

8-1-2022

Measuring Judicial Collegiality Through Dissent

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Buffalo Law Review

VOLUME 70

AUGUST 2022

NUMBER 4

Measuring Judicial Collegiality Through Dissent

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While scholars frequently offer ideology as a primary explanation for judicial behavior, judges, and some scholars, emphasize the importance of collegiality on multimember courts. But there is disagreement over how to determine when collegiality is at work, and what type of multimember court is more likely to exhibit collegiality among its judges. Resolving these competing claims calls for a valid measure of collegiality.

This Article develops novel measures of collegiality based on dissenting judges' expressions of collegiality towards judges in the majority. It uses judge-level and court-level databases to validate these measures by showing that the

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novel measures correlate with some, but not other, measures of dissent aversion—a feature of multimember courts that commentators see as aligned with collegiality.

The Article then investigates empirically settings where judges tend to act collegially and the characteristics of courts that tend to be collegial. Analysis reveals that collegiality is not associated with ideological homogeneity and is more likely to be found in published opinions; that the Supreme Court is more collegial than are the courts of appeals; and that collegiality is less likely to be found on courts with large complements of judges, and on courts with chambers spread across more courthouses.

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INTRODUCTION

The dominant view among legal scholars is that ideology drives judicial decision-making.¹ Political scientists, too, have found evidence that ideology plays an important role in how judges decide cases.² Scholars in both fields have found that the ideological makeup of multi-judge panels often affects the outcomes of cases.

Yet another school of thought—advanced perhaps most prominently by Judge Harry Edwards, now a Senior Judge on the United States Court of Appeals for the District of Columbia Circuit and a former chief judge of that court—argues that this scholarship ignores the important role that judicial collegiality plays in judicial decision-making.³ Along with Professor Michael Livermore, Judge Edwards has more recently upped the ante in the debate, arguing that empirical studies of judicial decision-making ignore the influence of collegiality on the behavior of judges.⁴ Judge Edwards

1. See, e.g., FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 27–29 (2007) (criminal justice); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 319–21, 324–25 (2004) (employment discrimination); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 842 (2008) (administrative law); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717–19 (1997) (environmental law); Sunstein et al., *supra*, at 322–23 (same); Banks Miller & Brett Curry, *Expertise, Experience, and Ideology on Specialized Courts: The Case of the Court of Appeals for the Federal Circuit*, 43 LAW & SOC'Y REV. 839, 855–57 (2009) (finding evidence of ideological voting in patent cases at the Federal Circuit).

2. The view is most closely associated with Professors Jeffrey Segal and Harold Spaeth. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 6 (2002); *infra* notes 21–22 and accompanying text.

3. See Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1335 (1998) [hereinafter Edwards, *Collegiality and Decision Making*]; Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003) [hereinafter Edwards, *Effects of Collegiality*].

4. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58

asserts that collegial judges “are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.”⁵ Along similar lines, the late Judge Frank Coffin, formerly of the United States Court of Appeals for the First Circuit, describes collegial judges as having “respect for the strengths of others,” and the common goal of “excellence in the court’s decision.”⁶ Former Tenth Circuit Judge Deanell Reece Tacha asserts that “judicial collegiality enhances the quality of appellate decisionmaking.”⁷ She similarly describes “collegiality on an appellate court” as “knowing my fellow judges so well, and respecting their intellects and work patterns so much, that I am willing to listen and consider carefully their perspectives on each legal issue that we confront.”⁸ Tenth Circuit Judge Michael Murphy explains that “a collegial court better manifests the bedrock principle upon which appellate courts rest: multiple minds are better than one.”⁹ Fourth Circuit Judge Pamela Harris describes judicial collegiality as “knowing each other, really respecting each other and knowing each other’s views, being willing to be persuaded and also to persuade; to be part of a robust, deliberative process.”¹⁰ And Professor Stephen Wasby mines interviews with judges who have sat on the Ninth Circuit to conclude that “a collegial court is a ‘cohesive,’ ‘friendly,’ ‘warm group’ of people, . . . one in which the judges have ‘mutual respect’ and ‘understanding’ for each other and

DUKE L.J. 1895, 1917–18 (2009).

5. Edwards, *Effects of Collegiality*, *supra* note 3, at 1645.

6. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 215 (1994).

7. Deanell Reece Tacha, *The “C” Word: On Collegiality*, 56 OHIO ST. L.J. 585, 586 (1995).

8. *Id.* at 587.

9. Michael R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 456 (2000).

10. Maura Levine, *Inside the Fourth Circuit Court of Appeals: How Collegiality Works*, UNIV. OF CHI. L. SCH. (May 19, 2016), <https://www.law.uchicago.edu/news/inside-fourth-circuit-court-appeals-how-collegiality-works> (describing talk by Fourth Circuit Judge Pamela Harris).

maintain friendship across ideological lines.”¹¹

The divide over collegiality extends to debate over which courts (or types of courts) are likely to be more collegial. Professors Frank Cross and Emerson Tiller argue that features of the Supreme Court make it more likely to function collegially than the courts of appeals: The Justices of the Supreme Court sit together on virtually all cases; they collectively select the cases they hear; and the impulse to act individually is mitigated by “the need to act collectively in order to be effective.”¹² In contrast, Judge Edwards argues in a working paper that features of the courts of appeals make *those courts* more likely to function collegially than the Supreme Court. He notes that, as compared to the courts of appeals, the Supreme Court hears far fewer cases; hears more complex and contested cases; publishes all its decisions; can decline to hear some cases; and issues many cases with multiple Justices weighing in with separate opinions.¹³

In order to resolve these competing claims over the role and importance of judicial collegiality—and also to resolve competing claims as to which courts are more collegial—one must have a valid way to measure the phenomenon. But the proper way to measure judicial collegiality is itself contested.

11. Stephen L. Wasby, *Communication in the Ninth Circuit: A Concern for Collegiality*, 11 U. PUGET SOUND L. REV. 73, 76 (1987) (footnote omitted) (quoting unattributed interviews with judges). See also Patricia M. Wald, *Collegiality on a Court: Its Practices, Problems, and Pitfalls*, 40 FED. B. NEWS & J. 521, 524 (1993) (“I found that one of the most important things in running an appellate court was maintaining an atmosphere in which judges can agree or disagree on substance free of personality clashes or risk of personal reprisal.”); DONALD R. SONGER, SUSAN W. JOHNSON, C.L. OSTBERG & MATTHEW E. WETSTEIN, LAW, IDEOLOGY, AND COLLEGIALLY: JUDICIAL BEHAVIOUR IN THE SUPREME COURT OF CANADA 66 (2012) (reporting similar quotations from interviews with Canadian Supreme Court Justices).

12. Frank B. Cross & Emerson H. Tiller, *Understanding Collegiality on the Court*, 10 U. PA. J. CONST. L. 257, 259 (2008) (quoting Linda Greenhouse, *The Court: Same Time Next Year. And Next Year*, N.Y. TIMES, Oct. 6, 2002, at C3).

13. See Harry T. Edwards, *Collegial Decision Making in the US Courts of Appeals* 6 (N.Y.U. Sch. of L. Pub. L. & Legal Theory Res. Paper Series Working Paper No. 17-47).

Judge Edwards has emphasized the unanimity with which the federal courts of appeals (including the court on which he sits) decide cases.¹⁴ On this logic, collegiality drives judges to vote against their ideological preferences. However, as others have pointed out, judges may vote against their ideological preferences—and, specifically, choose to form majority blocs or to issue unanimous opinions—for reasons other than collegiality.

Professors Cross and Tiller suggest a few measures of collegiality. For one thing, one might look at how a judge's ideological voting patterns change over time as new judges join (and other judges leave) a court, on the logic that certain judges might collegially attract (or uncollegially repel) the judge to (or from) their viewpoints.¹⁵ For another, “evidence of collegiality (or lack thereof) could be found in the willingness to issue separate opinions, such as concurrences, even in the event of outcome agreement.”¹⁶ Finally, one could (though the data challenges are daunting) examine voting fluidity—cases where a judge changed his or her vote over the course of hearing and deciding particular cases.¹⁷ In the end, however, they concede that the “Edwards/Coffin concept” of collegiality is “difficult to measure or model.”¹⁸

Judge Edwards has tried to marshal empirical evidence of unanimity of decision on the federal courts of appeals to

14. *See id.* at 20–21; *see also* SONGER ET AL., *supra* note 11, at 92, 153–55 (noting arguments that collegiality contributes to unanimous decision-making on the Supreme Court of Canada).

15. *See* Cross & Tiller, *supra* note 12, at 260.

16. *Id.* Judge Patricia Wald suggested that concurrences may be more threatening to judicial collegiality than dissents. *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1413 (1995) (“Though certainly not as threatening as dissents, concurrences raise more collegial eyebrows, for in writing separately on a matter where the judge thinks the majority got the result right, she may be thought to be self-indulgent, single-minded, even childish in her insistence that everything be done her way.”).

17. *See* Cross & Tiller, *supra* note 12, at 260.

18. *Id.* at 271.

argue that these courts decide cases collegially.¹⁹ Yet there are reasons—such as the prevalence of “panel effects”—to doubt that deciding substantial numbers of cases unanimously, necessarily reflects a high degree of collegiality.²⁰

This Article accepts the challenges of measuring the “Edwards/Coffin concept” of collegiality. It does so by focusing not on the direction of judges’ votes, but rather on the way judges treat one another precisely when there is disagreement. Returning to the emphasis of Judges Edwards and Coffin on “respect,” the measure asks whether dissenting judges treat the judges in the majority (and their opinions) with respect.

The Article uses this measure of collegiality to begin to shed empirical light on the collegial practices of judges and courts. With respect to individual judges’ practices, the evidence shows first that dissenting judges are more likely to express collegiality in cases that are to be published as opposed to unpublished.

Second, the data shows that any ideological divide between the majority judges and dissenting judges does not prompt dissenting judges to the extent to which they express collegiality. One might think that a dissenting judge with an ideological orientation different from the judges in the majority might be *less* likely to express collegiality, because those differences presumably are grounded in fundamental beliefs. Alternatively, one might think that such a dissenting judge would be *more* likely to express collegiality in order to dispel public expectations that ideological distinctions among judges draw into question the accuracy and legitimacy of judicial decision making. The evidence, however, supports neither of these views.

Third, the data reveals no difference in the expression of

19. See Edwards, *supra* note 13, at 22–23.

20. See *infra* Part I.

collegiality based on the gender of the dissenting judge. Research suggesting that women generally tend to be more cooperative might suggest that female dissenting judges would be more likely to express collegiality. The evidence, however, does not support that conclusion.

Finally, the evidence shows that judges sitting by designation on a court of appeals panel are (i) more likely to express collegiality than judges not sitting by designation, but (ii) less likely to express collegiality in more than one way. This suggests that judges sitting by designation may express collegiality more out of “obligation” than out of deeper feelings of respect. On reflection, this conclusion that is not surprising given the likelihood that judges sitting by designation are not very familiar with their co-panelists, and do not have—nor are likely to perceive the need to establish—long-term working relationships with their co-panelists.

The Article next examines empirically the “comparative collegiality” of courts. First, contrary to Judge Edwards’ assertion, the evidence shows that the Supreme Court is more collegial than are the federal courts of appeals.

With respect to relative collegiality of the regional federal courts of appeals, the evidence reveals that collegiality will more commonly be practiced on courts with fewer judges housed in fewer courthouses. On the other hand, the evidence does not support the notion that courts with lower dissent rates will be more collegial, or that courts that include more rural areas—or that include areas with residents whom commentators sometimes characterize as “more polite”—will be more collegial.

The Article proceeds as follows. Part II explicates divergent conceptions of judicial collegiality, and discusses incentives and disincentives to behave collegially. Part III introduces dissent as a felicitous setting in which to study collegiality. It discusses when a judge will choose to dissent and when, assuming the judge will dissent, she will express collegiality toward the majority.

Part IV develops the measures of collegiality in the context of dissent. It explains the novel databases I assembled to effectuate the measures. It then shows that the measures have scientific validity.

Part V present the core empirical analysis. It develops hypotheses—at the judge level, comparatively with respect to the Supreme Court and federal courts of appeals, and comparatively across the regional courts of appeals—and tests them empirically. Part VI discusses the findings and their ramifications.

I. THEORIZING JUDICIAL COLLEGIALLY

In this Part, I first survey the divergent theoretical understandings of judicial collegiality. I then turn to incentives and disincentives for judges to behave collegially.

A. *Divergent Theoretical Understandings of Judicial Collegiality*

Political science's focus on ideologically driven voting reached an apex with Professors Jeffrey Segal and Harold Spaeth's exposition of the attitudinal model.²¹ Segal and Spaeth hypothesized that judges (at least judges, like federal Article III judges, who enjoy lifetime tenure)—vote their ideological and policy preferences in disposing of cases. They offered some data in support of their hypothesis, in the context of votes cast by Justices on the United States Supreme Court.²²

In the years since, commentators have argued that Segal and Spaeth overstated the applicability of the model, in particular arguing that the attitudinal model has less application in the context of lower courts. The Supreme Court Justices have no judicial overseer;²³ a majority

21. See SEGAL & SPAETH, *supra* note 2, at 86.

22. See *id.* at 321–23.

23. In the wake of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal

decision of the Supreme Court may only be overridden by a subsequent Court decision,²⁴ congressional action (with respect to a statutory holding), and constitutional amendment (with respect to a constitutional holding). As such, Supreme Court Justices have little incentive, the argument goes, to vote other than in line with their own preferences.²⁵ In contrast, judges on lower courts are more likely to consider other factors—not least the fact that they are subject to reversal by higher tribunals—in deciding how to cast their votes and draft opinions.²⁶

Nevertheless, commentators have found evidence of ideological voting at the level of the U.S. courts of appeals—the intermediate appellate courts in the federal judiciary.²⁷

courts (including the Supreme Court) are supposed to decide questions of state law the way that the relevant state high court would decide those questions.

24. The Court's freedom to overrule one of its earlier decisions is legally subject to the doctrine of *stare decisis*. See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015); e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–869 (1992) (concluding that *stare decisis* required reaffirmance of the holding in *Roe v. Wade*, 410 U.S. 113 (1973)). Still, the Court has characterized *stare decisis* as “a ‘principle of policy,’ . . . and not as an ‘inexorable command.’” *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 63 (1996) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) and *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). And some commentators argue that the doctrine is so malleable that it imposes very little constraint on outcomes. See, e.g., Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988) (“Because a coherent rationale for the intermittent invocation of *stare decisis* has not been forthcoming, the impression is created that the doctrine is invoked only as a mask hiding other considerations.”); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988) (“[S]tare decisis has always been a doctrine of convenience, to both conservatives and liberals.”).

25. Some commentators question this point, suggesting that Supreme Court Justices vote “strategically,” taking into account the likely reaction of the political branches to a decision with an eye to obtaining a final outcome closest to their (the Justices’) own preferences. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICE JUSTICES MAKE 9–18* (1998); FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* 4 (2000).

26. See, e.g., Jonathan Remy Nash & Rafael I. Pardo, *Rethinking the Principal-Agent Theory of Judging*, 99 IOWA L. REV. 331, 336 (2013).

27. See *supra* note 1 and accompanying text.

In particular, commentators examining decision-making by multi-judge panels suggests that lower court judges are swayed by the ideology of other judges who serve on panels with them. Dean Richard Revesz first identified what has come to be known as “panel effects” in an examination of voting in environmental cases by judges on the United States Court of Appeals for the District of Columbia Circuit.²⁸ He found that “the party affiliation of the other judges on [a] panel has a greater bearing on a judge’s vote than his or her own affiliation.”²⁹

Dean Revesz’s 1997 initial study of panel effects drew a strongly critical response from Judge Harry Edwards.³⁰ He argued that Dean Revesz’s data “surely do not convincingly show that ‘ideology’ broadly influences decision making,” but rather, “are consistent with the view that collegiality is alive and well in judicial decision making on the D.C. Circuit.”³¹ The debate developed into a colloquy.³² More recently, Judge Edwards—with Professor Michael Livermore—has taken on empirical judicial studies scholars more generally.³³ Judge Edwards and Professor Livermore argue that “[t]he effects of collegiality and interjudge deliberations are not accounted for in the attitudinal model of judging.”³⁴ They further point out that none of the scholars who have found evidence of “panel effects” on courts of appeals have “investigated whether these panel effects are the result of genuine judicial deliberations or “strategic voting” on the part of the judges.”³⁵ Finally, writing for himself, Judge Edwards

28. See Revesz, *supra* note 1.

29. *Id.* at 1719. See *id.* at 1760–64.

30. See Edwards, *Collegiality and Decision Making*, *supra* note 3.

31. *Id.* at 1336.

32. See Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry Edwards*, 85 VA. L. REV. 805, 805 (1999).

33. See Edwards & Livermore, *supra* note 4, at 1907–10.

34. *Id.* at 1917.

35. *Id.* at 1943.

asserts: “Based on my twenty-nine years on the court, my claim is that decisions are based on legal materials and are the product of fruitful judicial deliberations.”³⁶

Other federal circuit judges echo Judge Edwards’ sentiment. Former Judge Deanell Reece Tacha offers that, on the question of “whether judicial collegiality enhances the quality of appellate decisionmaking[,] [m]y answer is an emphatic, ‘Yes.’”³⁷ As the late Judge Frank Coffin put it, judicial collegiality affects “the flavor, quality, and—at their best—the wisdom of appellate opinions.”³⁸

If judicial collegiality is valuable and enhances the quality of judicial decision making, then what exactly is it and whence, and when, does it arise? Professors Cross and Tiller analogize judicial collegiality to the collegiality often sought after, and sometimes found, by academics.³⁹ While Professors Cross and Tiller have characterized the “Edwards/Coffin conceptualization” of judicial collegiality as “a rather ‘warm and fuzzy’ concept of sensitive, collaborative production aimed at optimizing the result,”⁴⁰ it seems that the judges who have described their experiences with judicial collegiality agree that at its core it rests on mutual respect and openness to other’s ideas, arguments, and positions.⁴¹

Chancellor Howard Gillman has suggested that collegiality arises out of “(a) experiences of duty and professional obligation, (b) understandings of shared purpose, (c) concerns about the maintenance of corporate

36. *Id.* at 1951.

37. Tacha, *supra* note 7, at 586.

38. FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 172 (1980). See Levin Campbell, *Coffin’s Court: A Colleague’s View*, 63 *ME. L. REV.* 417, 436 (2011) (“Judge Coffin viewed collegiality as essential to the quality of the work put out by the federal courts of appeals.”).

39. Cross & Tiller, *supra* note 12, at 257–58.

40. *Id.* at 258.

41. See *supra* text accompanying notes 3–10.

authority or legitimacy, and (d) participation in a routine.”⁴² Professor Adeno Addis and I have elsewhere argued that judicial deliberation takes place where four criteria are met:⁴³ (i) The judges must sincerely have as their goal the search for the truth or the most defensible result;⁴⁴ (ii) the judges must “advance and defend their proposals and propositions with reasons that are acknowledged as such by and are accessible to others”;⁴⁵ (iii) the judges must “treat each other as free and equal with their own commitments and think that they owe one another accessible and acceptable justifications for the conclusions and judgments that they reach”;⁴⁶ and (iv) over time, “decisions [should] lead to further dialogue and revision as participants take into account the views of others and in the process transform their own views and preferences.”⁴⁷

Two factors bolster the view that the judges’ conception of collegiality is “rather ‘warm and fuzzy’”—that is, rather ambiguously defined. First, there is confusion over the valid observable implications of collegiality—that is, over what one might expect to observe where judicial collegiality is present. Consider Judge Edwards’ emphasis on unanimity in decision making on multimember courts: Judge Edwards’ early work on collegiality focused on unanimity as evidence of collegiality and, after lamenting existing empirical legal studies’ failure to consider collegiality, his latest working

42. Howard Gillman, *The New Institutionalism, Part I: More and Less than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics*, LAW & CTS., Winter 1996–97, at 6, 8.

43. See Adeno Addis & Jonathan Remy Nash, *Identitarian Anxieties and the Nature of Inter-Tribunal Deliberations*, 9 CHI. J. INT’L L. 613, 615 (2009). The focus of the work Professor Addis and I undertook was specifically inter-tribunal deliberation, that is, deliberation across courts and judicial systems. See *id.* at 613. However, the basic analytic points readily translate to deliberation among judges on a single court.

44. See *id.* at 615.

45. *Id.*

46. *Id.* at 616.

47. *Id.*

paper again touts unanimity as establishing the existence of collegiality.

Yet there is reason to question whether unanimity in decision making is necessarily evidence of collegiality at work, or even necessarily will arise where collegiality is indeed at work. Dean Revesz has noted that the evidence he found of panel effects

could be consistent with either a “deliberation hypothesis,” under which judges modify their views because they “take seriously the views of their colleagues,” or a “dissent hypothesis,” under which “a judge who sits with two colleagues from the other party moderates his or her views in order to avoid having to write a dissent.”⁴⁸

Moreover, just as colleagues on a faculty might respect one another and be open to one another’s views and still reach divergent conclusions on some issues, so too might collegial judges end up voting differently in numerous cases. Indeed, Judge Harris has asserted that “collegiality and the suppression of disagreement are at cross purposes with each other,”⁴⁹ while Sixth Circuit Judge Bernice Donald has argued that “dissent and collegiality should not be seen as binary opposites.”⁵⁰

A second factor that leads commentators to consider “judicial collegiality” an amorphous concept is the idea that, even to the extent there are implications that one might expect would accompany collegiality, those implications are notoriously difficult to measure. For example, Professors Cross and Tiller comment—accurately, it seems—that we ought to observe truly collegial judges changing their votes over the course of hearing and deciding cases.⁵¹ But evidence

48. Revesz, *supra* note 32, at 834 (quoting Revesz, *supra* note 1, at 1732–33).

49. Levine, *supra* note 10.

50. Bernice B. Donald, *The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality and Dissent in Multi-Member Courts*, 47 U. MEM. L. REV. 1123, 1129 (2017).

51. See *supra* text accompanying note 17; see also Wald, *supra* note 11, at 522–23 (noting a survey of appellate judges finding, and agreeing from personal

of intra-case vote fluidity is generally available only from judges' personal papers, and such papers are simply not available on any kind of systematic basis. In the end, though it may be what Professors Cross and Tiller describe as "a shortcoming of social science research practices," the fact remains that social science research tends to "overlook features less amenable to measure."⁵²

In this Article, I use a measure other than directionality of, or changes in, votes to assess collegiality. I focus instead on content of opinions in cases where there is in fact disagreement. Specifically, I look to see whether, in cases where there is a dissenting opinion, the judges on either side of the divide respect one another and their opinions. The logic behind this approach is simple: First, the core conception of judicial collegiality does not suggest that it is absent when disagreement triumphs in a particular case. To the contrary, advocates of the importance of collegiality emphasize that collegiality requires judges to be open to, and respect, one another's arguments, not that it requires judges actually *to be convinced* by their fellow judges' arguments.

Second, to the extent that collegiality rests on and begets respect among judges, there are readily observable implications that should arise in opinions where dissent is present. And, as I discuss in the next Part, this allows me to generate testable hypotheses.

B. *Incentives and Disincentives to Behave Collegially*

A judge's incentives to be collegial can be placed under two broad categories: (i) a true commitment to, and preference for, collegiality; and (ii) instrumental concerns. I explore each of these categories in turn.

First, the incentives of a judge to behave collegially

experience that "when precedents are absent or ambiguous, personalities, predilections and group relations fill the void").

52. Cross & Tiller, *supra* note 12, at 271.

might result from a true commitment to, and preference for, collegiality. A judge might be a collegial person; indeed, perhaps, by virtue of self-selection and/or the judicial selection process, judges are generally collegial.

Moreover, given the varied nature of interpersonal relations, it may be that some judges have an easier time being—and are more naturally—collegial toward some of their colleagues than toward others. Commentators have theorized, and to some degree found, that greater group homogeneity is likely to lead to collegiality.⁵³ There is reason to believe that the same might be true for judges grouped together on a court: One might think that judges who are more similar (along relevant metrics) might be more likely to express collegiality for one another and other judges' opinions.⁵⁴

Furthermore, even a judge who is not generally collegial might behave collegially on her court, either because she has developed a collegial attitude toward her fellow judges, or because she has internalized a norm of collegiality that

53. See, e.g., Keith Ingersoll, Edmund Malesky & Sebastian M. Saiegh, *Heterogeneity and Team Performance: Evaluating the Effect of Cultural Diversity in the World's Top Soccer League*, 3 J. SPORTS ANALYTICS 67, 69 (2017) (“[C]ombining members with different backgrounds may hamper the team’s cooperation and collaboration.”); *id.* at 70 (“Activities in which a good fit between various units is the first concern (for example, bike manufacturing where its different parts have to be assembled), should have a homogeneous workforce in order to maximize coordination. In contrast, activities where problems are identified, but team members must find creative ways to solve them (i.e. research and design projects) should have a more heterogeneous workforce in order to maximize the chance of developing successful innovations.”); Andrea Prat, *Should a Team Be Homogeneous?*, 46 EUR. ECON. REV. 1187, 1200 (2002) (using modeling to reach the same conclusion).

54. See Murphy, *supra* note 9, at 456 (noting that differences in ideology, background, culture, and expertise of judges can work against collegiality); Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361, 367–71 (2008) (arguing that more homogeneous Supreme Court majority coalitions tend to render more consequential decisions because such coalitions will have more comparable preferences).

pervades the court.⁵⁵ Judges and commentators argue that repeated interactions among judges make this more likely⁵⁶ (although there is also a school of thought that people are less polite, or even rude, to people with whom they are closer and deal repeatedly⁵⁷). This logic suggests that collegiality should be more common on courts with fewer judges⁵⁸ and on courts with judges sitting in fewer courthouses (i.e., with more judges sitting together in the same courthouses).⁵⁹

55. See VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEAGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* 39 (2006) (“[A] judge may be disinclined to author separate opinions, seeing them as potentially detrimental to his good reputation by marking him as difficult or injudicious.”).

56. See Murphy, *supra* note 9, at 458 (“Collegiality requires a familiarity with other judges . . .”); Tacha, *supra* note 7, at 588 (“The first and most important factor is that the judges know each other well personally.”).

57. See, e.g., DENISE SOLOMON & JENNIFER THEISS, *INTERPERSONAL COMMUNICATION: PUTTING THEORY INTO PRACTICE* 338 (1st ed. 2013) (noting that, at least in some ways, “you are less polite or even rude to your close friends, romantic partner, and family members”). Consider as well the common adage, “Familiarity breeds contempt.”

58. See JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* 161 (2002) (“In a small circuit, . . . the judges deal with each other regularly, sitting on panels together relatively frequently. That can carry advantages because the judges become more familiar with one another, leading to better communication regarding the development of circuit law as well as more informal communication regarding specific cases.”).

59. Jonathan Cohen describes the relevant overarching criterion as “geographic size,” which he then explains “can be measured in at least two ways: (1) the geographic span of the circuit; and (2) the geographic dispersion of the court’s resources.” *Id.* at 153. Cohen finds little support in interviews with judges for the notion that the geographic span of the circuit reduces collegiality. See *id.* (Cohen explains that “[t]he only way in which there was any hint that the court’s geographic span might have an effect is in the diversity of the judges who sit on the cases.” *Id.* However, this is not so much a point about how a feature of a court directly affects collegiality, but rather a point about how judicial heterogeneity may increase with geographic span to the extent that characteristics of population may serve as a proxy for characteristics of judges. See *infra* note 157.) Instead, Cohen finds that “[m]ore significant to the judges’ interaction with one another is the court’s geographic dispersion . . .” COHEN, *supra* note 58, at 154. And, while at least one judge Cohen interviewed described the growing importance of “cybercollegiality”—that is, electronic interactions that substitute for personal interactions where judges are not in the same building, *id.* at 157—

Second, the incentives of a judge to behave collegially instead—or additionally—might arise from instrumental concerns. A judge seen as violating a court’s norm of collegiality might suffer consequences.⁶⁰ A judge might be concerned that, if her colleagues perceive her to have acted uncollegially, they may in turn act uncollegially toward her. A judge also might worry about other informal sanctions. For example, judges responsible for opinion assignment might assign authorship responsibility for undesirable opinions to the uncollegial judge.⁶¹

Alternatively, legitimacy and court power might induce a judge to act collegially. It is well understood that a court draws its power from its perceived legitimacy,⁶² and collegiality enhances legitimacy. Accordingly, the judge might act collegially out of self-interest in maintaining (or extending) the court’s power (and hence her own). Such a calculation might convince a dissenting judge to act

Cohen nevertheless acknowledges that technological “advances have not enabled the judges to communicate as informally as judges can do when they work in the same building,” *id.* at 156–57.

60. *Cf.* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745–54 (2001) (describing the development and importance of reputation-based non-legal sanctions in regulating the cotton industry).

61. *See* Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 210 (1989) (“A system of discretionary opinion assignments . . . creates strategic opportunities for the assigning justices. The ability to reward members of the court with desirable opinion assignments or to punish colleagues with a barrage of uninteresting or unimportant cases can be used to discourage the expression of disagreement with the assigning justices, leading to greater consensus within the institution and greater power for those with assignment responsibilities.”); *see also* Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1673 (2006) (“[T]he Chief’s assignment power may provide . . . leverage over the other Justices. In theory, the Chief Justice may . . . use her position to punish or reward Justices for whatever reason she chooses.”).

62. *See, e.g.*, Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) (“For an institution like the U.S. Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy . . .”).

collegially, especially when the panel has broken along ideological lines, lest the perception that courts decide cases ideologically were to grow.⁶³

Third, a judge might act collegially to satisfy her perception of what an external “audience” to whom she is playing would prefer.⁶⁴ Thus, for example, the judge might act collegially if she believes it would enhance her chances of elevation to a higher court. Specifically, the judge would have an incentive to act collegially if she believes that the selectors of judges at higher levels of the judiciary prefer to elevate collegial judges.⁶⁵ Similarly, a judge would have an incentive to act collegially if she believes that acting collegially would burnish her reputation.⁶⁶

Practically speaking, if the press is likely to cover a case, the opinions in the case are more likely to reach the key audience about which a judge is concerned. That being so,

63. There is evidence that public support for the judicial system transcends ideological and political lines. See JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 61 (2009) (“Liberals trust the Court at roughly the same level as conservatives; Democrats and Republicans hold the Supreme Court in similar regard.”). Lack of collegiality between judges of different ideologies might undermine this cross-cutting support.

64. See Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL’Y 133, 148 (2009) (noting that a judge may cast vote on the basis of “desire for the esteem of a particular audience”); Rachael K. Hinkle, Michael J. Nelson & Morgan L. W. Hazelton, *Deferring, Deliberating, or Dodging Review: Explaining Counterjudge Success in the US Courts of Appeals*, 8 J.L. & COURTS 277, 281–82, 290–96 (2020) (noting that judges who write separate opinions sometimes do so for external audiences, but finding empirical support for ideological motivations).

65. See Ed R. Haden, *Judicial Selection: A Pragmatic Approach*, 24 HARV. J.L. & PUB. POL’Y 531, 545–46 (2001) (explaining the logic behind Presidents trying to select judges who can effectively build judicial coalitions).

66. See G. Edward White, *Toward A Historical Understanding of Supreme Court Decision-Making*, 91 DENV. U.L. REV. ONLINE 201, 209–10 (2014) (“[I]t is incontrovertible that interaction with colleagues is a major dimension of a modern Justice’s work, that the effectiveness of a Justice’s collegial contributions is regularly assessed by that Justice’s colleagues, and that a Justice’s effectiveness or ineffectiveness as a colleague contributes to his or her reputation.”).

judges may have an added incentive to express collegiality in cases that they anticipate are more likely to be reported on by the media, and more widely read and cited.⁶⁷

Just as there are incentives for judges to behave collegially, so too are there disincentives. The conception of collegiality that calls for unanimity in decision—or even that judges take the time to understand (if not ultimately to come around to agree with) the other judges’ view—can be costly. There can be psychic cost to joining an opinion with which one disagrees,⁶⁸ and it takes time and effort to engage other judges—and possibly then to adjust one’s opinion to take account of the opposing arguments.⁶⁹

It is far less costly, by comparison, simply to behave civilly. To be sure, some individuals may find it costlier to behave civilly, and some individuals may find it costlier to behave civilly toward particular individuals.⁷⁰ Expressing collegiality would seem even less costly than behaving civilly,

67. See Wald, *supra* note 11, at 524 (“Personal antagonisms do fester and breed on courts, as elsewhere; the press is only too willing to pick up on and publicize them . . .”); *id.* at 525 (Where judges feud, “[e]very split decision is billed as a further skirmish in the guerrilla warfare between the judges. Reporting on the substance of decisions gets lost in the byplay.”); *cf. id.* at 523 (“The press and public opinion also drive courts toward consensus: the model appellate court is perceived as one that agrees on everything. And courts themselves seem happiest when they are united.”).

68. One can think of this psychic cost as the result of foregoing the benefit of filing a separate dissenting opinion. As Justice Antonin Scalia once said, it is an “unparalleled pleasure” to write a dissenting opinion since it affords the judge the opportunity “[t]o be able to write an opinion solely for oneself, without the need to accommodate; “to any degree whatever, the more-or-less differing views of one’s colleagues; to address precisely the points of law that one considers important and *no others*;” and “to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority’s disposition should engender—that is indeed an unparalleled pleasure.” Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42 (1994).

69. See HETTINGER ET AL., *supra* note 55, at 20 (“Dissenting opinions usually mean more work for the judges on the panel, not only for the dissenter herself, who must expend a scarce resource (time) to craft the separate opinion, but also for those in the majority who may feel the need to counter the dissenter’s arguments.”).

70. See *supra* note 53 and accompanying text.

although there may be a small cost associated with preparing “stock” collegial language,⁷¹ communicating that point to law clerks to the extent that clerks actually draft a judge’s opinions,⁷² or both.

II. DISSENT AS A SETTING IN WHICH TO STUDY COLLEGIALITY

Dissent is a natural setting in which to examine collegiality. Judge Edwards asserts that unanimity of decision—that is, the absence of dissent—is reflective of collegiality.⁷³ Professors Cross and Tiller’s argument that the fluidity of judges’ votes would provide an excellent window into collegiality at work rests on the assumption that collegiality can convert dissent to unanimity.⁷⁴

It stands to reason, then, that the collegiality nevertheless may persist even where dissent is indeed the final outcome. To put it another way, if collegiality can successfully produce decisional unanimity, and indeed can induce judges to suppress their dissenting beliefs, then presumably there will be some cases where dissent emerges in spite of collegiality.

But when will a judge dissent, and in what subset of cases with a dissent will the dissenting judge do so collegially? I address each question in turn.

A. *The Decision to Dissent*

There will only be a dissenting opinion if both (i) the dissenting judge has preferences that differ from the judges in the majority, and (ii) the dissenting judge deems it worthwhile to file a dissenting opinion. I consider each of

71. See *infra* note 112 and accompanying text (noting that dissenting with “respect” is commonplace).

72. But see COHEN, *supra* note 58, at 13 (“A common criticism of the institution of law clerks is that they hurt collegiality by isolating judges.”).

73. See *supra* note 14 and accompanying text.

74. See *supra* note 17 and accompanying text.

these steps in turn, focusing on the role of the judges on the panel, the case, the characteristics of the would-be dissenting judge, and the characteristics of the court.⁷⁵

1. Divergence of Panel Preferences

There will only be a dissenting opinion in a case if and only if there is a disagreement among the judges on the panel as to at least part of the proper disposition of the case. If the lone judge disagrees with the disposition completely, then she will file a dissenting opinion; if she disagrees in part, she will file an opinion dissenting in part (possibly captioned as an opinion concurring in part and dissenting in part).⁷⁶

Whether a judge will differ with her colleagues on disposition will generally depend upon the preferences of the judges and the nature of the case. While individual preferences are hard to discern, commentators have theorized, and empirically validated, that a judge's ideology⁷⁷ is a good predictor of how a judge will vote.⁷⁸ In particular, on courts of appeals, ideological divergence between two judges on one hand, the third judge on the other, is a good predictor of whether there will be a dissent in a case.

Beyond the relative ideology of the judges, commentators have also found the presence (or absence) of dissent to be a function of the nature of the case. Some cases raise issues, or

75. See HETTINGER ET AL., *supra* note 55, at 33–41 (identifying characteristics of cases, judges, and courts as relevant to whether there will be dissensus).

76. If a judge disagrees with the majority's reasoning but nevertheless agrees with the result reached by the majority, then the judge should file an opinion concurring in the judgment. (Even in that circumstance, some judges will caption their opinion as one "concurring in part and dissenting in part.")

77. It is generally impossible to measure a judge's ideology directly. See, e.g., Fischman & Law, *supra* note 64, at 143–45. Commentators instead often rely upon the appointing President's ideology, or a combination of the ideologies of the appointing President and Senators from the judge's state of the same party as the President, as a proxy for the judge's ideology. See, e.g., *id.* at 166–76.

78. See, e.g., *id.* at 147–49 (noting problems with equating votes as a proxy for preferences).

arise under areas of law, that are more politically salient, and hence are more likely to induce judges to vote along the lines of their ideological differences.⁷⁹

2. Rationing Dissent

Just because a judge has a different view as to the proper disposition of a case does not mean that that judge will dissent. While difference of opinion is a prerequisite to dissent, its presence is not sufficient for dissent.⁸⁰

The notion that judges will cast votes in accordance with their own preferences, unconstrained by other concerns, is embodied in the “attitudinal model” propounded by political science Professors Segal and Spaeth.⁸¹ Most critiques of the attitudinal model focus on factors that may sway a judge to vote against her preferred position even where that vote would carry the day on the court. These critiques center on institutional constraints on judging. In particular, critics argue that a judge may consider whether another actor—a reviewing court or a legislature—might overturn his or her preferred outcome and replace it with something less desirable.⁸² While the Supreme Court (as the highest court) need only concern itself with the response of the legislature (and then to a large extent only in statutory and common law cases, as opposed to constitutional ones⁸³), judges on a federal court of appeals panel may concern themselves with responsive action not only by the legislature, but also by the Supreme Court and by the court of appeals itself sitting en

79. See Sunstein et al., *supra* note 1, at 309–10 (noting that some areas of law “by general agreement, are ideologically contested,” while suggesting that other areas involve cases that are “apparently nonideological”).

80. See Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 103–20 (2011) (presenting an economic model of “dissent aversion”).

81. See *supra* notes 21–22 and accompanying text.

82. See Donald, *supra* note 50, at 1130.

83. See EPSTEIN & KNIGHT, *supra* note 25, at 141–45.

banc.⁸⁴

Much as factors beyond the judge's pure preferences affect whether the judge will cast a vote *on the winning side* in line with, or against, his or her preferences, so too may such factors affect whether a lone judge will cast a vote in line with his or preferences—and file a dissent—or against his or her preferences—by suppressing a dissent. Table 1 summarizes these factors.

TABLE 1. Factors favoring, and disfavoring, dissent.

Factors Favoring Dissent	Factors Disfavoring Dissent
True commitment to legal principle and/or outcome	Collegiality
Desire to signal appropriateness of further review	Cost/effort to judge of dissenting (workload)
Perceived need to provide dialogue, and encourage evolution, in the area of law	Personal reputation
	Court legitimacy
	Perceived need to make the area of law more predictable

Several factors conspire to likely constrain a judge's freedom to dissent, especially across a run of cases. First, from an institutional perspective, collegiality may limit dissent.⁸⁵ It has been argued that collegiality can be measured by unanimity of decision.⁸⁶ Even if the relationship is not purely linear, it still stands to reason that collegiality is reduced (or not at a high level to begin with)

84. See Virginia A. Hettinger, Stefanie A. Lindquist & Wendy Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 124–25 (2004).

85. See Epstein et al., *supra* note 80, at 104; Donald, *supra* note 50, at 1130.

86. See *supra* note 14 and accompanying text.

where a judge who might dissent is *never* won over by her colleagues' arguments.

Second, also from an institutional perspective, the desire to ensconce and maintain judicial legitimacy may reduce dissent.⁸⁷ It is well accepted that unanimous decisions generally increase a court's legitimacy,⁸⁸ which in turn makes it easier to enforce a court's judgments.⁸⁹ Thus, a judge who is otherwise inclined to dissent might hesitate to do so to the extent that dissent undermines the court's legitimacy.⁹⁰

Third, dissent may be undesirable from the individual judge's instrumental perspective. Judge Richard Posner has argued that many, if not most, judges value their leisure time.⁹¹ Drafting a dissent—and then the subsequent back-and-forth between the dissenting judge and the judges in the majority—consumes time and effort.⁹² A lone judge reasonably might question whether it is worth surrendering time and effort in a lost cause.

Fourth, even if a judge does not care about being collegial for normative reasons, she might want to burnish her reputation as a collegial judge—or at least avoid gaining the reputation of a “serial dissenter.” A judge might be concerned that, if she is seen to dissent too much, her fellow judges

87. See Donald, *supra* note 50, at 1130.

88. See HETTINGER ET AL., *supra* note 55, at 19 (“[U]nanimity among judges may promote institutional legitimacy and effective implementation of individual decisions by providing a unified voice behind judicial policies.”).

89. See *id.* (“Consensual decision making . . . may aid in enhancing compliance with court decisions.”).

90. See *id.* (“Dissensus . . . undermines consensual decision-making processes, and consensual decision making on appellate courts serves critical institutional interests.”). At the same time, there is a collective action problem in that the legitimacy benefit flows to all the judges, not just the would-be dissenting judge. See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 65 (2006).

91. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993).

92. See Epstein et al., *supra* note 80, at 104.

might be less likely to sign onto majority opinions that she drafts. She also might think that those who select higher level judges might be less likely to elevate a judge who is seen to dissent too often.⁹³ Finally, a judge might think that dissenting too frequently could dilute the signal the dissents send to reviewing courts.⁹⁴

The foregoing suggests that many judges will internalize some limit on how often they can dissent. Dissenting effectively uses up a scarce resource, so that judges who (left to their own devices) would dissent in a large number of cases must identify the subset of those cases where it is actually worth filing dissents.⁹⁵

It seems that the nature of each individual case will weigh heavily in that calculus. Consider first that a judge is more likely to dissent in a case where the judge has a true

93. See Haden, *supra* note 65, at 545–46 (discussing the likelihood that those who select judges might prefer candidates who might excel at assembling coalitions).

On the other hand, some judges might affirmatively seek the reputation of serial dissenter. (Some so describe Justice John Paul Stevens. See, e.g., Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES MAG., (Sept. 23, 2007), <https://www.nytimes.com/2007/09/23/magazine/23stevens-t.html>.) For example, Justice Antonin Scalia spoke about his desire to establish his reputation—perhaps especially through dissents—for law students, perhaps indicating less of a concern for his reputation among his colleagues or the public today. See Molly Cooke, *Justice Scalia Addresses First-Year Law Students*, THE HOYA (Nov. 17, 2005), <https://thehoya.com/justice-scalia-addresses-first-year-law-students> (noting the Justice’s observation that he “geared his dissents toward study in law classes because of his hope for the next generation of lawyers”); see also Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, NEW YORKER (Mar. 28, 2005), <https://www.newyorker.com/magazine/2005/03/28/supreme-confidence>. (“[H]is opinions seem to be for the benefit of a future generation that may yet be saved for originalism.”).

94. See Deborah Beim, Alexander V. Hirsch & Jonathan P. Kastellec, *Whistleblowing and Compliance in the Judicial Hierarchy*, 58 AM. J. POL. SCI. 904, 905 (2014).

95. See Anthony Niblett & Albert H. Yoon, *Judicial Disharmony: A Study of Dissent*, 42 INT’L REV. L. & ECON. 60, 70 (2015) (providing empirical evidence that majority and dissenting opinions generally rely on distinct precedents, not different readings of the same precedent).

commitment to the legal principle or outcome in the case.⁹⁶ To the extent that (as discussed above) the difference in opinion in the case is an outgrowth of ideological distance, it seems likely that dissent will be more likely in more politically salient cases.⁹⁷

Second, a judge is more likely to dissent if she believes it important to increase the likelihood of review by a higher judicial actor.⁹⁸ Studies have shown that the presence of a dissent increases the likelihood of discretionary appellate review.⁹⁹ That being the case, it is understood that filing a dissent is a way to “signal” a higher court that review is appropriate.¹⁰⁰ In the case of a court of appeals panel

96. See, e.g., HETTINGER ET AL., *supra* note 55, at 34 (“Based on their substantive content, some cases simply lack the content necessary to elicit dissensus in the form of dissents or reversals.”); cf. Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 58 (1993) (suggesting that, in cases of doctrinal paradox—that is, cases in which “rationales and outcomes are set in conflict with each other”—judges on multimember courts can and should “decide whether the court, in the aggregate, is more durably committed to its judgment as to the pertinent rationales or its judgment as to the outcome”).

97. See, e.g., HETTINGER ET AL., *supra* note 55, at 39 (“[S]alient, complex, and ambiguous cases all are more likely to foster the expression of dissensus among judges.”); cf. *id.* at 34 (noting that “the nature of the U.S. Courts of Appeals’ mandatory docket means that a significant proportion of the cases handled by circuit judges do not raise issues that are matters of first impression or otherwise legally consequential” and that, “as a general rule, these cases do not raise questions sufficiently salient to elicit much reaction from the judges deciding them.”).

The same result might obtain where the would-be dissenting judge is not herself so concerned with the legal principle or outcome in the case, but wishes to appeal to an interest group (including those who select which judges to elevate) that is concerned with the legal principle or outcome.

98. See, e.g., Donald, *supra* note 50, at 1130.

99. See, e.g., Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 563 (1999) (finding empirical evidence that dissenting panel opinions increase the likelihood of Supreme Court review); cf. Rachael K. Hinkle & Michael J. Nelson, *How to Lose Cases and Influence People*, 8 STAT., POL., & POL’Y 195, 208–13 (2017) (finding that language from dissenting Supreme Court opinions that is memorable is more likely to be cited in the future).

100. See Tracey E. George, *The Dynamics and Determinants of the Decision to*

decision, a dissent might signal that a case is a good candidate for the court of appeals en banc, and/or the Supreme Court, to review.¹⁰¹ Such a case will often be a case as to which the would-be dissenting judge cares deeply about the legal principle or outcome. However, it may also be that the judge is not concerned about the case coming out one way or the other, but believes that the public, or legal community, would benefit from a higher court providing clarity on a governing legal issue.¹⁰²

Third, even if higher court review is unlikely or unpredictable, a lone judge might be more likely to consider a dissent worthwhile to the extent that the legal issue or area

Grant En Banc Review, 74 WASH. L. REV. 213, 247 (1999) (“[T]he mere fact of a dissent signals to a nonpanelist that she may justifiably expend personal resources to rehear the case or at least investigate it further.”); HETTINGER ET AL., *supra* note 55, at 41 (“[C]ircuit judges may choose to dissent to signal the circuit *en banc* that the majority panel opinion is contrary to circuit law or contrary to the preferences of the circuit majority.”); *id.* (“[C]ourt of appeals judges may use dissent as a strategic tool to signal the Supreme Court and thereby invite review by that body.”); *see generally* Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court’s Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 103–07 (2000) (presenting a signaling model of Supreme Court certiorari review).

101. *See* Micheal W. Giles, Thomas G. Walker & Christopher Zorn, *Setting a Judicial Agenda: The Decision to Grant En Banc Review in the U.S. Courts of Appeals*, 68 J. POL. 852, 861 (2006) (finding empirical evidence that dissenting panel opinions increase the likelihood of en banc review); Caldeira et al., *supra* note 99, at 563; George, *supra* note 100, at 259–60 (describing empirical finding that, “when a panel member dissents, the panel’s ruling is much more likely to be reheard en banc than when the panel is unanimous”); Scalia, *supra* note 68, at 36–37 (“When a judge of one of our Circuit Courts of Appeals dissents from an opinion of his colleagues, he warns the Courts of Appeals of the other twelve Circuits . . . that they should not too readily adopt the same legal rule. And if they do not . . . a ‘conflict’ among the Circuits will result, ultimately requiring resolution by the Supreme Court’s grant of a petition for certiorari. At the Court of Appeals level, a dissent is also a warning flag to the Supreme Court: the losing party who seeks review can point to the dissent as evidence that the legal issue is a difficult one worthy of the Court’s attention.”).

102. *See, e.g.*, *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 745–69 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc) (portion of opinion including the caption “The Supreme Court Should Grant Certiorari in This Case”), *aff’d sub nom.* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); Scalia, *supra* note 68, at 38 (noting that certain dissents can “embolden[] counsel in later cases to try again, and to urge an overruling”).

of law in the case is one that deserves greater dialogue among judges and courts,¹⁰³ or is an issue or area of law that would benefit from legal evolution.¹⁰⁴ A dissent also might signal lawyers that the issues in the case are ripe for further adjudication.¹⁰⁵ On the other hand, the lone judge may choose *not* to dissent to the extent that she believes that the legal question is one that would benefit from the greater predictability that a unanimous decision would provide.¹⁰⁶

B. *Expressions of Collegiality in Dissent*

Assuming that (i) there is a genuine difference in opinion on a panel, and (ii) the judge in the minority has decided to file a dissent, then the question arises (iii) whether the lone judge will express collegiality toward the majority in his

103. See Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1917 (2008) (“A multiplicity of opinions, and potentially also of approaches, might help to open debate as to the proper way to resolve an issue.”); HETTINGER ET AL., *supra* note 55, at 19 (“[D]issents . . . create an adversarial crucible from which the most solidly forged rule of law is most likely to emerge.”); Scalia, *supra* note 68, at 41 (“The most important internal effect of a system permitting dissents and concurrences is to improve the majority opinion.”); see also Addis & Nash, *supra* note 43, at 616 (noting the importance of dialogue to judicial deliberation).

104. See HETTINGER ET AL., *supra* note 55, at 19 (“[D]issents play an important role in doctrinal evolution.”); Donald, *supra* note 50, at 1130. As Professor Robert Schapiro explains in the context of interpreting state constitutional provisions, a “federal court interpretation may be helpful . . . in contributing to the discussion of the best way to realize the underlying constitutional value. Federal judges can contribute to a plurality of legal meaning, which provides a rich background for the investigation of fundamental rights.” Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399, 1417 (2005); see *id.* at 1417–20.

105. HETTINGER ET AL., *supra* note 55, at 20 (“[L]awyers are sensitive to uncertainty on the court (manifested in dissents or concurrences) and thus may press litigation in those areas of uncertainty”). The flip side is that dissenting too often might invite too much future litigation and overburden the court’s docket. See *id.*

106. See *id.* (“When judges march in lockstep, citizens and their lawyers are better able to predict the outcome of legal disputes that may reach the courts and thus are more likely to settle their disputes that may reach the courts and thus are more likely to settle their disputes without recourse to litigation.”).

dissenting opinion. With the exception of preparing stock language and conveying the notion to law clerks, the drafting effort required to express at least basic collegiality is comparatively inexpensive.¹⁰⁷ Thus, all else equal, one would expect a dissenting judge to express collegiality at least at a basic level to the extent that collegiality—whether motivated by a true feeling or by instrumental concerns—was a factor in the judge’s decision making calculus as to whether to dissent in the first place. Indeed, even if a judge did not herself have collegial feelings and put little weight on internal court consumption of collegial behavior in deciding whether to file a dissent in the first place, one might think that the cost of expressing collegiality was low enough that a judge who thought there could be some benefit from the *external* consumption—i.e., public consumption—of such expressions that she would include some collegial language in her dissenting opinion.

One might object to the foregoing analysis on the ground that the expression of collegiality is so inexpensive that expressing collegiality will be the default.¹⁰⁸ To whatever extent that is the case, however, there remains a costly option: to *remove* expressions of collegiality that otherwise would appear by rote. If that is the case, then the measures here really examine the absence, not the presence, of expressions of collegiality. Even so, the same prediction should in the end obtain: One should expect to find expressions of collegiality as commonplace.

III. MEASURING EXPRESSIONS OF COLLEGIALITY IN DISSENT

The previous Part established dissent as a valuable setting in which to study collegiality. To do so, it is necessary to develop measures of collegiality in dissent. It is to that task that I turn in this Part. Based on existing literature on

107. See *supra* notes 71–72 and accompanying text.

108. See *infra* note 112 and accompanying text.

judicial collegiality, I develop various measures of the expression of collegiality in dissent.

I have opted to develop measures of dissent based upon particular choice of language by the dissent author. I recognize that this goes against the current trend in text-based empirical legal research to rely upon mechanized textual analytics that identify key words and can detect the valence of particular language and passages.¹⁰⁹ I have made the decision to focus on particular choice of language because, by making such clear choices, the author of a dissent knows that she can *clearly signal* her *particular* displeasure with the majority's decision and/or opinion. By contrast, more diffuse linguistic word choices and valence are far less clear to readers, and indeed may even be the product of subconscious preferences and inclinations.

Turning now to particular linguistic choices, commentators have identified several settings where a dissenter's choice of language reflects an expression of collegiality (or lack thereof) toward the majority. Without doubt, the most common of these is the dissenting judge's decision to state that his or her dissent is taken "with respect" or "respectfully." Commentators have described how the "respectful" dissent grew with the rise of dissents themselves,¹¹⁰ to the point that today *not* noting that a dissent is "respectful" is virtually tantamount to questioning the legitimacy of the majority's reasoning and/or outcome.¹¹¹

Because expressions of "respect" have become so commonplace,¹¹² it is important to have in place other

109. See, e.g., Michael A. Livermore, Vladimir Eidelman & Brian Grom, *Computationally Assisted Regulatory Participation*, 93 NOTRE DAME L. REV. 977, 996–97 (2018).

110. See Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1306 (2011).

111. See *id.* at 1325–26; Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 MICH. ST. L. REV. 853, 877 (2014).

112. See *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, *supra* note 110, at 1325; Donald, *supra* note 50, at 1145.

measures for expressions of collegiality. Next, commentators have described as collegial the decision by a dissenting judge to refer to the judges in the majority as “the court.”¹¹³ In contrast, the decision to refer to the judges in the majority as “the majority” (or variants like ‘the panel majority’) bespeaks an absence of collegiality.¹¹⁴ Finally, commentators have identified as collegial the decision by a dissenting judge to refer to the judges in the majority as his or her ‘colleagues’ or ‘friends.’¹¹⁵

I relied upon the foregoing to implement an empirical metric of the expression of collegiality in dissent on the federal courts of appeals, at both the case-level (“case-level dataset”) and court-level (“court-level dataset”). (In Part IV below, I return to these databases to perform empirical tests of various hypotheses.)

A. *Case-Level Database*

For the case-level dataset, I gathered all cases decided during the 2016 calendar year by the twelve regional courts of appeals¹¹⁶ in which there was a dissenting opinion.¹¹⁷ I

113. See Ronald J. Placone, *The United States Supreme Court and Abortion: A Decline in Civility*, 33 T. JEFFERSON L. REV. 181, 195 (2011).

114. See *id.* at 201.

115. See *id.*

116. I collected no data for the United States Court of Appeals for the Federal Circuit.

117. I searched in Westlaw’s collection of federal court of appeals decisions using the search: ‘advanced: DA(aft 12-31-2015 & bef 01-01-2017) & SY(dissented dissenting)’.

I considered but rejected the idea of collecting similar data for concurring opinions. Some concurring opinions are close to dissents, agreeing with the majority opinion only on the final outcome; such opinions might generate similar incentives as dissents with respect to expressions of collegiality. Others, however, might almost entirely agree with the majority opinion, thus suggesting little in the way of antagonism. It is unclear whether the author of such a concurring opinion would (i) readily express collegiality, or (ii) not see the need to express collegiality given the substantial alignment of views. For this reason, a prediction about expressions of collegiality in concurrences is far more difficult to craft, and in any event very different from what one reasonably should expect to find in

discarded all cases decided en banc. I also discarded all cases in which a three-judge panel generated three opinions, except that I retained such cases where there was a clearly denoted majority opinion, and the judge who issued a separate concurring opinion made clear that he or she was joining the majority opinion *in full*. This generated a dataset of 527 cases. Table 2 presents a summary of the distribution of the cases across the federal circuits.

dissents.

TABLE 2. Frequency and Percentage of cases in case-level dataset, by circuit.

Circuit	Number of Cases	Number of Cases, Excluding Per Curiam Cases	Number of Published Cases	Number of Published Cases, Excluding Per Curiam Cases
D.C.	23 (4.36%)	20 (4.80%)	22 (5.91%)	20 (5.68%)
1	12 (2.28%)	12 (2.88%)	12 (3.23%)	12 (3.41%)
2	15 (3.01%)	14 (3.36%)	15 (4.03%)	14 (3.98%)
3	25 (4.74%)	25 (6.00%)	18 (4.84%)	18 (5.11%)
4	30 (5.69%)	27 (6.47%)	22 (5.91%)	22 (6.25%)
5	49 (9.77%)	37 (8.87%)	36 (9.68%)	33 (9.38%)
6	91 (17.3%)	85 (20.38%)	43 (11.56%)	41 (11.65%)
7	33 (6.26%)	31 (7.343%)	33 (8.87%)	31 (8.81%)
8	52 (9.87%)	45 (10.79%)	50 (14.13%)	45 (12.78%)
9	142 (26.94%)	73 (17.50%)	73 (19.62%)	73 (20.74%)
10	31 (5.88%)	30 (7.19%)	27 (7.26%)	27 (7.67%)
11	24 (4.55%)	18 (4.32%)	21 (5.65%)	16 (4.55%)
TOTAL	527	417	372	352

For each case in the dataset, I coded basic citation information; the circuit court that decided the case; whether the case was published; whether the majority opinion was signed or issued per curiam; the political party of the President who appointed each of the three panel members; and whether the dissenting judge dissented in full or

partially.¹¹⁸ I also coded whether the majority-dissent split was ideological—that is, whether the judges constituting the majority were appointed by Presidents of the same political party and the dissenting judge was appointed by a President of the other political party.

In an effort to discern whether the majority and dissenting judges treated each other collegially, I also coded whether the majority opinion used the word “respect” in referring to the dissenting opinion or judge; whether the dissenting opinion used the word “respect” in referring to the majority opinion or judges; whether the majority opinion used the words “colleague,” “panelist,” or “friend” in referring to the dissenting judge; whether the dissenting opinion used the words “colleagues,” “panelists,” or “friends” in referring to the majority judges; and whether the dissenting opinion referred to the majority coalition as “the court” or “the panel” (as opposed to the much more common appellation “the majority”).¹¹⁹

Commentators have observed that expressions of “respect” in dissent have become almost ubiquitous across the run of cases, while at the same time some judges deploy the term with less frequency or not at all.¹²⁰ Accordingly, it was important to develop measures of collegiality that captured a judge’s (and then a court’s) tendency to express collegiality in different ways. I generated a variable (“Any Collegiality”) for each case that indicated whether the dissenting opinion used *any kind* of collegial language with respect to the majority opinion (i.e., whether the dissenting

118. In coding, I abided by the heading that the authoring judge chose to describe his or her separate opinion. For example, one judge captioned a separate opinion as “concurring in the judgment but otherwise dissenting.” Technically, this would be referred to as a simple concurring opinion, but I included it in the dataset as a partial dissent.

119. I only coded a case as having a dissent that used the term “the court” when the dissenting opinion used that term to refer to the majority opinion (not, for example, to the Supreme Court majority in some other case).

120. See *From Consensus to Collegiality: The Origins of the “Respectful” Dissent*, *supra* note 110, at 1324.

opinion either (i) used the word “respect” in referring to the majority opinion or judges, *or* (ii) used the words “colleagues,” “panelists,” or “friends” in referring to the majority judges, *or* (iii) referred to the majority coalition as “the court” or “the panel”). I also generated a variable for each case equal to the *sum of all ways* the dissenting opinion used collegial language with respect to the majority opinion (with a maximum value of 3, since I coded 3 possible ways a dissenting opinion might manifest such collegiality) (“Collegiality Sum”).

The two measures—Any Collegiality and Collegiality Sum—measure collegiality as expressed in dissents in different ways. By measuring whether the dissenting judge makes any expression of collegiality toward the majority, Any Collegiality considers whether the dissenting judge manifests at least some minimal collegial expression toward the majority. In contrast, Collegiality Sum recognizes that some base level of collegial expression may be *de rigueur*, and looks instead to whether the dissenting judge has gone beyond that base level to express collegiality in multiple ways—perhaps a true or more refined measure of collegiality.

Table 3 presents descriptive data on how often dissenting opinions employ each of the different ways of expressing collegiality toward the majority opinion and judges. (Bear in mind that some opinions express collegiality in more than one way.) The data make clear that the most common way by far to express collegiality is to note that the dissent is taken “respectfully.” They also show that expressions of collegiality are more common in dissents from published opinions and dissents from signed majority opinions.

TABLE 3. Frequency of various means of expressing collegiality in court of appeals dissenting opinions (row percentages in parentheses).

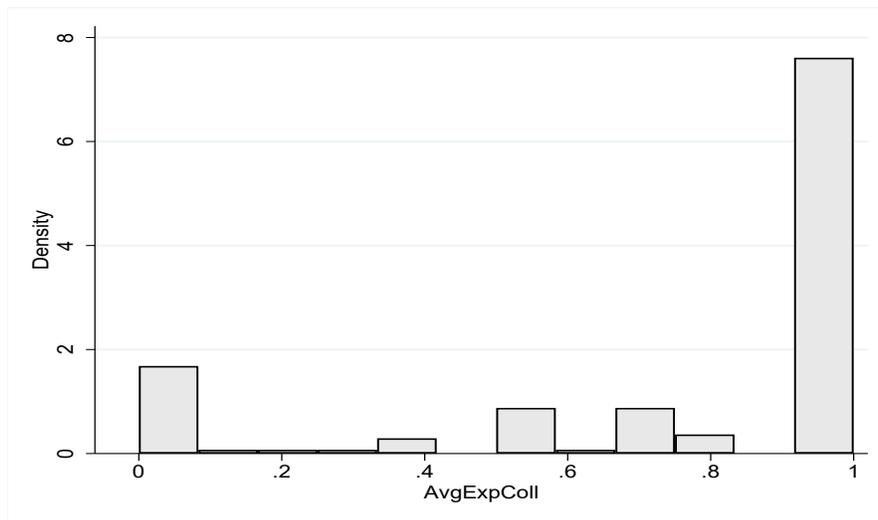
	Number of Dissenting Opinions Expressing “Respectful” Dissent	Number of Dissenting Opinions Referring to the Majority as the “Court” or “Panel”	Number of Dissenting Opinions Referring to the Majority Judges as “Colleagues,” “Friends,” or “Co-Panelists”	Total
All Cases	373 (70.78)	65 (12.33)	85 (16.13)	527 (100.00)
Published Cases	273 (73.39)	59 (15.86)	72 (19.35)	372 (100.00)
Unpublished Cases	100 (64.52)	6 (3.87)	13 (8.39)	116 (100.00)
Cases with Signed Majority Opinions	309 (74.10)	58 (13.91)	74 (17.75)	417 (100.00)
Cases with Per Curiam Majority Opinions	64 (58.18)	7 (6.36)	11 (10.00)	110 (100.00)

Analysis of the decision to express collegiality based on case characteristics would not have much meaning if that decision were made by judges across cases (i.e., without regard to case characteristics). Figure 1 presents a histogram of the fraction of the time that dissenting judges not sitting by designation express at least one form of collegiality toward the majority.¹²¹ The distribution does appear

121. I omitted judges sitting by designation for two reasons. First, as discussed below, a judge sitting by designation will express collegiality toward the majority as a formality, and thus at higher rates than home-court judges. *See infra* tbl. 8. Second, judges sitting by designation are district judges who hear few cases and thus file even fewer dissents. As such, the vast majority of the judges sitting by designation in the dataset (22 out of 23 judges) filed a dissent in a single case,

somewhat bimodal. Figure 1, however, includes fifty-two judges who filed only one dissent; these judges had no opportunity within the dataset limitations to exhibit heterogeneity in the decision to express collegiality.¹²² Accordingly, Figure 2 presents a histogram including only the 112 judges not sitting by designation who filed at least two dissents. The fact that Figure 2 is far less bimodal supports the validity of the analysis below.

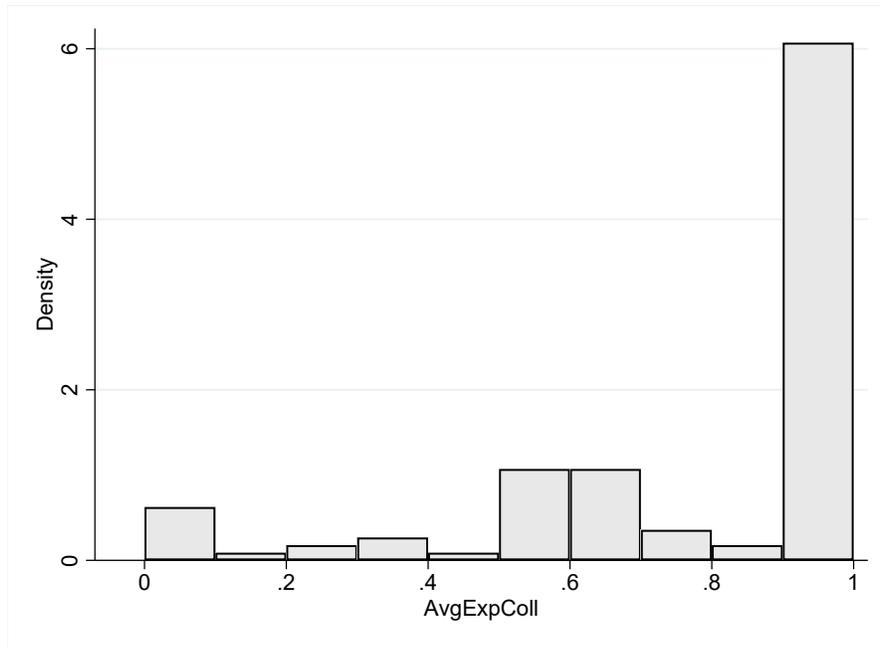
FIGURE 1.



and thus had no opportunity to exhibit heterogeneity in the decision to express collegiality.

122. *See id.*

FIGURE 2.



B. Court-Level Database

I used the data from the case-level dataset to generate overall circuit measures of collegiality.¹²³ The question arose as to what universe of cases was the correct one to use in constructing these circuit measures. For example, while some circuits published almost all, or all, cases with a dissent (for example, the First), others—such as the Ninth—had numerous unpublished opinions with dissents. The Ninth Circuit also made much greater use of judges sitting by designation than did the other circuits.

Rather than choose one “correct” set of cases over which to examine the court-level hypotheses, I instead developed different circuit-level measures for each of the various case-level measures of collegiality. I determined each of these circuit-level measures using both the entire dataset and subsets of the dataset: (a) all cases; (b) all published cases; (c) all cases excluding cases where the dissenting judge was sitting by designation; and (d) all published cases excluding cases where the dissenting judge was sitting by designation. This allowed me to compare circuit collegiality measures across different sets of cases.

Specifically, for each of the basic case-level measures of collegiality, I divided the total number of cases from each circuit that exhibited that measure of collegiality by the total number of cases in the relevant set from that circuit. Thus, for example, the measure of “Any Collegiality” in a circuit is the fraction of cases (ranging from 0 to 1) from that circuit where either opinion exhibited any form of collegiality toward the other opinion.

For the various “Total Collegiality” measures, I coded a

123. Before I began assembling circuit-level data on collegiality, I verified that the case-level dataset generated meaningful data at the circuit level by making sure that no single judge dominated the data for any circuit. For the First Circuit, one judge was responsible for a hefty 41.67% of dissents. Across other circuits, however, no single judge was responsible for writing more than 27.27% of the dissents.

case: (i) 0 if the case exhibited no collegiality; (ii) 1 if the case exhibited one form of relevant collegiality; (iii) 2 if the case exhibited two forms of collegiality; and (iii) 3 if the case exhibited all three forms of collegiality. For each circuit, I then summed the total number of these values and divided that sum by the total number of cases from each circuit. (Examples of some of these calculations appear in Tables A1 and A2 in the Appendix.)

Table 4 presents the various collegiality measures (and ranks) for each circuit, for, respectively, (a) all cases; (b) all cases excluding cases where the dissenting judge was sitting by designation; (c) all published cases; and (d) all published cases excluding cases where the dissenting judge was sitting by designation. The data reveal variation across the circuits. The First and Third Circuits perform robustly well across measures. Though the lower rankings vary more from measure to measure, the Ninth and Eleventh Circuits overall seem to perform most poorly.

TABLE 4. Collegiality measures (with rankings in parentheses) (all cases).

Circuit Collegiality	<i>All Cases</i> (<i>N</i> = 527)		<i>All Cases</i> <i>Except</i> <i>Cases where</i> <i>the</i> <i>Dissenting</i> <i>Judge is</i> <i>Sitting by</i> <i>Designation</i> (<i>N</i> = 504)		<i>All</i> <i>Published</i> <i>Cases</i> (<i>N</i> = 372)		<i>All</i> <i>Published</i> <i>Cases Except</i> <i>Cases where</i> <i>the</i> <i>Dissenting</i> <i>Judge is</i> <i>Sitting by</i> <i>Designation</i> (<i>N</i> = 358)	
	Any	Total	Any	Total	Any	Total	Any	Total
D.C.	0.739 (9)	1.348 (3)	0.739 (9)	1.348 (3)	0.773 (9)	1.409 (3)	0.773 (8)	1.409 (3)
1	1.000 (1)	1.583 (1)	1.000 (1)	1.583 (1)	1.000 (1)	1.583 (1)	1.000 (1)	1.583 (1)
2	0.800 (5)	0.800 (11)	0.786 (5)	0.786 (11)	0.800 (6)	0.800 (11)	0.786 (6)	0.786 (11)
3	1.000 (1)	1.520 (2)	1.000 (1)	1.520 (2)	1.000 (1)	1.500 (2)	1.000 (1)	1.500 (2)
4	0.800 (5)	1.100 (5)	0.786 (5)	1.071 (6)	0.818 (5)	1.045 (7)	0.810 (5)	1.048 (7)
5	0.898 (3)	0.980 (8)	0.896 (3)	0.979 (8)	0.889 (3)	1.000 (9)	0.886 (4)	1.000 (9)
6	0.736 (9)	0.857 (9)	0.724 (10)	0.851 (9)	0.791 (7)	1.024 (8)	0.786 (6)	1.024 (8)
7	0.758 (7)	1.212 (4)	0.750 (7)	1.219 (4)	0.758 (11)	1.212 (4)	0.750 (11)	1.219 (4)
8	0.750 (8)	1.058 (7)	0.750 (7)	1.058 (7)	0.760 (10)	1.080 (6)	0.760 (9)	1.080 (6)
9	0.683 (12)	0.824 (10)	0.664 (12)	0.817 (10)	0.781 (8)	0.986 (10)	0.758 (10)	0.985 (10)
10	0.871 (4)	1.097 (6)	0.871 (4)	1.097 (5)	0.889 (3)	1.111 (5)	0.889 (3)	1.111 (5)
11	0.708 (11)	0.750 (12)	0.714 (11)	0.762 (12)	0.714 (12)	0.762 (12)	0.684 (12)	0.737 (12)
TOTAL	0.770	0.989	0.764	0.994	0.812	1.086	0.805	1.089

Other circuits perform better on one measure than the other. The D.C. and Seventh Circuits fare not so well along the measure of “Any Collegiality,” but fare better on the

measure of “Total Collegiality.” Evidently, some dissents offer no respect to the majority, but other dissents make up for that by evidencing respect in multiple ways. This may reflect heterogeneity among circuit judges. In contrast, the Second and Fifth Circuits do better on the “Any Collegiality” measure than on the “Total Collegiality” measure. This suggests that the judges on those courts in dissent tend as a rule to offer one expression of respect—probably noting that the dissent was “respectful,” and perhaps more as a formality—but do not go beyond that.

Beyond these collegiality measures, I coded each of the twelve courts of appeals under study for: (i) the number of active circuit judges during the 2016 calendar year;¹²⁴ (ii) the number of courthouses housing active circuit judges during the 2016 calendar year; (iii) the court’s caseload per authorized judgeship;¹²⁵ (iv) the court’s dissent rate, calculated as the number of cases the court terminated on the merits in 2016¹²⁶ divided by the number of dissents in the case-level dataset from that court; (v) the extent to which the court is ideologically heterogeneous, calculated as the absolute value of $\frac{1}{2}$ less the fraction of active circuit judges appointed by Republican Presidents; (vi) the total geographic area encompassed by the circuit;¹²⁷ and (vii) the fraction of

124. I counted a circuit judge as “active” if he or she was an active judge for more than half of 2016.

125. For caseload data, I used the cases pending as of Dec. 31, 2016 as reported by the Federal Judicial Center, *See Table B-1. U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding During the 12-Month Period Ending December 31, 2016*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/data_tables/stfj_b1_1231.2016.pdf (last visited July 11, 2022).

126. I used Federal Judicial Center data on the number of cases terminated on the merits (following oral argument or submission on the briefs) in 2016. *See Table B-5. U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding, During the 12-Month Period Ending December 31, 2016*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/data_tables/stfj_b5_1231.2016.pdf (last visited July 11, 2022).

127. I relied on census data and, for those circuits that include U.S. territories, included those territories in the data. *See State Area Measurements and Internal*

population within the circuit categorized by the census as rural.¹²⁸

C. *Validating the Measure*

There are no other existing measures of expressions of collegiality. That said, it is possible to validate my measure against a measure of a related phenomenon. Professors Lee Epstein, William Landes, and Judge Richard Posner have analyzed “dissent aversion”—the tendency of judges sitting in panels *not* to file dissenting opinions (even if they disagree with the position reached by the majority).¹²⁹ Dissent aversion turns at least in part on notions of collegiality,¹³⁰ and thus it makes sense to expect a measure of dissent aversion to produce results at least somewhat similar to a measure of collegiality.

Measuring dissent aversion in terms of a court’s dissent rate, Epstein, Landes, and Posner hypothesize that dissent aversion should correlate inversely with the number of judges on a court, with a court’s workload, and with ideological distances among a court’s judges.¹³¹ They operationalize those variables and find support for those hypotheses on the federal courts of appeals.¹³²

As reflected in Table 5, I find—much as Epstein, Landes, and Posner found with respect to dissent rate—that

Point Coordinates, U.S. CENSUS BUREAU, <https://www.census.gov/geographies/reference-files/2010/geo/state-area.html> (last updated Dec. 16, 2021).

128. I relied on census data and, for those circuits that include U.S. territories, included the population in those territories in the data. See *2010 Census Urban and Rural Classification and Urban Area Criteria*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html> (last updated Oct. 8, 2021). Because I relied on census data, the population numbers count all residents within the circuit boundaries.

129. See Epstein et al., *supra* note 80, at 103–34.

130. See *id.* at 104.

131. See *id.* at 106–09, 129.

132. See *id.* at 129–30.

expressions of collegiality in dissent correlate inversely with court size. The inverse correlation with court workload is weaker but still evident. Notably, as Table 5 also reflects, I find *little evidence* that the expression of collegiality correlates with a court's dissent rate or with a court's ideological homogeneity (i.e., my measures of the expression of collegiality in dissent does not correlate with Epstein, Landes, and Posner's measure of dissent aversion). These findings provide validation for the measures of collegiality I propound.¹³³

133. See Robert Adcock & David Collier, *Measurement Validity: A Shared Standard for Qualitative and Quantitative Research*, 95 AM. POL. SCI. REV. 529, 540 (2001) (elucidating the concept of "convergent/discriminant validation" by use of the following questions: "Are the scores . . . produced by alternative indicators . . . of a given systematized concept . . . empirically associated and thus convergent? Furthermore, do these indicators have a weaker association with indicators of a second, different systematized concept, thus discriminating this second group of indicators from the first?").

TABLE 5. Correlations of the measures of collegiality with number of judgeships, caseload, and dissent rate.

	Authorized Judgeships	Caseload per Judgeship	Dissent Rate	Court Ideological Homogeneity
<i>All Cases</i>				
Any Expression of Collegiality	-0.408	-0.241	-0.313	-0.420
Total Expressions of Collegiality	-0.520	-0.487	0.206	-0.121
<i>All Cases Except Those with Dissents Authored by Judges Sitting by Designation</i>				
Any Expression of Collegiality	-0.442	-0.254	-0.301	-0.383
Total Expressions of Collegiality	-0.528	-0.481	0.212	-0.102
<i>Published Cases</i>				
Any Expression of Collegiality	-0.217	-0.137	-0.204	-0.468
Total Expressions of Collegiality	-0.401	-0.411	0.369	-0.081
<i>Published Cases Except Those with Dissents Authored by Judges Sitting by Designation</i>				
Any Expression of Collegiality	-0.254	-0.205	-0.150	-0.458
Total Expressions of Collegiality	-0.391	-0.417	0.375	-0.086

IV. EMPIRICAL ANALYSIS

In this Part, I lay out hypotheses relating to the expression of collegiality by judges and courts. I then undertake to evaluate those hypotheses empirically.

A. *Hypotheses*

In this Section, I develop testable hypotheses based upon the discussion set out in the previous Section. The initial five hypotheses address decision making at the case-level by the courts of appeals. The sixth hypothesis speaks to the relative frequency with which the courts of appeals (as a whole), as compared to the Supreme Court, feature expressions of collegiality in the context of dissent. The final eight hypotheses test the comparative frequency of expressions of collegiality in dissent at the court level across the courts of appeals.

1. Case-Level Hypotheses

In developing case-level hypotheses regarding the expression of collegiality in dissent, the discussion above suggests consideration of both features of cases, and features of the panels hearing the cases. I consider each in turn.

Let us begin with features of cases, and consider first the distinction between published and unpublished cases. There are three reasons to expect expressions of collegiality in dissenting opinions to be less common in cases decided by unpublished, as opposed to published, opinions. First, published cases tend to be decided by opinions written in chambers (either by the judges themselves or their own law clerks), while unpublished opinions are often (though not always) drafted by staff law clerks; the lesser proximity between the judge and the opinion drafting process may reduce the likelihood of expressions of collegiality.¹³⁴ Second, resorting to deciding cases by unpublished opinion is often a

134. See COHEN, *supra* note 58, at 13.

response to time constraints: Unpublished opinions provide a way for courts to resolve cases quickly.¹³⁵ And pressures of time may correlate with a reduction in the frequency of expressions of collegiality.¹³⁶ Third, unpublished cases are less likely to be read, and circuit rules place restrictions on their precedential value.¹³⁷ As such, judges are less likely to deploy expressions of collegiality in dissent in unpublished cases since those cases are less likely to draw the attention of the media and key audiences.¹³⁸ This reasoning justifies Hypothesis Case-1 (Publication Hypothesis).

- Hypothesis Case-1 (Publication Hypothesis): Expressions of collegiality in dissent are more likely to be found in opinions in published cases than unpublished cases.

Next, the fact that the dissenting judge in a case chooses to file a dissent that is only partial—as opposed to a complete dissent—may reflect greater panel homogeneity, and may correlate with more expressions of collegiality. Hypothesis Case-2 captures this notion.

- Hypothesis Case-2 (Partial Dissent Hypothesis): Expressions of collegiality in dissent are more likely to

135. See David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668–73 (2005); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW. 43, 43 (2000) (“While [an unpublished disposition] can often be prepared in a few hours, [a published] opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing, revising.”); *id.* at 44 (Published “[o]pinions take up a disproportionate share of the court’s time even after they are filed.”).

136. See *supra* notes 91–92 and accompanying text.

137. See, e.g., 4TH CIR. R. 32.1.

138. See *supra* note 67 and accompanying text; Kozinski & Reinhardt, *supra* note 135, at 44 (“[T]he phrasing (as opposed to the result) of [an unpublished disposition] is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.”); *id.* (“If [unpublished dispositions] could be cited as precedent, . . . [u]npublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them.”).

be found in cases where the dissenting opinion is partial, not full.

Beyond features of the case itself, features of the panel hearing the case may affect the frequency of expressions of collegiality in dissent. In particular, greater panel homogeneity may correspond to a lower frequency of such expressions.

First, consider that the dissenting judge in a case on the one hand, and the judges joining to form the majority on the other hand, may sometimes have different ideological frames—which I capture here by reference to the party of the President who appointed the judges.¹³⁹ We may perceive of three competing hypotheses in cases of “ideological dissent”—that is, cases in which the two judges comprising the panel majority were appointed by Presidents of one political party, and the dissenting judge was appointed by a President of the other party. First, the absence of homogeneity between majority and dissent may make expressions of collegiality by the dissent *less* likely.¹⁴⁰ Second, in contrast, a judge filing an “ideological dissent” might be inclined to express collegiality toward the majority on the logic that the media, or the public, might focus on those cases in particular as cases where collegiality might be strained,¹⁴¹ or on the logic that in fact such cases reflect truly divergent policy preferences.¹⁴² Finally, the core conception of judicial collegiality holds that judges will respect each other’s views and be *open to* those with differing views.¹⁴³ On

139. This is standard in the literature on decision making by the federal courts of appeals. See, e.g., Fischman & Law, *supra* note 64, at 167–68.

140. See, e.g., Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1472 (2017) (finding evidence supporting the notion that conservatives tend to interrupt liberals, and liberals tend to interrupt conservatives, at Supreme Court oral arguments).

141. See *supra* note 67 and accompanying text.

142. See *supra* notes 62–63 and accompanying text.

143. Cf. Edwards & Livermore, *supra* note 4, at 1956–57 (portion of page

this logic, one would not expect to find more, or fewer, expressions of collegiality in cases of ideological dissent. These competing predictions are captured by Hypotheses Case-3A, Case-3B, and Case-3C (the Ideological Hypotheses).

- Hypothesis Case-3A (Ideological Heterogeneity Hypothesis): Expressions of collegiality in dissent are *less* likely to be found in cases where the judges in the majority were both appointed by Presidents of the same political party, while the dissenting judge was appointed by a President of the other political party.
- Hypothesis Case-3B (Ideological Public Consumption Hypothesis): Expressions of collegiality in dissent are *more* likely to be found in cases where the judges in the majority were both appointed by Presidents of the same political party, while the dissenting judge was appointed by a President of the other political party.
- Hypothesis Case-3C (Ideological *Null* Hypothesis): Expressions of collegiality in dissent are *neither more nor less* likely to be found in cases where the judges in the majority were both appointed by Presidents of the same political party, while the dissenting judge was appointed by a President of the other political party.

Second, commentators have often hypothesized and observed that women generally are more cooperative than men in group settings.¹⁴⁴ Recent research has found such behavior to extend to judges: Professor Tonja Jacobi and Dylan Schweers present empirical findings that male Supreme Court Justices interrupt their colleagues far more

written solely by Judge Edwards; finding “examples of hard and very hard cases, involving mixed panels in which the decision of the court is unanimous”).

144. See, e.g., Catherine C. Eckel & Philip J. Grossman, *Are Women Less Selfish than Men?: Evidence from Dictator Experiments*, 108 *ECON. J.* 726, 730 (1998) (finding that “women donate, on average, about twice what men donate” in interactive experiments).

frequently than do female Justices at oral argument.¹⁴⁵ On this basis, one might expect female judges to express collegiality in dissent more than their male counterparts; Hypothesis Case-4 captures this idea.

- Hypothesis Case-4 (Gender Hypothesis): Expressions of collegiality in dissent are *more* likely to be found in cases where the dissenting judge is female.

A third point related to panel composition is that sometimes a panel consists of judges other than the judges (regular or senior) of the court of appeals—whether judges from districts within the circuit or judges from other circuits. These judges are less familiar with the regular circuit judges.¹⁴⁶ The discussion above provides competing predictions as to whether such settings will be more, or less,¹⁴⁷ likely to generate expressions of collegiality. These competing predictions are captured by Hypotheses Case-5A and Case-5B (the Sitting by Designation Hypotheses).

- Hypothesis Case-5A (Sitting by Designation Hypothesis, version A): Expressions of collegiality in dissent are *more* likely to be found in cases where the dissenting judge is sitting by designation.
- Hypothesis Case-5B (Sitting by Designation Hypothesis, version B): Expressions of collegiality in dissent are *less* likely to be found in cases where the dissenting judge is sitting by designation.

145. See Jacobi & Schweers, *supra* note 140, at 1463 (“[W]e consistently see that the male Justices interrupt at a far higher rate than the female Justices.”).

146. See Wasby, *supra* note 11, at 118–19 (interviews with Ninth Circuit judges indicating that they generally are less familiar with, and communicate less with, district judges who sit by designation). *But cf. id.* at 120–21 (suggesting that collegiality between circuit judges and district judges increases as a result of district judges sitting by designation).

147. *Cf. Wald, supra* note 11, at 524 (“An observer of appellate courts . . . notices that senior judges tend not to ask questions from the bench or spend time explaining or even justifying their votes to colleagues.”).

2. Court of Appeals-Supreme Court Comparative Hypothesis

The discussion to this point suggests that expressions of collegiality in dissent should be more common on the Supreme Court than on the courts of appeals. There are five reasons for this. First, while courts of appeals generally hear cases in panels of three,¹⁴⁸ all the Justices participate in deciding the cases on the Supreme Court's docket. Second, with the exception of the First Circuit, all the courts of appeals have more judges than the Supreme Court has Justices.¹⁴⁹ Third, while the Supreme Court Justices all maintain home chambers in the same building, this is true among the regional courts of appeals only for the District of Columbia Circuit. Fourth, the Supreme Court attracts considerably more media attention than do the courts of appeals.¹⁵⁰ Finally, while the Supreme Court publishes all its cases, the courts of appeals publish only a fraction of their cases. Thus, especially given the low overall level of media coverage of the courts of appeals, the number of cases that are likely to attract any media coverage at all is comparatively minute. Accordingly, as Hypothesis Comparative-1 predicts, one would expect the Supreme Court to exhibit more expressions of collegiality in dissent.

- Hypothesis Comparative-1 (Frequency Hypothesis): Expressions of collegiality in dissenting opinions will be less common across the federal courts of appeals than in the United States Supreme Court.

148. See 28 U.S.C. §§ 46(b), (c).

149. See *id.* § 44(a).

150. See ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURTS OF APPEALS 1 (2001) (“The Courts of Appeals are virtually invisible to most Americans . . . They receive little media coverage because their decisions are often less dramatic than the pronouncements of the Supreme Court . . .”); Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1137 (2010) (“[T]he actions of the Supreme Court attract greater attention . . .”).

3. Court-Level Hypotheses

Consider first that judges who are more familiar with one another will be more collegial. It stands to reason that the greater the number of judges on a court, the less familiar judges may be with one another. On this basis, Hypothesis Court-1 predicts that larger courts will be less collegial.

- Hypothesis Court-1 (Court Size Hypothesis): The greater the number of authorized seats on a court of appeals, the lower the expressions of collegiality in dissent.

Along similar lines, one might expect that the greater the number of courthouses in which judges on a court maintain chambers, the fewer the interactions among the judges, and concomitantly the lower the collegiality.¹⁵¹ Hypothesis Court-2 captures this notion.

- Hypothesis Court-2 (Courthouse Hypothesis): The greater the number of courthouses that are home to judges' chambers, the lower the expressions of collegiality in dissent.

Next, one might anticipate that a court's higher

151. See Murphy, *supra* note 9, at 458–59 (“Collegiality requires a familiarity with other judges, which occurs only with regular face-to-face contact.”); Michael J. Nelson, Morgan L.W. Hazelton & Rachael K. Hinkle, *How Interpersonal Contact Affects Appellate Review*, 84 J. POL. 573, 575–77 (2022) (finding that appellate judges who sit on panels reviewing Fourth Amendment cases are more likely to vote with the district judges below when the judges have chambers in the same courthouse); see also Morgan L.W. Hazelton, Rachael K. Hinkle & Michael J. Nelson, *The Elevator Effect: Collegiality and Consensus in Judicial Decisionmaking* 10–11, 22–23 (working paper presented April 4, 2019, at the University of Chicago Law School Judicial Behavior Workshop) (on file with author) (using whether judges work in the same city as a predictor of likely collegiality); Rachael Hinkle, Morgan Hazelton & Michael Nelson, *Legal Scholarship Highlight: Getting to Know You—The Unifying Effects of Membership Stability*, SCOTUSBLOG (May 26, 2017, 12:11 PM), <https://www.scotusblog.com/2017/05/legal-scholarship-highlight-getting-know-unifying-effects-membership-stability/> (marshalling empirical evidence to show that judges who serve together for longer periods of time are less likely to issue opinions dissenting from one another).

workload may displace some expressions of collegiality.¹⁵² Hypothesis Court-3 asserts this, making use of court docket size as a proxy for workload.¹⁵³

- Hypothesis Court-3 (Docket Size Hypothesis): The greater the number of cases per judge, the lower the expressions of collegiality in dissent.

One might expect greater homogeneity among judges on a court to translate to greater collegiality. Hypotheses Court-4 and Court-5 make this assertion, using dissent rates,¹⁵⁴ and judges' ideologies,¹⁵⁵ respectively, as proxies for heterogeneity. Hypothesis Court-5 also receives support from the notion that expressions of collegiality will be more likely in settings that are more likely to attract public attention and media coverage.¹⁵⁶

- Hypothesis Court-4 (Rate of Dissent Hypothesis): The greater the percentage of cases in which there is a dissent, the lower the expressions of collegiality in dissent.
- Hypothesis Court-5 (Judicial Ideological Heterogeneity Hypothesis): The more ideologically heterogeneous the court of appeals, the lower the expressions of collegiality in dissent.

152. See Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 769 (1983) (noting the challenge to collegiality posed by growing caseloads); Wald, *supra* note 11, at 527 (same).

153. To the extent that it is costlier to omit, rather than include, expressions of collegiality, *see supra* text accompanying note 108, then one might expect a higher workload to correspond to greater measures of collegiality. The data below tend to refute this alternate hypothesis. *See infra* tbl. 12.

154. *See supra* note 14 and accompanying text; Wald, *supra* note 11, at 523 (“[T]he push toward consensus *is* a familiar part of appellate court life.”).

155. *See* Jonathan P. Kastellec, *Hierarchical and Collegial Politics on the U.S. Courts of Appeals*, 73 J. POL. 345 (2011) (providing empirical evidence that the ideological composition of the Supreme Court, and whole circuit, affects the dispositions and votes of three-judge panels).

156. *See supra* note 67 and accompanying text.

The remaining court-level hypotheses use the population within the circuit's geographic reach as a proxy for the judges who sit on the court of appeals. First, the size of a circuit's geographic scope might be a proxy for the heterogeneity of the population, which in turn may be a proxy for the heterogeneity of the judges on the court.¹⁵⁷ Hypothesis Court-6 captures this notion.

- Hypothesis Court-6 (Geographic Size Hypothesis): The larger the geographic region covered by a circuit, the lower the expressions of collegiality in dissent.

Second, it is sometimes said that rural areas are politer and friendlier than urban ones.¹⁵⁸ Perhaps, then, judges on courts with a greater percentage of rural areas will be more collegial. Hypothesis Court-7 expresses this idea.

- Hypothesis Court-7 (Rural-Urban Hypothesis): The greater the percentage of a circuit is categorized as rural, the greater the expressions of collegiality in dissent.

Last, consider assertions that some regions within the United States—specifically, the South and Midwest—are

157. Some judges suggest that the geographic size of a circuit may have a direct effect on court collegiality. See Wasby, *supra* note 11, at 79–81 (noting the implications of the Ninth Circuit's sprawling geography on collegiality); Tacha, *supra* note 7, at 589 (making a similar point for the Tenth Circuit); Wald, *supra* note 11, at 527 (“With circuits so farflung and schedules so crowded, it is amazing how little one sees of one[']s own colleagues even in in the same building.”). I conclude that the better measure is not how far apart judges' Chambers are from one another, but rather the extent to which Chambers lie in distinct courthouses (whatever the distances between them). That said, one yet might think that a circuit's geographic scope acts as a proxy for heterogeneity among the court's judges. See COHEN, *supra* note 58, at 153 (noting that interviews with circuit judges disclosed that “[t]he only way in which there was any hint that the court's geographic span might have an effect is in the diversity of the judges who sit on the cases”).

158. See, e.g., Joseph Newman & Clark McCauley, *Eye Contact with Strangers in City, Suburb, and Small Town*, 9 ENV'T & BEHAVIOR 547 (1977) (presenting empirical evidence consistent with the notion that people in rural settings are more polite and friendlier than those in urban settings).

politer or friendlier than other regions.¹⁵⁹ If politeness breeds collegiality, then perhaps courts that include portions of those regions will exhibit more frequent expressions of collegiality in dissent.¹⁶⁰ Hypothesis Court-8 captures this notion.

- Hypothesis Court-8 (Regional Nature Hypothesis): The politer and friendlier the region(s) covered by a circuit, the greater the expressions of collegiality in dissent.

B. *Empirical Analysis of Case-Level Hypotheses*

I used the case-level dataset to check the accuracy of case-level Hypotheses Case-1 through Case-4. I deployed a logistic regression using the “Any Collegiality” variable—and an ordered logistic regression using the “Total Collegiality” measure—to test the first four hypotheses. In addition to the key dependent variables—whether the opinion was published, whether the dissent was partial, whether the majority and dissent broke along ideological lines, and whether the dissenting judge was female—I also included as an independent variable whether the dissenting judge was appointed by a Republican President. Table 6 presents the

159. See, e.g., Peter J. Rentfrow, Samuel D. Gosling, Markus Jokela, David J. Stillwell, Michal Kosinski & Jeff Potter, *Divided We Stand: Three Psychological Regions of the United States and Their Political, Economic, Social, and Health Correlates*, 105J. PERSONALITY & SOC. PSYCH. 996, 1006–07 (2013) (using empirical data to describe an area of the U.S.—consisting largely of the Midwest and South—where residents are in general aptly characterized as “friendly and conventional”).

160. The Fourth Circuit may provide an example of a circuit seeming to conform to its regional collegial identity. See *Courtroom Protocol for Counsel*, U.S. CT. OF APPEALS FOR THE 4TH CIR. (Oct. 9, 2019), <https://www.ca4.uscourts.gov/docs/pdfs/courtroomprotocol.pdf> (“The judges come down from the bench after each case to shake hands with counsel and thank them for their advocacy.”); Levine, *supra* note 10 (describing speech by Judge Harris) (“The judges follow every conference with a social lunch. Harris admits she was skeptical about this at first because her inclination was to decompress alone after conference. That changed after she joined the Fourth Circuit. ‘It’s a key ritual of collegiality making manifest that the disagreements about cases have no consequences for our personal interactions.’”).

results for the logistic regression, and Table 7 presents the results for the ordered logistic regression.

Tables 6 and 7 provide strong evidence to support Hypotheses Case-1. As Table 6 reflects, the rate at which dissenting opinions in cases used collegial language to refer to majority opinions or majority judges—or majority opinions used collegial language to refer to dissenting opinions—was statistically different in published as opposed to unpublished cases.¹⁶¹ Table 7 reports a similar result for the Collegiality Sum measure. (Interestingly, Table 7 also suggests that judges appointed by Republican Presidents are more likely to employ more expressions of collegiality in their dissenting opinions than are judges appointed by Democratic Presidents.)¹⁶²

161. To minimize concerns over lack of independence in the observations, I ran the same regression clustering standard errors at the judge-level; other than a reduction in the significance of the constant to the 5% level, the results were the same. Also, though I do not report the tests, I ran similar tests for all the different metrics of collegiality, and found similar statistically significant results. I also found similarly statistically significant results for cases where the majority opinion was, or was not, issued *per curiam*. Cf. Wald, *supra* note 11, at 523 (“A graphic example of the ‘safety in numbers’ syndrome is the use by courts of the *per curiam* decision. No one judge is officially singled out as author of the opinions. Criticism must therefore be directed at the group, not at any single judge.”).

162. I also ran the same regression clustering standard errors at the judge-level. The publication decision remained statistically significant at the 1% level, but the party of the appointing President was no longer statistically significant.

TABLE 6. Logistic regression (with robust standard errors) of whether a dissenting opinion used any collegial language in respect of the majority opinion.

Variable	Coefficient (Odds Ratio)	Robust Standard Error	<i>p</i>-value
Was the opinion published?	0.754 (2.126)	0.217	0.001***
Was the dissent partial?	0.055 (1.057)	0.236	0.815
Did the majority and dissent break along ideological lines?	0.055 (1.057)	0.216	0.798
Was the dissenting judge male?	-0.123 (0.884)	0.229	0.592
Was the dissenting judge appointed by a Republican President?	0.147 (1.158)	0.216	0.497
<i>constant</i>	0.678	0.257	0.008***
<p><i>N</i> = 527. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level. Pseudo-R^2 = 0.022.</p>			

TABLE 7. Ordered logistic regression (with robust standard errors) of the Collegial Sum used by dissenting opinions.

Variable	Coefficient (Odds Ratio)	Robust Standard Error	p-value
Was the opinion published?	0.889 (2.432)	0.184	0.000***
Was the dissent partial?	0.188 (1.206)	0.198	0.344
Did the majority and dissent break along ideological lines?	0.116 (1.123)	0.178	0.515
Was the dissenting judge male?	0.045 (1.046)	0.177	0.799
Was the dissenting judge appointed by a Republican President?	0.362 (1.437)	0.178	0.042**
N = 527. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level. Pseudo-R ² = 0.0260.			

Hypothesis Case-2 contended that expressions of collegiality would be more common in partial dissents than in full dissents. As Tables 6 and 7 reveal, the data do not support this hypothesis.

Recall that Hypotheses Case-3 offered competing takes on whether an ideological divide between the majority and dissent would affect the likelihood of expressions of collegiality. My own prediction was that there would be *no* such relationship, i.e., that the null hypothesis (expressed by Hypothesis Case-3B) would hold. The empirical evidence is indeed consistent with Hypothesis Case-3B: I found no statistically significant relationship between the presence of

an ideological divide and an expression of respect. Of course, absence of evidence of a statistical relationship is not evidence of absence of a relationship. Still, the statistical test does not approach significance, even at the 10% level, for either measure.

Hypothesis Case-4 posited that female dissenting judges would be more likely to express collegiality than male dissenting judges. As Tables 6 and 7 show, the data do not support this hypothesis.

Hypotheses Case-5 proposed different conceptions of the relationship between judges sitting by designation and expressions of collegiality. The empirical evidence provides some support for each of these conceptions. Table 8 looks at the set of published cases and shows that, with statistical significance (at the 10% level, and approaching significance at the 5% level), a dissenting judge sitting by designation was more likely to express collegiality than was a dissenting judge not sitting by designation.¹⁶³ This is consistent with Hypothesis Case-5A.

163. With two dissents authored by judges sitting by designation not expressing “respect” for the majority, the results approached significance at the 10% level ($p = 0.128$) for the set of all cases.

TABLE 8. Correlation in published cases between whether the dissenting judge was sitting by designation and whether the dissenting opinion uses any collegial language in respect of the majority opinion or judges.

		<i>Whether the dissent uses any collegial language in respect of the majority opinion or judges.</i>		
		No	Yes	Total
<i>Whether the dissenting judge was sitting by designation.</i>	No	70 (19.55)	288 (80.45)	358 (100.00)
	Yes	0 (0.00)	14 (100.00)	14 (100.00)
	Total	70 (18.82)	302 (81.18)	372 (100.00)
<p>Note: Row percentages are reported in parentheses. The <i>p</i>-value from a Fisher's exact test is 0.082.</p> <p>Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.</p>				

But there is also empirical evidence supporting Hypothesis Case-5B, to the effect that judges sitting by designation are *less* likely to express collegiality. Table 9 shows (again for published opinions) a more nuanced view of the practices of judges sitting by designation. Instead of considering whether the dissenting judge expressed any collegiality (as did Table 8), Table 9 presents data on the total number of ways the dissenting judge expressed collegiality. Once again, judges sitting by designation expressed collegiality differently, with statistical significance (at the 1% level), than did judges not sitting by designation.¹⁶⁴ Table 8 reveals, however, not only that judges sitting by designation were more likely to express some

164. The result was similar and significant at the 5% level for all cases ($p = 0.033$).

collegiality (than to express no collegiality) than were judges not sitting by designation, but also that judges sitting by designation were likely to express collegiality only once (most likely by noting a “respectful” dissent), while judges not sitting by designation were more likely to engage in multiple expressions of collegiality. The latter conclusion is consistent with Hypothesis Case-5B.

TABLE 9: Correlation in published cases between whether the dissenting judge was sitting by designation and the number of ways the dissenting opinion uses collegial language in respect of the majority opinion or judges.

		<i>The number of ways the dissenting opinion uses collegial language in respect of the majority opinion or judges.</i>				
		0	1	2	3	TOTAL
<i>Whether the dissenting judge was sitting by designation.</i>	No	70 (19.55)	194 (54.19)	86 (24.02)	8 (2.23)	358 (100.00)
	Yes	0 (0.00)	14 (100.00)	0 (0.00)	0 (0.00)	14 (100.00)
	Total	70 (18.82)	208 (55.91)	86 (23.12)	8 (2.15)	372 (100.00)
<p>Note: Row percentages are reported in parentheses. The <i>p</i>-value from a Fisher’s exact test is 0.007***.</p> <p>Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.</p>						

C. Empirical Analysis of Comparative Court Hypothesis

In order to compare practices of collegiality in dissent between the courts of appeals and the Supreme Court, I compiled a Supreme Court dataset. Because some Supreme Court cases include multiple dissents, the unit of analysis in the Supreme Court database is the dissent.¹⁶⁵ I used the

165. By contrast, since each case in the case-level dataset contains exactly one dissent, the unit of analysis for the case-level dataset can be said equivalently to be either the case or the dissent.

same search term I used for the case-level dataset to identify Supreme Court cases decided during 2016 with a majority opinion and at least one dissenting opinion.¹⁶⁶ The Supreme Court dataset consists of 46 dissenting opinions (spread over 36 cases). Table 10 presents a summary of the distribution of these dissents.

TABLE 10. Frequency of various means of expressing collegiality in Supreme Court dissenting opinions (row percentages in parentheses).

	Number of Dissenting Opinions Expressing “Respectful” Dissent	Number of Dissenting Opinions Referring to the Majority as the “Court” or “Panel”	Number of Dissenting Opinions Referring to the Majority Judges as “Colleagues,” “Friends,” or “Co- Panelists”	Total
All Dissents	33 (71.74)	43 (93.48)	0 (0.00)	46 (100.00)
Cases with Per Curiam Majority Opinions	1 (33.33)	3 (100.00)	0 (100.00)	3 (100.00)
Cases with Signed Majority Opinions	32 (74.42)	40 (93.02)	0 (0.00)	43 (100.00)

I used the Supreme Court and case-level court of appeals datasets to check the accuracy of Hypothesis Comparative-1.

166. I searched in Westlaw’s collection of Supreme Court decisions using the search: ‘advanced: DA(aft 12-31-2015 & bef 01-01-2017) & SY(dissenting).’ The search generated 38 cases. I dropped one case that had no dissenting opinion (that the search generated because the word “dissenting” appeared in the case syllabus), and another case with two dissents that featured only a plurality opinion.

As Table 11 reflects, consistent with Hypothesis Comparative-1's prediction, Supreme Court dissents reflect collegiality toward the majority opinion and Justices, with statistical significance, more often than do dissents at the courts of appeals. Indeed, 100% of the dissents in the Supreme Court dataset include such expressions.¹⁶⁷

TABLE 11. Correlation between whether the dissent was filed in a Supreme Court case and whether the dissenting opinion uses any collegial language in respect of the majority opinion or judges.

		<i>Whether the dissent uses any collegial language in respect of the majority opinion or judges.</i>		
		No	Yes	Total
<i>Whether the dissent was filed in a Supreme Court case.</i>	No	121 (22.96)	406 (77.04)	527 (100.00)
	Yes	0 (0.00)	46 (100.00)	46 (100.00)
	Total	121 (21.12)	452 (78.88)	573 (100.00)
<p>Note: Row percentages are reported in parentheses. The <i>p</i>-value from a Fisher's exact test is 0.000***.</p> <p>Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.</p>				

167. Interestingly, none of the Supreme Court dissents refers to the majority Justices as "colleagues" or "friends." Also, court of appeals dissents make use of the word "respect" to refer to the majority opinion or judges at essentially the same rate (70.68%) as do Supreme Court dissents (71.74%). However, every Supreme Court dissent in the dataset that does not use the word "respect" *does* refer to the majority as "the Court" at least once (though many opinions also refer to "the majority").

D. Empirical Analysis of Court-Level Hypotheses

I used the case-level dataset to check the accuracy of court-level Hypotheses Court-1 through Court-7. The limited size of the court-level dataset—only 12 units—precluded meaningful statistical analysis. Accordingly, I restricted myself to checking on the presence of correlations in evaluating the various hypotheses. Table 12 presents these correlations (for all hypothesis except Hypothesis Court-7), broken down in panels for (a) all cases, (b) all published cases, (c) all cases except those with a dissent authored by a judge sitting by designation, and (d) all published cases except those with a dissent authored by a judge sitting by designation.¹⁶⁸

Perusal of Table 12 reveals that most correlation coefficients change substantially depending on the set of cases from which they emerge. In order to evaluate the strength of the relationship between collegiality and the various variables, I divided the variables into three categories. First, some variables had correlation coefficients that were uniformly (or almost uniformly) substantial correlation coefficients: population, authorized judgeships, and courthouses. For these variables, I concluded that the relationship between them and collegiality was high. A second category of variables produced correlation coefficients that were low across almost all measures of collegiality and sets of cases: ideological homogeneity and dissent rate. For these variables, I concluded that the relationship between them and collegiality was low. Finally, for the remaining third set of variables, the correlation coefficients were mixed—some of them were low and some of them were high. I did not take such results as evidence supporting these hypotheses.

168. Table 4, above, presented some of the results included in the more complete Table 10.

TABLE 12. Correlations of the measures of collegiality with court-level variables.

	All Cases		<i>All Cases Except Those with Dissents Authored by Judges Sitting by Designation</i>		Published Cases		<i>Published Cases Except Those with Dissents Authored by Judges Sitting by Designation</i>	
	Any	Total	Any	Total	Any	Total	Any	Total
Authorized Judgeships	-0.402	-0.53	-0.442	-0.352	-0.217	-0.401	-0.254	-0.391
Courthouses	-0.315	-0.572	-0.528	-0.588	-0.167	-0.508	-0.198	-0.497
Caseload per Judgeship	-0.241	-0.487	-0.442	-0.352	-0.137	-0.411	-0.205	-0.417
Dissent Rate	-0.313	0.206	-0.528	-0.588	-0.204	0.369	-0.15	0.375
Court Ideological Homogeneity	-0.42	-0.121	-0.442	-0.352	-0.468	-0.081	-0.458	-0.086
Total Area ¹⁶⁹	-0.376	-0.418	-0.528	-0.588	-0.193	-0.3	-0.218	-0.291
Rural Fraction ¹⁷⁰	-0.004	-0.229	-0.442	-0.352	-0.073	-0.29	-0.055	-0.280

Hypothesis Court-1 predicted that a higher number of authorized judgeships will correlate with lower collegiality. As expected, the correlation coefficients here were uniformly negative, and mostly substantial. There is, in short, evidence supporting this hypothesis.

Hypothesis Court-2 claimed that a circuit with a higher number of courthouses serving as home chambers to judges will have lower collegiality. As expected, the correlation coefficients here were uniformly negative and also uniformly substantial. There is, then, strong evidence supporting this

¹⁶⁹ In running these correlations, I excluded the District of Columbia Circuit.

I also coded for each circuit the total *land* area covered by each circuit, and ran correlations using that variable. The results were substantially the same as for total area.

¹⁷⁰ In running these correlations, I excluded the District of Columbia Circuit.

hypothesis.

Hypothesis Court-3 asserted that a circuit with a higher caseload will exhibit lower collegiality. As expected, the correlation coefficients here were all negative and rather substantial. There is, in short, some evidence supporting this hypothesis.

Hypothesis Court-4 claimed that circuits with higher dissent rates will have lower collegiality. The correlation coefficients here had mixed signs and were uniformly insubstantial. Contrary to Judge Edwards' assertions, the evidence does not support this hypothesis.

Hypothesis Court-5 predicted that judicial ideological heterogeneity will translate to fewer expressions of collegiality. The correlation coefficients here were mostly, but not entirely, negative, and they were generally insubstantial. Thus, the existing evidence does not support this hypothesis.

Hypothesis Court-6 asserted that the greater area covered by a circuit, the lower the collegiality. On the understanding that the hypothesis rested on the notion of "sprawl" leading to lower collegiality, my primary test of the hypothesis relied on using "total area" as the proxy for geographic area. As expected, the correlation coefficients I found were negative and, though somewhat mixed, were largely substantial. There was at least moderate support for this hypothesis.

Hypothesis Court-7 predicted that more rural circuits will be more collegial. Contrary to this prediction, the correlation coefficients here were uniformly negative. However, they were also nearly uniformly insubstantial. In sum, there is no evidence to support this hypothesis.

Hypothesis Court-8 predicted a positive relationship between regional politeness and court collegiality. The data do not provide support for this hypothesis. The Fourth, Fifth, Sixth, and Eleventh Circuits include states that lie within the southeast census region (which corresponds broadly to

most conceptions of the southern U.S., an area reputed to be especially polite), yet the data (as reflected in Table 3 above) indicate that these circuits are not especially collegial. (Indeed, the Fifth and Eleventh Circuits lie near the bottom of the circuits on some collegiality measures.) The Midwest—another region reputed to be polite—does a little better, but again the Sixth, Seventh, Eighth, and Tenth Circuits (which include portions of the Midwest) are not near the top of the collegiality measures. It bears noting that two circuits that include portions of the Southeast (one of which also includes part of the Midwest) have had internal operating controversies. Evidence suggests that the Fifth Circuit stacked panels in civil rights cases in the late 1950s and early 1960s in order to ensure liberal Republican majorities.¹⁷¹ More recently, some Sixth Circuit judges have alleged improprieties in selecting the relevant judges to decide cases.¹⁷² While both these controversies now lie in the distant past—the latter over a decade ago, and the former more than a half century ago—it is conceivable that they yet may contribute some suspicion—and perhaps some uncollegiality—into the court’s operations today. It is also plausible that one or both of these episodes represent signs

171. See J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1044–65 (2000) (discussing “panel packing” by the Fifth Circuit in the late 1950s and early 1960s in civil rights cases).

172. Compare *Grutter v. Bollinger*, 288 F.3d 732, 753–758 (6th Cir. 2002) (Moore, J., concurring) (responding to the complaint, lodged by Judge Boggs’s dissenting opinion, that “the present case has been decided by a nine-judge en banc court . . . rather than an eleven-judge en banc court, and that the members of the hearing panel originally assigned this case . . . purposefully engineered this result”), *aff’d on unrelated grounds*, 537 U.S. 1043 (2002), and *id.* at 772 (Clay, J., concurring) (“[T]he dissent’s new-found allegations of impropriety as to the course this matter followed in reaching the *en banc* court simply defy belief. It is ludicrous to think that with our circuit operating with only one-half of the active judges’ positions filled, and with over 4000 cases reaching our Court each year, the Chief Judge or any members of this Court would single out any one particular case and maneuver the system for a particular outcome.”), *with id.* at 810–14 (Boggs, J., dissenting) (“Procedural Appendix,” alleging procedural irregularities in constituting the court to hear the case).

or symptoms of uncollegiality at the time that yet persists today.

V. DISCUSSION OF RESULTS

The preceding Part established support for some (but not all) case-level hypotheses and some (but not all) court-level hypotheses. Table 13 presents a summary of the findings.

TABLE 13. Summary of findings.

Hypothesis	Was there support for the hypothesis?
<i>Case-level hypotheses</i>	
Hypothesis Case-1 (Publication Hypothesis)	Yes (***)
Hypothesis Case-2 (Partial Dissent Hypothesis)	No
Hypothesis Case-3A (Ideological Heterogeneity Hypothesis)	No
Hypothesis Case-3B (Ideological Public Consumption Hypothesis)	No
Hypothesis Case-3C (Ideological Null Hypothesis)	Data were consistent with the null hypothesis.
Hypothesis Case-4 (Gender Hypothesis)	No
Hypothesis Case-5 (Sitting by Designation Hypotheses)	Dissenting judges sitting by designation were more likely to express collegiality at all (*), but less likely to express collegiality in more than one way (**).
<i>Supreme Court-courts of appeals comparative hypothesis</i>	
Hypothesis Comparative-1 (Frequency Hypothesis)	Yes (***)
<i>Court-level hypotheses</i>	
Hypothesis Court-1 (Court Size Hypothesis)	Yes
Hypothesis Court-2 (Courthouse Hypothesis)	Yes
Hypothesis Court-3 (Docket Size Hypothesis)	Some
Hypothesis Court-4 (Rate of Dissent Hypothesis)	No
Hypothesis Court-5 (Judicial Ideological Heterogeneity Hypothesis)	No
Hypothesis Court-6 (Geographic Size Hypothesis)	Some
Hypothesis Court-7 (Rural-Urban Hypothesis)	No
Hypothesis Court-8 (Regional Nature Hypothesis)	No

Considering first case-level hypotheses, the data provide support for the hypothesis that dissents are more likely to express collegiality in published cases (Hypothesis Case-1). This conclusion bolsters the notion that dissents are more likely to express collegiality when the majority opinion is drafted by a judge herself (or by her personal law clerks), and that dissents are more likely to express collegiality when the case is one that is more likely to draw the attention of lawyers, the media, and the public generally.

The data did not provide support for a couple of hypotheses that looked to the homogeneity (or lack thereof) of the panel hearing the case. The evidence did not support the hypothesis that expressions of collegiality would be more frequent in cases where the dissent was partial (Hypothesis Case-2). Neither did the data support the hypothesis that expressions of collegiality would be less frequent in cases where the panel broke along an ideological divide (Hypothesis Case-3A). On the other hand, the data also did not support the complementary hypothesis that, owing to the likelihood of public consumption, expressions of collegiality would be *more* frequent where the panel broke along an ideological divide. Rather—consistent with broad understandings of judicial collegiality—there was no evidence that ideology had any impact on the frequency of expressions of collegiality.

The data did not support the hypothesis that female judges would more frequently express collegiality in dissent than male judges (Hypothesis Case-4). Interestingly, however, there was some evidence that the hypothesis *did* hold for judges appointed by Democratic Presidents.

Finally, the data provided insights into competing conceptions of the behavior of dissenting judges who are sitting by designation. On the one hand, judges sitting by designation are more likely to express collegiality in some way toward the majority judges or opinion than are judges not sitting by designation (Hypothesis Case-5A). On the other hand, judges *not* sitting by designation are more likely

to deploy more cumulative expressions of collegiality toward the majority judges or opinion (Hypothesis Case-5B).

Turning to the court-level hypotheses, the data supported the hypotheses that arose out of the notion that more frequent interactions among judges would correlate with greater expressions of collegiality in dissent. The evidence showed that expressions of collegiality in dissent were greater on courts with fewer authorized judgeships (Hypothesis Court-1), on courts with judges stationed in fewer courthouses (Hypothesis Court-2), and on courts with lower workloads (Hypothesis Court-3).

In contrast, the data did not disclose any effect of homogeneity on the frequency with which dissenting judges expressed collegiality. Neither dissent rate (Hypothesis Court-4) nor court ideological homogeneity (Hypothesis Court-5) were strongly correlated with the frequency of expression of collegiality in dissent.

The hypotheses relying on characteristics of the geographic region covered by the circuit as a proxy for the homogeneity of the judges on the court largely failed to attract support from the data. There was some evidence that the size of the geographic area covered by the circuit—a proxy for regional heterogeneity¹⁷³—correlated with expressions of collegiality in dissent (Hypothesis Court-6). However, expressions of collegiality in dissent did not correlate with either the percentage of circuit area categorized as rural (Hypothesis Court-7). And, to the extent that certain regions of the United States are seen as friendlier or more polite, circuits including those regions did not generally exhibit greater expressions of collegiality in dissent (Hypothesis Court-8).

Finally, looking to comparative collegiality, the evidence supports the hypothesis that the Supreme Court exhibits more expressions of collegiality in dissent than do the federal

173. See *supra* note 157 and accompanying text.

courts of appeals (Hypothesis Comparative-1).

The evidence here provides some support for Judge Edwards' arguments about collegiality, but it also draws some of his contentions in question. The evidence bolsters Judge Edwards' point that ideological disagreement does not drive, or detract from, collegiality.¹⁷⁴ That a panel broke along an ideological divide was not a statistically significant predictor of an expression of collegiality in dissent being more, or less, likely. And neither a court's ideological homogeneity nor the ideological homogeneity of the geographic region covered by the court correlated with fewer expressions of collegiality in dissent. However, the evidence does not support Judge Edwards' assertion that collegiality is inversely correlated with a court's dissent rate.¹⁷⁵ Nor does the evidence support Judge Edwards' argument that the courts of appeals are more collegial bodies than the Supreme Court.¹⁷⁶ Rather, as Professors Cross and Tiller have argued and as I hypothesized, the Supreme Court exhibits more collegiality, at least on this measure.¹⁷⁷

174. *See supra* note 36 and accompanying text.

175. *See supra* notes 14, 19, and accompanying text.

176. *See supra* note 13 and accompanying text.

177. *See supra* note 12 and accompanying text.

CONCLUSION

In this Article, I have introduced meaningful, tractable measures of judicial collegiality. Empirical investigation using the measures reveals that collegiality is not function of ideological differences, that judges are more likely to exhibit collegiality in published opinions—i.e., when there is more of a spotlight on their actions. At the court level, the Supreme Court seems more collegial than the federal courts of appeals. This is likely a function of the Supreme Court hearing all cases with the same group of judges and having all judges based in the same courthouse. Finally, empirical analysis indicates that lower dissent rates are not correlated with higher levels of expressed collegiality. Rather, courts with fewer judges, and judges housed in fewer courthouses, are more likely to be collegial courts.