
commonly engage in issue suppression. Existing models are, then, incomplete, insofar as they do not predict these behaviors.

In order to predict split opinions and avoidance behavior using a case-space approach, one needs to treat the cost of failure to make policy as a finite, positive cost similar to the cost of drafting an opinion. Consider a simplified picture of the case-space model of judicial decision-making that treats both the cost of opinion writing and the cost of failing to make policy as finite, positive costs.\(^{17}\) If one shows these two costs in the same space as the costs associated with joining someone else’s opinion, the potential costs facing each of the judges might look like Figure 4.3, below. Figure 4.3 shows the three potential costs together on one set of axes. The figure shows costs due to an imperfect policy statement—this is effectively the cost of joining an opinion another judge has written that does not perfectly capture one’s own preferences or of penning an opinion that does not sincerely reflect one’s preferences. The figure also shows a finite positive cost of drafting a separate opinion, a cost that only enters the calculus of a judge not assigned the opinion (since the assignee has no choice but to write an opinion and here I treat that cost as fixed). Finally, the figure also shows a finite, positive cost that is incurred if a judge fails to join a majority opinion—the cost of failing to set policy. The top-most horizontal line indicates the combined costs of not setting precedent and drafting an opinion; this may be seen as the total cost of writing a separate, non-precedential opinion, such as a separate concurrence or dissent. Consideration of these costs all in the same space illustrates that judges may at times pose a credible threat of causing a splintered court opinion in which each judge writes separately.

\(^{17}\) Note that Lax and Cameron (2007) do not treat drafting costs as finite; rather, generating a high-quality opinion creates additional costs, an important insight here that is set aside only for the purposes of illustration.
and also indicates why judges might prefer to avoid issues rather than each write separate opinions.

**Figure 4.3: Loss functions for the three judges depending on the policy content of the opinion along with potential costs of writing separately**

![Diagram showing loss functions for judges](image)

Judges, as rational labor market participants (e.g., Posner, 2008), should seek to minimize the costs of judging just like other people minimize costs in their own lives. When one considers all the various options available to judges, it is clear that such a cost minimization approach will lead to avoidance behavior (if possible) whenever judges have preferences that are too widely spread apart. To see why, let us return to the example of the three judges.

As drawn, in Figure 4.3, J2 and J3 are close enough to one another to form a majority in the presence of costs. Either of them can be assigned the opinion and will be willing to write it at a location that the other will agree to because the combined costs of writing separately (for the non-assignee) will be greater than any costs imposed by agreeing to a compromise position. However, J1 will write a special concurrence because the cost of joining any opinion that J2 or J3 would agree to is higher than the cost of writing alone. In other words, costs create a “zone of acceptability” within which judges will agree to join one another’s opinions because the costs of joining are outweighed by the costs of writing separately (e.g., Lax and Cameron 2007). It is, then, costs that explain why judges ever agree to join together and issue a common opinion.
*However, the zone of acceptability is not a foregone conclusion.* Judges too far apart from one another would rather write alone than join a common opinion. In the above diagram, J1 is such a judge. Even if she were assigned the opinion, she would likely end up losing the majority and causing J2 and/or J3 to write a counter-opinion that would become the majority because she would be unwilling to compromise enough to prevent them from writing a counter-opinion. This result only makes sense when one treats the cost of failing to make policy as finite. In other words, there is a point at which judges would rather express their own view of the case than make any policy at all.

Thus far, of course, the model only predicts that J2 and J3 will write together while J1 will write a concurrence. However, it is possible for all three judges to be far enough apart from one another that none of them can agree on a common opinion. Each would rather write a “correct” opinion while bearing the costs associated with drafting such an opinion and that the opinion will not be precedential than bear the cost of joining an opinion acceptable to one of the other judges. This might, then, lead to a splintered set of opinions where each judge writes alone and no clear rule emerges. In other words, if the costs of compromise become sufficiently large in comparison to the costs of disagreement, we should no longer expect to see compromise. In this situation one might expect to see splintered opinions and no clear rule emerge from the case.

Yet splintered opinions are rare in the judiciary, especially in the appellate courts. That might be because judges do not negotiate a lot of conflict or because the costs of failing to set precedent are actually quite high. But there is another possibility, which is that splintered opinions are not the only choice presented to judges in a conflict-dominated group. I argue that judges very often have another option, which is to avoid the charged issues in the case entirely through engaging in an extreme form of issue suppression: procedural avoidance.
Overall, the above discussion suggests that the three judges in the situation of very spread out preferences would like a way out—a way of “just saying no” to the policy question that underlies the dispute while still issuing a joint opinion. In the Supreme Court, of course, the justices could simply make use of discretionary cert. in this way—refusing to hear cases as their preferences become more spread apart. Indeed, a prominent court journalist suggests that an increasingly divided Court is the cause of the Court’s dwindling docket in recent years (Greenhouse 2006).\(^\text{18}\) The lower courts do not have explicit agenda control. They are required to decide the cases that come to them. Nevertheless, there are many legal doctrines that have evolved over time that allow judges to effectively control their policy agenda in the content of the opinion itself. These doctrines represent narrow procedural solutions to cases—doctrines like exhaustion of remedies, standing, and other jurisdictional concerns. Deciding a case using such a doctrine allows the judges to determine the outcome of the case without making a strong precedent in the given policy area. I argue here that appellate judges make use of these kinds of procedural “outs” to avoid making policy in the face of too much conflict on a panel. This allows the judges to avoid the worst option (from their perspective) of issuing splintered opinions—increasing everyone’s workload and potentially damaging institutional legitimacy—when they cannot agree on a policy statement in a case.


http://www.nytimes.com/2006/12/07/washington/07scotus.html?pagewanted=1\&r=2. She speculates that the mechanism in the Supreme Court relates to uncertainty. The argument here about costs is likely much more applicable to appellate courts that cannot avoid issuing opinions than to the Supreme Court.
Separating out the costs of writing a counter opinion and the costs of not making precedent highlights the best choice available to judges in a conflict-dominated group, which is to avoid the issue entirely. This option, if available, allows judges not assigned the majority opinion to accrue only the cost of not making binding precedent while avoiding the opinion writing costs. Facing one cost is better than facing two. Judges not assigned the opinion in a conflict-dominated group are highly motivated to encourage the opinion writer to avoid the issues that would trigger a splintered opinion. While it is not perfectly clear from the formal approach why the opinion writer would accede to these requests, remembering the context of appellate decision-making helps clarify why the opinion assignee would be so accommodating.

In any given appellate panel, each judge will be assigned some of the opinions; because of this, one’s fellow judges have immediate opportunities for “pay-back” in the event of an opinion assignee choosing to write a broad opinion that forces his colleagues to draft concurrences and dissents even though a procedural avoidance solution was possible. If too much of this non-cooperative behavior ensued, everyone’s workload would potentially become unmanageable. (Note that recent work by Epstein, Landes and Posner, 2010, indicates that dissent-drafting is negatively correlated with caseload, a finding that bolsters the idea that workload concerns would lead to pressure to avoid issues rather than issue split opinions.) Ultimately, workload considerations along with the feasibility of issue suppression suggest that avoidance behavior should emerge whenever judges face too much conflict to agree on a policy statement. Thus, a small alteration in the case-space approach (treating the failure to make policy as a finite, rather than infinite, cost) allows for the prediction of issue suppression based on the structure of preferences in the decision group. In particular, an ideologically heterogeneous group will reach the merits of a dispute (enter the policy space) less often than a homogenous group. This basic
idea leads to two testable hypotheses, the first of which relates to whether the court enters the policy space in general and the second of which relates to the particular type of legal rulings used to avoid the policy space:

**H3:** *Given a choice, collegial courts with more ideological heterogeneity will be less willing than ideologically aligned courts to enter the policy space by reaching the substance of a case.*

**H4:** *In a case with a procedural threshold issue, collegial courts with more ideological heterogeneity will be less likely to rule that the threshold issue is met than an ideologically aligned court.*

This second set of two hypotheses about judicial behavior capture the intuition that judges do not compromise at all costs, and a majority opinion is not inevitable (even if a majority outcome is). Hypothesis 3 is a direct test of whether or not the opinion reaches the substantive questions posed by the case whereas Hypothesis 4 looks more specifically at the particular procedural rulings. While Hypothesis 3 might be correct even without procedural rulings, Hypothesis 4 suggests that the mechanism of policy avoidance is through particular types of procedural decisions; the content of procedural law itself, then, will flow from the presence or absence of conflict in the appellate courts. I test both hypotheses using data from the U.S. Courts of Appeals in Chapter 6, below. I look at published appellate decisions that contain a procedural threshold issue.

The distinction between the two hypotheses relates to the particular measures used in the quantitative test. Hypothesis 3 is tested using a measure that captures whether or not the
appellate court addressed a substantive issue of the case in its opinion. This measure, then, includes opinions in which the appellate court remands all the substantive issues to the district court for initial decision as “not entering the policy space.” This is so even if the appellate court concluded that the procedural threshold issue was met. The key to this measure, then, is whether or not the appellate court itself discusses the merits of the case in the opinion. Hypothesis 4 is tested using a measure that captures the particular ruling on the procedural threshold issue by the appellate court. It does not directly measure whether or not the substantive issues were reached in the opinion and instead looks at the particular legal ruling on the threshold issue. Hence, it asks whether the court ruled that the procedural threshold issue was met or not. So, in this measure an opinion in which the appellate court concluded that the procedural threshold issue was met but the court did not continue on to address the merits of the case (instead remanding to the district court) would be coded as a positive outcome. Thus, the same case might be coded differently for the two measures although in general they will overlap a great deal. While the two measures overlap a great deal, as discussed in more detail in Chapter 6, the distinction is worth noting because it relates to the particular mechanism through which appellate courts use narrow opinions to avoid conflict. Hypothesis 3 is the more direct test of the theory of this chapter while Hypothesis 4 hones in on the proposed mechanism—the procedural rulings of courts. Both hypotheses are also taken up in Chapter 7, which explores a small set of district court decisions about the constitutionality of abortion bans in the 1970s. Those decisions engage collegial conflict because they were made by 3-judge district court panels.

Fundamentally, the theory of issue avoidance in the content of opinions rests upon the idea that judges in collegial groups pose a credible threat of writing separately even if doing so means failure to make policy. This threat is credible, in some sense, because judges care about
their work—they care about whether or not their names are associated with “correct” opinions or not. Another way of putting this is that judges are willing to be difficult. The threat of a splintered opinion leads to pressure for a second-best solution in the presence of divergent preferences. The solution I propose that judges use is the ability to write narrowly and avoid the merits of a dispute entirely. While in the Supreme Court judges have tools like discretionary cert. to avoid such nasty situations, in the lower courts the judges must be more creative. They use procedural avoidance tools, as shown below.

4.1 Competing Hypothesis: Is Procedure Instead Used as a Tool to Achieve Desired Outcomes by Minorities in a Collegial Decision Group?

In addition to the literature on collegial compromise and conflict-avoidance discussed in Chapter 2, a literature that takes seriously the idea that judges have preferences about the content of legal rules, there is also some literature suggesting that judges are, in fact, completely outcome-oriented and make use of legal doctrine purely to achieve outcome goals. This can be seen as an alternative theory to that which I propose here because it supposes that the procedural tool is effectively a manipulation of other judges rather than a genuine doctrinal compromise. While I have been focusing on the use of procedural threshold issues to provide a means of conflict-avoidance, it cannot be ignored that sometimes judges may also make use of these doctrines in order to achieve desired outcomes in particular cases—making use of procedure to get to a minority-preferred outcome. Some evidence suggests that procedural games at the Supreme Court are based on this type of maneuvering. In Epstein and Knight (1998), they considered Supreme Court case histories that suggested justices sometimes tried to interject a procedural dimension into cases in order to achieve more preferred outcomes. More recently,
Baird and Jacobi (2009) considered how changing the frame of an issue from a substantive policy focus to a federal/state power issue (arguably, a procedural frame) allows the dissenting opinion to become the majority opinion in a future case before the Supreme Court, again illustrating how procedural games can interplay with substantive outcomes. All of this suggests that it is important not to ignore outcome goals that might play a role in the decision to resolve a case procedurally.

One concern here is that it might be difficult to distinguish between this type of heresthetical maneuvering and the type of doctrinal compromise that I have suggested. However, by modeling collegial conflict in a slightly different manner, it should be possible to see whether the observed trends are due to heresthetical maneuvers or instead due to the collegial compromise I have posited. The test relies on two assumptions: 1) that conservative judges desire conservative outcomes, and 2) that procedural terminations of lawsuits are generally conservative outcomes. Assumption 1 is fairly non-controversial and is backed up by a considerable literature demonstrating attitudinal effects in both the Supreme Court and the appellate courts (e.g., Segal Spaeth and Benesh 2002; Sunstein et al. 2006). The second assumption is supported quantitatively by Cross (2007), who tends to show in general that decisions to procedural terminate a lawsuit are more often than not conservative and by the general rule-of-thumb that pro-defendant decisions (which a procedural termination is) are generally conservative. So, let us then combine the assumptions and assert that conservative judges generally favor the outcome achieved through a procedural termination. Of course, this is not accurate 100% of the time, but it is likely an approximation of the truth. If heresthetical maneuvering is at work, then, the only panel composition in which we should expect procedural avoidance is that with exactly one conservative judge. This would be the only situation in which
a minority (the sole conservative) would see the benefit of trying to convince the majority (the two liberals) that a procedural outcome is required. Unified panels have no need for manipulation. Similarly, a sole liberal who was outcome-oriented would not gain the outcome he or she desired by convincing the majority to agree to a procedural solution. So, a heresthetic outcome-oriented theory predicts that only one type of mixed panel ought engage in procedural avoidance for strategic reasons. In contrast, my theory predicts that mixed panels of both types should engage in procedural avoidance. So, panels with exactly one liberal (sitting with two conservatives) ought in my theory to also be motivated to engage in procedural avoidance behavior. If true, that suggests that the liberal judge is placated by a “narrow” procedural opinion, regardless of the outcome, because of the narrower doctrinal statement. Hence, if both types of “mixed” panels are more likely than a unified panel to engage in procedural avoidance, that suggests that the behavior is a compromise over doctrine rather than simple heresthetic manipulation of outcomes by a clever minority. This alternative hypothesis will be tested by a change in the model specification to consider the details of the panel composition that lead to procedural avoidance.
CHAPTER 5

EMPIRICAL EVIDENCE FROM DISTRICT COURT BEHAVIOR

This chapter begins the process of subjecting the theoretical claims to empirical testing. In this chapter, I explore evidence from two distinct datasets made up of district court decisions. District courts are the lowest level of federal court, the trial courts. In general, district court judges do not operate collegially; rather, they decide cases alone. For this reason, only the two hypotheses to do with agenda setting may be tested in this level of the court system. Recall from Chapter 3 that the two agenda-setting hypotheses are:

1. As a district court judge is more ideologically distant from the expected value of the appellate court, he or she will more often issue narrow, procedural opinions rather than reach the merits of a case that presents an ideologically-charged policy issue.

2. Appellate judges will not generally reach the merits of a dispute if a district court has not done so.

Only the first hypothesis may be tested using district court decisions. Hence, that is the focus of this chapter. Hypothesis 2 will be explored in the following chapter, which takes up evidence from the U.S. Courts of Appeals.

In order to test the hypothesis about district courts using narrow rulings to limit more often in the face of hostile appellate circuits, I gathered recent district court decisions and coded them for the degree to which the district judge reached the merits of the case or, instead, terminated the case for procedural reasons. A “procedural” termination in my coding scheme
includes rulings based on exhaustion, standing, timeliness, and deference to state court proceedings (e.g., abstention)—all issues that are more likely to relate to the narrow facts of a particular case at hand than to be broadly applicable beyond the facts of the case. (Recall the Newdow ruling, discussed above, in which the Court ruled that a man could not bring suit in federal court because he lacked full custody of his daughter and therefore lacked “standing” to bring the suit; such a ruling is not likely to apply to many other litigants and is therefore a very effective means of avoiding making a major policy statement.) Two datasets were collected independently in order to consider the robustness of the findings. The first set of data includes a random selection of cases that present a constitutional issue of any type from 2006/2007 district court decisions. The second focuses in specifically on prisoner habeas corpus decisions rendered in 2005. In both of these kinds of decisions, procedural issues are fairly common. Among the set of cases that raise a constitutional issue, the cases are distributed as shown in Figure 5.1. Among the habeas corpus decisions, nearly all the cases (75%) included a significant procedural issue. The distribution of substantive opinions is also shown in Figure 5.1

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19 Exhaustion relates to whether or not a plaintiff raised the issues in the case first to an appropriate administrative agency or state court.
Table 5.1 Distribution of the dependent variable in the two district court data sets

<table>
<thead>
<tr>
<th></th>
<th>Among all the cases</th>
<th>Among those with a significant discussion of a procedural issue</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>a) Constitutional Cases</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All substantive issues discussed</td>
<td>87</td>
<td>19</td>
</tr>
<tr>
<td>Some substantive issue discussed</td>
<td>35</td>
<td>35</td>
</tr>
<tr>
<td>No substantive issue discussed (case entirely procedurally terminated)</td>
<td>37</td>
<td>37</td>
</tr>
<tr>
<td>TOTAL</td>
<td>159</td>
<td>91</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Among all the cases</th>
<th>Among those with a significant discussion of a procedural issue</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>b) Habeas cases</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All substantive issues discussed</td>
<td>65</td>
<td>58</td>
</tr>
<tr>
<td>Some substantive issue discussed</td>
<td>27</td>
<td>35</td>
</tr>
<tr>
<td>No substantive issue discussed (case entirely procedurally terminated)</td>
<td>58</td>
<td>58</td>
</tr>
<tr>
<td>TOTAL</td>
<td>150</td>
<td>123</td>
</tr>
</tbody>
</table>

I present the information about the data collection process along with the findings from each data collection separately, below.

**5.1 Evidence from Recent Constitutional Cases in the District Courts**

The first dataset contains decisions issued in 2006-2007 that raise at least one constitutional issue. The cases for this data were located by doing very general word searches in
Lexis-Nexus for randomly-selected dates in 2006 and 2007.\textsuperscript{20} Opinions were only included in the data if they were of the type that could potentially terminate the case; in other words, evidentiary motions and the like were not included. Only decisions by Article III judges were included, so no opinions by magistrate judges are included in the data. Further, only cases with a constitutional issue were included. This limitation is a way of capturing the need for the case to be ideologically interesting; nearly all cases with a constitutional issue contain a clear ideological.

\textsuperscript{20} Dates were chosen using a random number generator and limiting the range for 1-12 (to generate a month) and 1-31 (to generate a day). Then, I searched in Lexis-Nexis legal database for search terms “constitution!” and “suit” (in order to locate civil cases that raise a constitutional issue) for the specific date in question. The search had to be limited to particular dates in order to limit the number of results; otherwise, too many cases would have been obtained from a search of such a general nature. The search turned up a large number of cases with constitutional issues—cases of all different types. For example, there are many cases in the data based on the Fourth Amendment challenging police searches or arrests, a very common type of constitutional suit. There are First Amendment cases challenging laws that regulate speech. There are discrimination suits based on the Equal Protection Clause. There are Eight Amendment challenges to prison conditions. There is a Dormant Commerce Clause challenge to local environmental regulations. There is a due process challenge to a state placing a child in foster care and another one challenging care given to disabled people by the state. In other words, the cases really span the range of possible types of cases based on the U.S. Constitution. No single type of case dominates the data. I limited to number of cases to 20 (the first 20 results) from any given day in order to not fill the dataset with data all from a given day.
The dependent variable used is whether or not the district judge reached the merits of the dispute as opposed to terminating the case procedurally.

In the quantitative analysis at the district level, the dependent variable is captured in two different ways. First, a dichotomous variable is created that asks whether the district court reached the merits of any of the constitutional claims or not—including all the cases regardless of whether a significant procedural issue was even mentioned in the opinion. Of the 159 cases coded, at least one substantive issue was reached in 121 of them. In these models, it is assumed that district judges are capable of interjecting or relying upon a dispositive procedural issue in any case. In subsequent models, however, the analysis is repeated including only those cases in which a significant procedural issue is raised and discussed—thus limiting the cases to those in which the facts clearly present such an issue as an option for the judge. This is a strong control for the influence that may occur due to whether the issue is legally available to the judges. Although splitting the cases this way limits the number of cases available for analysis, it can help answer concerns about controlling for whether the issue was raised or not in the litigation.

The limitation to constitutional issues does, of course, get rid of one type of procedural ruling that could be made as all such cases contain a federal question. However, these cases contain many other types of procedural issues (see below, note 5). No type of case is likely to be able to encompass all types of procedural rulings. Further, this limitation should operate to work against findings, thus suggesting that in this way this data presents a conservative test.

The most common procedural issues included various types of jurisdictional issues (including standing, *Rooker-Feldman* issues, personal jurisdiction, etc.), exhaustion, statute of limitations, issues to do with collateral estoppel arising under *Heck* for prisoner suits, and collateral estoppel more generally.

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21 The limitation to constitutional issues does, of course, get rid of one type of procedural ruling that could be made as all such cases contain a federal question. However, these cases contain many other types of procedural issues (see below, note 5). No type of case is likely to be able to encompass all types of procedural rulings. Further, this limitation should operate to work against findings, thus suggesting that in this way this data presents a conservative test.

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of the cases, a significant procedural issue is clearly at issue and discussed in the opinion. Of those cases, a substantive issue is reached in 54 of the decisions. Finally, analysis is also shown that makes use of three (rather than two) categories for the dependent variable. This analysis, then, allows for an intermediate category in which the judge partially terminated the case procedurally but reached the substance of other issues.

The key independent variable used in the analysis is the Euclidean distance between the district court judge’s ideology score and the appellate court’s mean ideological score for active judges. The ideology score for the district judges is taken from the Common Space score of the appointing president (Poole 1998; Poole and Rosenthal 1997). For the appellate judges, the mean Judicial Common Space score (Giles et al. 2001; Epstein et al. 2007) for active judges on the circuit was used. In this data, the measure of ideological distance ranges from 0.242 to 0.705, with a mean of 0.486. A score near zero suggests very little ideological conflict, while a score closer to 1 suggests strong ideological opposition.

Analysis of the raw data gives some initial support for Hypothesis 1. The 2nd, 3rd, and 9th Circuits are generally considered to be more liberal (and this is in accord with the measure used here). In these three circuits, conservative judges (those appointed by a Republican) reach the merits of some legal issue in about 63% of cases. Liberal judges do so about 70% of the time in these left-leaning circuits. Among the rest of the circuits, however, the proportions are reversed, as expected by the theory. Conservative district judges almost always reach the merits of some issue in the more conservative circuits (about 92% of the time) while liberal district judges continue to do so in only about 71% of the cases they hear. Indeed, among Republican-

Note that the scores were downloaded from Keith Poole’s website at

appointed judges sitting beneath the generally-considered strongly conservative 4th and 5th and 7th circuits, not a single case is completely terminated on procedural grounds whereas in the 9th Circuit such judges have almost a 50% chance of using a complete procedural termination versus making a substantive legal decision. (Note also that this initial analysis might suggest that procedural avoidance is a tool used only by conservative judges, a possibility explored, and rejected, in more detail below.)
In order to better understand these initial observations, it is helpful to consider the multivariate models. Several controls are introduced to build the model. The direct effect of ideology was included in the model to capture any direct effects of ideological orientation. Others have shown, for example, that procedural terminations may be more common among conservative-leaning judges (Cross 2007), perhaps because often such a termination leads to a conservative outcome. The presence of the federal government as a party is also included in

24 Note, however, that others showed that standing decisions are employed with ideological goals by both liberal and conservative judges (Staudt 2004; Pierce 1999; Rowland and Todd 1991; Braman 2006). Nevertheless, this is not inconsistent with the idea that there may be, on average, a greater tendency for conservative judges to make use of procedural avoidance tools.
the multivariate model on the theory that judges may be pressured to reach the merits of a
dispute when the federal government is a participant, as suggested by the issue manipulation
literature discussed above. Additionally, a control for whether or not the plaintiff had
representation is included; presumably a plaintiff with an attorney is better able to defend against
procedural arguments. Further, a control was added to capture whether or not the plaintiff was a
prisoner at the time of suit. Prisoner suits are subject to a whole array of additional procedural
hurdles, so one may expect judges to reach the merits of a prisoner suit less often than in other
types of suits. Additionally a control is included in the district courts analysis for caseload,
intended to capture time pressure on the district courts to potentially terminate cases procedurally
rather than reach the merits, which might take more time. Time itself was not included in the
district courts model because the data were limited to a single year. However, the number of
years the judge had served on the bench was included to capture any changes affecting judges
across time.

Three multivariate models are shown below in Table 5.2. Each is modeled using logistic
regression, which is appropriate because the dependent variable is specified as a dichotomous
outcome. (A positive outcome for the dependent variable in this model specification is if the
district judge reached the substance of any of the constitutional claims in the case; a negative
outcome occurs if the judge failed to reach the constitutional issue because he or she terminated
the issue on procedural grounds.) The logistic regression models the probability of a positive
outcome occurring and is a standard non-linear model in which the probability is bounded by
zero and one and generally changes slowly near probability zero or one and more steeply in the
middle of the curve. The logistic regression model helps prevent inaccurate conclusions that
might be drawn from a linear model because it helps to correct for heteroskedastic errors that
will necessarily occur when applying a standard linear regression model to a dichotomous dependent variable. However, note that using a linear model does not alter the findings shown.

Model 1 is a logistic regression model using all the cases in the data. The second model considers the analysis only for judges appointed by Republican presidents. The third model limits the data to those cases in which a procedural issue was at least discussed. All of the models also contain random effects by district. The random effects specification allows for the possibility that errors are correlated within districts while still allowing for inclusion of the district-level control for caseload. The random effects model will help to prevent errors in inference that might occur due to mis-estimation of the model error caused by groupings of data by district.²⁵

²⁵ Note that a fixed-effects model (fixed effects by district) without the caseload variable was also run. Because of the large number of districts included in the sample, many cases have to be dropped because of no within-district variation. However, the basic result for the ideological dissonance variable is still observed even in that specification. Further, a fixed-effects model was also run using circuit-level groups to determine if that specification undermined the results. It did not. The significance levels remain statistically significant for the variable of interest and the coefficient remains roughly the same. The robustness of the results to changes in model specification gives greater confidence that the results are real. However, not every model is shown here to avoid redundancy.
Table 5.2: Multivariate logistic models of the tendency of district court judges to reach the merits of lawsuits arising out of the U.S. Constitution

<table>
<thead>
<tr>
<th></th>
<th>Model 1: Tendency to reach the merits (all cases)</th>
<th>Model 2: Tendency to reach the merits (cases with Republican-appointed judges)</th>
<th>Model 3: Tendency to reach the merits (only cases with a threshold issue)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Tendency to reach the merits</td>
<td>Tendency to reach the merits</td>
<td>Tendency to reach the merits</td>
</tr>
<tr>
<td>Ideological dissonance with appellate circuit</td>
<td>-4.395 ** (2.22)</td>
<td>-7.22 ** (3.45)</td>
<td>-6.46 ** (2.75)</td>
</tr>
<tr>
<td>Conservative district court judge</td>
<td>0.196 (0.454)</td>
<td>--</td>
<td>0.831 (0.553)</td>
</tr>
<tr>
<td>Years on the bench</td>
<td>0.021 (0.027)</td>
<td>0.020 (0.036)</td>
<td>0.040 (0.032)</td>
</tr>
<tr>
<td>Federal government</td>
<td>-1.041 * (0.566)</td>
<td>-0.750 (0.832)</td>
<td>-0.665 (0.656)</td>
</tr>
<tr>
<td>Plaintiff attorney</td>
<td>1.343 ** (0.609)</td>
<td>0.623 (9.952)</td>
<td>0.661 (0.714)</td>
</tr>
<tr>
<td>Plaintiff prisoner</td>
<td>0.524 (0.560)</td>
<td>0.188 (0.958)</td>
<td>0.418 (0.662)</td>
</tr>
<tr>
<td>District caseload</td>
<td>0.0014 (0.002)</td>
<td>0.002 (0.003)</td>
<td>.003 (0.002)</td>
</tr>
<tr>
<td>Constant</td>
<td>1.761 (1.47)</td>
<td>3.490 (2.273)</td>
<td>1.349 (1.885)</td>
</tr>
<tr>
<td>N</td>
<td>141</td>
<td>81</td>
<td>82</td>
</tr>
<tr>
<td>Number of groups (districts)</td>
<td>53</td>
<td>42</td>
<td>42</td>
</tr>
<tr>
<td>Log likelihood</td>
<td>-69.02</td>
<td>-35.79</td>
<td>-47.347</td>
</tr>
</tbody>
</table>

* p<0.10 ** p<0.05 *** p<0.01 (two-tailed tests) (standard errors shown in parentheses)
The models above each show that district judges are less likely to make a substantive ruling in a case when they are ideologically distant from the reviewing court. This is what would be expected if these lower court judges strategically limit the substantive agenda of the appellate court when they perceive the appellate court’s preferences to be quite dissonant from their own. Notably, the concept of interest is the only variable that is consistently significantly related to the judges’ decisions to reach the merits of the case. In the first model, whether or not the plaintiff is represented by an attorney is also a significant predictor of the decision to reach the merits of an issue. In cases in which the plaintiff is represented, a judge is more likely to reach the merits of the dispute, as would be predicted if a lawyer is helpful in avoiding procedural pitfalls. The effect is not seen, however, in the models in which the cases are limited by type of judge or type of issue—perhaps due to the small number of cases used in that analysis. The presence of the federal government, somewhat surprisingly, appears (weakly) to cause judges to be less willing to reach the merits of a dispute. This effect was not anticipated. Like the effect of plaintiff representation, however, it is not seen in the models constrained to cases that contain a procedural issue or a Republican-appointed judge. Overall, there appears not to be a strong direct effect of ideology; instead, procedural avoidance appears to be best predicted by ideological conflict, not direct ideological preferences. This finding is interesting given that there is, in fact a correlation between a conservative outcome and procedural avoidance behavior. (The bivariate correlation coefficient is 0.33.) Further, the weakness of the correlation in many ways understates the relationship. No case in the data is coded as having a “liberal” outcome in which a judge engaged in procedural avoidance. However, many substantive decisions are conservative. So, it is the case that in general procedural avoidance is a tool that tends toward conservative outcomes; however, it is not the only way for a judge to reach a conservative
outcome. Given this fact, indeed, it is somewhat surprising that there is not a direct effect of the judge’s ideological preference observed. Overall, however, this set of cases shows little direct ideological effects on outcomes—there is no relationship between the judge’s ideological orientation and the ultimate ideological orientation of the outcome in these cases. That lack of a direct relationship may well be due, at least in part, to the liberal judges making use of procedural avoidance strategically—sacrificing outcome goals for agenda-setting goals. The lack of a finding may, however, simply reflect that there are not enough cases in the data to pick up the direct effect of ideology, which is generally a fairly small effect in any event in lower court cases.

While there is not a direct ideological effect observable on the tendency to engage in procedural avoidance, it does appear to be possible that the strategic use of this doctrine may be at least somewhat contingent the judge’s personal ideological preferences. Recall from the previous chapters that one might anticipate such a conditionality as it is possible that only conservative judges (whose ideological preferences support procedural terminations in general) would make use of procedural threshold rulings for agenda purposes. Liberal judges might just be too conflicted about the outcomes caused by procedurally terminating a lawsuit to make use of this tool strategically. This logic is, of course, somewhat undermined by the lack of a direct ideological effect—it does not appear from the data that liberal and conservative judges make use of procedural terminations at different rates. Another possible explanation of the conditionality is the time period of this data collection, during 2005/06. Conservative judges have more to gain in that time frame from delay tactics as they should expect the appellate landscape to be moving in a conservative direction. Hence, they may be more motivated to
engage in this sort of strategic agenda manipulation than their liberal counterparts, who should anticipate things only getting worse for the foreseeable future.

However, let us consider whether the two types of judges are differentially affected by the presence of appellate conflict. As suggested by the raw data, the coefficient reflecting the effect of ideological dissonance is larger when the data is limited to Republican-appointed judges. Further, the coefficient is smaller in magnitude and not significant when one instead confines the data to Democrat-appointed judges (not shown). Along with the raw data, this is consistent with the idea that conservative judges are more likely to use procedural avoidance as a tool of agenda control. However, an interaction term that captures the difference in coefficients across the ideology of the district court judge is not significant. On balance, then, the evidence does not allow one to conclude that the strategic use of procedural avoidance is contingent upon the judge’s ideological orientation, though there is some suggestion in the data of such a conditionality. This is a question that is pursued in more detail in the second data analysis of this chapter, below.

What can we conclude from the above discussion? On average, conflict with the appellate circuit seems to be a driving force leading at least some judges to decide to terminate cases procedurally rather than reach the merits. In addition to being in the predicted direction and statistically significant, the effect of ideological conflict is not substantively small as seen in Figure 5.2, below, which shows the predicted marginal effect on the probability of a judge reaching the merits of a case (holding other variables at their mean values) for both the set of all cases and also for the set of cases limited to those in which a procedural issue was discussed in the opinion. The estimated effects are large in both sets of cases. However, as would be expected if judges are constrained by the issues raised by the parties, the model is tighter among
cases where the issue is clearly raised in the case than it is amongst all cases. (Note that this is further support of the general conclusions in the issue manipulation literature that issue suppression is quite common whereas issue creation may not be.) Indeed, amongst the cases in which a threshold issue is discussed by the district court judge, the model predicts that a perfectly ideologically-aligned judge will nearly always reach the merits while a perfectly-opposed judge will almost never do so. Of course, in reality there are no perfectly-opposed district judges because the measure of the appellate courts is estimated as the mean of the appellate judges and is therefore never at the far ideological extremes.
Figure 5.2 Probability of reaching merits of a case by ideological distance from the appellate court a) amongst all cases (n=141); b) amongst cases with a threshold issue (n=82)

a.

b.
Within the range of what is actually seen, however, the model predictions are fairly similar to what was observed in the raw data. Recall that conservative judges in conservative circuits essentially always reach the merits of a dispute, for example.

5.2 Evidence from Recent Habeas Corpus Cases in the District Courts

In this section I replicate the test of Hypothesis 1, the idea that district judges will reach the substance of cases less often when they are in ideological conflict with their superiors, using a new dataset. In order to confirm the initial results supporting Hypothesis 1, a second data collection project was undertaken. In this data, the cases used are all habeas corpus petitions filed by prisoners. These petitions all either challenge the prisoner’s confinement or the conditions of confinement. Limiting the type of case considered allows one to look more closely at how judges behave in a particular type of case and to explore what happens in a set of cases in

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26 Data collection for this set of cases was undertaken in the same manner as before. The habeas data was collected in a similar fashion as the constitutional cases. Word searches in Lexis-Nexus were conducted with the following search terms: “habeas” and “petitioner” “but not magistrate.” The last search term allowed a more efficient screen for cases resolved by a magistrate judge; again only decisions rendered by Article III federal judges were included in the data. I searched again using randomly-selected dates to limit the number of cases returned. All of the cases in this dataset, unlike the first one, are of the same kind. Each represents a challenge to confinement or to the conditions of confinement. Of course, there is still a great deal of variation among the cases as prisoners can raise all sorts of challenges—ineffective assistance of counsel, prosecutorial misconduct, trial mishaps (Due Process challenges) or problems with how the prison treats them (an 8th Amendment challenge).
which all judges can almost be guaranteed to agree upon the outcome, taking the issue of potential conflict about outcomes out of the picture. This is so because the outcomes of these cases are essentially predetermined to be against the prisoner, who only prevailed in 6% of the cases in the data. Thus, if judges experience conflict between outcome-oriented goals and agenda-manipulation goals (as suggested by the potential difference between conservative and liberal judges in their reaction to ideological dissonance, observed above), those conflicts essentially disappear in this set of cases. Here, we should expect conservative and liberal judges to be equally strategic in their use of procedural avoidance.

Habeas petitions make up a substantial percentage of the cases filed in federal court (around 12% in recent years according to the statistical reports of federal courts). Although the Writ of Habeas Corpus has a constitutional basis (Article I, Section 9), federal statutes govern the details of their filing (e.g., 28 U.S.C. Section 2241; 28 U.S.C. Section 2255). Further, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) added a host of procedural limitations on such petitions, including rules about exhaustion of state remedies, a 1-year statute of limitations (that can be “equitably tolled”—i.e., ignored, in the judge’s discretion), and a bar on repeated petitions by the same prisoner. A large percentage of habeas petitions, as will be seen below, contain the factual potential for a district judge to terminate the case procedurally rather than rendering a constitutional ruling on the merits.

One hundred and fifty decisions rendered in habeas corpus petitions were coded from randomly selected dates in 2005 (see note 26, supra, for more information regarding data collection). Of these cases, 114 contained at least one procedural threshold issue that was discussed. This is such a high percentage it seems likely that judges do not struggle to find a procedural issue when they are interested in doing so in habeas cases. The majority of the
threshold issues were issues of exhaustion of remedies (56%). This classification includes issues about whether a claim is “procedurally barred” because of failure to correctly pursue state remedies. Other common procedural issues that were raised include statute of limitations concerns and problems with jurisdiction due to successive habeas petitions being filed by a prisoner.

The dependent variable is the same as before; it captures the tendency of the court to reach the merits of the constitutional challenge present in the habeas petition. Occasionally a judge will rule in the alternative—giving both a procedural reason for the decision and a substantive reason. In that case, the ground was counted as having a substantive decision. This is appropriate under the theory of the paper because the appellate court would have no issue reaching the merits in such a case since the district judge had “opened the door.” For the most part, judges tended to either completely reach the merits (dependent variable = 1 in 65 out of 150 cases) or not reach them at all (dependent variable = 0 in 58 out of 150 cases). This illustrates the appropriateness of treating the dependent variable as a dichotomous concept; judges either avoid a case or they address it on the merits.

Before moving to the multivariate models, however, first consider the raw data. “Liberal” judges in the 2nd, 3rd, and 9th Circuits reach the merits about 59% of the time whereas conservative judges in these circuits do so only about 54% of the time. In contrast, in the rest of the circuits liberal judges reach the merits about 45% of the time and conservative judges continue do so about 56% of the time. The raw data is even more suggestive, however, if one separates out only the 3rd and 9th Circuits as “liberal” circuits. Among liberal judges in the more liberal circuits (9th and 3rd), they are likely to reach the merits about 76% of the time whereas conservatives in those circuits do so only about 45% of the time. On the other hand, liberal
judges in the rest of the circuits reach the merits about 45% of the time and conservatives in the more conservative circuits reach the merits about 58% of the time. In other words, the percentages flip. This is what would be predicted by the theory that ideological conflict is a cause of judges engaging in procedural avoidance behavior. Further, the raw data here indicates liberal judges who are at least as willing to engage in strategic procedural avoidance as their conservative counterparts. This is consistent with what would be expected if conflict with outcome goals caused the difference in behavior in the last dataset. Figure 5.3, below, illustrates the raw data.
Figure 5.3: Among habeas cases, percentage of cases with a substantive opinion by ideology of the district court judge and appellate circuit a) classing 2nd 3rd and 9th as “liberal” circuits; b) classing only the 2nd and 9th as “liberal” circuits. 

a) 

![Bar chart showing percentage of substantive opinions by ideology and circuits.]

b) 

![Bar chart showing percentage of substantive opinions by ideology and circuits.]

The multivariate analysis again strengthens the support for the theory that district judges play a strategic agenda-setting role in writing their decisions. The independent variable of interest is coded in exactly the same way in this analysis as in the first district court analysis. It reflects the ideological distance between the district court judge and the expected ideology of the appellate court. A few minor adjustments, however, are made to the model. For example, the plaintiff’s status as a prisoner is dropped as an explanatory variable, obviously, since the plaintiff in all of these cases is a prisoner. The other controls are retained. Again, random effects are included by district. The multivariate models of the tendency of a district court judge to reach the merits of a habeas petition are shown below in Table 5.3. Here, the data are analyzed using logistic regression (as before) for all cases in which a judge either reached the merits of all claims or no claims.

A second modeling approach is also taken here, however. Linear regression is applied to capture those cases in which a judge partially disposed of the case using a threshold issue. In the latter specification, the dependent variable is captured as the percentage of claims that obtained a substantive ruling. Linear regression is appropriate in this specification because the dependent variable is not dichotomous. Again, all models contain random effects by district in case there are district-level effects that are un-modeled.

Unlike in the first analysis, when one limits the type of cases under consideration to a particular type, the tendency to reach the merits of a dispute appears more predictable. As above, ideological distance from the appellate court is strongly negatively related to the decision to reach the merits of the prisoner’s claims. Thus, the multivariate analysis gives additional support to the hypothesis that district judges strategically manipulate the agenda of appellate courts by limiting their substantive opinions in the presence of a hostile appellate court. Here,
however, some of the control variables are also significant. Again we see that the presence of the federal government makes a district court judge less likely to reach the merits of the dispute. This suggests that the significance of this variable in the last analysis was not by chance. However, the reasons for this relationship are not clear. Further work is needed to better understand why the federal government’s presence might reduce a trial court judge’s willingness to engage in the merits of a case whereas it appears to increase an appellate court judges’ willingness to do so. This may simply be related to the competence of lawyers who work for the federal government (since all the cases have a government on one side in these habeas cases). Perhaps federal government lawyers are very effective in identifying procedural defects with prisoner claims.

Moving onto the other controls, again there is no direct ideological effect, illustrating that conflict, not values, are operational here. ²⁷ However, time on the bench is found to be negatively correlated with the tendency to reach the merits in the habeas corpus cases. This was not seen in the more general set of cases and may simply reflect long-term judges’ particular impatience with prisoner petitions. Finally, representation for the plaintiff again increases the chances of a claim being decided on the merits. In this set of cases, however, that effect does not dissipate when one confines the cases to those with a threshold issue present (results not shown). Unlike in the first dataset, there are very few cases without a threshold issue present among the habeas petitions; therefore, the model looks very much the same. Further, as suggested by the raw data, the effect is not contingent at all upon whether one considers Republican-appointed or

²⁷ Recall, however, that there is very little variation in ideological orientation of the outcome in this set of cases as the prisoner always loses, as discussed at the start of this section. This makes it far less likely to expect direct ideological effects.
Democrat-appointed judges. The coefficient using either set of judges is identical; while the first set of data suggested there might be a difference in behavior across the two types of judges, this data indicates that both conservative-leaning and liberal-leaning judges are equally willing to engage in strategic agenda manipulation. The difference in the first data set may have resulted from conflict with outcome goals or, as noted previously, because of differences in the anticipations of the two sets of judges (with conservative judges anticipating an increasingly conservative judiciary as Bush II continued to make appointments); however, in this analysis the strategic behavior is not confined to Republican judges. Hence, in the final analysis we cannot be certain that there is any conditionality based upon the orientation of the judge—either due to outcome conflicts or differences in anticipation of new appellate judges. Finally, as before there are no effects due to differing caseloads across the circuits.

Again, the effect size predicted by the model is significant. Figure 5.4, below, shows the model predictions (with other variables held at their means) across the entire theoretically-possible range of ideological dissonance. In sum, then, two distinct data collections confirm the finding that district judges are more likely to decide a case narrowly, avoiding the substance of a dispute, when they are ideologically opposed to their appellate circuit, an effect that would be predicted if district judges act as strategic agenda setters in the content of their opinions.
Table 5.3: Models of the tendency of district judge to reach the merits of claims in habeas corpus cases

<table>
<thead>
<tr>
<th>Tendency to Reach the Merits of Claims</th>
<th>Logistic regression model</th>
<th>Linear regression model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideological dissonance from the appellate circuit</td>
<td>-4.00 ** (1.81)</td>
<td>-0.655 ** (0.311)</td>
</tr>
<tr>
<td>Conservative district judge</td>
<td>0.310 (0.457)</td>
<td>0.040 (0.083)</td>
</tr>
<tr>
<td>Years on the bench</td>
<td>-0.062 ** (0.03)</td>
<td>-0.010 ** (0.005)</td>
</tr>
<tr>
<td>Federal government presence</td>
<td>-0.944 ** (0.418)</td>
<td>-0.173 ** (0.076)</td>
</tr>
<tr>
<td>Plaintiff attorney</td>
<td>0.993 ** (0.485)</td>
<td>0.173 ** (0.082)</td>
</tr>
<tr>
<td>Caseload</td>
<td>0.0004 (0.002)</td>
<td>0.00006 (0.0004)</td>
</tr>
<tr>
<td>Constant</td>
<td>2.71 ** (1.397)</td>
<td>0.956 *** (0.257)</td>
</tr>
<tr>
<td>N</td>
<td>123</td>
<td>150</td>
</tr>
<tr>
<td>R-Square</td>
<td>--</td>
<td>0.152</td>
</tr>
</tbody>
</table>

* p<0.10; ** p<0.05; ***p<0.01, two-tailed
Figure 5.4: Predicted probability of a claim being decided on the merits by the district judge’s ideological distance from the appellate circuit
5.3 Effects on Legal Rulings (Or, How All This Affects the Law of Procedure)

While above we were concerned primarily with the judicial policy agenda, I shift the focus here to consider explicitly what this means for a particular type of legal rulings. Among the habeas corpus cases, there are so many cases that raise an exhaustion issue (64, to be precise), it is possible to look at the magnitude of the effect of hierarchical conflict on how judges rule on this particular legal issue. So, here we can see that the content of the law itself is affected by this ideological conflict. In Table 5.4, below, I change the specification of the dependent variable to capture whether or not the judge terminated on exhaustion grounds. Then, I re-ran the models from above for only the 64 cases that contained an exhaustion issue. Note that, unlike in the appellate data (explored in the following chapter) the change of specification of the dependent variable is much closer to simply a change in the sign of the outcome variable. While appellate judges may remand a case to a district court judge without reaching the merits of a dispute or terminating it procedurally, a district court judge in general has no one to send the case to for a substantive decision and so in order to avoid the substance must render a procedural termination. In other words, this is in some sense just a negative coding of the same concept in the district courts (the two specifications are correlated with one another at -0.87. They are not perfectly negatively correlated because of some cases that involve alternative rulings by the district judge or because of cases that engage multiple procedural threshold issues.) Nevertheless, it is interesting to re-frame the results in this way and focus in on one particular legal issue to understand the implications of this work for the content of the law.

The multivariate model indicates that even among such a small set of cases, one can observe a statistically significant effect due to hierarchical conflict. District court judges, in fact, do rule that prisoners failed to exhaust their remedies more often when they are ideologically
opposed to their appellate court. In other words, we can see here one particular mechanism for the foregoing results.

The magnitude of the effect on the exhaustion rulings is shown below, in Figure 5.5. Interestingly the only control that reaches statistical significance in this model is the judge’s time on the bench. More years on the bench makes a judge more likely to terminate a case for failure to exhaust administrative remedies. As noted above, this may reflect judges losing patience with prisoner petitions. In addition, it might reflect growing comfort with the procedural rules that govern this kind of lawsuit—leading to greater willingness to rely upon them over time. Interestingly, plaintiff representation is not significant in predicting whether a judge will terminate a case for failure to exhaust remedies. However, the sign is still in the anticipated direction and the lack of significance may only reflect the fairly small number of cases in this analysis. Indeed, perhaps what is most surprising is that the main effect is seen even when one only has 64 cases in the data; this effect is not one that is only seen in very large datasets, in other words.
Table 5.4: Modeling the probability of a district judge ruling that a plaintiff has failed to exhaust remedies or is procedurally barred (because of failure to exhaust)

<table>
<thead>
<tr>
<th></th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideological dissonance with appellate circuit</td>
<td>1.227***</td>
<td>(0.387)</td>
</tr>
<tr>
<td>Conservative district court judge</td>
<td>-0.065</td>
<td>(0.104)</td>
</tr>
<tr>
<td>Years on the bench</td>
<td>0.017 ***</td>
<td>(0.006)</td>
</tr>
<tr>
<td>Federal government</td>
<td>0.096</td>
<td>(0.109)</td>
</tr>
<tr>
<td>Plaintiff attorney</td>
<td>-0.059</td>
<td>(0.102)</td>
</tr>
<tr>
<td>Caseload</td>
<td>0.0005</td>
<td>(0.0004)</td>
</tr>
<tr>
<td>Constant</td>
<td>-0.472</td>
<td>(0.313)</td>
</tr>
<tr>
<td>N</td>
<td>64</td>
<td></td>
</tr>
<tr>
<td>R-square</td>
<td>0.28</td>
<td></td>
</tr>
</tbody>
</table>

* p<0.10 ** p<0.05 *** p<0.01 (two-tailed tests)
Figure 5.5: Probability of a judge ruling the plaintiff failed to exhaust by ideological distance from appellate circuit
5.4 Appellate Responses and Alternative Explanations

Above I argued that interpreting the evidence that district court judges respond to ideological distance from their appellate courts might depend upon the appellate court response. My agenda-setting argument depends, in part, upon evidence that appellate courts respond to what district courts do—that their agendas are, in fact, affected by district court behavior. While the appellate models are presented in full in the following chapter, it is useful to note here that the evidence strongly supports the conclusion that appellate courts limit themselves to issues addressed by a district court. Indeed, they only very rarely reach the substantive issues of a case if the district court has not already done so. That is corroborative of my theory about an agenda-setting explanation for the evidence of district court responsiveness to conflict.

However, I also proposed an alternative mechanism: fear of reversal. Although I do not present here a full analysis of the determinants of reversals, the evidence gathered here also somewhat supports the fear-of-reversal mechanism. Among cases in which the district court judge ruled on a procedural threshold issue, the appellate court reversed about 36% of the time. On the other hand, among cases in which the district court ruled on the merits, the appellate court reversed about 48% of the time. Because appellate courts appear more willing to reverse a substantive decision, district court judges might be responding to that incentive in deciding how to frame their decisions. As will be seen in the discussion below, these numbers are not as extreme as the numbers indicating that appellate judges almost never reach issues not addressed by district courts. However, this alternative mechanism cannot be completely discounted. Rather, it is possible that both mechanisms provide part of the explanation for the observed trends presented in this chapter. Nevertheless, given that the raw data does not suggest a huge difference in reversal rates for the two types of decisions and that there is no formal reason to
anticipate a different level of appellate review, I believe it is reasonable to conclude that strategic agenda-setting is the dominant, if not sole, explanation for the trends presented in this chapter.

5.5 Conclusions from the District Courts Data

The analysis shown in this chapter gives strong support for the hypothesis that district judges with preferences that are very different from their appellate court are more likely to avoid the merits of a dispute, instead writing a procedural opinion. In two distinct sets of recent district court opinion data, and across multiple model specifications, it is found that district judges sitting under appellate judges with divergent preferences tend to issue more opinions that fail to reach the merits of a dispute; instead, district judges use procedural doctrines, such as exhaustion, to terminate the claim without addressing the broader issues posed by the case. This is what would be expected if district judges behave strategically in writing their opinions, limiting the policy agenda available to higher courts and thereby impeding the policy power of a hostile appellate court.

Further, district judges who have conflict with their appellate judges are more likely to rule against a plaintiff on exhaustion grounds. These findings suggest that in addition to effects on the policy agenda, doctrinal law may emerge as a result of these forces, and in particular political conflict may increase the procedural complexity of the law. The consequences of strategic procedural avoidance are not limited to those consequences affecting the judicial policy agenda. Regardless of the effect this sort of strategic behavior is having upon the appellate policy agenda, there is another important consequence of this strategic use of procedural avoidance. That is the effect on the law of procedure itself—especially as applied by trial courts. If the decision to terminate a case for lack of exhaustion, or to abstain in favor of state courts, is
grounded in strategic political considerations as opposed to determined by the facts of the case, that suggests that the application of these doctrines will appear quite unpredictable to litigants and practicing attorneys. This uncertainty will be magnified by the fact that such decisions are not predictable as direct ideological effects, but rather must be understood to reflect underlying ideological conflict among judges, requiring one to know more than just the deciding judge’s ideology to understand the phenomenon. Understanding how judicial strategic behavior affects the application of procedural doctrines that are, on their face, intended to achieve other goals, can help us to think more carefully about the normative concerns relevant in designing the rules that govern judicial decisions whether or not to hear a case.
In this chapter, I consider data from the U.S. Courts of Appeals in order to explore evidence of the theoretical ideas outlined in chapters 3 and 4. Like the Supreme Court, scholars have documented that appellate panels are affected by complex political dynamics in the course of reaching a majority opinion. (e.g., Tiller and Cross 1998; Sunstein et al. 2006; Kastellec 2008). Decisions in the Courts of Appeals are made by panels of three judges. Each decision is, then, collegial in the sense that three judges participate at a time and at least two judges must agree to each outcome. Generally, however, there is a strong norm of unanimity—dissents are quite rare (occurring in fewer than 10% of cases). Panels are drawn randomly from the set of circuit judges. The decision about the outcome of the case is essentially dichotomous; for this reason, a majority is always possible for a three-judge panel regarding the outcome of the case. However, the decision about the legal rule that must emerge—the content of the opinion itself—is far more complex. Bargaining occurs over the content of opinions as well as final outcomes. For example, Owens and Black (2010) examined the private paper of Judge Skelly Wright, a former D.C. Circuit judge, and concluded that panel members ideologically distant from the opinion writer were more likely to request a change to the content of an opinion than ideologically close panel members. In this work, I argue that the changes requested likely include arguments for procedural avoidance behavior, minimizing the scope of a judicial opinion in the face of ideological conflict. It is only by accommodating such requests that judges on conflict-dominated collegial courts are able to join together in one opinion rather than write separately, as discussed above in Chapter 4. Further, I consider whether the U.S. Courts of
Appeals, like district court judges, engage in strategic agenda manipulation aimed toward the Supreme Court.

As noted above, most studies of collegial courts focus attention on the 9-member Supreme Court. This choice, however, is problematic in the context of this research question for several reasons. The first is fairly straightforward. The Supreme Court has increasingly been given explicit control over its agenda in the form of discretionary cert. As a result, one might not expect to see other forms of agenda control emerging in that collegial body. The Supreme Court, in other words, has more tools at its disposal than other American courts. That suggests that the driving force behind proceduralism in American law probably does not come from the top, but rather comes from the bottom. Given that much law, perhaps most law, is made by lower court judges, it is reasonable to be interested in what those judges do even to the extent that it may be different from the Supreme Court.

In addition to the fact that there the Supreme Court has other tools at its disposal, the Supreme Court is also the top of the hierarchy—obviously, it does not play an agenda-setting role for any superior. Further, even the collegial conflict hypothesis is difficult to gain traction on using Supreme Court data. Partly, this relates to an identification problem. The main hypotheses relates to the heterogeneity of the decision group. In the Supreme Court, however, capturing the relevant decision group is problematic. One might make use of the members of the majority coalition. However, the membership of such a coalition is likely to be endogenous to the issues presented in the case, making it difficult to identify the extent to which the issues are determined by the decision group as opposed to the decision group being determined by the issues. This suggests that one could not trust any positive findings from this characterization of
the decision group.28 Another possibility is to make use of the Court as a whole. However, the structure of preferences in that decision body changes only very slowly over time, leading to not a lot of data and the potential for many competing unmeasured variables that changed with time. When combined with the problem that discretionary cert. might be substituting for avoidance within the opinion itself, one probably should not expect to see any effects at all in Supreme Court decisions.

It is possible to avoid both of these problems by instead focusing on appellate decisions. Decisions in the Courts of Appeals are made by panels of three judges. Each decision is, then, collegial in the sense that three judges participate at a time and at least two judges must agree to each outcome. Panels are drawn randomly from the set of circuit judges. The structure of preferences on the panel, then, is exogenously determined and varies case to case, making this an ideal means of testing whether or not judges on collegial courts engage in issue suppression as a form of institution-preserving gridlock. The varying ideological composition of appellate panels also makes it possible to consider whether these courts engage in the same sort of agenda gamesmanship observed in the district courts. In addition to these main hypotheses, however, in this chapter I also consider the second half of the evidence to do with district court agenda manipulation—whether or not appeals courts could be expected to respond to that strategic

28 Indeed, if one uses the Spaeth Supreme Court database to model the decision to terminate a case on procedural grounds as compared to all other cases, heterogeneity of the majority coalition is strongly positively correlated with this dependent variable. Illustrating the endogeneity problem, however, is that choosing other issue areas (such as economic issues) leads to the same results. Issues, at the Supreme Court level, drive the majority coalition.
behavior. Hence, all four of the hypotheses are at test in this chapter. For ease of reference, I restate them here.

_Hypothesis 1 (from Chapter 3): Appellate court judges will be less likely to reach the substance of a dispute when the panel’s preferences are far from the median preference of the Supreme Court than when they are close to the Supreme Court median._

_Hypothesis 2 (from Chapter 3): Appellate court judges will generally not reach the substance of a dispute when the lower court has not already done so._

_(providing the second half of the evidence about DISTRICT court agenda manipulation)_

_Hypothesis 3 (from Chapter 4): Appellate panels with widely spread ideological preferences will be less likely to reach the substance of a dispute than panels with tightly grouped preferences._

_Hypothesis 4 (from Chapter 4): Appellate panels with widely spread ideological preferences will be more likely to terminate a case for procedural reasons than panels with tightly grouped preferences._

### 6.1 Appellate Data

This study makes use of the Songer Appeals Court database as a starting point for the data. The Songer database includes a wealth of information about published decisions issued by the U.S. Courts of Appeals.\(^{29}\) The database codes the grounds for decisions, including whether

\(^{29}\) Note that the data are limited to published decisions, which, as noted by many prior researchers, introduces a selection problem into the analysis. This is particularly problematic
or not a case contains a procedural threshold issue, such as standing or jurisdiction, and whether or not the threshold issue was met. However, the Songer data does not identify whether or not the appellate court actually reached the merits of the suit. It would be tempting to assume that if the plaintiff met the threshold issue, the appellate court reached the substance, and if the plaintiff did not, the appellate court did not. However, this is not always the case in the appellate courts. Rather, sometimes the appellate court rules that the plaintiff has met the threshold issue but then remands to the district court for a ruling on the merits. In such a situation, the court cannot be deemed to have entered the substantive policy space. Further, occasionally the appellate court rules that a plaintiff has not met a threshold issue, but nevertheless goes on to make a substantive ruling regardless of that problem. For these reasons, a more reliable measure of the appellate court’s decision to rule on the merits is needed. In order to obtain such a measure, I located the opinions identified in the Songer data as containing a threshold issue and read the opinions to code whether the appellate opinion ruled on the merits of the dispute. I used three types of procedural issues identified by the Songer coders. They are: standing, jurisdiction, 30 and exhaustion. As noted above, “standing” refers to a plaintiff having a sufficient interest in the

here, where the object of study involves judges who choose to issue narrower decisions. The decision to publish a decision might be expected to be negatively correlated with reliance on procedural issues. However, this selection problem would operate against finding the hypothesized results here. Therefore, the analysis here can be seen as a conservative test given the selection problems.

30 Note that I limited the jurisdiction cases to those decided after 1995. This was done to limit the sheer numbers of cases to be read for re-coding. This creates a slight weighting in the data in favor of more recent cases; however, analysis suggests that this would not affect the results.
outcome of the case to be an appropriate litigant before the court. Jurisdiction refers to any of a variety of issues that relate to the court’s power to hear the case. Exhaustion refers to whether or not the plaintiff has done everything necessary in the state courts (or administrative agency) in order for the case to be “finished” enough to be before the court. These are three of the most common types of procedural issues that can be used to terminate a lawsuit without reaching the merits. Each of these doctrines suggests the possibility of a judicial decision that is limited in scope—narrowly confined to the facts of the particular case rather than reaching broadly into the policy space.

Note that the data collection method limits the cases to those cases in which a procedural threshold issue is raised by the parties and is in real dispute in the case. This approach was taken because it is posited that judges can only engage in procedural avoidance if the facts of the case raise some sort of procedural issue. This limitation might affect the generalizability of the results. However, the presence of some sort of threshold issue in a case is not a rare event. Rather, in the Songer data (which is limited to published cases and so may well understate the presence of procedural issues), about 40% of cases contain some sort of threshold issue. Further, to the extent that the theory stated here also extends to cases in which more than one version of a “substantive” issue is present, it is almost certainly the case that in the vast majority of cases judges have some sort of decision about the scope of issues reached in their opinions. Therefore, it is reasonable to believe that the results identified here are illustrative of a broader trend of issue avoidance in the American courts.

The core concept of interest in this thesis is the judicial decision whether or not to enter the policy space. Using the appellate data, one can capture this decision in two related, but not identical, ways. First, a direct measure of whether or not the appellate court reached the merits
of the dispute was created. Each decision in the Songer data identified as containing a relevant
procedural issue was coded for whether or not the court’s decision reached the merits of the case
or not. Thus, all cases in which the court terminated a case for failure to exhaust remedies or for
lack of standing or other jurisdictional problem, and did not additionally address the merits, were
coded as “0.” In addition, if the court ruled that a party had standing, etc., but remanded to the
district court for a decision on the merits so the appellate court did not reach the merits itself, that
was also coded as “0.” Only when the appellate opinion actually addressed the substance of the
dispute was a case coded as 1.” Overall, the appellate court reached the substance of the dispute
in only about 36% of the cases. Among cases with a standing issue, the substance was reached
in about 45% of cases. Among cases with a jurisdictional issue, the substance was reached in
about 38% of cases. And, among those with an exhaustion issue, the panel reached the substance
in about 29% of cases.

The other way to approach the dependent variable is to ask whether the judge terminated
the case because a threshold issue was not met. This is the way the information is captured in the
Songer database. Hence, did the court find that the parties to the case lacked “standing” to sue?
Did the parties fail to sufficiently exhaust their administrative remedies? In this way of
capturing the depending variable, a “yes” means that the case is terminated for the threshold
reason. A “no” means that the case is allowed to continue but does not necessarily mean that the
appeals court reached the merits. As expected, this dependent variable is correlated with whether
or not the court reached the merits of the controversy (depending on the issue, correlation ranged
from -.499 to -.67) but is not identical to such a measure. To get a sense of how the above
characterization compares with a consideration of how the panel ruled on the threshold issue,
consider the following. Among cases with a standing issue, the panel found the plaintiff lacked
standing in about 41% of cases. Hence, the court found that the plaintiff met the standing requirement in nearly 60% of cases. Note from above, however, that only in 45% of cases was the substance addressed. Similarly, about 41% of the time the panel found it lacked jurisdiction, so in nearly 60% of the cases the court found it did have jurisdiction. Again, however, only in about 38% of the cases did the court actually reach the merits of the dispute. Finally, the panel found a problem with the plaintiff’s exhaustion of remedies in about 57% of the cases in which an issue of that sort was raised, leaving just over 40% of the cases that raised an exhaustion issue open for substantive decision. Nevertheless, the court addressed the substance of the dispute in only 29% of those cases. This should illustrate why it is important to treat the two measures separately.

The key explanatory variable of interest in this chapter is preference heterogeneity among judges. In order to capture heterogeneity, one must first have a way of identifying preferences. For this purpose, I use Judicial Common Space scores (Giles et al. 2001; see also Epstein et al. 2007). These measures of ideology are based on the preferences of the appointing president in combination with senatorial courtesy. Though not perfect measures of ideological preferences, they have been shown to have face validity and are widely recognized in the literature to be the best measures of preferences available for appellate court judges. Once one has chosen a measure of preferences, however, there are still choices about how to capture conflict. A simple way would be to simply use the range—the distance between the extremes on the panel. This is very intuitive but it does not account for fact that, in theory at least, any two judges may form a majority. A better measure might be the standard deviation—a measure that reflects the average distance of each judge from the mean of the group, and therefore is a straightforward measure of the dispersion of preferences in the group. In the data used here, the standard deviation of the
panels ranges from 0 (all three judges have identical JCS scores) to 0.68 (indicating a very large spread of JCS scores, since those scores have a range of about 1.3), with a mean of 0.293. Finally, another measure is also considered. One might argue that the most appropriate measure would consider the minimum distance present between any two judges on the panel. Such a measure would capture the intuition that it only takes two judges to “make policy.” On the other hand, an opinion with a dissent invites Supreme Court review or *en banc* review. It may well be seen as a sub-optimal outcome and an ineffectual policy statement. To the extent that appellate judges seek consensus in order to strengthen policy statements, the standard deviation will be a better measure. To the extent that appellate judges are happy with a minimum winning coalition, a measure of the minimum distance will be the best measure.\(^{31}\) Both are considered here. In the data used here, the minimum ideological distance ranges from 0 to 1.091, with a mean of 0.211. It is, not surprisingly, highly correlated with the standard deviation of the panel.

Another variable of interest is ideological distance from the Supreme Court. This measure is very similar to the measure of ideological dissonance with the appeals court from Chapter 5. Here, however, I use the Martin-Quinn score of the median Supreme Court justice to capture the expected ideological position of the Supreme Court. Further, I measure the appellate court’s preferences as the mean of the three judge’s JCS scores on the panel. (Note that the analysis was also run using the opinion writer’s JCS score instead of the mean of the panel—there was no difference in results.) Distance is again captured as the Euclidean distance between these two ideology scores.

\(^{31}\) See Jacobi (2009) and Jacobi and Sag (2009) for a thorough discussion of the different theories of judicial coalition formation on the Supreme Court and an empirical assessment of each using the Supreme Court data.
The final important explanatory variable included is whether or not the district court reached the substance of the case. Measuring this variable is not straightforward. Because nearly all of the district decisions that preceded the appellate opinions in the Songer data were unpublished, they are not available for review. As a result, this variable had to be coded using information provided in the appellate opinion itself, which generally summarized the grounds of the lower court decision. In most cases the appellate opinion refers specifically to the grounds of the district court opinion. In a few cases (about 15), no information was provided about the grounds of the lower court decision. In those cases, this variable is coded as ‘missing’ and the case is not included in the analysis. This variable is included in the model, then, as a dichotomous representation of what the district court did: reach the merits or rely on a procedural issue. While there may be error in this variable due to the reliance on the appellate court opinion summary, note that inclusion of this variable in the model does not change any of the other results.

Now that we have specified the dependent variables and the independent variables of interest, it is important to consider appropriate controls that should be included. As noted above, not a lot of work has gone before in the area of studying issue manipulation in the courts. To a certain extent, some guidance can be gleaned from the work on issue manipulation and procedural avoidance in the Supreme Court. As discussed above, work by McGuire and Palmer (1995) and Palmer (1999) suggests that the presence of amicus briefs, the presence of the federal government, and whether or not the decision is an affirmance or not are all important explanatory variables in determining whether or not a court is willing or able to suppress issues. These concepts translate to the appellate context. One can imagine that the courts are less willing to
avoid issues when the federal government is a party to the case, as suggested by the evidence in Carey (2010) and Palmer (1999). The same logic applies to the presence of amicus parties—
their presence suggests attention to the issues in the case and the pressure for judicial resolution. Indeed, McGuire and Palmer (1995) found that amicus participation increased the likelihood of issue suppression; however, Carey (2010) found no effect on avoidance behavior. In addition to these variables, an additional control is included for any direct effects due to ideology. It is not clear that one might expect ideology to have a direct effect, but it is possible that there is some ideological difference between the right and the left that relates to judicial power. This is particularly true in the specification that considers whether the threshold issue was met or not.

While it is true that a court may make use of a procedural threshold issue liberally or conservatively, with more liberal judges ruling in favor of liberal causes on these issues just as they do on more substantive issues (e.g., Pierce 1999; Staudt 2004; Rowland and Todd 1991), nevertheless there are reasons to believe that there may be a conservative slant to decisions that rely on procedural issues. Cross (2007) showed that judicial decisions that rely on procedural rules to terminate cases tend to be more conservative than those that do not. To the extent that reliance on a procedural issue generally bars access to court for plaintiffs, the conservative slant is perhaps not surprising. This control is captured using the panel mean Common Space score.

Further, a variable for the year of the decision is included to control for increases or decreases across time that might reflect changes in judicial willingness to reach the merits of disputes. Visual inspection of the data suggests a general, linear increase in the percentage of cases in which the courts reach the merits of a dispute across time. Table 6.1, below, shows the percentage of cases with a threshold issue present in which the panel reaches the merits of the dispute by time period.
Table 6.1: Tendency of appellate courts to reach the merits in cases with a threshold issue present

<table>
<thead>
<tr>
<th>Period</th>
<th>Merits Reached</th>
</tr>
</thead>
<tbody>
<tr>
<td>1948-1969</td>
<td>31% (n=52)</td>
</tr>
<tr>
<td>1970-1979</td>
<td>28% (n=69)</td>
</tr>
<tr>
<td>1980-1989</td>
<td>35% (n=69)</td>
</tr>
<tr>
<td>1990-1999</td>
<td>39% (n=158)</td>
</tr>
<tr>
<td>2000-2002</td>
<td>47% (n=74)</td>
</tr>
</tbody>
</table>

Finally, the Supreme Court’s ideological preferences are also included to test for direct effects (again using the median Supreme Court Martin-Quinn score). This is included primarily in order to ensure that the appellate court distance from the Supreme Court is not picking up some other aspect of Supreme Court ideological drift.

6.2 Evidence and Analysis

Reading judicial opinions gives the impression that avoidance behavior may be a response to conflict as occasionally judges are quite candid in their opinions. For example, Judge Magruder wrote in *Rainsberger v. Lamb*, 311 F.2d 195 (9th Cir. 1963): “Personally I would be willing to assume without deciding that appellant has exhausted his remedies under the state law, after which I would decide the case on the merits, since it seems clear to me that no constitutional rights have been violated. But my two colleagues do not agree to this disposition of this appeal, and not being in disagreement with them I have written the opinion their way.” (citations omitted). Of course, judges are not often so candid. Instead, it may be necessary to observe behavior consistent with a conflict avoidance strategy. Consider the following two cases. In the 5th Circuit’s opinion in *Barnes v. Levitt*, 118 F.3d 404 (1997), the court (made up of a liberal, a moderate and a conservative according the JCS scores) wrote that they could not posit
any opinion on the merits of the case because it found that the district court lacked jurisdiction. In contrast, in *Varandani v. Bowen*, 824 F.2d 307 (4th Cir. 1987), an ideologically-aligned panel of three moderates decided to terminate a Medicare dispute on procedural grounds but additionally, purely voluntarily, issued a substantive opinion. The court in *Varandani* did not have to enter the policy space; it chose to do so because it had little conflict to negotiate. It is this sort of trend that this paper tests quantitatively.

Bivariate analysis supports the hypothesis that panels with less ideological heterogeneity are more likely to reach the merits of a dispute. Both the absolute value of the range of JCS scores as well as the panel’s standard deviation are found to be statistically significant in a model explaining the appellate court’s tendency to reach the merits when they are the sole explanatory variable in the model. This is also true of the absolute minimum distance between any two judges on the panel; the results are not dependent upon measure. In addition, the correlation holds in a simple model with dummy variables for the circuits and only the standard deviation of the panel included as an explanatory variable (p<0.001) (also true for the absolute minimum ideological distance).

Because the district court reaching the substance might be considered a precondition to the appellate court doing so, bivariate analysis within circuits was considered for the set of cases in which the district court did, in fact, reach the merits of a dispute. In this formulation, again the standard deviation of the panel is strongly statistically predictive of a failure of the appellate panel to reach the merits of a dispute (p=0.002) (also true for the absolute minimum ideological distance measure; p=0.02).

When one considers that cases are randomly assigned to panels within circuits, there is a strong argument that this bivariate evidence settles the matter. One should not expect case
characteristics or anything else, for that matter, to be correlated with the ideological patterns of panel compositions within a circuit, suggesting that omitted variables would likely not be problematic. This is an unusual situation where the world really does give us random assignment of an independent variable in spite of no control over the research subject. In other words, there is very strong initial support for the hypothesis. In the next section, I discuss the multivariate models.

The following models were estimated using logistic regression. This is the same as the models used in the prior chapter. This specification accounts for the dichotomous nature of the dependent variable, preventing errors in conclusions due to heteroskedastic error that will be present if one models a dichotomous variable using a linear model. In addition to the other controls, the models below also contain fixed effects for the circuits to account for any differences across circuits. Such fixed effects are included as dummy variables for the circuits. If there are differences between circuits, the model will completely account for any such differences and prevent biased findings due to omitted circuit-level variables. The primary model is presented in Table 6.2, below.

The model shown in Table 6.2 provides strong support for the hypothesis that increased ideological conflict on an appellate panel makes the court far less likely to reach the merits of the dispute. The variable for the standard deviation of the panel is strongly statistically significant and in the predicted direction, negative. The size of the effect due to ideological conflict on the panel is fairly large. Over the range of the standard deviations found in the data, the probability of a panel reaching the merits of the case falls from more than 60% on an ideologically unified panel to about 10% when there is a wide dispersion of preferences. See Figure 6.1, below (in
which probabilities were simulated using Clarify\textsuperscript{32} with all other variables held at their means). Further, the coefficient on the concept of interest is stable across time – dividing the data set by year does not change the coefficient’s value and interacting it with year is not significant. In addition, use of alternative measures does not change the results. Thus, the basic model looks the same if one uses any variation on: the standard deviation of the appellate panel, the absolute minimum distance between any two appellate judges, and also if one uses the opinion writer’s JCS score (instead of the mean) to reflect the appellate panel’s preferences. The evidence, then, appears to uniformly support Hypothesis 3. Ideological heterogeneity is an important cause of judicial avoidance of substantive issues in a case.

\textsuperscript{32} Tomz, Wittenberg and King (2003).
Table 6.2: Logistic model of tendency of appellate panel to reach the merits of a case

<table>
<thead>
<tr>
<th></th>
<th>Coefficient</th>
<th>Z</th>
</tr>
</thead>
<tbody>
<tr>
<td>District court reached the merits</td>
<td>3.34 (.337)</td>
<td>9.90 ***</td>
</tr>
<tr>
<td>Standard deviation of the panel’s ideology scores</td>
<td>-4.587 (.969)</td>
<td>-4.73 ***</td>
</tr>
<tr>
<td>Panel ideology mean (conservative)</td>
<td>1.337 (.916)</td>
<td>1.46</td>
</tr>
<tr>
<td>Affirming district court</td>
<td>0.928 (.316)</td>
<td>2.94 ***</td>
</tr>
<tr>
<td>Amicus briefs</td>
<td>0.123 (.212)</td>
<td>0.58</td>
</tr>
<tr>
<td>Federal government party</td>
<td>0.658 (.331)</td>
<td>1.99 **</td>
</tr>
<tr>
<td>Year</td>
<td>0.046 (.013)</td>
<td>3.50 ***</td>
</tr>
<tr>
<td>Supreme Court median (conservative)</td>
<td>-0.834 (.553)</td>
<td>-1.51</td>
</tr>
<tr>
<td>Supreme Court-Appellate Court Difference</td>
<td>1.97 (.834)</td>
<td>2.37 **</td>
</tr>
<tr>
<td>1st Circuit</td>
<td>-0.346 (.691)</td>
<td>.50</td>
</tr>
<tr>
<td>2nd Circuit</td>
<td>-1.203 (.608)</td>
<td>-1.98 **</td>
</tr>
<tr>
<td>3rd Circuit</td>
<td>-0.720 (.595)</td>
<td>-1.21</td>
</tr>
<tr>
<td>4th Circuit</td>
<td>-1.222 (.680)</td>
<td>-1.80 *</td>
</tr>
<tr>
<td>5th Circuit</td>
<td>-0.912 (.630)</td>
<td>-1.45</td>
</tr>
<tr>
<td>6th Circuit</td>
<td>-0.778 (.616)</td>
<td>-1.26</td>
</tr>
<tr>
<td>7th Circuit</td>
<td>-0.647 (.641)</td>
<td>-1.01</td>
</tr>
<tr>
<td>8th Circuit</td>
<td>-1.476 (.754)</td>
<td>-1.96 **</td>
</tr>
<tr>
<td>9th Circuit</td>
<td>-1.497 (.716)</td>
<td>-2.09 **</td>
</tr>
<tr>
<td>10th Circuit</td>
<td>-1.417 (.810)</td>
<td>-1.75 *</td>
</tr>
<tr>
<td>11th Circuit</td>
<td>-1.552 (1.138)</td>
<td>-1.36</td>
</tr>
<tr>
<td>Constant</td>
<td>-73.156 (23.311)</td>
<td>-3.14 ***</td>
</tr>
<tr>
<td>N</td>
<td>403</td>
<td></td>
</tr>
</tbody>
</table>
Figure 6.1: Probability of Appellate Court Reaching the Merits of a Case by Standard Deviation of the Panel’s Ideology Scores
Let us consider the evidence of Hypothesis 2—the second piece of evidence relevant to whether district courts are empowered to be strategic agenda setters in the federal judiciary. Does the appellate court keep to the agenda set by the district court? Along with the variable for panel heterogeneity, the other most significant predictor of whether the court will reach the merits is the control for whether or not the district court did so. When the district court reaches the merits of the dispute, the appellate court is quite a bit more likely to do so as well. One does not require a multivariate model to observe this effect. Indeed, in the raw data, the appellate court reaches the substance of the dispute in only about 12% of cases in which the district court did not; however, when the district court does reach the merits, the appellate court does so in about 63% of cases. Thus, this is not a perfect predictor but it is an important one.

Of course, one might be concerned about these findings given the fact that I am relying upon the appellate court’s characterization of the district court’s decision. That is a valid concern. However, the quantitative evidence on the matter is reinforced by consideration of judicial language in appellate opinions. For example, the appellate opinion in *Harris v. International Longshoremen’s Association*, 321 F.2d 801 (1963) explains its decision to not address the merits of the case:

“Facts relevant to various issues were developed in affidavits annexed to the motion for summary judgment and in extensive uncontradicted testimony taken at hearings on plaintiffs' unsuccessful motions for preliminary injunctions. However, the opinion below in support of the granting of summary judgment unambiguously confined the issue sub judice to the exhaustion of internal remedies. Accordingly, we shall consider only that issue, leaving the merits of the plaintiffs' grievance for future determination whether within the association or through future litigation.”

33 Also see *Story v. Kindt*, 26 F.3d 402 (3rd Cir. 1994) (“we believe it preferable for the merits to be addressed by the district court in the first instance”).
Further, I should note that the other results illustrated in the model are unaffected by the inclusion or exclusion of this variable.

In general, it appears that appellate courts prefer to wait until the district courts have addressed the substance of a dispute before they reach it. The numbers seen in the appellate data make clear that this preference is not mere lip service, but is rather implemented in the behavior of appellate judges. The district court judge’s agenda control is not perfect, but it is a substantial effect in any given case. This finding, in combination with the evidence showing that district court judges faced with a hostile appellate court are far less likely to issue a merits-based opinion, is strong support for the idea that lower court judges engage in strategic negative agenda control over appellate courts.\(^{34}\) However, this finding connects back to the strategic agenda setting behavior of district judges, discussed in the last chapter. It says nothing about how appellate court judges engage in this type of behavior. That is taken up in the following section.

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\(^{34}\) In further support of the idea that lower court judges in fact have substantial agenda control over higher court judges is the fact that it appears that litigants assist the agenda control. Though not discussed in the previous chapter, the evidence indicates that an appeal is more likely when a substantive decision is rendered than when a procedural decision is written. I do not make much of the quantitative evidence on this subject, however, given that I am not confident how often the electronic database captures an attempt at an appeal. However, this finding is strengthened in the following chapter.
Do appellate courts avoid issues when faced with a hostile Supreme Court? In the last chapter, it was shown in two distinct sets of data that district judges are less likely to render a substantive decision when faced with an ideologically hostile Supreme Court. Such results are consistent with a theory of strategic agenda setting behavior on the part of lower court judges. Naturally, then, one wonders if the same is true of appellate judges. It is not. Indeed, the difference between the appeals court panel and the Supreme Court is positively related to the tendency to reach the merits of the dispute. See Table 6.2, above. Unlike district court judges, appeals court judges are actually more likely to engage in the policy substance of the case in the face of a hostile appellate court. This suggests that the institutional position of the appeals court judges causes them to behave differently than the district court judges.

What is it about appeals court judges that causes them to respond differently to ideological conflict with superiors than district court judges? The best explanation of this difference in behavior relates to the fact that appellate judges, unlike district court judges, are responsible for “making law.” Their decisions make binding policy beyond the case at hand. District court judges, on the other hand, lack the power to make law. Regardless of how they write the decision, it only binds the parties to the decision and is not binding on other judges in other cases. Hence, district court judges face very little cost to writing a procedural decision. (This is especially true when they can use the procedural termination to reach the outcome they prefer; as discussed in the prior chapter, district court judges may be affected by competing outcome considerations. However, they do not face competing costs due to failure to lay down a general policy rule since they have no power to do so in any event.)

This institutional difference between district and appellate court judges would suggest that appellate judges might be less affected by agenda manipulation concerns. Such concerns
might be outweighed by the interest in setting policy when possible. However, it does not at first
glance explain why the opposite effect might be observed. Why might appellate judges actually
reach the merits more often when faced with a hostile Supreme Court judge? Although this
effect was not anticipated, the explanation may lie with the fact that the cost of failing to make
policy (recall the diagrams from Chapter 4) are dependent upon the ideological orientation of the
Supreme Court. When the Court is aligned with the appellate panel, the cost of failing to make
policy in a given case may seem lower; in general, the Supreme Court backs your ideological
goals and the overall content of the law may be seen as supportive of your preferences.
However, when the Supreme Court is very different from the appellate panel, the cost of that
panel failing to make policy might be seen as quite a bit higher; the overall content of the law is
moving in a direction with which you disapprove and so there is higher cost to failing to “weigh
in” on the debate. Whenever the costs of failing to make policy are higher, the “zone of
acceptability” will grow. In such a situation, then, the panel members will be more willing to
compromise with one another on a substantive decision and less needing of a procedural “out.”
This is, in some sense, reminiscent of the idea that even groups with not much in common can be
induced to work together by the threat of a common enemy. Given that the effect was not
anticipated, however, additional work is needed to confirm that this positive relationship is seen
in other data sets. Nevertheless, the evidence at least indicates that one cannot take a “one size
fits all” approach to studying judicial behavior: institutional situation matters to decision
strategy. The evidence presented here suggests that appellate courts, in contrast to district courts,
act aggressively in the face of an ideologically hostile Supreme Court.  

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Note that one other potential “principal” ought to be considered in analysis of appellate courts.
That is the potential role for en banc review, review by the full appellate court. Giles, Hettinger,
Zorn and Peppers (2007) studied en banc decisions, finding evidence of ideologically-driven en
What other factors influence the appellate decision to reach the substance of a case?

Again in this data, there are no direct effects of ideology seen—either due to the panel’s preferences or due to the Supreme Court’s preferences. Some of the other controls are, however, significant. An appellate panel is more likely to reach the substance of a dispute if it is affirming the district court—a direction not predicted. However, this may relate to the type of cases likely to generate conflict. When there is agreement with the lower court, those cases may be less ideologically salient and so easier to reach the substance than the cases where a reversal is necessary. The presence of amicus briefs is not related to the courts’ decisions to reach the merits or not. However, the presence of the federal government encourages the court to reach the substance of the dispute, a finding consistent with what McGuire and Palmer found relating to issue suppression on the Supreme Court. This finding is in accordance with the idea that the federal government, especially in cases that have proceeded to a published appellate decision, would prefer a substantive resolution to the issues and the courts are obliging. Of course, this is inconsistent with the findings from Chapter 5. That difference may result from the difference in case mix under study. Here, only published appellate decisions are considered—a set of cases where the federal government is desirous of judicial resolution of issues. In the last chapter, the set of cases was much broader and so the negative effect of the federal government may have been picking up an outcome preference on the part of the government as opposed to the desire for the courts to reach an issue (note that procedural terminations will generally favor the government). The control for year was found to be significant and positive, indicating an increasing willingness over time to enter the policy space. While there is not a strong theoretical

_banc_ decisions, albeit at a very low rate (less than 1%). Further, they noted evidence of strategic anticipation by panels in heterogeneous circuits. In this analysis, no effect was seen for distance between the panel and the circuit median, perhaps a reflection of strategic anticipation.
reason to expect this, this is the pattern that was anticipated through visual inspection of patterns across time. Finally, the circuit dummies were all signed negatively, with some reaching traditional levels of statistical significance. This suggests that the D.C. Circuit, the omitted category, may be more likely to reach the merits of a dispute than another circuit—a phenomenon likely related to the unique case mix of the D.C. Circuit.

The model as shown in Table 6.2 correctly predicts 82% of the cases in the data. This is a reduction in error of about 51%. Overall, this is a significant improvement, then, in predicting when the appellate court will reach the merits of a case versus avoiding it.

The evidence from the appellate data, then, seems strong support for the idea that appellate panels engage in a form of judicial gridlock that manifests in avoidance patterns. The next question is whether or not it is appropriate to group these cases together, treating the question about threshold issues as a common concept. However, splitting the data into three groups (one for each type of threshold issue) illustrates that the model does not change across subsets of the data, and is statistically significant in each of the three subsets of the data (not shown). A few differences are, however, observed. Most notably, the influence of the federal government, observed in the combined data, appears to result exclusively from the cases in which a standing issue is present, likely reflecting the type of issue in which the federal government is most likely to be a participant.

Let us now move on to consider what changes when the specification of the dependent variable changes. Thus far, the concept of interest has been whether or not the appellate panel reaches the merits of a dispute consistent with the main focus on the courts’ policy agenda. However, the tool that they are posited to use to avoid the merits is the differential ruling on threshold issues to terminate lawsuits. This moves the focus to a consideration of how these
forces affect the content of the law itself. The last chapter illustrated that in district courts, one can see effects on the particular types of rulings in addition to effects on the policy reach of the opinion. In other words, procedural rulings are the tool district court judges use to effect their strategic agenda manipulation. Here, I ask whether this is also the tool appellate judges use to evade conflict with one another. (Note that appellate judges, unlike district court judges, have a real alternative—to remand the case to a district court without making a procedural ruling.)

To explore this question, we again consider each subset of the cases in the data separately. As before, we begin with a bivariate analysis. Among the cases with a standing issue, if one models the within-circuit tendency to terminate a case for lack of standing, the standard deviation of the panel is positively related to that decision, but it just misses traditional levels of statistical significance (p=0.08, two-tailed). Of course, this result would meet conventional measures of statistical significance in a one-tailed test, which could be justified in this context given that the theory only suggests an effect in one direction. Roughly the same is true of the tendency to terminate a case for lack of jurisdiction (p=0.13, two-tailed). However, the tendency to terminate a case for lack of exhaustion is positive and statistically significant even in the bivariate model (p=0.02, two-tailed).

As above, one can also consider the same analysis (with fixed effects by circuit) only among the cases in which the district court reached the substance of the dispute. In that form of bivariate analysis, again the termination of a suit for lack of exhaustion is statistically significantly predicted by a panel’s standard deviation (p=0.04, two-tailed). Further, the termination of a suit for lack of jurisdiction is statistically significantly predicted by the panel’s standard deviation (p=0.05, two-tailed). Again, then, the bivariate analysis suggests that the structure of the preferences on the panel affects the evolution of procedural doctrines in that
ideological heterogeneity leads to the expansion of such legal doctrines—allowing courts to get rid of cases without really addressing the policy question that underlies the dispute. The multivariate analysis follows in Table 6.3.

Table 6.3 shows the same model, from above, applied for each of the different threshold issues. It models the tendency of the panel to find that a case does not survive a threshold issue. (Note that one should expect all of the signs in this table to be reversed from the prior table because of the negative correlation of the two dependent variables.) The evidence from the split dataset in Table 6.3 lends qualified support for the idea that the panel composition has an effect not just on the policy agenda of the court but also on the evolution of the law of threshold issues. For example, when looking at the legal ruling of the panel, one can see that ideologically heterogeneous panels are more likely to terminate a case for lack of exhaustion than ideologically closely-aligned panels. This is also statistically significant using the absolute minimum ideological distance measure of group conflict. The effect size predicted is large. The probability of a court terminating a case for failure to exhaust remedies increases from about 30% to about 80% depending upon how much ideological dispersion there is on the panel. See Figure 6.2, below. Further, the signs are as expected for termination for lack of jurisdiction and standing, but the models do not reach traditional levels of statistical significance. (Note that the absolute minimum distance measure reaches weak statistical significance—p = 0.08, two-tailed, for jurisdictional rulings.) Along with the bivariate analysis from above, this suggests that one should expect to see effects on the evolution of the legal doctrines themselves due to ideological conflict on a collegial court.

These findings, then, may help us to understand why it is that judges make up rules that limit their power to decide cases. It can be seen as a conflict-induced type of passive behavior
that lessens the workload of the judges without requiring them to sign onto decisions with which they disagree. While the evidence is not as strongly supportive of Hypothesis 4 as it is of Hypothesis 3, there is some evidence from the split data that procedural rulings themselves are used as strategic tools of compromise. The weakening of the results, however, occurs only because the number of cases is somewhat small because of the lack of pooling. Indeed, if one repools the cases and runs the model again asking whether any of the three possible procedural doctrines is used to terminate the case, the panel's standard deviation of ideology scores is again highly statistically significant. See the last model shown in Table 6.3, below. Hence, we can safely conclude that one mechanism appellate judges use to avoid the merits of disputes is to rule that procedural threshold issues are not met. Thus, political conflict affects not just the policy agenda of the appellate courts, but also the development of procedural doctrines themselves.
Table 6.3 Logistic Model of tendency of appellate panel to procedurally terminate a case using particular threshold issues (Circuit dummies not shown)

<table>
<thead>
<tr>
<th></th>
<th>Rule that a plaintiff lacks standing</th>
<th>Rule that the court lacks jurisdiction</th>
<th>Rule that the plaintiff failed to exhaust remedies</th>
<th>Procedurally terminate the case for any of the three reasons</th>
</tr>
</thead>
<tbody>
<tr>
<td>District court reached the merits</td>
<td>-1.117 *** (0.421)</td>
<td>-1.544 *** (0.411)</td>
<td>-0.087 (0.400)</td>
<td>-0.994 *** (0.237)</td>
</tr>
<tr>
<td>Standard deviation of the panel’s ideology scores</td>
<td>1.497 (1.201)</td>
<td>2.074 (1.449)</td>
<td>3.775 *** (1.52)</td>
<td>2.457 *** (0.797)</td>
</tr>
<tr>
<td>Panel ideology mean (conservative)</td>
<td>3.199 (2.358)</td>
<td>-0.589 (1.396)</td>
<td>-0.441 (1.073)</td>
<td>0.084 (0.728)</td>
</tr>
<tr>
<td>Affirming district court</td>
<td>1.188 *** (0.496)</td>
<td>0.974 ** (0.416)</td>
<td>1.506 *** (0.435)</td>
<td>1.185 *** (0.253)</td>
</tr>
<tr>
<td>Amicus briefs</td>
<td>-0.664 (0.468)</td>
<td>-0.089 (0.257)</td>
<td>-1.1190 (1.065)</td>
<td>-0.242 (0.221)</td>
</tr>
<tr>
<td>Federal government party</td>
<td>-0.783 * (0.457)</td>
<td>0.421 (0.495)</td>
<td>0.209 (0.488)</td>
<td>-0.050 (0.278)</td>
</tr>
<tr>
<td>Year</td>
<td>-0.030 (0.019)</td>
<td>-0.036 * (0.022)</td>
<td>-0.038 ** (0.018)</td>
<td>-0.037 (0.011)</td>
</tr>
<tr>
<td>Supreme Court median</td>
<td>-1.968 (1.82)</td>
<td>0.186 (0.837)</td>
<td>0.271 (0.504)</td>
<td>0.153 (0.422)</td>
</tr>
<tr>
<td>Supreme Court-Appellate Court Difference</td>
<td>2.357 (2.229)</td>
<td>-0.279 (1.127)</td>
<td>-0.603 (0.804)</td>
<td>-0.343 (0.607)</td>
</tr>
<tr>
<td>N</td>
<td>140</td>
<td>170</td>
<td>147</td>
<td>386</td>
</tr>
</tbody>
</table>

*** p<0.01 ** p< 0.05 * p<0.10
Figure 6.2: Termination of a case for Failure to Exhaust Remedies by Standard Deviation of Appellate Panel
6.3 Testing the Competing Hypothesis About Heresthetetic Manipulation

As discussed above, one concern about drawing the conclusions I have drawn from the empirical results presented relates to the idea that the empirical trends may instead be driven by outcome-oriented manipulations by minority judges. To test this theory, let us consider two types of “mixed” panels: those with a sole liberal judge and those with a sole conservative judge. As discussed above, my theory would predict that both types of mixed panels would be more likely to engage in procedural avoidance (and thereby not reach the merits of cases) than unified panels. On the other hand, a heresthetical theory would be expected to suggest that only sole-conservative panels would drive the results. This is so because, recall, I have assumed that only the conservative judges favor the outcomes achieved by a procedural termination. That is, of course, an important assumption that may not be met in all cases. However, the results should at least be suggestive of which theory is operational here. The same models as from above are reproduced below with one important change. I have removed the variable for the panel’s mean ideology score and the variable for the panel’s standard deviation. I have replaced these variables with two dummy variables that capture the two types of “mixed” panels one might see: sole conservative and sole liberal. Hence, the “omitted category” includes all ideologically unified panels. The results are shown in Table 6.4, below.
Table 6.4 Logistic Model of tendency of appellate panel to reach the merits of a case/procedurally terminate a case by type of mixed panel (Circuit dummies not shown)

<table>
<thead>
<tr>
<th></th>
<th>Reach the Merits</th>
<th>Procedurally terminate the case for any of the three reasons</th>
</tr>
</thead>
<tbody>
<tr>
<td>District court reached the merits</td>
<td>3.398 *** (0.341)</td>
<td>-1.079 *** (0.244)</td>
</tr>
<tr>
<td>Sole conservative on the panel</td>
<td>-1.967 *** (0.396)</td>
<td>1.009 *** (0.320)</td>
</tr>
<tr>
<td>Sole liberal on the panel</td>
<td>-1.08 *** (0.365)</td>
<td>0.472 (0.307)</td>
</tr>
<tr>
<td>Affirming district court</td>
<td>0.878 *** (0.313)</td>
<td>1.276 *** (0.259)</td>
</tr>
<tr>
<td>Amicus briefs</td>
<td>0.174 (0.226)</td>
<td>-0.283 (0.225)</td>
</tr>
<tr>
<td>Federal government party</td>
<td>0.720 ** (0.331)</td>
<td>-0.101 (0.285)</td>
</tr>
<tr>
<td>Year</td>
<td>0.045 *** (0.013)</td>
<td>-0.038 *** (0.011)</td>
</tr>
<tr>
<td>Supreme Court median</td>
<td>-0.716 (0.495)</td>
<td>0.327 (0.401)</td>
</tr>
<tr>
<td>Supreme Court-Appellate Court Difference</td>
<td>1.961 *** (0.670)</td>
<td>-0.882 * (0.551)</td>
</tr>
</tbody>
</table>

N = 403

*** p<0.01 ** p< 0.05 * p<0.10, two-tailed
Table 6.4 generally suggests that both types of “mixed” panels avoid the substance of the dispute. This is supportive of the theory that conflict-avoidance incentives operate independently of outcome-goals. The first model captures tendency to reach the substance of a case or not, as above. Both panels with a sole conservative and panels with a sole liberal are less likely than unified panels to reach the substance of a dispute. However, the effect is larger for panels with a sole conservative, giving support to at least some role for heresthetical maneuvering. The second model illustrates use of procedural doctrines to terminate a case (as opposed, as discussed above, to merely avoiding the substance through a remand decision). This in many ways is the better test to use in differentiating between the two theories as this is the better specification to capture the conservative outcome preferences. The differences between the two types of mixed panels are larger in this specification, again with sole-conservative panels being more likely than sole-liberal panels to engage in procedural avoidance. Again, this might suggest that heresthetical maneuvering plays some role in the decision to use procedural law to terminate a lawsuit. However, although the sole-liberal effect falls beneath traditional levels of significance, the coefficient is still positive, indicating that sole-liberal panels are also on average more likely than unified panels to terminate a lawsuit procedurally. Further, when one considers only mixed panels, there is no statistically-significant difference between sole-conservative and sole-liberal panels in their tendency to procedurally terminate a lawsuit (not shown).

All of this suggests that there probably is some heresthetical maneuvering going on in these panels, consistent with Baird and Jacobi (2009). However, outcome goals do not completely explain this behavior. Rather, mixed panels of both types are both more likely than unified panels to engage in procedural avoidance or otherwise avoid the merits of a lawsuit.
That finding suggests that, consistent with the theory outlined above, judges care about the announced doctrine as well as the outcomes of cases.

6.4 Generalizability

Overall, the evidence presented in this chapter has strongly supported the idea that the judicial policy agenda is affected by collegial conflict and, further, that procedural law is used as a tool to affect that agenda. While the results about hierarchical conflict between the appellate courts and the Supreme Court were not anticipated, the collegial conflict findings were exactly what one would expect to find if judges are capable of avoiding issues in order to negotiate political conflict. One criticism of the evidence presented here might be that cases were selected that had a threshold issue present; as a result, the findings might not generalize beyond similar cases. As noted at the start of this chapter, however, even if this is the case the results likely apply to the majority of appellate cases. However, it is likely that the results actually apply more broadly, albeit in modified form. To see why, recall that the decision to evade the substance of a case entirely is an extreme form of issue suppression. In particular, it is a form of issue suppression more amenable to measurement than others. However, to the extent that one accepts the results here as indicative of broader issue suppression trends, one can expect to see such findings in any multi-issue case.

To get a sense of the importance of the idea of issue suppression and/or manipulation, consider the well-known case, Lawrence v. Texas. The Court was asked to rule on the constitutionality of a statute that forbade homosexual (but not heterosexual) sodomy. The majority opinion rested on substantive due process grounds. The announced rule indicates the extent to which the states are allowed to regulate adult, consensual sexual activity. As written,
then, the rule applies to government regulation of sexual conduct between consenting adults; that is the policy issue affected by the decision. However, the other opinions in the *Lawrence* case confirm that the justices had the option of addressing other issues as well. Justice O’Connor’s concurring opinion in the *Lawrence* case provides a nice illustration. She did not write separately to weigh in on her preferred rule in the “substantive due process” set of cases. Rather, Justice O’Connor argued that the opinion should address equal protection law rather than substantive due process law. She saw the challenged statute as unlawful because it separated out homosexual from heterosexual activity. In other words, there was more than one legal issue present in the case. The majority only relied upon one of the issues. Much turns on this decision. If O’Connor’s approach had been used, the resulting rule would have applied to laws that distinguish between heterosexuals and homosexuals, not laws that regulate consensual sexual activity in general.

If Justice O’Connor had been able to obtain a majority on the equal protection issue, the opinion would have spoken directly to the issue of homosexual rights rather than being confined to the issue of government regulation of sexual activity. As Justice Scalia pointed out in his dissent, O’Connor’s rule would have had implications for the hot-button issue of gay marriage, whereas the majority opinion need not apply at all to that issue. It is probably no accident that the majority opinion is framed in due process rather than equal protection, given the implications about future cases and the massive internal and external conflict the Court could have expected had it written broadly on the topic of equal protection for homosexuals.

While the *Lawrence* case may be an extreme example in some respects, the entire structure of legal education encourages the idea that a given set of facts may engage multiple legal issues. Thus, it is a very common practice for law school exams to be graded on the basis
of “issue spotting,” the ability of a student to identify as many different types of legal issues raised by a particular fact pattern as possible. Lawyers arguing cases and judges deciding cases were trained in this tradition. Issue spotting is probably the single most valuable skill for an advocate because the ability to manipulate the frame of a case, a type of agenda setting, is a powerful tool for achieving desired outcomes. Thus, it is reasonable to expect that the lawyers will argue more than one reason in favor of their client’s preferred outcome and, in many situations, the judges themselves may appropriately spot issues and therefore potentially change the scope of the case. If all this is true, it suggests that some or another form of issue manipulation/suppression is available in most cases appellate judges hear. However, it is for further work to consider the extension of this model to issue-by-issue policy agendas. Here all that is shown is that the dichotomous decision whether or not to enter the policy space at all in a given opinion is influenced by the presence of conflict among the judges on the panel.

6.5 Discussion and Conclusions

This chapter illustrates that the distribution of ideological preferences in the appellate courts can lead to different justifications for case outcomes—leading to effects on the policy agenda of the courts and in the development of the law itself. The evidence supports the theory that judges working collegially are more likely to avoid the merits of a dispute when they have a lot of political conflict within the group. Effectively, then, appellate panels experience policy gridlock—manifesting in minimalist judicial opinions—when there is too much ideological conflict present. These findings support the idea that judges are not willing to compromise at all costs. Rather, in some situations judges prefer no policy to the available compromise policy positions. When this is the case in the appellate courts, issue avoidance plays a key role in
allowing the judges to nevertheless write a joint opinion and avoid the additional workload and potential legitimacy damage associated with splintered opinions. This behavior promotes judicial minimalism in the words of the opinion but also may increase the procedural complexity of the law and, overall, create the appearance of arbitrariness in the application of procedural rules in decisions.

This data from the appellate context also highlights a difference between the strategic calculations made by district courts and appellate courts. The evidence in Chapter 5 showed that district court judges use procedure to limit the agenda of a higher court. However, the evidence from the intermediate courts of appeals illustrates that appellate judges, who have the ability to lay down binding law, increase their willingness to do so in the presence of a hostile Supreme Court. This reflects a real difference in the institutional empowerment of these two different types of actors in the federal judiciary and emphasizes the complex balancing that happens when judges make decisions about the content of their opinions. However, the evidence from the appellate court data strengthens the findings from the previous chapter in one important way. By showing that district court judges indeed do have the power to influence the appellate agenda, this strengthens the conclusion that the patterns observed in Chapter 5 are the result of a strategic calculation to affect the agenda.
CHAPTER 7

ABORTION IN THE LOWER COURTS

The previous six chapters have articulated and presented evidence of a theory about how political conflict leads to judicial avoidance behavior and procedural opinions. Quantitative evidence that supports the theory was found from cases at the appellate level that contained a procedural issue (coming from many issue areas), and from cases at the district court level that raised a constitutional issue or were prisoner habeas corpus suits. The goal of this chapter is to focus in on a particular, critical issue that has come before the courts in order to better understand how avoidance behavior and political conflict have influenced specific areas of the law. In this chapter, I discuss district court decisions in abortion cases in the early 1970s, the set of decisions that includes the district decision in *Roe v. Wade*. The Supreme Court’s decision in *Roe v. Wade* is, of course, one of the Court’s most controversial and important decisions. It has spawned decades of continued controversy and debate about the proper role of the judiciary in protecting civil liberties and limiting legislative power. In the following pages, I consider the trial court decisions that paved the way for the Court’s decision in *Roe v. Wade*, especially focused on understanding the role that the district courts played in affecting the Supreme Court’s ability to make abortion policy. By exploring the cases that were decided around the same time as *Roe*, it is possible to identify whether and how conflict avoidance behavior or strategic agenda setting helped determine when and how the courts got involved in abortion regulation.

In this chapter, then, I consider whether the different approaches taken by the lower courts during the early 1970s can be explained with reference to the conflict avoidance and agenda setting theories outlined by the previous chapters. Why did the district court in *Roe* choose to hear the merits of the case while so many other courts did not? I argue here that at
least part of the explanation relates to the structure of political conflict among judges in the federal courts. Lower court judges were more likely to find procedural problems with these cases when 1) they were in disagreement with the anticipated outcome from the Supreme Court and/or 2) they were faced with a large amount of collegial conflict within the 3-judge panels.

The organization of this chapter is as follows. First, in Section 7.1, I discuss some relevant background facts to do with how abortion was addressed in the federal courts in the 1970s. In this background section I present an initial table of the fourteen district court decisions I analyze along with their outcomes. I also make use of this section to identify how similar to one another the fourteen decisions are—and so exploring what types of controls are at play in the qualitative analysis. The next two sections consider how to apply the measures and hypotheses explored in the quantitative work to this qualitative setting. In particular, Section 7.2 discusses the role of horizontal conflict, collegial conflict, in the district court decisions. The emphasis in that section is on exploring how well one can measure ideological conflict by focusing on appointment data. In particular, because the set of judges is small I track past decisions issued by the judges in order to gain a deeper understanding of how well appointment information reflects true ideological conflict. Section 7.3 addresses vertical conflict by explaining how the Supreme Court (the relevant appellate court, as explained below) could be predicted to rule and so to identify how this strategic element might be predicted to play out in the district court decisions. Then, in Section 7.4, I again present the table showing the fourteen district court decisions but this time identifying how the theory of this thesis would predict the opinions would look in those cases—predictions based on the analysis from the prior sections. Section 7.4 highlights how well the theory does in predicting the content of these fourteen decisions. Section 7.5 considers the potential counter-examples to the theory and explores the details of the cases to
better understand how they fit with the theory. Finally, in Section 7.6 I consider the larger implications and consequences of strategic avoidance behavior, using the abortion cases as a driving example.

7.1 Relevant Background to do with Abortion and the Courts

Including the trial court decision in Roe v. Wade and its companion case, Doe v. Bolton, there were fourteen published district court decisions in 1970 and 1971 that addressed the constitutionality of abortion regulations. In all likelihood, this surge of cases at the trial level represented interest group responses to signals the Supreme Court had been sending in the preceding years, including the landmark decision in Griswold v. Connecticut, 381 U.S. 479 (1965). (As noted above, Baird (2007) presented convincing evidence that interest groups respond to such signals by the high court by identifying appropriate plaintiffs and bringing a new wave of suits up through the court system.) However, in spite of the interest group efforts, other actors also limit the flow of cases to the Supreme Court. These actors include lower court judges, who may choose to terminate suits without reaching the merits. As shown in Chapter 6, cases that are terminated procedurally are far less likely to warrant substantive attention at the appellate level. Further, when the plaintiff is pursuing political change through the courts, such a plaintiff may well not even bother appealing a procedural termination. Indeed, the evidence presented below suggests this is the case. As a result, lower court judges play a critical role in filtering the policy agenda of the federal courts.
In the 1970s, procedural rules in federal court required a three-judge panel to hear challenges to the constitutionality of state statutes in which injunctive relief was requested.\textsuperscript{36} The panel had to include a judge from the appellate circuit in which the district court was located in addition to two district court judges.\textsuperscript{37} Decision rules, therefore, were much more similar to modern-day appellate decisions than to most district court decisions. In addition to the three-judge panel, the law provided for a direct appeal to the Supreme Court any decision rendered by a three-judge panel of district court judges.\textsuperscript{38} This appeal was not discretionary; unlike nearly all of the modern Supreme Court’s docket, such cases were part of the Court’s mandatory appellate jurisdiction. In other words, the Court could not say no. As a result, the district court panel played an even more important role in the policy agenda of the high courts.

The fourteen district court decisions issued in 1970 and 1971 are listed below, in Table 7.1. The table also indicates the judges who joined the opinion, the appointing president, a rough summary of the decision, and what happened on appeal, if any. For example, \textit{Roe v. Wade} was decided at the trial level in an unsigned, published opinion by a three judge panel in the Northern District of Texas. The decision was issued June 17, 1970. The court rendered a full decision on the merits of the constitutional question, paving the way for the Supreme Court’s 1973 landmark

\begin{quote}
\textsuperscript{36} “An interlocutory or permanent injunction restraining the action of any officer of such state in the enforcement of such statute shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application is heard and determined by a district court of three judges under Section 2284 of this title.” 28 U.S.C. Section 2281 (repealed).
\end{quote}

\begin{quote}
\textsuperscript{37} 28 U.S.C. Section 2284 (repealed).
\end{quote}

\begin{quote}
\textsuperscript{38} 28 U.S.C. Section 1253.
\end{quote}
opinion in the case. Such a decision was not inevitable, however. The district court was given multiple reasons to terminate the suit for procedural reasons, thus likely avoiding a substantive Supreme Court ruling on the constitutional question. The parties argued that the case should be terminated for lack of standing and also that the federal court should abstain in favor of state court proceedings. The current shape of the law might have been quite different had the district court judges avoided the merits of the dispute in *Roe v. Wade*.

### Table 7.1: Published Abortion Decisions in District Court in 1970/1971 (shading indicates procedural avoidance)

<table>
<thead>
<tr>
<th>Case Cite</th>
<th>Judges (appointing president)</th>
<th>Decision</th>
<th>Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>Case Name</td>
<td>Decisions and Arguments</td>
<td>Authors and Roles</td>
</tr>
<tr>
<td>-------------</td>
<td>----------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| Apr. 27, 1971 | Major v. Ferdon, 325 F. Supp. 1141  
(N.D. Cal., Feb. 25, 1971) | Abstention arguments. (Suit by physician)  
Abstained in favor of state courts. Standing discussed but not relied upon. 
(Physician, being prosecuted) | Oliver Hamlin (Eisenhower)  
Robert Schnacke (Nixon)  
Albert Wollenberg (Eisenhower)  
No evidence of appeal. |
|             | Corkey v. Edwards, 322 F. Supp. 1248  
(W.D. N. Carol., Feb. 1, 1971) | Reached the merits and upheld the ban; rejected abstention and standing arguments. 
(Plaintiffs physicians not being prosecuted) | James Craven (JFK; elevated by Johnson)  
Woodrow Jones (Johnson)  
James McMillan (Johnson)  
The Supreme Court later vacated this in light of Roe v. Wade. |
(Plaintiffs women and physicians, not being prosecuted) | Luther Swygert (FDR; elevated by JFK)  
Edwin Robson (Eisenhower)  
William Campbell (dissenting) (FDR)  
The Supreme Court later vacated this in light of Roe v. Wade. |
(Plaintiffs women and physicians, not being prosecuted) | David Lewis (Eisenhower)  
Alfred Arraj (Eisenhower)  
Olin Chilson (partial dissent) (Eisenhower)  
No evidence of a substantive decision; unclear what happened. |
|             | Steinberg v. Brown, 321 F. Supp. 741  
(N.D. Ohio, Dec. 18, 1970) | Reached the merits and upheld the ban; rejected standing and abstention arguments. 
(Plaintiffs women and physicians, not being prosecuted—note that this court differentiated between pregnant and non-pregnant women) | Paul Weick (Eisenhower)  
Ben Green (dissenting) (JFK)  
Don Young (Johnson)  
No evidence of appeal; in conflict with Roe. |
|             | Babbitz v. McCann, 320 F. Supp. 219  
(Suit by physician, being prosecuted by state) | Otto Kerner, Jr. (Johnson)  
John Reynolds (Johnson)  
Myron Gordon (Johnson)  
First decision was appealed to Supreme Court but dismissed for lack of jurisdiction due to lack of injunction; second was vacated in light |
As can be seen from Table 7.1, procedural resolutions were very available in this set of cases. Every single one of the district court opinions dealt with a significant procedural argument. Indeed, the procedural arguments made to the district courts were remarkably similar to one another and, indeed, the underlying factual allegations were very similar—allowing me to
essentially consider this “controlled”. In nearly every one of the cases challenges to the court were made based on abstention and/or standing. The doctrine of abstention is discretionary and asks federal courts to refrain from interfering with activities of state courts. Interestingly, however, the courts’ decisions on these issues appears to bear no relationship to subtle variations in fact patterns. So, for example, it seems to have no bearing on decisions about abstention (deference to state court proceedings) whether or not the physician bringing suit was actually being prosecuted by the state courts. In other words, it did not seem to matter whether there actually was a competing state court action. Further, the standing decisions for the most part also ignore the status of the doctor’s prosecution, though arguably it should be relevant to that as well. (Indeed, physicians could probably always be barred using one or the other doctrine. If being prosecuted, abstention; if not, lack of standing.) However, the differing fact patterns do not predict the decisions on the threshold issues in these cases. Some judges find women and doctors have standing; others do not. Indeed, even the question of whether or not a woman needs to be pregnant to maintain standing appears to only be used as a justification in denying standing or in cases in which there is also a pregnant plaintiff present so that the basic challenge can still be heard. Several judges found that women who are not pregnant (or their doctors) had sufficient interest to provide legal standing. Indeed, reading the opinions summarized in Table 7.1 does not give one any confidence that the decisions were predictable based on differing fact patterns. This suggests that the cases provide a good starting point for exploring the ideas of this thesis—that the decisions are actually caused by political considerations.

While fourteen cases is not enough to get a strong sense of causation, exploring this limited dataset should allow a deepening of understanding from the prior chapters. Further, the fourteen cases do present a good amount of variance to explain. In five cases, the judges chose
to terminate a case based on a procedural argument instead of rendering a substantive decision. Finally, the issue area of abortion is exactly the type of issue area in which the theory about strategic avoidance should apply. It was a highly ideologically-charged issue area in which the facts nearly always presented the possibility of a procedural termination. Hence, we should expect to see political conflict playing a role in the decisions district court judges made about whether to issue a substantive decision in these cases. The next two sections describe how the theory would operate in this setting before moving onto a reconsideration of Table 7.1.

### 7.2 Horizontal Conflict in the Abortion Panels

The theory of horizontal conflict suggests that cases in which the judges negotiate a lot of ideological difference are more likely to procedurally avoid the merits of a lawsuit. A cursory examination of Table 7.1 reveals that five of the panels were ideologically “mixed,” meaning that the judges on the panel were appointed by presidents from different political parties. Among those five cases, three of the panels resolved the case procedurally. Thus, in *Landreth v. Hopkins*, two Nixon appointees and a Johnson appointee found that the plaintiffs lacked standing because they were not currently pregnant and the doctors were not currently threatened with prosecution. In *Ryan v. Specter*, a Roosevelt appointee, an Eisenhower appointee, and a Johnson appointee determined that it was appropriate to abstain in favor of state proceedings. Finally, in *Doe v. Randall*, a judge appointed by FDR and elevated by Eisenhower and an Eisenhower appointee joined an opinion to abstain, while the Johnson appointee would have terminated the case for lack of standing. In contrast, among the nine cases in which the judges had all been appointed by a president of a common party (or wrote alone so there could be no collegial conflict), fully seven reached the merits of the dispute. Only two “unified” panels wrote
opinions terminating the cases for procedural reasons. Even a rough glance, then, at this set of cases supports the hypothesis that ideological conflict within a group will increase the willingness of judges to resolve cases procedurally.

An important criticism can be leveled against this analysis, however. Is a measure based on party of the appointing president appropriate in capturing political conflict? In order to evaluate this measure, consider two cases: *Roe v. Wade* and *Landreth v. Hopkins*. Is it accurate to conclude that there was more ideological conflict at play in *Landreth* than in *Roe*? When one looks beyond the partisan labels to the judges’ behavior around the time of the decisions, the answer is a resounding yes.

The judges in *Roe v. Wade* were: Irving Loeb Goldberg, Sarah Tilghman Hughes, and William McLaughlin Taylor, Jr.39 Judge Goldberg was a circuit court judge on the U.S. Court of Appeals for the Fifth Circuit. He had been appointed four years prior to the decision, in 1966, by Lyndon Johnson. Judge Hughes was one of the few female federal court judges of the time. She had been appointed to the bench by John F. Kennedy in 1961. Judge Taylor was also a Johnson appointee; he received his commission in 1966. As noted, a surface consideration of these three judges suggests that they did not have a lot of conflict to negotiate as a group. They were appointed by ideologically-similar presidents to the same state at roughly the same time as one another. To the extent, then, that one believes that the players in the appointment process exercise a significant amount of ideological selection, these three judges were selected by very similar forces.

39 Throughout this chapter, biographical information about the judges is presented. The source of this information is the Federal Judicial Center’s Biographical Database.
Further, a review of their judging history exhibits similar approaches to the law. Just months prior to their decision in *Roe v. Wade*, Judge Hughes wrote an opinion joined by Judge Goldberg and Judge Taylor, ruling that a statute criminalizing sodomy was unconstitutional. *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex, Jan. 21, 1970). In that case, too, they had rejected a plea for abstention and an argument based on lack of standing. In other words, the three judges had only recently issued an opinion, acting as a group, that looked much like the opinion in *Roe v. Wade*. Judge Hughes’ opinion in *Buchanan* is, overall, very much the same as the unsigned opinion in *Roe v. Wade*. The three also joined together in an opinion (again signed by Judge Hughes) striking down the Texas Board of Education’s district divisions on the ground that they violated the “one person one vote” principle. *Freeman v. Dies*, 307 F. Supp. 1028 (N.D. Tex, Dec. 19, 1969). By herself, Judge Hughes had recently ordered a Texas hospital to start paying female orderlies at the same rates as it paid male orderlies, on the grounds that the failure to do so violated the Equal Pay Act, and in favor of Caucasian tenants who sued their landlord for racial discrimination on the grounds that the landlord evicted them due to the presence of Black guests to the apartment. See *Schulz v. Brookhaven Hospital*, 305 F. Supp. 424 (N.D. Tex., Oct 8., 1969); *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex., Sept. 18, 1969). Judge Taylor, writing alone, had just recently awarded a plaintiff compensatory damages and attorney’s fees in a case involving racial discrimination in violation of the Fair Housing Act and Civil Rights Act. *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex., June 9, 1971). However, he had also neglected to find a school’s policy on corporal punishment unconstitutional. *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex., June 4, 1971). On the other hand, Judge Taylor had recently ordered the Department of Agriculture to implement a food assistance program in Texas counties that did not currently have such a program within 60 days and to make monthly reports to the court about
the numbers of people being served by the program. *Jay v. U.S. Dept. of Agriculture*, 308 F. Supp. 100 (N.D. Tex., Dec. 30, 1969). Judge Goldberg had written a recent opinion striking down a Mobile, Alabama law against assembling in the streets that was being used to prevent Black protestors. *LeFlore v. Robinson*, 434 F.2d 933 (5th Cir. 1970). In addition, he authored an opinion granting habeas corpus relief to a Mexican American who showed that there was no Hispanic representation on the grand jury that indicted him; the appellate opinion ordered the prisoner released on this ground, though noted that the state could elect to re-try him. *Muniz v. Beto*, 434 F.2d 697 (5th Cir. 1970).

This review of the recent decisions of the three judges exhibits clearly that the three judges who joined the district court opinion in *Roe v. Wade* were remarkably well aligned with one another. Each had issued recent opinions protecting the rights of minorities and/or the underprivileged; each had illustrated a willingness to use the Constitution to achieve progressive goals. In addition to their separate histories, they had already established the pattern of writing strong, liberal opinions together as a group. Such a trio would not likely have had much difficulty finding common ground and avoiding the threat of a split opinion. Instead, the group dynamics strongly favored the drafting of an opinion that addressed all the issues in the case and laid them out for the Supreme Court.

In contrast to the judges in *Roe*, the judges in *Landreth v. Hopkins* had considerably more conflict to negotiate. In *Landreth*, the panel decided that the plaintiffs lacked standing and so could not proceed to the merits of the abortion regulation challenge. The panel consisted of Paul Roney, a Nixon appointee to the Fifth Circuit Court of appeals, and district judges Arnow and Middlebrooks, appointed by Johnson and Nixon, respectively. Given the partisan division in appointing presidents, then, one can immediately suspect greater ideological conflict among
these three judges than among the Roe judges. Their judicial behavior around the time of the abortion decision confirms this.

Judge Roney’s most recent civil rights case involved an opinion concluding that black citizens who had been removed from the voter rolls because of pleading guilty to a crime had no constitutional claim on the basis of not having been informed of this consequence to their guilty pleas. Waddy v. Davis, 445 F.2d 1 (5th Cir. 1971). In addition, Judge Roney had recently authored an opinion ordering several unions to cease picketing employers. NLRB v. Lafayette Building and Construction Trades Council, 445 F.2d 495 (5th Cir. 1971). While neither of these decisions is remarkable, they suggest that Judge Roney’s ideological orientation likely comports with expectations given that he was a Nixon appointee; ideologically, he appears to be at least a moderate conservative.

Moving to Judge Arnow, we do not see the consistent progressive liberalism of the Johnson appointees who decided Roe; however, there is still evidence of a general liberal tendency. In Judge Arnow’s most recent civil rights case, he ruled against a caseworker for the Department of Health who argued he had been transferred and dismissed from employment due to race discrimination. London v. Florida Dept. of Health and Rehabilitative Services, 313 F. Supp. 591 (N.D. Fla., May 12, 1970). On the other hand, that same year Judge Arnow overturned a Social Security office denial of benefits on the basis that the plaintiff had provided evidence of serious mental health issues (including severe hypochondria) that would impair her ability to work. Kennedy v. Finch, 321 F. Supp. 303 (N.D. Fla., Mar. 27, 1970). Further, Judge Arnow’s opinion in Augustus v. School Board, 299 F. Supp. 1069, illustrates a firm commitment to school desegregation, saying: “The only desegregation plan that meets constitutional standards, is one that works.” He requires, by that decision, the school district to provide annual
tabulations of the racial populations of each school so that the success of the desegregation plan may be monitored. In a later case involving the school district, the judge enjoined the school from displaying the confederate flag and required it to change its mascot from “Rebels,” because of the racial connotations (361 F. Supp. 383 (N.D. Fla., July 24, 1973). Judge Arnow also ruled in favor of conscientious objectors in *U.S. v. Laird*, 327 F. Supp. 711 (N.D. Fla., Mar. 15, 1971). On balance, Judge Arnow is probably classifiable as reasonably liberal, conforming to the expectations due to his appointment by Johnson. However, his record is less consistent than all three of the judges from the *Roe* decision.

Finally, the evidence suggests that Judge Middlebrooks was probably a staunch conservative. He ruled in *Foxworth v. Wainwright* that there was no constitutional violation when a fourteen-year-old black defendant lacked his own counsel upon appeal, a conclusion overturned on appeal. Judge Middlebrooks also ruled that Florida State University was under no constitutional obligation to recognize the Young Socialist Alliance, another decision that was reversed on appeal. *Merkey v. Board of Regents*, 344 F. Supp. 1296 (N.D. Fla., July 11, 1972). Relatedly, Judge Middlebrooks refused to find that a university had acted improperly in expelling a student who taught a “class” called: “How to Make a Revolution in the USA”—essentially a student-led discussion group. In the opinion, Judge Middlebrooks writes: “It has become a time-tested rubric of the law that freedom of speech is not an absolute right.” *Center for Participant Education v. Marshall*, 337 F. Supp. 126 (N.D. Fla., Jan. 12, 1972).

This above discussion suggests that, while there is undoubtedly error in ascribing political conflict to judges on the basis purely of partisan appointment, nevertheless the rough measure does capture an increased likelihood of conflict. Hence, an initial prediction from the theory should be that mixed panels are more likely to engage in procedural avoidance.
7.3 Vertical Conflict in the Abortion Panels

Which lower court judges would have been incentivized to limit higher court access to the abortion issue? The answer, according to the theory, is that any judge who anticipated an outcome he or she disagreed with ought to try to prevent the issue from reaching the higher court. As noted above, decisions from a 3-judge trial court panel were directly appealable to the Supreme Court. As a result, the relevant ideology to consider in terms of strategic agenda control is that of the Supreme Court. Hence, in this section the goal is to consider how judges on the lower courts might have anticipated the high court to rule. Given that a particular issue is at stake, it is appropriate to imagine that the lower court judges were able to anticipate more finely how the Supreme Court might rule—rather than relying upon rough ideological signals. Nevertheless, let us begin by considering standard measures of the Supreme Court’s changing ideology in the relevant time period. In the early 1970s the general view is that the Court was steadily progressing to the right. Martin-Quinn measures of the median justice’s ideology score (conservative coded high) by year are summarized below in Table 7.2

<table>
<thead>
<tr>
<th>YEAR</th>
<th>MEDIAN JUSTICE</th>
<th>MEDIAN JUSTICE IDEOLOGY SCORE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1969</td>
<td>Black</td>
<td>-.08</td>
</tr>
<tr>
<td>1970</td>
<td>Harlan</td>
<td>0.07</td>
</tr>
<tr>
<td>1971</td>
<td>White</td>
<td>0.13</td>
</tr>
<tr>
<td>1972</td>
<td>White</td>
<td>.204</td>
</tr>
</tbody>
</table>
To think about the strategy of the district court judges, one must think of the composition of the Supreme Court at the time of the opinion as well as the anticipated movement of the Court. *Roe v. Wade*, for example, was issued June 17, 1970. At that time, the Court was made up of Justices Black, Blackmun, Brennan, Burger, Douglas, Harlan, Marshall, Stewart and White. As seen in Table 7.2, around the time of the district court’s decision in *Roe*, the Supreme Court median (probably Harlan) was hovering around a neutral ideological position. However, past voting patterns in previous cases would add to the district judges’ ability to forecast likely Supreme Court action in this issue area.

*Griswold v. Connecticut*, decided in 1965, was the most pertinent previous case. In *Griswold*, the Court had ruled that the rights listed in the Constitution included un-enumerated “penumbras,” such as the right to engage in birth control practices. In that case, Justice Harlan—the likely median in 1970—had concurred. In addition to his opinion in *Griswold*, Harlan had written previously in *Poe v. Ullman* that “the full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. … It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.”

A lower court judge would probably have predicted (wrongly) that all of those who voted in the majority in *Griswold* would be favorable to the right asserted in *Roe*; these judges were: Douglas, Brennan, Harlan, and White. Justice Black had dissented in *Griswold*. As had Justice Stewart. A lower court judge would probably have expected these judges to continue that position. (Note that, in actuality, White and Stewart switched sides in *Roe*.) Blackmun, Burger, and Marshall had not participated in *Griswold*. Justice Marshall was a fairly prominent liberal
justice, appointed by Lyndon Johnson in 1967. Justice Burger had not been on the bench for long (appointed in 1969 by Nixon), but he could be expected to be a strict-constructionist conservative based on his speeches and prior jurisprudence on the D.C. Circuit. Justice Blackmun had only just been elevated to the Supreme Court—literally days prior to the district court’s decision. A Nixon appointee and close friend of Justice Burger, he was expected to toe a fairly conservative line. With this line-up in 1970, probably the best prediction was a Supreme Court decision overturning the ban on abortion. The four votes from Griswold would be predicted to hold, and Justice Marshall likely could be expected to form the fifth vote to overturn the abortion regulation. Nevertheless, overall the Supreme Court’s ideological moderation might indicate a balanced approach, perhaps allowing some restrictions on abortion while not allowing others—indeed, the kind of approach that ultimately the Court took in Roe v. Wade.

Of course, adding uncertainty to the district judges’ calculus was the fact that the Court’s membership was in a state of flux at the time. Justices Black and Harlan were both ill by the latter half of 1971, retiring in September of that year. Justice Harlan, the key vote as predicted in 1970/1971, announced his retirement the day after Landreth (the last case noted in Table 7.1) was issued. District court judges likely foresaw these retirements though it is unlikely that anyone knew exactly when they would occur. Thus, any district court judge sitting in 1970/1971 could have anticipated movement of the Court toward the right in the near future but would not know precisely how soon that movement would occur.

All of this suggests that, on balance, the more conservative district judges likely would have understood that delays operated in their favor. The longer they waited, the more likely it was that the Court would have moved to the right enough that a conservative decision could be anticipated. Hence, conservative judges in 1970/1971 ought to have been motivated
ideologically to engage in strategic avoidance behavior. (Note that even though *Roe v. Wade* had been decided and appealed by mid-1971, the Supreme Court had not yet determined whether or not to reach the merits—having decided instead to postpone the decision about jurisdiction until hearing on the merits. 402 U.S. 941. Thus, the strategic situation holds throughout the time period under review.) On the other hand, more liberal, progressive judges should have favored sending the issue to the Supreme Court as quickly as possible—betting the issue could be decided before the composition changed against them. Given a Nixon presidency, they could only anticipate things getting worse in the future. Hence, the theory predicts that liberal-dominated panels would be more likely to reach the merits, while conservative-dominated panels would be more likely to avoid and hope for delay of the issue in reaching the Supreme Court. Note that, from above, the judges in *Roe v. Wade* and *Landreth v. Hopkins* fit this predicted pattern. The judges in *Roe* were committed progressives, whereas the judges in *Landreth* were substantially more conservative-leaning as seen both from their pattern of appointment characteristics and their prior judicial decisions.

### 7.4 Theoretical Predictions and Actual Behavior of the District Court Panels

Table 7.3 illustrates how the theoretical predictions (using very rough measures) match up to the actual behavior of the district court panels in the abortion decisions. Table 7.3 shows each case, along with predicted behavior according to both strands of the theory and actual behavior. The outcomes that are consistent with predictions from both strands of the theory are shown in the rows without shading. Outcomes predicted by one form of conflict, but not the other, have light shading. As can be seen, the theory does a fairly good job of predicting how the district court judges ruled on the procedural issues—a much better job, it should be noted, than
explanations based on differences in fact patterns, as discussed above in Section 7.1. Indeed, the theory only clearly mis-predicts one of the fourteen cases: Planned Parenthood v. Landreth. That case is discussed in more detail in the following section.

Table 7.3: Published Abortion Decisions in District Court in 1970/1971 with Predictions

<table>
<thead>
<tr>
<th>Case Cite</th>
<th>Prediction from Horizontal Conflict</th>
<th>Prediction from Vertical Conflict (Agenda Control)</th>
<th>Actual Behavior</th>
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<tbody>
<tr>
<td>------</td>
<td>------------------------------------------------------------</td>
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</tbody>
</table>

### 7.5 Consideration of the “Errors”

Looking at Table 7.3, it can be seen that only one case, *Planned Parenthood v. Nelson*, defies initial expectations from both strands of the theory. In contrast to theoretical expectations, in *Planned Parenthood v. Nelson*, a Kennedy appointee and two Johnson appointees ruled that plaintiffs lacked standing, had failed to exhaust remedies, and in any event abstention was appropriate. A better example of procedural avoidance behavior is hard to come by. Might this case suggest another important variable for consideration or is it best considered as an example of the problems inherent in using rough measures?
Planned Parenthood v. Nelson was issued from a panel made up of a Kennedy appointee and two Johnson appointees. The Kennedy appointee, James Browning, had been born and raised in Montana and had spent much of his career working in the Antitrust Division of the Department of Justice. Interestingly, he had received the “not qualified” rating from the American Bar Association and his appointment was opposed by Supreme Court Justice Felix Frankfurter, a prominent liberal appointed by FDR. He is primarily known for his advances in increasing the institutional efficiency of the Ninth Circuit. Unlike the Roe judges, Judge Browning did not have a strong, recent history of issuing progressive judicial opinions. Rather, the opinions he had authored in the last five years had primarily dealt with less controversial subjects: criminal matters, admiralty suits, tax liability issues, etc. Perhaps the best indication of his ideological orientation comes from an opinion issued in 1969, in which he opposed union rights to picket employers who have a contract with another union (Lane-Coos-Curry-Couglas v. NLRB, 415 F.2d 656 (9th Cir. 1969) or his 1969 opinion affirming the conviction of a man convicted of refusing to submit to induction into the military by claiming conscientious objector status (U.S. v. Weersing, 415 F.2d 130 9th Cir., Aug. 7 1969). While the evidence is somewhat sparse, the best conclusion is that Judge Browning was not an ardent left-winger; rather, he was likely a political moderate and perhaps even somewhat conservative. Judge Muecke, on the other hand, had just issued a judgment against a defendant for violating the Fair Labor Standards Act by withholding back wages (Schultz v. Crossman, 1970 U.S. Dist. LEXIS 12999, D. Ariz. Jan. 30, 1970) and had also acquitted a man under the conscientious objector rules (United States v. Fraser, 314 F. Supp. 1262, D. Ariz. June 12, 1970). Finally, Judge Copple had an even clearer  


This suggests that although the three men were appointed by presidents of similar ideological orientation, there was more conflict present in this panel than in the panel that issued *Roe v. Wade*. Indeed, the actual level of conflict present may have been closer to that present in the *Landreth v. Hopkins* panel. Dovetailing with this finding is the fact that the panel was less consistently progressive than the panel in *Roe*, perhaps suggesting a set of judges that might have, ultimately, preferred the abortion bans to be upheld. Overall, analysis of the decision in *Planned Parenthood v. Nelson* indicates the limits of the rough measures used more than any fundamental flaw in the theory.

Four cases were predicted by only one of the two strands of the theory. (One case has no clear outcome as it is unclear what the district court ultimately did, if anything, to resolve the case.) Of course, given that both forces are proposed as operational, none of these results is inconsistent with the theory. One would, indeed, expect that at times one consideration would dominate while at other times another would. Of the four cases where predicted behavior differed between accounts based on horizontal and vertical conflict, three of the outcomes followed expectations from a vertical conflict analysis while the fourth followed expectations from horizontal conflict. This may indicate that, at least in opinions of intense policy importance such as abortion, strategic agenda control concerns may dominate. This is reasonable, in particular when an ideologically unified group decides nevertheless to terminate a case.
procedurally, as occurred in *Major v. Ferdon*. That group of conservative judges might have predicted the ultimate outcome and decided not to present it immediately to the Supreme Court. The strategic calculation, in such a situation, would trump the fact that the judges could have easily come to agreement on the substantive question. The judges in *Major v. Ferdon* could easily have calculated that they had more to gain by trying to delay Supreme Court resolution of the issue than they did by expressing their immediate opinion on the matter; this is particularly so given that, even in these 3-judge panels district courts lack the power to make law, as discussed extensively in the foregoing pages. Hence, one might expect vertical conflict to always outweigh the lack of collegial conflict.

Two other cases, facially at least, are predicted by the vertical strand of the theory but not the horizontal strand: *Doe v. Scott* and *Steinberg v. Brown*. In these cases, mixed panels dominated by Democrat appointees issued merits opinions. Further consideration of these cases illustrates the limitations of the rough measures and additional complexity that might need to be considered to fully predict avoidance behavior. In particular, it is worth noting that both decisions contain dissents. In fact, only one other decision out of the fourteen considered (*Doe v. Randall*, discussed below) contains a full dissent or concurrence. This might be seen as further support for the theory that horizontal conflict leads to a choice between split opinions and avoidance behavior. When a split opinion is chosen, one should no longer expect the theory to hold as well. Further analysis of the preferences stated in the opinions themselves illustrates the limits of trying to predict behavior using appointment measures, especially in cases that contain a dissent, which may additionally throw off vertical strategic considerations.

*Doe v. Scott* is the easier to analyze. In *Doe v. Scott*, an FDR appointee and an Eisenhower appointee join together to strike down an abortion ban, while an FDR appointee
issues a dissent. The majority opinion is a strong substantive opinion in favor of striking abortion regulation, while the dissent argues first that there is no standing and then addresses the substantive arguments made in the majority. This can be seen as an example of a situation where being appointed by presidents of the same party does not translate into ideological unity. Clearly there was significant difference of opinion among these three judges about abortion regulation. That much can be seen from the opinions themselves. The majority in this case is not incentivized to compromise with the dissent by engaging in procedural avoidance because they likely predict that the Supreme Court will agree with them. This case, then, seems to be a good example of when vertical strategic concerns will outweigh problems due to conflict. The strand in the dissent about standing is probably indicative of a failed attempt by Judge Campbell to get the others to agree to dismiss the case on procedural grounds—his preferred option based both on horizontal and vertical conflict considerations. Here, the majority chose not to compromise and avoid a dissent, but instead engaged with the substance. This case might also, then, be seen as evidence that only two judges are important from a compromise perspective.

Steinberg v. Brown is more complex and is, in its way, the strongest counter-example to the theory posed here. In Steinberg v. Brown, Judge Weick (an Eisenhower appointee) joins with Judge Young (a Johnson appointee) to reach the merits of the case and uphold an abortion ban, while Judge Green (a JFK appointee) writes a dissent. The majority opinion soundly addresses the legal arguments and concludes that the right to privacy cannot apply where a fetal life is at stake—contrasting this situation with the Griswold outcome, which only involved the decisions of two competent adults. The opinion goes on to deride the plaintiffs for trying to make arguments about why a fetus is not a life, asserting that it was clear, biologically, that life begins at conception. This was certainly not a marginally substantive opinion: rather, Judge Young and
Judge Weick clearly joined together in making a very broad policy statement, with which Judge Green vigorously dissented.

From his recent decisions, Judge Weick appears best classifiable as an ideological moderate leaning rightward. In *Bright v. Nunn*, 448 F.2d 245 (6th Cir. 1971), he affirmed a district court decision dismissing a First Amendment challenge to university and state-imposed curfews and other limitations in response to violent student protests of the Vietnam War. The prior year, he wrote the *en banc* opinion in *Dewey v. Reynolds*, 429 F.2d 324 (6th Cir. 1970) finding that an employer need not necessarily accommodate religious beliefs and practices under the Civil Rights Act, ruling against an employee who refused to find replacements for his Sunday shifts. In *U.S. v. McKinney*, 427 F.2d 449 (6th Cir. 1970) he authored an opinion affirming a district judge’s finding that a soldier had not raised his conscientious objector status, but the court remanded to the district court for reconsideration of a sentence that the appellate judges found excessive—though they had not been asked to reconsider the sentence by the parties. Judge Young, the Johnson appointee who wrote the substantive abortion opinion joined by Judge Weick, also appears to have a tendency to steer a middle course, though with a more leftward tilt. In a contemporaneous case to *Steinberg*, he had ruled that General Motors had violated Title VII by following Ohio state laws requiring seats to be provided for female employees to rest when not actively working and forbidding women to do jobs requiring lifting more than 25 pounds or working more than 48 hours per week, 8 hours per day. Accordingly, Young voided the Ohio laws due to their conflict with Title VII, but also found that GM owed no damages because its behavior was a good faith attempt to comply with the law. *Manning v. General Motors*, 1971 U.S. Dist. LEXIS 12108 (N.D. Ohio, Aug. 10, 1971). Further, in *Gray v. Toledo*, he ruled that a law limiting political activities of police officers could be read narrowly to only prohibit partisan
activity; so long as the law was interpreted in this manner, Judge Young found it unproblematic from a constitutional perspective. However, portions of the law were unconstitutionally overbroad to the extent that they limited political discussion not directed towards party success. 323 F. Sup. 1281 (N.D. Ohio, Mar. 10, 1971). Both of these decisions appear to reflect a desire to come to middle-ground solutions, similar in nature to Judge Weick’s opinion affirming the conviction of the soldier but suggesting that nevertheless the sentence was too harsh. Indeed, as an Eisenhower appointee, Judge Weick’s JCS score (available because he is an appellate judge, not a district judge), is a fairly moderate 0.218. Hence, the majority opinion may not have required the judges to span too much conflict. On the other hand, Judge Green appears to have been more of an ideologue. Just the month before Steinberg, he refused to dismiss a First Amendment case for abstention reasons, concluding in King v. Jones, 319 F. Supp. 653 (N.D. Ohio, Nov. 3, 1970), that witnesses testifying before a Grand Jury about the Kent State riots could not be required to maintain the secrecy of the proceedings, a decision vacated on appeal.

The take-home from consideration of this case might be to suggest that a “minimum-ideological-distance” measure might be more appropriate rather than one that includes all three judges. As noted in the prior chapters, it only takes two judges to form a majority in a panel of three. However, as noted repeatedly in earlier chapters, there is no difference in the results from the quantitative models depending upon how collegial conflict is captured.

However, the opinion in Steinberg raises another set of questions. The opinion itself is in this case probably the best measure of each judge’s attitudes toward abortion regulation specifically. (Note that this measure is not always reliable, and is unavailable in the cases in which judges avoid the merits.) Yet, the opinion is not a “middle-of-the-road” opinion. Judge Weick and Judge Young wrote a strong, substantive opinion. One might wonder why they
would write such an opinion if, strategically, they could anticipate Supreme Court reversal. There are many possible explanations for this behavior. One might be that their prediction of the Supreme Court’s behavior might have been different from my own analysis. Another might be that these two judges are simply not themselves terribly strategic. The theory of strategic agenda-setting need not apply to every judicial decision in order to be, on average, correct.

One last possibility bears mentioning, however. This is the possibility that the theory does not apply in cases with a dissent. Whenever there is a great deal of conflict, and, for whatever reason the judges elect not to engage in procedural avoidance, this might interfere with strategic calculations. This is so because the dissenting judge will be incentivized to write a substantive opinion whenever he or she is the one who believes the Supreme Court will rule his way. In Steinberg, Judge Green may have “forced the hand” of Judge Weick and Judge Young. If Judge Green indicated his intention of drafting a substantive dissent, the substance of the dispute would be available to the Supreme Court regardless of what Weick and Young did. In that situation, then, they would be better off at least penning their own opinions. This speculation about Steinberg illustrates how the final decision to issue a substantive or procedural opinion may be the result of fine-tuned dynamics in a group. It also suggests one reason why strategic judges might take into account the preferences of a lone judge; he or she has the power to affect the scope of issues presented in the case even while acting alone. Overall, the presence of a dissent greatly complicates the analysis with respect to vertical agenda setting strategies. In general, of course, that complication is not present in the modern world of district courts—where almost all decisions are rendered by a single judge. However, this may contribute to an ultimate explanation of the unexpected finding with regard to the role of vertical conflict in appellate decisions to reach the merits.
7.6 Effects on the Agenda and the Development of Substantive Law

By focusing in on a particular set of cases, it is easier to consider how procedural avoidance behavior can have important effects for the development of both law and policy. First consider how procedural avoidance behavior affects the appellate agenda. In Chapter 6, I showed that appellate courts are unlikely to reach the merits of a dispute when the district court has not done so. Considering the district court abortion cases, another mechanism is revealed for effects on the appellate agenda. Refer back to Table 7.1. Five of the fourteen cases resulted in an opinion grounded in procedural, rather than substantive, law. Among those five cases, four of them were not appealed, and the fifth was affirmed without opinion. In contrast, among the eight substantive rulings (one case had neither a procedural termination nor a substantive ruling), seven were appealed. Two of those (Roe v. Wade and Doe v. Bolton) resulted in the landmark Supreme Court opinion that continues to shape American politics and judicial appointments.

Litigants interested in effecting social change through the courts apparently prefer to not expend further resources on a case once a lower court has found a procedural flaw in the case. This is yet another way in which the lower courts can count on having an effect on appellate policy agendas. Of course, the two mechanisms may be related to one another. It is possible that the litigants did not appeal because they were aware of the likelihood that the Supreme Court would not address the merits of a case in which the only issue reached below was procedural. Nevertheless, the abortion cases reaffirm that procedural rulings in the lower court affect the set of cases available for appellate policy decisions.

How might this have affected the content of abortion law? Of course, this analysis must be highly speculative given that we cannot know what would have happened had the events gone
differently. However, let us consider the fourteen abortion cases and ask whether any real difference might have occurred had the district judges made different choices about whether or not to address the merits, leading to different cases available to the Supreme Court for decision.

The Texas statute struck down in *Roe v. Wade* is a broad ban forbidding anyone to provide abortion services to a woman, and making it a criminal offense punishable by 2-5 years in prison if one did so. The law did, however, contain an exception to save the life of the mother. See *Roe v. Wade*, 410 U.S. 113. The Court found the breadth and clarity of the challenged statute relevant to its decision. The opinion points out that the law makes no distinction between timing of abortions and that abortion is permitted only for a single reason: to save the life of the mother. Because of this, the Court does not consider whether the statute is too vague to survive constitutional scrutiny. The Court’s abortion policy was further clarified in the companion case, *Doe v. Bolton*. That case challenged a Georgia law that forbade abortion except when a physician believed “in his best clinical judgment” it would endanger a woman’s life or “seriously and permanency injure her health,” when the fetus would likely be born with a “grave, permanent and irremediable” mental of physical defect, or in the case of rape. Further, the law had procedural requirements for obtaining an abortion. The Court upheld the limitation that a physician must determine, using his best judgment, that the abortion was necessary for the woman’s health (though interpreted this to apply broadly to her psychological health). The Court used this decision, then, to clarify that a woman’s right to abortion was not absolute. In doing so, the Court noted that requiring physicians to make professional judgments that an abortion is necessary for the health of the mother “operates for the benefit, not the disadvantage, of pregnant women.” However, the Court ruled that the state could not require all abortions to be performed in hospitals or for separate committee approval prior to an abortion or limit
abortion services to residents of the state. The ruling in *Doe v. Bolton*, then, served an important role in fleshing out the *Roe v. Wade* decision, and illustrating the limits and scope of the right to abortion.

The Supreme Court made use of the fact that it had before it two different types of abortion statutes in order to issue a full abortion policy statement. The details of the statute challenged affect the Court’s ability to speak to an issue. Although many of the state laws looked like the Texas statute, effectively banning all abortions except to save the woman’s life, the Georgia statute addressed in *Doe* allowed the Court to provide additional details. In order to provide a full statement of its abortion policy, the Court would have had a more limited number of cases from which to choose. Consider what might have happened if the Court had instead taken *Corkey v. Edwards*, the challenge to the North Carolina statute. That statute provided that abortion was lawful in the event that the pregnancy would “gravely impair the health” of the woman, there was substantial risk that the child would be born with “grave physical or mental defect,” or the pregnancy resulted from rape or incest (*provided the rape was reported within a week of its occurrence*). Further, the statute required parental consent for minors/incompetents. In addition, the abortion had to be performed in a hospital and required three doctors to examine the woman and certify in writing the justification for the abortion. Although the statute is similar in complexity to the Georgia statute, it is not clear how the Court might have been affected by the subtle changes in wording. Might the Court have struck down the requirement that a rape have been reported? Would it have ruled that the requirement of consent was unconstitutional? On the other hand, what if the lower court had reached the merits in *Landreth v. Hopkins*, making this case available to the high Court? That case addressed a Florida statute that forbade all abortions without exception and additionally forbade any advertisement, advice, notices (e.g.,
in the newspaper), directed toward helping a woman obtain an abortion. This statute, then, would have implicated the First Amendment in addition to the Fourteenth. While it seems likely that the interest groups desirous of overturning abortion law were active enough in the early 1970s such that eventually a suit would decided on the merits by the Supreme Court, nevertheless it is also apparent that cases are not always perfectly fungible. The final contours of the Supreme Court’s abortion policy were no doubt influenced by which cases it used as vehicles to deliver its policy.
Chapter 8

Normative Conclusions, Future Work and A Prediction About the Gay Marriage Case

8.1 Normative Conclusions

At the outset of this thesis, I identified two normative strands of concern when thinking about judicial avoidance behavior. The first, and primary, strand related to the judicial agenda. When and how do issues reach resolution in the American court system? This normative strand relates both to the appearance of judicial modesty as well as, at least potentially, effects on ultimate outcomes. Consider, for example, the possibility that the district courts had delayed resolution of the abortion issue for a few additional years, as discussed above in Chapter 7. I have argued throughout the foregoing chapters that judges avoid reaching the merits of politically charged issues when faced with ideological conflict within the judiciary. Hence, lower court judges strategically limit the political agenda of hostile appellate courts by avoiding issues in lawsuits. This affects the judicial agenda of the appellate court both because appellate courts tend to give district courts “first stab” at issues as well as because it appears to be the case that litigants are less likely to appeal a procedural outcome than a substantive outcome. Further, appellate panels reach compromise positions that involve avoidance of issues in the face of too much conflict among the judges on an appellate panel. In short, then, the evidence suggests that a politically diverse judiciary will resolve fewer issues than a politically homogenous judiciary.

Where does this leave us from a normative perspective? It seems clear to the author that those opposed to judicial “minimalism” have the better argument. The federal judiciary is a vital part of the functioning of American democracy. While some might argue that democratic deliberation is furthered by judges avoiding issues, it is hard to see as a practical matter how that
can be so. Those picked to be federal judges generally have a long and significant experience with the law. They have thought carefully about normative issues. Why should their voices not be heard on the most salient issues of our times? Judges, in writing opinions, have a rare opportunity to explain their view of a policy issue in light of a specific set of concrete facts. Surely democratic deliberation is furthered, not hindered, by encouraging them to engage fully with the debate. To those who would retort that we should not take decisions away from the democratically-accountable branches of government, I would reply that those branches nearly always have the power to change a judicial outcome if desired (see, e.g., Dahl 1957; Eskridge 1991). As is well-known, the judiciary lacks both purse and sword. What they do have is the power of reasoned argument. To favor judicial minimalism is to try to deny them even that tool and to prevent what is likely a well thought-out opinion from being heard. In sum, I would argue that democratic deliberation is never furthered by encouraging judges to evade hard issues. Surely it is better to live in a world where such issues are addressed directly in the reasoning of the opinion rather than being shrouded in the mystery of technical, and likely artificial, justifications of outcomes.

Of course, many would disagree with my normative conclusion. Eminent legal scholars like Cass Sunstein (e.g., Sunstein 1996, 1999) have argued that judicial minimalism is a core component of legitimacy and rule of law. He has argued (along with many others—e.g., Bickel in 1962) that the judiciary should, to the extent possible, leave issues to the political realm—those branches of government that are elected by the people. The argument is certainly appealing. At first blush, it seems eminently reasonable to ask judges to steer clear of any “hard” issues, leaving the other branches of government more free to make substantive policy while the
judiciary instead decides cases in narrow, technical ways. After all, the judiciary is unelected so they should make as little policy as possible.

While this idea of judicial evasion furthering democratic goals is currently in vogue, the argument rests upon the assumption that the judiciary reigns supreme in American democracy, that the elected branches lack power to resist an unfavorable court decision. However, the other branches of government are by no means powerless; indeed, it seems clear that both the executive branch (and the vast administrative state) and the legislative branch have more absolute policy power (by any measure) than the courts. Further, it should be remembered that engaging in procedural avoidance behavior still leads to judicial outcomes—winners and losers in court. In this limited sense, judicial minimalism is an impossible goal—all cases must be decided on one ground or another. I am simply arguing for the reasoning to be less opaque, more direct. Decisions rooted in procedural avoidance likely increase the overall complexity of the procedural law and effectively increase the judiciary’s power to reach whatever outcome they might desire in a future case. To the extent this is so, it countervails any goal of rule of law. Justice Scalia refers to this as the courts’ “never say never” approach and notes: “Whatever the virtues of judicial minimalism, it cannot justify judicial incoherence.” *NASA v. Nelson* (562 U.S. __ 2011) (Scalia concurring).

While some might argue that judicial engagement with policy issues might damage the courts’ legitimacy (which is known to be strong and remarkably robust), the evidence does not

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42 Justice Scalia points this out in his recent concurring opinion in *NASA v. Nelson* (562 U.S. __ 2011), suggesting that substituting one real constitutional question for a hypothetical one in the guise of minimalism is not minimalism at all.

43 E.g., Gibson, Caldeira and Baird (1998); Gibson (2007).
support that justification for judicial minimalism. Indeed, Gibson (2008) recently published excellent experimental evidence indicating that state supreme court justices are not perceived any worse by the public when they address political issues in their campaigns, suggesting that the public is not bothered by the idea that judges engage in policy issues and are affected by their personal values. Indeed, Gibson, Caldeira and Spence (2003) suggest that it is possible that the decision in Bush v. Gore certainly did not harm legitimacy and may have even enhanced it. Gibson and Caldeira (2009) have also recently presented survey evidence suggesting that the American public does not believe, in any event, in the “myth of legalism”—or at least the idea that personal values play no role in judicial decision making.44 However, this does not cause the public to hold the Court in low esteem. Rather, Gibson and Caldeira argue that the public is not simple-minded. People are capable of understanding that the courts make value-laden decisions but simultaneously believing that such decisions are principled, or at least that the decisions are not self-serving. In other words, people are comfortable with the courts engaging with policy so long as the engagement is sincere and not for personal gain. All of this evidence suggests that legitimacy would not be hurt by judges openly addressing policy issues in their opinions. Rather, to the contrary, the public would likely rather see open engagement with the issues than believe that value motivations are occurring but being hidden.

While one might debate the normative value of judicial modesty (making the normative thrust of this work unclear), there is a side effect of procedural avoidance behavior that is, I

44 But see Baird and Gangl (2006) (finding that college students persisted in believing judicial decisions were made in a principled manner even when told about ideological influences; however, they also found that perceptions of political decision making did not detract from perceptions of fairness—though perceptions of legalism did increase perceptions of fairness).
think, uncontroversially negative. That is the effect on procedural law. The effect on procedural law must be to make the decisions appear arbitrary and unprincipled—reflecting the inherent normative tension present in any discussion of judicial “minimalism.” This is the second normative concern I addressed in the introduction to this work. While I dismissed it at the outset as incidental, as opposed to a driving force that explains this behavior, it is worth considering a bit here at the end what this secondary effect looks like.

To get a sense of the potential scope of this incidental effect on the law of procedure, consider the scholarly writing on the doctrine of standing, one of the procedural doctrines I posit that judges use to avoid reaching the merits of a dispute. There is general consensus among academics who study this type of law that the law of standing is a mess. One law review article accuses the courts of applying standing rules “in a fashion that is not only erratic, but also eminently frustrating in view of the supposedly threshold nature of the standing inquiry.” (Nichol 1984). He goes on to talk about the “vagaries” and “schizophrenic” application of the law of standing, resulting in the fact “that the foundation of standing law is essentially incomprehensible.” More recently, law professor James Pfander wrote of the area: “no one can pretend to offer a simple account of so vexing a corner of the jurisdictional world.” (Pfander 2009). Similarly, the law of exhaustion of remedies, another procedural tool I posit is used by judges interested in avoiding the merits of disputes, has been criticized as being “complex and confusing,” leading to “indeterminate outcomes.” (Gelpe 1985; Funk 2000).

The work presented in the foregoing chapters suggests an explanation for the apparent incoherence of the procedural rules. If one understands that the application of these rules relates to a broader strategic game, it is easy to see why the evolution of the law would be dissatisfying to those interested in making sense of judicial decisions. It seems likely that the application of
these rules would seem even more arbitrary than substantive decisions of the federal courts, which often track a straightforward ideological orientation (e.g., Segal and Spaeth 2002). To the extent that judicial decisions can be identified as directly ideological, they do not appear arbitrary or incoherent—just political. Procedural decisions, on the other hand, appear to be not as directly predictable based on the deciding judge’s ideological preferences. Rather, one must know that judge’s preferences in combination with other judges’ preferences in order to predict a procedural termination. This makes it harder to parse what is going on and makes procedural decisions seem particularly confusing to those who try to make sense of the law.

One contribution of this work is, then, to pose an explanation for why it is that procedural doctrines are almost invariably criticized as confusing and arbitrary. A naïve expectation, after all, would be just the opposite. We would likely expect procedural law to be far clearer and more rule-bound than substantive law since it would seem to engage our ideological conflicts less. However, the naïve expectation is exactly wrong. Procedural law, precisely because it does not engage our ideological conflicts, provides a useful strategic tool in the judiciary. The result is that the content of this type of law ends up being even less clear and understandable than the substantive law.

In closing this work, then, I would argue in contrast to the arguments in favor of minimalism that the normative force of this work should be to encourage the judiciary to limit its use of these tools in favor of more direct and open engagement with the political conflict they address in their opinions. To the extent that these procedural doctrines are used as tools of conflict avoidance and are applied dependent upon the characteristics of the court, rather than the characteristics of the case, they do not further rule of law but rather its opposite: veiled discretion. It is only when political conflict in the courts is openly acknowledged that the
American public can fully understand the role the court system plays in balancing rights and power in our society and engage meaningfully in the judicial appointment process.

8.2 Ideas for Future Work

There are many questions for future work suggested by this thesis. One question that this thesis leaves unanswered is the role of litigants. By constraining decisions to those that contain a threshold issue, I limit the analysis to what judges do when presented with a choice of grounds for the decision by the litigants. However, a fruitful line of future work might consider why it is that litigants raise these issues or fail to raise them. It may be the case that all high-quality lawyers raise procedural issues whenever possible (this is, indeed, my suspicion). However, there may also be a strategic component to the decision if, for example, a lawyer has a client who is interested in the development of the law rather than obtaining a particular outcome.

Another question of interest might be to consider how the structure of the law itself feeds back into the strategic judicial game. Thus, we might wonder if the appellate courts are empowered to take the discretionary element out of the procedural rules and limit lower court abilities to affect their agenda. In other words, could the appellate court affect the use of procedural strategizing by changing the content of the law of procedure to make it more rule-bound? (Of course, by doing so, they would also have to give up an important compromise tool that helps them limit their workloads!)

Finally, I have focused exclusively here on the lower federal courts. Nevertheless, the Supreme Court is also to blame for the incoherent state of procedural law. The work discussed in Chapter 2 by Maeve Carey (2010) might suggest that the Supreme Court uses procedure strategically just like the lower courts do—possibly explaining their failure to make coherent rules. However, as noted above, her findings are only supportive indirectly of her theory of
strategic conflict avoidance with Congress. It would be worth exploring the Supreme Court’s role in procedural decisions in more detail.

Another avenue of future work takes us back to the central normative concern with judicial minimalism and away from the incidental effects on the law of procedure. As noted above, judicial minimalism need not manifest in procedural decisions. Rather, issue suppression of any sort might be a type of judicial minimalism. In particular, future work might consider whether the trends observed here with respect to this extreme form of issue suppression also manifest when one considers choices judges make between two substantive issues. While it would undoubtedly be more difficult to measure and code for minimalism in the decision between two substantive issues, the work presented here suggests that it might be possible to in general observe judges rendering broader, more “important” substantive decisions when not faced with political conflict from above or within.

8.3 A Prediction for a Current Case: What Will the Ninth Circuit Do With Prop. 8?

While it is likely never possible to predict what a particular panel will do with a particular case, it is nearly impossible to end this thesis without commenting at least briefly on what the theory predicts for one case in particular. Perhaps the most salient issue before the U.S. courts as I write the closing paragraphs of this thesis is the issue of gay marriage. The opinion by district court judge Vaughan Walker was issued several months back and the appellate panel has been selected to hear the appeal. Judge Walker held a full trial on the question of homosexuality and concluded it was unconstitutional to ban gay marriage (striking down Prop. 8) after finding, among other things, that homosexuality is not a choice and that children of gay parents do not
fare worse than other children. On appeal, the Ninth Circuit has a choice between a procedural resolution and one that embraces the substantive issues Judge Walker addressed. The procedural issue on appeal is one of standing to appeal. The question arises because the defendants in the case, Governor Arnold Schwarzenegger and Attorney General Jerry Brown, declined to defend the case at trial—as both parties were not in favor of Proposition 8. An interest group, ProtectMarriage, stepped in to run the defense of Proposition 8 at trial. Schwarzenegger and Brown have declined to appeal Judge Walker’s decision but ProtectMarriage has filed an appeal.

So, what do I predict will happen in the Ninth Circuit? Consider the appellate court panel. The appeal has been assigned to Stephen Reinhardt, a well-known far-left California judge who was appointed by President Carter, N. Randy Smith, a conservative appointed by President George W. Bush from Idaho, and Judge Michael Hawkins, a moderate Clinton appointee from Arizona. I think it is safe to say that there is a good deal of ideological conflict present on this panel. Thus, the work on collegial conflict would predict a procedural resolution—a decision holding that ProtectMarriage lacks standing to appeal. Interestingly, this procedural decision would not result in a conservative outcome because the procedural resolution would block the appeal, not the suit, and so would also comport with the majority’s (likely) outcome preferences. Of course, this case may be salient enough that a dissent cannot be avoided and so collegial concerns may not be most relevant.

Instead, the vertical considerations are likely to dominate in this setting given that the case is extremely salient and all eyes are on the Supreme Court. The work in the foregoing chapters found that in run-of-the-mill appellate cases, appellate courts do not follow the same type of agenda-setting logic as district court judges—and, indeed, they may be more likely to reach issues when there is a hostile Supreme Court. However, this case is one where I would
expect the agenda setting strategy to more closely approximate what happens in district courts. The decision, should the substantive issues be reached, has a very high likelihood of reaching the Supreme Court. This will not be lost on the Ninth Circuit panel. Given that fact, they are likely to engage in the sort of agenda-limiting behavior used by the district court judge. The Supreme Court is still an ideologically conservative institution, with Kennedy as the median justice, suggesting now is not the time for a pro-gay marriage ruling. Hence, the vertical conflict theory also suggests that the Ninth Circuit panel will likely sidestep the issue and rule that the parties lack standing to appeal rather than reach the merits of the case.

Hence, I predict a procedural ruling from the Ninth Circuit panel. However, that analysis assumes Judge Michael Hawkins has preferences in support of gay marriage. In the Ninth Circuit’s most recent *en banc* hearing that related to gay rights (a challenge to a city resolution urging the Catholic church to amend anti-gay policies) Judge Hawkins joined a decision finding that the plaintiffs lacked standing. *Catholic League for Religious and Civil Rights v. City of San Francisco*, 2009 U.S. App. LEXIS 29285 (Dec. 16, 2009). In a nearly-identical case that came before the Ninth Circuit in late 2001, however, Judge Hawkins penned the decision that supported San Francisco’s right to express its condemnation of religious anti-gay sentiments. *American Family Association v. San Francisco*, 277 F.3d 1114 (9th Cir. 2002). It seems reasonable to conclude from this that Judge Hawkins’ preferences align with the liberal pro-gay rights stance. So, the strategic thing for Hawkins and Reinhardt to do is probably to terminate the appeal procedurally, hoping to prevent (or at least delay) Supreme Court action on the case.

The gay marriage issue, like the abortion cases discussed in the last chapter, highlights the importance of judicial decisions about what types of decisions to write. A procedural resolution of the Prop. 8 case leaves the world in uncertainty about the unconstitutionality of gay
marriage. The district court’s decision would stand, leaving California without the law. However, with no appellate ruling on the topic there would still be no federal precedent speaking to the constitutionality of similar state laws so the effect of Judge Walker’s decision would be minimized. I have argued in this Conclusion, however, that while the Ninth Circuit is predicted to issue a procedural opinion, normatively speaking it would be better if they would issue a substantive opinion. While that might not lead to the preferred policy outcome, it would serve the purpose of adding to the scope of democratic deliberation and open discussion of important issues. Further, it would prevent the use of procedural law for political goals, a use that increases procedural uncertainty and incoherence in the application of the rules. A Supreme Court ruling that allowed bans on gay marriage would certainly not prevent states from allowing gay marriage and, indeed, the increased attention to the issue might catalyze more democratic movement in that direction—movement that does not rely upon the courts for implementation.
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