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Papers on Lower Federal Court Judicial Selection
and Judicial Behavior

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An abstract of
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Abstract

Papers on Lower Federal Court Judicial Selection and Judicial Behavior

By Jonathan Remy Nash

In contrast to the bulk of the existing political science literature on American judicial politics, the papers in this dissertation focus on the lower federal courts. The first looks at federal district court, and use as a natural experiment a time period during which New York federal district judges were appointed by Senators of both parties regardless of the party of the sitting President. It examines the nomination of federal district judges, and argues that the ideology of the Senator who recommends a nominee (i) does not predict the length of time until the nomination is resolved by the Senate, but (ii) has some effect on the likelihood of ultimate confirmation. The second paper looks at the appointment of magistrate judges by federal district courts, arguing that district courts will value expertise over ideological considerations. The paper presents a model of the appointment process, and offers empirical evidence consistent with the hypothesis. The third paper examines decision-making by judges in groups. While many commentators and judges tout the importance of collegiality in decision-making, empirical validation of that hypothesis faces the challenge of measuring collegiality. The paper offers novel measures of collegiality based on expressions of collegiality by dissenting judges towards judges in the majority. The paper validates these dissent-based measures, and then uses the databases to gather empirical data on settings where judges tend to act collegially, and the characteristics of courts that tend to be collegial.

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1. Overview

Political scientists have historically focused their study of American courts and judicial politics on the U.S. Supreme Court, and to a lesser degree on state supreme courts. However, the Justices of the U.S. Supreme Court comprise a miniscule portion of the federal judiciary. Further, every year the Supreme Court decides fewer than 100 of the hundreds of thousands of cases filed in the federal judiciary; in other words, most federal cases by far are decided without participation by the Supreme Court. Lower federal courts are thus an integral, but understudied, facet of the federal judiciary.

Two questions that are critical to understanding how courts function are (i) how judges are selected, and (ii) how the judges behave once they ascend to on the bench. The field's overall focus on the Supreme Court has produced valuable scholarship on these questions, but institutional differences between the Supreme Court and the lower federal courts limits the extent to which the results of the extant Supreme Court research can be properly exported to the lower federal courts.

On the selection front, the President appoints Article III federal judges with the advice and consent of the Senate. But the President and the Senators are more likely to care more about, and thus invest more time in, Supreme Court appointments than lower federal court appointments. First, the U.S. Supreme Court focuses on the most pressing societal legal issues of the day.

Second, general media coverage of courts focuses on the U.S. Supreme Court. As such, politicians, and interest groups that prompt politicians to act, logically might devote more attention to Supreme Court appointments.

Third, the Supreme Court hears all its cases en banc, i.e., with all the Justices voting on every case In contrast, most decisions by a lower federal court involve a small fraction of the

judges on that court: Decisions by federal district courts (the federal "trial court") are rendered by lone district judges, and decisions by federal courts of appeals (the intermediate appellate courts directly above the federal district courts and below the Supreme Court) are ordinarily rendered by panels of three judges. It follows that the predictable impact of a single judge's appointment will be greater on the Supreme Court than on a lower federal court. Accordingly, those who select judges logically would put more effort into the choice of Supreme Court Justices.

Finally, with only nine Justices on the Supreme Court, openings are sporadic. In contrast, openings on the lower federal courts—whether through the retirement and death of judges, or through the creation of new judgeships—are far more frequent. A decision by the players in the political branches to devote equal resources to all judicial openings would impose demands on resources significantly larger for the lower federal courts than it would for the Supreme Court. This is especially true for presidential administrations, which have constitutional responsibility for all judicial vacancies. In contrast, it stands to reason that a state's two Senators may focus special attention on lower court judicial nominees from their states.

Moving beyond the appointment of Article III judges, Congress has empowered lower federal court judges—but not the Justices of the Supreme Court—to appoint non-Article III judges who work in the district courts to help manage caseload: District court judges appoint federal magistrate judges, while circuit court judges appoint federal bankruptcy judges.

Lower courts also differ from the Supreme Court in terms of judicial behavior. First, in terms of casting votes on cases, the traditional story is that Supreme Court Justices, having neither a fear of reversal by a higher court nor a reason to modulate their behavior in order to increase the likelihood of a more prestigious position, may simply vote their true preferences. In contrast,

lower court judges may be concerned over reversal by a higher court, and also may aspire to a higher position.

Second, the docket of the Supreme Court differs substantially from the dockets of the lower courts. The Supreme Court selects the cases it hears, and tends to hear cases that are highly important, and therefore contentious and politically salient. In contrast, the district courts and courts of appeals retain no discretion over their dockets. Many—indeed sometimes most—of the cases on their dockets are likely to be uncontroversial.

Chapters 2 and 3 of this dissertation address judicial selection on the lower federal courts. Chapter 4 addresses judicial behavior on the lower federal courts.

Chapter 2 contributes to the literature on judicial selection on federal district courts. While the existing literature assumes that the President consults with Senators who are members *of the same party*—and predicts that the Senate will uniformly deploy confirmation delay tactics, and support or oppose judicial nominees, based on whether the Senate is in the hands of the same party as the sitting President—the chapter looks at judicial nominations recommended to a President of one party by a Senator from the opposing party. The chapter relies on a natural experiment: the appointment of federal district judges in New York state over the 22-year period, from 1977 to 1998. During that period, New York was represented by one Senator of each major political party; the Senator who was of the same political party as the sitting President had responsibility for recommended nominees for three out of every four vacancies, while the other "out-of-party" Senator enjoyed that responsibility for the remaining one out of four vacancies. The chapter empirically examines the nominations for the New York federal district courts during this period. It finds that nominees recommended by the Senator who is in the minority party in the Senate were no more likely to face confirmation delays, but were somewhat less likely to be confirmed. It also

finds that divided government was likely to lead to confirmation delays, but not to confirmation denials.

Chapters 3 also addresses lower court judicial selection—specifically, the selection by district judges of magistrate judges. While scholars have largely ignored them, magistrate judges are an integral part of the federal judiciary. Moreover, existing commentary is mixed on whether the federal district judges—who appoint the magistrate judges in each district—do so based on merit, or with an eye to furthering their own ideological preferences. This chapter argues theoretically and empirically that district judges will appoint magistrate judges based on merit. It first develops a game-theoretic model explicating district judges' incentives to prioritize expertise in appointing magistrate judges. It then uses two novel datasets—one of local district rules regarding presumptive referrals to magistrate judges, and the other of referral practices in actual cases across districts—to validate observable implications drawn from the model.

Chapter 4 contributes to the literature on behavior of lower court judges—specifically, the collegiality of judges on the federal courts of appeals. While many scholars offer ideological proclivity as a primary explanatory factor for judicial behavior, judges—along with some scholars—emphasize the importance of collegiality on multimember courts. But there is disagreement as to how to assess when collegiality is at work, and what type of multimember court is more likely to exhibit collegiality among its judges. I develop here novel measures of collegiality, ones that are based on expressions of collegiality by dissenting judges towards judges in the majority. I use judge-level and court-level databases to validate these dissent-based measures, by showing that the novel measures correlate with some, but not other, measures that align with dissent aversion—a feature of multimember courts that commentators see as aligned with collegiality. I then use the databases to gather empirical data on settings where judges tend

to act collegially, and the characteristics of courts that tend to be collegial. Analysis reveals in particular 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 judges with chambers spread geographically across more courthouses.

2. Examining the Fate of Interparty Judicial Appointments

2.1. Introduction

Current academic commentary in political science, and in law, assumes that the U.S. President appoint lower court judges—especially federal district judges—with input from home-state Senators *from the same political party as the President*. The assumption features prominently in institutional analyses of judicial selection, and undergirds much of the theoretical and empirical literature in law, economics, and political science examining the voting behavior of lower federal court judges.

Indeed, the traditional understanding—that a Senator enjoys a role in the nomination process only to the extent he or she is of the same party as the President— underlies one of the fundamental measures of judicial ideology in use today: The now ubiquitous "judicial common space score" measure for judicial ideology—developed by political scientists Micheal Giles, Virginia Hettinger, and Todd Peppers—assigns a judge the following ideology: (i) if both Senators from the state and the President share a single party affiliation, the average of the President and the two Senators; (ii) if only one Senator shares a party affiliation with the President, then the average of the President and that Senator; and (iii) the President's ideology if neither Senator is of the same party as the President (Giles et al. 2001: 631). While Professors Giles, Hettinger and Peppers themselves only validate and apply their measure to federal circuit judges, they suggest that, if anything, the measure ought to apply more strongly to federal district judges (Giles et al. (2002)). Along these lines, commentators have now used the logic of Professors Giles, Hettinger, and Peppers expressly to calculate ideology measures for federal district judges (Boyd 2010).

But the traditional assumption—that home-state Senators from the opposing party play no role in selecting judicial nominees—accords with neither the Constitution nor political theory. Nor is it always the case in practice.

Consider first the Constitution. While that document vests authority in the President to appoint federal court judges "by and with the advice and consent of the Senate" (U.S. Const., art. II, § 2), it makes no mention of political parties (see THE FEDERALIST NO. 80 (Madison) (arguing that partisan politics posed a threat to functioning government, and that the constitutional design minimized that threat)). To the extent that home-state Senators of the same party as the President wield greater power in the judicial selection process, that is a function of practice and tradition, rather than constitutional command.

Consider next that democratic theory provides reason to think that Senators should play a role in home state nominations *regardless of party affiliation*. With good reason, the Constitution shields sitting federal judges from influence from the political branches, by providing life tenure and guaranteeing no reductions in salary (see U.S. Const., art. III, § 1). This leaves the only democratic influence over federal judges at the nomination stage. Yet the traditional approach deprives an elected statewide federal official without much of a say over state-based federal district court nominations solely because of the official's party affiliation.

Finally, the traditional assumption does not hold universally. In this chapter, I explore a setting where the logic underlying the traditional approach does not apply. From 1977 through 1998, New York had one Democratic Senator (Daniel Patrick Moynihan) and one Republican Senator (Jacob Javits from 1977 to 1980, and Alphonse D'Amato from 1981 through 1998). Throughout that period, the Senators followed an arrangement that "divided the spoils" of New York federal district court judicial nominations. The Senator who shared a party affiliation with

the President would recommend nominees—as the logic of the traditional approach would expect—for three out of every four vacancies. The power to recommend nominees for the remaining quarter of vacancies would fall, however, to the other Senator (see Federal Bar Council 1989: 145).

I use the New York setting to examine the questions of how senatorial ideology affects the confirmation of, and the time until the confirmation decision for, judicial nominees. To answer these questions, I have assembled a dataset consisting of all nominees—including failed nominees—that Presidents submitted to the Senate for federal district court seats in New York between 1977 and 1998. For all these nominees, I have identified the Senator responsible for recommending that nominee to the President.

I argue that the Senate majority will not generally treat nominees differently depending upon whether the nominee originated with the New York Senator who belongs to the Senate majority or not. This is because Senators—including the Senate leadership—will not want to interfere with an agreement freely entered into by two of its members (including one member of the Senate majority).

I hypothesize that the Senate majority will treat nominees promulgated by the minority-party Senator (that is, the Senator who is *not* a member of the Senate majority) worse under particular circumstances. First, a period of divided government—where the President's party is not the party of the Senate majority—will be more likely to produce such treatment than a period unified government. For one thing, divided government will ordinarily find the Senate in a mindset to obstruct presidential nominations overall. For another, in a period of divided government, the minority-party Senator will share a party affiliation with the President, thus making his nominees a particularly attractive target for the Senate majority; in contrast, in a period

of unified government, the minority-party Senator will be "out of power" with respect to both the President and the Senate; as such, there is likely to be less of an incentive to target.

Second, I hypothesize that worse treatment of nominees put forward by the minority-party Senator will more likely manifest itself in terms of confirmation success rather than confirmation delays. This is because elite supporters of the Senate majority will be enticed more by bottom line results rather than delays that do not affect the ultimate composition of the federal bench.

The empirical analysis provides results somewhat consistent with these hypotheses. I find that, consistent with the second hypothesis, nominees originating with the minority-party Senator were less likely to be confirmed than were nominees put forward with the majority-party Senator. However, while the first hypothesis suggests that such outcomes were likely to be exacerbated during periods of divided government, the data provide no such statistically significant result.

Turning to the length of the confirmation process, consistent with the first hypothesis, I find that confirmation periods for nominees recommended by the minority-party Senator were longer than those for nominees suggested by the majority-party Senator during times of divided government. However, this finding was the result not of relatively poor treatment of minority-party Senators' nominees during periods of divided government, but rather relatively *favorable* treatment of minority-party Senators' nominees during times of unified government—a result I never hypothesized.

The analysis in this chapter is valuable in at least five ways. First, most extant studies of confirmation practices focus on the Supreme Court, and the few studies that look at lower federal court nominee confirmation practices focus on the federal courts of appeals rather than the district

courts (see, for example, Nixon & Goss 2001; Binder & Maltzman 2002). This study sheds greater light on the understudied confirmation practices involving district court nominees.

Second, this chapter elucidates the nature of confirmation politics in the district court nomination setting where variation is far greater than is usually the case. Under the traditional approach, district court nominees will all be promulgated by political actors of the same party (whether the President alone, or the President acting in concert with Senator(s) of the same party). Since there will be little variation across district court nominees, one would expect the Senate in the ordinary course to deal with these nominees on a classwide, rather than individual, basis. Further, insofar as the importance of these nominations is relatively low and information about nominees comparatively high, one would expect the Senate in the ordinary course to confirm most nominees. Indeed, the empirical evidence I find validates this claim. In contrast, the New York setting exploits a natural experiment to allow investigation into the rare case where Senators of different political parties simultaneously generated district court nominees in the same state, and where we can accordingly gain greater leverage on political responses to nominations generated across ideological lines.

Third, investigation into the New York setting allows for insights into the extent to which Senators' allegiance flows to one institution—a political party—or another institution—the Senate itself. Consider that a decision by Senators of one political party to delay, or vote against, nominees generated by a Senator of the other party would elevate party loyalty over a deal voluntarily entered into by two (bipartisan) U.S. Senators. On the other hand, a decision generally to treat all nominees equally—regardless of which Senator generated the nominees—would subordinate party loyalty to senatorial prerogative. The findings here largely validate the second account—loyalty to the Senate and its members over loyalty to party—insofar as the evidence is

that Senators of a party may have delayed nominations from the opposing party's Senator, but only where there was a realistic chance of "running out the clock" and thus defeating those nominations.

Fourth, this chapter provides insight into a setting where actors affiliated with different political parties were able to act in concert to appoint lower federal court judges. Commentators have suggested that judicial decision making can sometimes be improved by having lower court judges of different political affiliations, or more moderate judicial appointees. An obstacle to implementing these suggestions, however, has been the question of whether these goals are attainable. The successful inclusion of selectors of different political affiliations in New York provides a basis on which to believe that (without changing the fundamentals of the constitutional appointment process) appointing lower court judges of different political affiliations, or more moderate judicial appointees, might indeed be practicable.

Finally, this chapter highlights how important it can be to drill down into particular practices that Senators may have used at certain times in determining who was nominated for the district courts, and how their nominations fared.

2.2 Overview of the Federal Judicial Appointment Process

2.2.1 The Constitution and Federal Judicial Appointments

The constitutional provisions governing the role, service, and appointment of federal judges are hardly numerous. Article III of the Constitution mandates the establishment of the United States Supreme Court, and leaves Congress with the discretion to create lower federal courts. It also directs that all judges appointed to the Supreme Court and the lower federal courts—

so-called "Article III judges"—shall enjoy life tenure (subject only to removal by impeachment) and no reductions in salary during their service. (U.S. Const., art. III, § 1.)

Article II delineates the process by which "judges of the Supreme Court" and "all other officers of the United States"—including lower federal court judges—are to be appointed. The President "shall nominate, and by and with the advice and consent of the Senate, shall appoint" these judges. (U.S. Const., art. II, § 2.)

The constitutional structure for the appointment and service of federal judges is designed to provide a balance between, on the one hand providing the federal judiciary with independence, and in particular to shielding federal judges from undue influence from the political branches, and on the other hand validating some notion of democratic theory that judges should be selected by (if not accountable to) elected representatives. Providing federal judges with a guarantee of no reduction in salary and life tenure furthers the goal of judicial independence, but reduces the accountability of judges, both to the people directly and to their elected representatives. The Constitution balances the absence of post-appointment accountability by empowering the President and the Senate to select judges. Even while it severely circumscribes the ability of elected officials to judge judges after they have ascended to the bench, it allows those officials to "pre-judge" would-be judges *before* they ascend to the bench. Indeed, the constitutional structure puts a premium on that anterior judgment by limiting the scope of posterior judgment. (Nash 2006: 2171-73.)

2.2.2 *The Realities, Democratic Underpinnings, and Politics of Supreme Court Appointments*

The technical reality of the appointment of Supreme Court Justices essentially follows the broad strokes of the constitutional language. The President, usually with help from his advisors, identifies an individual to nominate. Once the President nominates an individual for a vacancy on the Court, the Senate must consent—i.e., vote to confirm the nominee—before the nominee may take his or her position. Before they vote, Senators gather information about the nominee; over the course of the last century, that function has included hearings where the nominee testifies, and responds to questions, before the Senate. Senators routinely ask nominees who have prior judicial experience (which in recent decades has been the norm) about their prior decisions and opinions, and generally inquire about nominees' legal experience, writings (including academic writings), and judicial philosophies. (Nash 2006: 2183-84.)

2.2.2.1 Democratic Theory and Supreme Court Appointments

The method by which Supreme Court Justices are appointed is broadly consistent with the goals of democratic theory (at least once one concedes that the Constitution mandates life tenure and no reductions in salary). The selection of a Supreme Court Justice—a position that hears cases from across the nation—involves the President (the one nationally elected official) and Senators from all states.

2.2.2.2 Modeling Supreme Court Appointments

Bryon Moraski and Charles Shipan model Supreme Court nominations as a three-stage game with two players. The two players are the President and the Senate. In the first stage, a vacancy appears on the Court. In the second stage, the President chooses a nominee to fill that vacancy. In the third stage, the Senate decides whether or not to confirm the nominee. If it does, then the game ends; if not, then the players return to stage two. (Moraski & Shipan 2000: 1071.) The game focuses on the ability of political actors to alter the ideal point of the Court's median Justice; the median Justice's ideal point is appropriately focal in that commentators generally identify the Court median as the likely outcome, especially in contested cases (Epstein & Jacobi 2008: 44-49).

Professors Moraski and Shipan determine three different regimes that resolve the game in equilibrium. They do so by assuming that the occurrence of a vacancy on the Supreme Court empowers the players to alter the Court median. Under a regime with an unconstrained President—that is, one where the President and Senate both would like to move the Court median in the same direction and the Senate more so than the President—the President can establish the new Court median at his or her ideal point. Under a regime with a fully constrained President—that is, one where the President and the Senate lie on opposite sides of the existing Court median (that is, the median with the vacancy in place)—the President and Senate cannot bargain to an outcome other than to agree to a Justice who will keep the Court median exactly as-is. Finally, under a regime with a semi-constrained President—that is, where the President and the Senate lie on the same side of the current Court median but, unlike the first scenario, the Senate lies closer to the current Court median than does the President—the President and Senate will bargain to some point in between the President's ideal point and the current Court median. (Moraski & Shipan 2000: 1075-77.)

Professors Shipan and Shannon expand Professors Moraski and Shipan's basic model to add another weapon to the Senate's arsenal: the power to delay confirmation. They predict that, while the Senate will act quickly with respect to the unconstrained President and the semi-constrained President, delay well may occur under a regime with a fully constrained President. They offer a few reasons for this conclusion. First, they explain that, because the President and Senate find themselves on opposite sides of the current Court median, there is little chance that confirmation of the President's nominee will benefit the Senate; thus, the Senate is better off devoting its time elsewhere. Second, the Senate might suspect the President of advancing a nominee who ultimately will move the Court median toward the President's preferred point; it thus might use additional time to vet the nominee. Third, the Senate might use delay to weaken the President's political power. (Shipan & Shannon 2003: 659.)

2.2.3 The Realities, Democratic Underpinnings, and Politics of Lower Federal Court Appointments

2.2.3.1 The Political Reality of Lower Federal Court Appointments

The reality of the appointment of lower federal court judges differs in major respects from the reality of appointing Supreme Court Justices. To be sure, technically the President still nominates the individual, and the Senate holds a confirmation vote. The reality, however, is that home-state Senators hold considerable sway over the nomination process.

With few exceptions, lower federal court judges serve a defined geographic area that includes all, or part of, the state in which their home Chambers are located. The Senators of a state have input on nominees for judicial positions that are based in their state in two ways. First, under a longstanding practice, a home-state Senator has the privilege to "blue-slip"—that is (sometimes

depending upon the predilections of the Senate Judiciary Committee Chair), register objection and sometimes block—a judicial nominee whom he or she does not approve (Scherer 2005: 141-47). Second, home state Senators of the same political party as the President have traditionally enjoyed considerable input as to whom the President nominates (Scherer 2005: 28-29). While the last half century has seen Presidents wrest greater control over court of appeals nominees, Senatorial input over district court nominees remains the rule (Law 2005: 494).

The active role enjoyed by home state Senators in the nomination process is magnified by the fact that the whole Senate (and sometimes even the President) does not generally pay much attention to, and usually rubber stamps, lower federal court nominees, especially nominees to the district courts. Consider that federal district courts lie at the lower end of the judicial totem pole (at least insofar as we consider judicial appointments that must pass Senate muster) (Nash 2017: 1916). In addition, unlike in the setting of the Supreme Court or the courts of appeals where there is an incentive to shift the median of the court (Nash & Shepherd 2020: 662), there is little benefit to shifting the median ideology of a district court. Unlike the Supreme Court (which hears all its cases en banc) or the courts of appeals (which generally hears cases in panels of three), a lone district judge presides over most cases in the district courts. In this sense, the median of the district court is less important than the median of higher courts. In short, one would not expect the Senate to devote the same time and attention that it would to nominees to the Supreme Court or even the courts of appeals.

Moreover, even if a Senator, or the President, wanted to vet district court judicial candidates carefully, there is likely to be much less information about prospective district judges than about higher court judges. Most Supreme Court Justices, at least in recent history, have previously spent some time sitting on lower courts. Similarly, many court of appeals judges have

developed records as district judges before their elevation. By contrast, while a few prospective district judges may have experience as magistrate judges, bankruptcy judges, or state judges (see Nash 2017: 1924-27), most will not have much of a judicial record on which the President, a Senator, or the Senate can rely in determining the way he or she likely would resolve cases.

2.2.3.2 Democratic Theory and Lower Federal Court Appointments

The method by which district court nominees are appointed can be seen to be inconsistent, at least under some circumstances, with the goals of democratic theory. It may make sense to emphasize the power of home-state Senators (and thus indirectly the people of the state in question) and reduce the influence of the Senate as a whole, and the President. But even accepting that point, the traditional approach vests great power over district court nominees in home-state Senators *of the same party as the President*; it concomitantly *disempowers* home-state Senators not of the same party as the President (and those who voted for them).

2.2.3.3 Modeling Lower Federal Court Appointments

In this Section, I highlight important differences in the nomination process for district court judges as compared to the process for Supreme Court nominees. In particular, there are two overarching differences that suggest modifications to the game theoretic model I described in the Part 2.2.2.2. First, we ought to add a stage at the outset for Senatorial input. Second, we ought to deemphasize the stage where the Senate scrutinizes the President's nominees (whether to delay or outright deny confirmation).

Consider first Senatorial input. Individual Senators play an important role in the selecting who will, and will not, be nominated by the President for seats on the lower federal courts (see Songer 1982: 107-09; Goldman 1997: 27; Rutkus 2008: 4-13). Especially with respect to the district court, "senatorial courtesy" empowers home state Senators—traditionally who are of the same party as is the President—to recommend nominees to the President (Rutkus 2008: 5-10, 14). This means that we ought to add a new player—the relevant home state Senator (or Senators) and another stage to the game: In a new initial stage, the relevant home state Senator recommends a nominee to the President; at what is now the second stage, the President determines whether or not in fact to nominate that person. If the President does nominate him or her, then the game proceeds as above; if not, the players revert to the first stage.

At the same time, this additional stage should be, in the ordinary course of things, not affect behavior as to district court nominations in a significant way. Under the system generally in place in most states, the President and Senators *of the same party* select district court nominees. Since the relevant actors share party (and presumably general ideological) affiliation, the assumption is that that the selectors will generally agree on nominees. (If there is no home state Senator of the same party as the President, then the President in the ordinary setting wields full power to select district court nominees, and so this stage of the game is a nullity.) In short, then, while there is an additional stage of the nomination game in the district court setting, one would not expect it to have much of an impact on the selection of district court nominees.

Consider next that we should expect the Senate to focus less scrutiny on, and generally to be less likely to oppose, district court nominees than Supreme Court nominees or even nominees to the courts of appeals. There are, as I discussed above, two reasons for this. First, district court nominations matter less. For one thing, district judges lie at the bottom of the Article III judicial

hierarchy. For another, while it may make sense for politicians to be concerned about moving the median ideology of multimember courts (like the Supreme Court and the courts of appeals), the median ideology of a district court is less important. Second, even to the extent politicians wanted to vet a district court nominee, there is likely to be much less information available about a prospective district judge than about a nominee to a higher court.

In sum, under the typical district court nomination game model, one would expect most district court nominees that emerge to be confirmed by the Senate. While (as compared to Supreme Court nominations) there is an additional stage where the home state Senators of the same party as the President recommend nominees for the President to nominate, those actors' preferences will generally align. Further, the game stage that commentators predict will pose a large hurdle for Supreme Court nominees—the Senate confirmation process—is unlikely to pose anywhere near as a large a hurdle for district court nominees.

2.2.3.4 The Empirics of Lower Federal Court Appointments

The data are broadly consistent with the prediction in the preceding Section. They show that the vast majority of judicial nominees for district court positions made by Presidents Jimmy Carter, Ronald Reagan, George H.W. Bush, and Bill Clinton were confirmed. Of those failed nominations, only a very small proportion were not simply returned to the President without action. (See Rutkus & Sullenberger 2004: 14 tbl. 3.)

At the same time, there is some empirical evidence that certain political configurations may contribute to delay in disposition of judicial nominees and decrease the likelihood of confirmation. Divided government—that is, the setting where the President's political party is the minority party

in the Senate—may be a less fertile ground for confirmation success (see Binder & Maltzman 2009: 252; but see Krutz, Fleisher & Bond 1998: 878; Shipan & Shannon 2003: 658). And the majority Senate party may generally be less disposed to give nominees put forward by a President of the opposing party a quick hearing (Hartley & Holmes 2002: 278; Binder & Maltzman 2002: 196-97; Shipan & Shannon 2003: 663, 665; but see Allison 1998; Nixon & Goss 2001: 265-67). This is reflected in Table 2-1, with unified government settings as the baseline.

Type of Government	**Effect on Judicial Confirmation Process**
Unified (Republican President and Senate; Democratic President and Senate)	[baseline]
Divided (Republican President and Democratic Senate; Democratic Senate and Republican Senate)	Possible confirmation process delays, and possibly fewer confirmations

Table 2-1: Party control of the presidency and the Senate, and the associated effects on the judicial confirmation process.

The empirical evidence further suggests that the effects of divided government are exacerbated in the fourth year of a President's term. Whereas delaying the confirmation process earlier in a President's term simply delays the (mostly) inevitable confirmation vote, delay in the final year may result in failed nominations, with open seats preserved for the next President (potentially of a different party). There is thus a greater incentive for opposition Senators to deploy delay in the fourth year of a President's term, with the attendant potential effect of more failed nominations. And indeed, there is some empirical evidence showing a reduction in confirmation rates in the final year of a President's term (see Binder & Maltzman 2009: 252). There is also some evidence of confirmation delays in the fourth year of a presidential term (see O'Connell

2015: 1681–82 & n.91), although one might imagine that delays might not be so pronounced in the last year of a term since any nomination must terminate (one way or another) within a relatively short period of time.

2.3 The Arrangement Between New York's Senators Regarding Judicial Nominations, 1977-1998

2.3.1 Describing the Arrangement

The original allocation of district court judicial nominees between New York Senators of different parties arose during the four years—1977-1980—during which Senator Moynihan and Senator Jacob Javits, a liberal Republican, served jointly in the Senate (Molotsky 1981).[1] While the federal judiciary would shortly experience substantial growth, federal courts remained at the time rather small. During the four-year period (which essentially corresponded with the Carter administration), Senator Moynihan was responsible for nine recommendations for appointees to the New York district courts, while Senator Javits was responsible for two.

Alphonse D'Amato defeated Senator Javits in the Republican primary, and then won the general election in 1980. He quickly announced that he would continue the practice that Senators Moynihan and Javits had established, in response to which Senator Moynihan commented: "'This is extremely gracious of Senator-elect D'Amato, and I thank him.'" (Molotsky 1981.)

From his election, Senator Moynihan employed a judicial screening panel to sort through and identify suggestions for nomination. The panel was of bipartisan composition and purported to select nominees based upon merit. Senator D'Amato adopted a similar practice when elected,

[1] The discussion in this section is drawn largely from Nash 2015: 667-68.

although he reserved for himself the final call on any suggestions passed along to the President (Molotsky 1981.)

The Moynihan-D'Amato arrangement persisted over the years. One bump in the road was Moynihan's 1985 suggestion that President Reagan nominate William E. Hellerstein to the Southern District of New York. President Reagan rejected Hellerstein, leaving Moynihan to fume that Reagan did not want to appoint individuals with backgrounds in legal aid (Werner 1985). Though Moynihan claimed that the decision "'corrupts the system of appointment,'" the episode did not affect the Moynihan-D'Amato relationship; indeed, D'Amato had joined Moynihan in recommending Hellerstein's nomination (Werner 1985). Other episodes when Presidents declined to follow through on the suggestion of a Senator from the opposing party similarly did not derail the practice (see King 1991 (individual suggested by Moynihan withdrew name after three years of inaction by President Bush)).

Over the years, each Senator would fight for the other Senator's nominees (Dao 1998). In fact, it was Senator D'Amato who "helped push through a vote" on President Clinton's elevation of Judge (now Justice) Sonia Sotomayor to the Second Circuit, in the face of Republican opposition (Stolberg 2009).

The Moynihan-D'Amato arrangement lasted as long as both men served jointly in the Senate. It—like its predecessor arrangement between Senators Moynihan and Javits—was unusual (Dao 1998; Johnson 1993).[2]

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[2] One 1998 newspaper article suggests the practice might have become somewhat more widespread over time: "In many states, like New York, where the two Senators are from different parties, the senators divide the prerogative of choosing Federal District Court judges, no matter which party controls the White House" (Lewis 1998).

2.3.2 Why New York's Senators Agreed to, and Maintained, the Arrangement

One might ask why the Senators agreed to enter into this arrangement.[3] Three answers suggest themselves, each drawn from three goals Senators might have in choosing nominees for the district courts: having federal judges who fulfill certain political aims, choosing prospective judges based on merit, and handing out patronage positions to political allies.

Consider first the notion that Senators try to have judges appointed who will fulfill certain ideological goals. Such an understanding undergirds at least one major way that political scientists use to predict how a judge will perform on the bench (see Giles et al. 2001: 628-29). If this assumption is accurate, why would Senators Javits and Moynihan have entered into the original agreement, and why would Senators Moynihan and D'Amato have agreed to continue it in 1981? One answer, offered by Senator D'Amato in Senate testimony, is that the Senators shared a wish for a more balanced judiciary (see Confirmation Hearings on Federal Appointments 1995). It is unclear, however, why (from a self-interested perspective) a Senator would want to achieve such a goal. The explanation also begs the question why, if indeed each Senator had such a goal in mind, he or she might not implement on his or her own, by simply recommending prospective judges with different political attitudes. Perhaps a better way to think of the strategy is that, over time, each Senator would like to ensure that at least some judges will share his or her political beliefs and that, on that basis, one Senator might be willing to surrender judicial selections now in order to receive some in the future. Still, the question remains why the majority party Senator would agree to such an arrangement without knowing whether he or she would ever find herself a

[3] The discussion in this section is drawn largely from Nash 2015: 668-70.

member of the Senate minority. (As it turned out, Senator D'Amato enjoyed twelve years with a Republican President and six with a Democrat.)

Second, consider that Senators Javits, Moynihan, and D'Amato all employed judicial merit selection committees. To the extent that merit dominated the selection process, perhaps political differences would not impede an arrangement to allow the minority party Senator to recommend judicial nominees. And, consistent with this story, the two Senators' selection panels sometimes had overlapping membership (see Saxon 2001). Still, if merit truly was the goal to the exclusion of politics, one wonders why the two Senators would not simply have created a unified merit selection panel.

Third, consider that Senators may prefer to award appointments to politically powerful allies. Historically, district court recommendations were a form of patronage. While political considerations have been found to play a larger role in judicial selection in the years beginning with the Carter administration, that remains less so with respect to district court selections. (Scherer 2005: 11-13.) On this logic, Senators might agree to a power sharing arrangement on the ground that more judges would owe their jobs to them, and/or to ensure them some opportunities for patronage appointments even when their party was not in power in the White House.

In the end, some combination of these explanations is probably closest to the truth. Neither Senator Javits, Senator Moynihan, nor Senator D'Amato was particularly partisan. Senator Javits was a liberal Republican. Senator Moynihan had substantial roles in the Kennedy, Johnson, Nixon, and Ford administrations; his first recommendation to President Clinton for a district court appointment was a liberal Republican whom Senator Javits had unsuccessfully advanced years earlier. It has been said that Senator D'Amato engaged in political patronage (e.g., Halbfinger & Kocieniewski 2009). Moreover, his political loyalties often cross party lines. Over the course of

his Senate career, he recommended Democrats for the district court bench (e.g., Lubasch 1981); more recently, rumor has it that he worked to forestall a serious Republican challenge to the election bid of his former intern—and now Democratic New York Senator—Kirsten Gillibrand (Halbfinger & Kocieniewski 2009). In this sense, merit and political considerations may have complemented ideological considerations in selecting prospective district court judges (see Songer 1982: 109). Next, both Senators may have understood that a strong, nonpartisan federal judiciary was a valuable end in itself (Author's Interview with Robert Katzmann 2019)—perhaps especially in a state like New York that prides itself as a commercial center and actively seeks to attract business litigation within its borders (e.g., Dammann & Hansmann 2008: 49). Finally, it seems that there was a genuine affection between Senators D'Amato and Moynihan (Author's Interview with Alphonse D'Amato 2014; Author's Interview with Kenneth Gross 2015; Author's Interview with Robert Katzmann 2019).

2.3.3 Why the Presidents Acceded to the Arrangement

As I discussed in the previous Part, the prototypical district court nomination game includes a preliminary stage at which the President and home state Senators together arrive at nominees.[4] In the typical setting, the interests of these actors are largely aligned. In New York's bipartisan selection setting, by contrast, the President's ideological interests would not align when the Senator responsible for the nomination was affiliated with a different party. This misalignment conceivably might complicate the process. It seems, however, that as a rule Presidents accepted

[4] The discussion in this section is drawn largely from Nash 2015: 670-72.

the minority Senator's recommendations. There are several reasons that help explain why this was the case.

First, Presidents may have gone along with the plan on the logic that it was a simple extension of senatorial courtesy, so that to rebuff it would raise the ire of the Senate. Second, Presidents may have felt that their ability to ensure district court judges loyal to their ideologies was too difficult (given many candidates' scant judicial experience) and/or that to garner adequate information to make such calls would take too much time and effort, especially given the limited role of district judges who, after all, are bound by precedents of the Supreme Court and applicable court of appeals. Third, Presidents may have felt that those who were confirmed would owe at least some ideological allegiance—if not substantial allegiance—to the President who nominated them. (See Johnson & Songer 2002 (finding that district court judges reflected in their decision making more of the ideology of the Presidents who nominated them, rather than their home-state Senators); Nash 2015: 678-81 (finding the party of the appointing President, but not the party of the suggesting Senator, predictive of the median prison sentences rendered by New York district judges)). Finally, it might be that the *threat* of a President declining to nominate someone upon a Senator's recommendation was sufficient to screen out individuals whom the President would likely decline to nominate from either (i) the pool of applicants for a Senator's recommendation, and/or (ii) the pool of applicants from which the Senator selected his ultimate nominee.

2.3.4 Assessing the Senate's Reaction to the Arrangement

The other point at which the New York's "divide the spoils" nomination scheme might disrupt the ordinary district court nomination game is the reaction of the Senate to those whom the

President ultimately nominated. Consider three possible reactions by the Senate, one of which would impair the arrangement between New York's Senators, and the others which would not.

First, it is possible that the Senate would respond to nominees differently based upon the party affiliation of the Senator who originally recommended the nominee: The majority Senate party might treat nominees from the Senator of the same party far more favorably than nominees from the other Senator.

If this reaction were acted upon in an extreme, one would not think the arrangement between New York's Democratic Senator and Republican Senator would have survived. After all, the Senator from the minority Senate party would presumably voice concern to his colleague that the colleague had voluntarily entered into the arrangement, and urge his colleague to defend the arrangement, and all nominees put forth by either of them, to his co-partisans. And the Senator from the majority party would indeed have incentive to protect the arrangement, both because of his own reputation, and because he in the future might find his party in the minority and want his colleague to do the same for him.

A second possibility is that the Senate leadership could respect the bipartisan arrangement between the Senators and treat nominees more or less the same. The Senate leadership could take this position whether because of pressure from the Senators themselves (as I have explained just above), or because as an institutional matter the Senate should respect agreements into which its members—of either party—enter.

Finally, a hybrid possibility is the Senate could treat in general nominees from either Senator substantially the same, but still leave room for some differential treatment depending on

party affiliation. A hybrid approach might protect the Senate's institutional integrity while at the same time allowing limited partisan action to fulfill central party goals.

Given the theoretical notion that most lower court nominees will be confirmed, and the evidence validating that notion, I hypothesize that the first possibility—that the Senate's treatment of nominees would vary substantially based on the party of the recommending Senator—will not have been the case. To do so would interfere with the prerogative of individuals Senators and do harm to the Senate as an institution. It also seems unlikely that the Senate majority would entirely ignore the party of the recommending Senator. It instead seems most likely that the Senate majority would take a hybrid approach, *sometimes and to some degree* treating nominees originating with the minority-party Senator worse than nominees originating with the majority-party Senator.

If the Senate majority was likely to take a hybrid approach, under what conditions might we expect the Senate majority to discriminate against nominees recommended by the minority party Senator? I offer two suggestions—and two corresponding hypotheses.

First, I hypothesize that settings of divided government will be more likely to result in worse treatment by the Senate majority of nominees originating with the minority-party Senator than will settings of unified government. To understand the intuition underlying this view, it is important to recognize that the contrasts between the bipartisan nomination arrangement that prevailed in New York and the ordinary nomination setting (prevalent in most states) differed depending on whether the same party controlled the presidency and the Senate.

The typology of settings under the "ordinary" setting—where only Senators of the same party as the President recommend judicial nominees—is set out above in Table 2-1. Tables 2-2

and 2-3 set out that typology in the New York setting. Table 2-2 covers settings where party control of the presidency and the Senate is unified. The first row is the scenario that occurs in an "ordinary" state setting; the second row presents the scenario that can only happen where the Senator of the party other than the President's party can recommend nominees.

Relationship Between Party of the President and in the Senate Majority, and Party of Recommending Senator	**Effect on Judicial Nomination**
Same (Republican President, Republican Senate; Republican recommending Senator; Democratic President, Democratic Senate; Democratic recommending Senator)	[prevalent setting; baseline]
Different (Republican President, Republican Senate; Democratic recommending Senator; Democratic President, Democratic Senate, Republican recommending Senator)	Possibly slower confirmation process, and possibly fewer confirmations

Table 2-2: Predictions about the effects of party affiliation of the Senator recommending a nominee—with unified government—on the judicial confirmation process.

Table 2-3 presents additional possibilities where party control of the presidency and the Senate is divided. As in Table 2-2, the first row is the scenario that occurs in an "ordinary" state setting, while the second row presents the scenario that can only happen where the Senator of the party other than the President's party can recommend nominees. Whereas in Table 2-2, intuition suggests (and, as I shall explain shortly, theory predicts) that the additional scenarios—that is, the scenarios where the out-of-party Senator recommends nominees—will fare *worse* in the Senate, the opposite is true in Table 2-3: With divided government, the out-of-party Senator is a member of the Senate majority, and thus may find his nominees comparatively more likely to be acted upon quickly and to be confirmed. To put it another way, one might expect that the nominees of the Senator who is in the Senate majority would fare better—i.e., be confirmed more often and face

less confirmation delay—than the nominees of the other Senator. But in the case of unified government, such scenarios are the norm, while in the case of divided government, such scenarios can only occur where the out-of-party Senator has the power to recommend nominees.

Relationship Between Party of the President and Party of Recommending Senator	Effect on Judicial Nomination
Same (Republican President, Democratic Senate; Republican recommending Senator; Democratic President, Republican Senate; Democratic recommending Senator)	[prevalent setting; baseline]
Different (Republican President, Democratic Senate; Democratic recommending Senator; Democratic President, Republican Senate, Republican recommending Senator)	Possibly slower confirmation process, and possibly fewer confirmations

Table 2-3: Predictions about the effects of party affiliation of the Senator recommending a nominee—with divided government—on the judicial confirmation process.

Apart from the typological differences between the settings of unified and divided government, consider the different mindsets of the Senate majority. In unified government, the Senate majority will for the most part be moving forward with nominations from a President of the same party and recommended (if at all) by a Senator of the same party. Obstruction will not be part of that playbook. Thus, if the Senate majority were to act to obstruct, or deny confirmation, to nominees of a minority-party Senator, that would require a substantial shift in the mindset of the Senate majority (and perhaps especially its constituent committee members).

In contrast, with divided government, the notion of opposing nominees would much more likely at least be on the minds of the members of the Senate majority (and perhaps especially its constituent committee members). Thus, the possibility of delaying the rare nominee originating

with a majority-party Senator *less*, and/or obstructing that nominee's confirmation *less*, might be seen as a more viable party of the majority's overarching strategy.

I thus hypothesize that divided government is more likely to produce differential treatment between nominees originating with Senators of different parties than is unified government:

> <u>*Hypothesis 1*</u>*: Divided government is more likely to produce worse treatment by the Senate majority of nominees originating with a Senator of the minority party than is unified government.*

Second, if the Senate majority might seek to disadvantage nominees originating with the Senator of the opposite party, would that action affect confirmation rates or extend the length of the confirmation process? I begin with the likelihood of confirmation. As I noted above, the high confirmation rate suggests that outright denial of confirmation is not a common weapon in the general setting of federal district court nominations. Still, Professor Shipan suggests that Senate voting on Supreme Court judicial nominees has become increasingly partisan over time (Shipan 2008), and Professor Nancy Scherer finds increasing polarization over lower federal court nominees (Scherer 2005: 49-73). Especially, then, if we include strategic non-action on nominees as a means to deny confirmation, then one well might find success of confirmation turn to some degree on the partisan divide between the Senate majority and the originating Senator.

In contrast, a similar conclusion is generally less likely to obtain as to confirmation delays. There are two reasons to make a distinction between procedural and substantive maneuvering.

First, it would be very awkward for the Senate to apportion delays based upon which Senator recommended a nominee. For one thing, such action would put at risk a deal into which members of that very body entered voluntarily. If the President and the Senate majority were both

Republican, then the Republican-majority Senate would have been ill-advised to delay a Democratic Senator's nominees, insofar as the Democratic Senator only had the authority to recommend nominees by virtue of a Republican Senator's agreement. On the other hand, if the President were Republican and the Senate majority Democratic, then the Democratic-majority Senate would have been ill-advised to delay a Republican Senator's nominees, insofar as the Republican Senator might have responded by reneging on the arrangement and thus depriving his or her Democratic Senator counterpart of the power to recommend nominees to the Republican President in future. Moreover, as experience with the Moynihan-D'Amato arrangement demonstrates, each Senator would take steps to defend it, even against members of his own party.

Second, because it is less visible and not clearly on the merits, a procedural maneuver (at least one that does not clearly lead to the rejection of a nominee) is less likely to meet the demands of elite groups that monitor judicial confirmation processes. Professor Scherer has argued that the increased politicization of lower court judicial appointments is the result of increased mobilization of elite interest groups who focus on lower court nominees and judges (Scherer 2005: 108-32). If in fact procedural devices are less likely to curry the favor of these groups, then Senators will presumably be less likely to employ them.

To be sure, confirmation delays can be used toward strategic ends: As noted above, some commentators (though not all) have found evidence of strategic delays on lower federal court nominee confirmation when party control of the Presidency and Senate is divided. In the New York setting one might expect a party to use delay to derail the opposing party Senator's nominees

near the end of that Senator's term when that Senator faces dubious chances of reelection. Indeed, there is some evidence that something like this occurred in 1992.[5]

Even if confirmation delay is theoretically an available partisan weapon, its use in this way is limited to particular times and circumstances. Across the run of nominations, then, one would *not* expect to find confirmation delay deployed differentially depending on the party of the Senator who recommended the nominee's candidacy. Moreover, a delay in the fourth year of a President's term often need not be long to be effective; thus, it is possible that, even if delays are more common in the fourth year of a President's term, they will not increase with statistical significance the average length of the confirmation process.

Based on the foregoing, I arrive at a second hypothesis: Differentially worse treatment by the Senate majority of nominees originating with the Senator of the minority party is more likely to manifest itself in terms of confirmation success rather than the length of the confirmation process.

> <u>Hypothesis 2</u>: *To the extent that the Senate majority treats nominees originating with a Senator of the minority party worse than nominees originating with Senators of the majority party, that differential treatment is more likely to manifest itself in terms of confirmation success rather in the length of the confirmation process.*

I endeavor to test the two hypotheses in the next Part.

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[5] Professor Sheldon Goldman explains: "Republican Senator Alphonse D'Amato of New York, considered vulnerable in his reelection bid, saw only five of the 12 New York district court nominees confirmed, although one of the unsuccessful nominees, a Democrat backed by Senator Patrick Moynihan, could well have been sabotaged by D'Amato with the assistance of Senator Strom Thurmond on the committee in retaliation for the delay on the other nominees." Goldman 1993: 285 n.10. The Democrats may have acted in this way at that time in light of Senator D'Amato's vulnerability: If D'Amato lost, then the continuation of the arrangement would be meaningless. Ultimately, D'Amato won reelection, although Bill Clinton's presidential victory relegated him to recommended one out of four nominees instead of the three of four he had enjoyed up to that point.

2.4 Empirical Analysis

In this Part, I present my empirical analysis. First, I describe the dataset's contents and how the dataset was assembled. Next, I present descriptive statistics. I then present an empirical analysis of whether nominees were ultimately confirmed. Finally, I analyze statistically the length of the judicial confirmation process.

2.4.1 The Dataset

I collected a novel dataset of all judicial nominations made by Presidents to the four federal district courts in New York—the Eastern, Northern, Southern, and Western Districts of New York—during the years 1977 to 1998. For the first four of those years, New York's Senate representatives—who bore responsibility for those nominees—were Republican Jacob Javits and Democrat Daniel Patrick Moynihan. For the remainder of the period, New York's Senate delegation consisted of Moynihan and Republican Alphonse D'Amato.

I gathered data on all individuals nominated by the Presidents during the time period at issue. I did this for two reasons. First, this allows me to use the ultimate success of each nomination as a dependent variable. Second, with respect to the study of confirmation delay, including nominees whose confirmations were ultimately unsuccessful allows me to avoid a selection effect problem: Were I to include only nominees who were eventually confirmed, the population would be right-censored. I do not include individuals who were recommended by a New York Senator

for nomination but were not nominated. While such an approach would doubtless yield more information, it is quite difficult to identify all such individuals.[6]

The dataset consists of 86 nominations. Seven nominees' names were put forward twice (always, of course, after an initially unsuccessful nomination).[7] Each nomination counts as a separate observation in the dataset. Of the 86 nominations, 15 were unsuccessful.

For each nominee, I determined the Senator responsible for recommending that nominee to the President. For the vast majority of cases, this was done by finding contemporaneous newspaper coverage. In three cases, I was unable to find such coverage. For one of those cases, I found Congressional Record entries indicating which New York Senator introduced the nominee to the Judiciary Committee for hearings. For the remaining two nominees—both nominated by President Carter—I was able to find newspaper coverage linking them to former New York Republican Governor (and later Vice President) Nelson Rockefeller and former New York Republican-Liberal Mayor John Lindsey (Goldstein 1977). This coverage indicated that the two nominees were put forth by liberal Republican New York Senator Javits.

For each nominee, I also calculated the length of time for which the nomination was "at risk"—i.e., the number of days between the date the President submitted a nomination to the Senate, and the date on which either (i) the nominee was confirmed, (ii) the Senate returned the nomination to the President, having not acted upon it, or (iii) the President withdrew the nomination. (In only one case did the President withdraw the nomination; in no case did the Senate

[6] Another selection effect that is inherent in the data arises out of the fact that the President determines when to nominate candidates. The timing of a nomination may affect its ultimate success, and potentially also the time until a confirmation vote. The President's choice of timing for nominations is a function of political and institutional constraints. *See* Massie et al. 2004.

[7] Only one individual—Clarence Sundram, who was recommended by Senator Moynihan to President Clinton—was nominated twice and not confirmed either time. Each of the other six was confirmed on the second go-round, albeit in a different Congress and all but once having been nominated by a different President.

vote to deny confirmation.) In order to arrive at this length of time, I coded the date on which each nomination was made by the President, and the date on which the relevant subsequent action took place. For nominees who were confirmed, the Federal Judicial Center offers biographical information on all federal judges, including the dates on which they were nominated and then confirmed (Federal Judicial Center Database). In order to determine the date of nomination and the date of final action for nominees who were not confirmed, I relied first upon a congressional database, which provides this information back to the 97th Congress (*Congress.gov* database). (The American Bar Association website also provides dates of nominations back to the 101st Congress (American Bar Association Database), which allowed for a check.) For the Carter Administration, I was able to obtain dates of nomination from the collection of Carter Presidential Papers made available through the website of the University of California-Santa Barbara (The American Presidency Project Database). In order to determine dates on which nominations were returned by the Senate, I turned to a congressional website that lists the dates on which the Senate was in session and out session (Past Days in Session for the U.S. Congress Database). Since Senate rules dictate the return of a nomination after a recess in excess of 30 days, I identified the first such recess after the relevant nomination date.

Besides the two dependent variables, I also coded for each nominee whether the nomination was considered under a period of unified or divided government, and whether the nomination was made during the fourth year of a President's term.

Tables 2-4 and 2-5 present summary descriptive data. Of the 86 nominations in the dataset, only two were recommended by Javits. The vast majority that remain were recommended by Moynihan—38—and D'Amato—46. By far, the vast majority of nominations—in excess of 80%—were successful. There was no divided government until the second half of President

Reagan's second term in office, and the vast majority of failed nominations occurred during periods of divided government.

As for confirmation length, one can see in Table 2-5 that the length of the confirmation process got longer as time passed. (At least part of this delay was due to the increased number of authorized judgeships as time passed (Tobias 1998: 529, 539-40.)) Interestingly, the average confirmation length for the out-of-party Senator is sometimes substantially lower than for his in-party counterpart—even, as during the Reagan administration, when government was mostly unified. This may reflect the view of the majority Senate party that it would rather confirm nominees of a President of the same party—even those recommended by a Senator of the opposition party—than risk having judicial seats filled by a President of a different party in the future. Figure 2-1 presents a kernel density plot of the length of time until a confirmation decision is reached.

Congress (Years)	Type of Government	Recommending Senator	Number of Nominees Recommended	Number (Percentage) of Successful Nominees
President Jimmy Carter (D), 1977-80				
95th (1977-78)	Unified Democrat	Moynihan (D)	5	5 (100.00)
		Javits (R)	1	1 (100.00)
96th (1979-80)	Unified Democrat	Moynihan (D)	4	2 (50.00)
		Javits (R)	1	0 (0.00)
President Ronald Reagan (R), 1981-88				
97th (1981-82)	Unified Republican	D'Amato (R)	4	4 (100.00)
		Moynihan (D)	2	2 (100.00)
98th (1983-84)	Unified Republican	D'Amato (R)	4	4 (100.00)
		Moynihan (D)	0	--
99th (1985-86)	Unified Republican	D'Amato (R)	5	5 (100.00)
		Moynihan (D)	2	2 (100.00)
100th (1987-88)	Divided	D'Amato (R)	9	7 (77.78)
		Moynihan (D)	1	1 (100.00)
President George H.W. Bush (R), 1989-92				
101st (1989-90)	Divided	D'Amato (R)	4	4 (100.00)
		Moynihan (D)	1	1 (100.00)
102nd (1991-92)	Divided	D'Amato (R)	11	5 (45.45)
		Moynihan (D)	2	1 (50.00)
President Bill Clinton (D), 1993-98[8]				
103rd (1993-94)	Unified Democrat	Moynihan (D)	13	13 (100.00)
		D'Amato (R)	3	2 (66.67)
104th (1995-96)	Divided	Moynihan (D)	4	3 (75.00)
		D'Amato (R)	2	2 (100.00)
105th (1997-98)	Divided	Moynihan (D)	4	3 (75.00)
		D'Amato (R)	4	4 (100.00)

Table 2-4: Nominations and Confirmations, by Congress.

[8] President Clinton served in office for another two years, but during those two years New York was represented by two Democratic Senators—Daniel Patrick Moynihan and Charles Schumer.

President	Recommending Senator	Number of Nominees Recommended	Number (Percentage) of Successful Nominees	Average Length of Senate Nomination Process
Carter	Moynihan (D)	9	7 (77.78)	49.9
	Javits (R)	2	1 (50.00)	41.5
	Total	*11*	*8* *(72.73)*	*48.4*
Reagan	D'Amato (R)	22	20 (90.91)	83.5
	Moynihan (D)	5	5 (100.00)	49.0
	Total	*27*	*25* *(92.59)*	*77.1*
Bush	D'Amato (R)	15	9 (60.00)	138.7
	Moynihan (D)	3	2 (66.67)	215.0
	Total	*18*	*11* *(61.11)*	*151.4*
Clinton	Moynihan (D)	21	19 (90.48)	149.5
	D'Amato (R)	9	8 (88.89)	79.4
	Total	*30*	*27* *(90.00)*	*128.5*
TOTAL		**86**	**71** **(82.56)**	**106.9**

Table 2-5: Nominations, Confirmations, and Confirmation Process Length, by President.

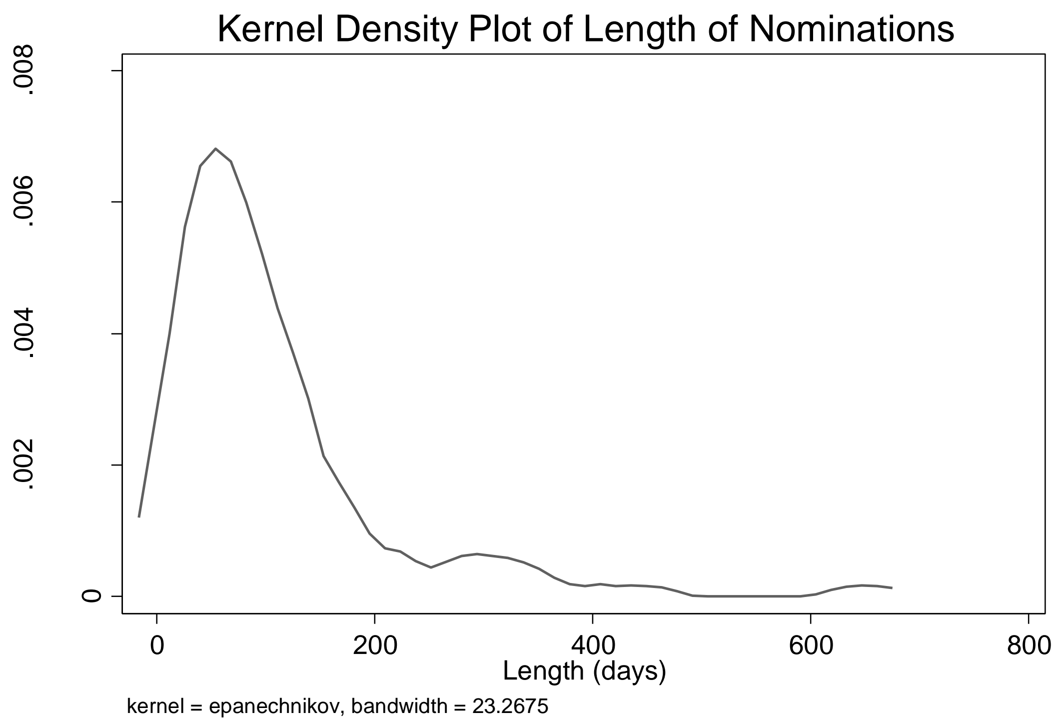

Figure 2-1.

Finally, Table 2-6 presents data on the nominees named by a President during the final year of his term and recommended by the minority party Senator. There were only six such nominees, and they were all made during two years. One of these was recommended during a time of unified government—in 1980 by a Republican Senator (Javits) and nominated by a Democratic President (Carter) supported by a Democratic Senate. The other five were recommended during a time of divided government—in 1992 by a Republican Senator (D'Amato) and nominated by a Republican President (Bush) facing a Democratic Senate. Of these six, only one—one of Senator D'Amato's suggestions—was ultimately confirmed. Because such nominations are so few in number and so unevenly distributed, I do not examine them in the statistical analysis below.

Congress	Nominating President (party)	Party in control of Senate	Recommending Senator (party)	Number of Nominees	Number (Percentage) of Successful Nominees
96th	Carter (D)	(D)	Lindsey (R)	1	0 (0.00)
102nd	Bush (R)	(D)	D'Amato (R)	5	1 (20.00)
TOTAL				**6**	**1 (16.67)**

Table 2-6: Nominees recommended by a minority party Senator and named during the fourth year of a President's term in office.

Before testing the hypotheses, I looked to see whether the general expectations other commentators have developed—as set out in Table 2-1—hold on these data. The results are reported in Tables 2-7 and 2-8. As expected, divided government is a statistically significant predictor of both a decreased likelihood of conformation success, and an increase in the length of the Senate confirmation process.

Variable	Coefficient (Robust Standard Error)
Divided government	-2.28** (1.10)
Fourth-year nomination	-4.76*** (1.54)
Divided government * Fourth-year nomination	3.09* (1.78)
Constant	3.66*** (1.02)

N = 86. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level. *Pseudo-*R^2 = 0.266.

Table 2-7: Logistic regression of confirmation success – all nominations.

Variable	Coefficient (Robust Standard Error)
Divided government	106.67*** (23.83)
Fourth-year nomination	-14.98 (23.57)
Divided government * Fourth-year nomination	-23.31 (37.90)
Constant	58.48*** (5.44)

N = 86. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level. R^2 = 0.250.

Table 2-8: Linear regression of length of Senate nomination process – all nominations.

2.4.2 Likelihood of Confirmation

I sought to determine the likely predictors of whether a nominee would be successfully confirmed. The prediction is that having a Senator in the minority Senate party would be significant, and decrease the likelihood of confirmation. Table 2-9 presents the data, broken down by confirmation success and whether or not the nominating Senator was in the Senate minority. As Hypothesis 1 anticipated as a possibility, a person nominated by a minority party Senator was

less likely to be confirmed than was someone nominated by a Senator of the majority party. A chi-squared test indicated that having such a distribution is highly unlikely to be random.

	Not Confirmed	**Confirmed**	***Total***
Majority Party Senator	3 (6.67)	42 (92.33)	45 (100.00)
Minority Party Senator	12 (29.27)	29 (70.73)	41 (100.00)
Total	15 (17.44)	71 (82.56)	86 (100.00)

*Chi-squared = 7.6107****

Table 2-9: Confirmation success against Senator's minority party status (row percentages are presented in parentheses below numbers).

To the extent that the foregoing discussion suggested different causal mechanisms at work under unified, as opposed to divided, government (and as embodied in Hypothesis 1), I next tested for the effect of nomination by the majority-vs.-minority party Senator and unified-vs.-divided government, each while controlling the other. Tables 2-10 and 2-11 presents the results broken down by settings where control was unified (Table 2-10) and divided (Table 2-11), in each case further broken down by confirmation success and whether or not the nominating Senator was in the Senate minority. Tables 2-12 and 2-13 presents the results broken down by settings where the nominating Senator was in the Senate majority (Table 2-12) and minority (Table 2-13), in each case further broken down by confirmation success and whether where control of the Presidency and Senate was unified.

	Not Confirmed	Confirmed	*Total*
Majority Party Senator	2 (5.71)	33 (94.29)	35 (100.00)
Minority Party Senator	2 (22.22)	7 (77.78)	9 (100.00)
Total	4 (9.09)	40 (90.91)	44 (100.00)

Fisher's exact: p = 0.180

Table 2-10: Confirmation success against Senator's minority party status (row percentages are presented in parentheses below numbers) where control of the Presidency and Senate is unified.

	Not Confirmed	Confirmed	*Total*
Majority Party Senator	1 (10.00)	9 (90.00)	10 (100.00)
Minority Party Senator	10 (31.25)	22 (68.75)	32 (100.00)
Total	11 (26.19)	317 (73.81)	86 (100.00)

Fisher's exact: p = 0.245

Table 2-11: Confirmation success against Senator's minority party status (row percentages are presented in parentheses below numbers) where control of the Presidency and Senate is divided.

	Not Confirmed	Confirmed	*Total*
Unified Control	2 (5.71)	33 (94.29)	35 (100.00)
Divided Control	1 (10.00)	9 (90.00)	10 (100.00)
Total	3 (6.67)	42 (93.33)	45 (100.00)

Fisher's exact: p = 0.539

Table 2-12: Confirmation success against divided control of Presidency and Senate (row percentages are presented in parentheses below numbers) where recommending Senator is in the Senate majority.

	Not Confirmed	Confirmed	*Total*
Unified Control	2 (22.22)	7 (77.78)	9 (100.00)
Divided Control	10 (31.25)	22 (68.75)	32 (100.00)
Total	12 (29.27)	29 (70.73)	86 (100.00)

Fisher's exact: p = 0.702

Table 2-13: Confirmation success against divided control of Presidency and Senate (row percentages are presented in parentheses below numbers) where recommending Senator is in the Senate minority.

To be sure, the data are not terribly conclusive, and there is limited power owing to the small number of observations. Still, it seems at least safe to say that the effect on confirmation outcome resulting from changing the setting from one where the Senator is in the majority to one where the Senator is in the minority—while controlling for whether control of the Senate and Presidency is unified or divided—is *less likely* to be the result of random chance than is the effect on confirmation outcome resulting from changing the setting from one where control of the Senate and Presidency is unified to one where it is divided—while controlling for whether the nominating Senator is in the majority or minority. This is reflected in the fact that the *p*-values on Tables 2-10 and 2-11 approach significance more than do their counterparts from Tables 2-12 and 2-13. This conclusion is consistent with Hypothesis 2, but less so with Hypothesis 1.

2.4.3 Confirmation Delay

In this Section, I investigate the extent to which the party of the Senator who recommends a nominee—as compared to the majority party in the Senate—affects the time until a confirmation vote. Unlike confirmation success, Hypothesis 2 predicts that whether or not the nominating

Senator hails from the Senate majority will be *less* likely to be a statistically significant predictor of confirmation delay than of confirmation success.

Because the data are uncensored, I used linear regression models.[9] The dependent variable was the number of days between the date the President nominated an individual and the date that nomination was resolved (whether positively or negatively).

I first conducted a simple regression, with a single independent variable: whether the recommending Senator was a member of the minority party in the Senate. The regression, the results of which are shown in Table 2-14, indicate that, with statistical significance, shifting the party of the recommending Senator from the Senate majority to the Senate minority increased the length of the confirmation process on average by more than sixty days.

Variable	**Coefficient (Robust Standard Error)**
Whether the Senator is in the minority party in the Senate	61.73*** (22.35)
Constant	77.49*** (9.07)

N = 86. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level. $R^2 = 0.241$.

Table 2-14: Linear regression of length of disposition of Senate confirmation process.

I next added as a second independent variable whether government was divided. Now, as Table 2-15 indicates, the party of the recommending Senator is no longer significant. Instead, with statistical significance, shifting from a unified government to a divided one increased the length of the confirmation process on average by more than ninety-eight days.

[9] Some scholars who study effects on confirmation delay rely on hazard rate models. *See* Nixon & Goss, *supra* note 17; Binder & Maltzman, *supra* note 17; Shipan & Shannon, *supra* note 41. In addition to the linear regression model I discuss in the text, I also ran hazard rate models; the results were essentially the same.

Variable	Coefficient (Robust Standard Error)
Whether the Senator is in the minority party in the Senate	6.97 (20.19)
Divided government	98.10*** (19.83)
Constant	55.69*** (7.03)

N = 86. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level. R^2 = 0.241.

Table 2-15: Linear regression of length of disposition of Senate confirmation process.

But as the discussion above indicates—and as Hypothesis 1 asserts—a very different causal mechanism may be at work during periods of divided, as opposed to unified, government. If that is true, then it is important to consider the interaction term—that is, whether it matters when the recommending Senator is in the Senate minority *and* government control is divided. Table 2-16 presents those results. Here, divided control and having a minority-party Senator as recommender are *both* statistically significant. Notably, however, having a minority-party Senator as recommender contributes to a reduction in the average confirmation process length (of nearly twenty-two days). That said, the interaction term, which approaches significance at the 10% level, offsets that reduction where, in addition to having a minority-party Senate recommender, government control is also divided.

Variable	Coefficient (Robust Standard Error)
Whether the Senator is in the minority party in the Senate	-21.93** (9.21)
Divided government	71.50*** (28.88)
Whether the Senator is in the minority party in the Senate * Whether control of government was divided	56.05 (38.21)
Constant	61.60*** (6.35)

N = 86. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level. $R^2 = 0.254$.

Table 2-16: Linear regression of length of disposition of Senate confirmation process.

In order to examine the different settings of unified, and divided, government control, I divided the data and ran separate regressions. Table 2-17 presents the results for unified government, and shows that (as in Table 2-16), with statistical significance, having a minority-party Senator as recommender results in a reduction in the average confirmation process length of nearly twenty-two days.

Variable	Coefficient (Robust Standard Error)
Whether the Senator is in the minority party in the Senate	-21.93** (9.20)
Constant	61.60*** (6.34)

N = 86. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level. $R^2 = 0.064$.

Table 2-17: Linear regression of length of disposition of Senate confirmation process (unified government).

Table 2-18 presents the results for divided government. It shows no statistically significant effect at all.

Variable	Coefficient (Robust Standard Error)
Whether the Senator is in the minority party in the Senate	34.12 (37.11)
Constant	133.10*** (28.19)

N = 86. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level. R^2 = 0.014.

Table 2-18: Linear regression of length of disposition of Senate confirmation process (divided government).

Together, Tables 2-17 and 2-18 suggest that, if anything, while there was a statistically significant difference between unified and divided government for how nominees recommended by minority-party Senators fared, the result was due to the (surprisingly) *favorable* treatment of minority-party Senators' nominees during unified government, rather than any unfavorable treatment of minority-party Senators' nominees during periods of divided government. This conclusion is broadly consistent with Hypothesis 1, but less so with Hypothesis 2.

2.5 Discussion of Results

The empirical analysis partially vindicated the two hypotheses I sought to test. First, the analysis indicates that judicial nominees suggested by the minority-party Senator were less likely to be confirmed than were nominees recommended by the majority-party Senator. This result is consistent with Hypothesis 2. However, contrary to Hypothesis 1, there is no indication that this outcome varied depending on whether government control was unified or divided.

With respect to length of the confirmation process, the empirical analysis indicates that nominees suggested by the minority-party Senator during periods of divided government tended to face the longest confirmation process times. This is consistent with Hypothesis 1. However, deeper analysis revealed that this finding was the result not of poor treatment of minority-party

Senators' nominees during periods of divided government, but rather *favorable* treatment of minority-party Senators' nominees during times of unified government—a result I never hypothesized. In some sense, the results are consistent with Hypothesis 2, since I found stronger statistically significant evidence of minority-party Senators' nominees being denied confirmation than being subject to confirmation process delays.

The results indicate that nominees recommended by the minority party Senator are no more likely to face confirmation delays, but are less likely to be confirmed. On the other hand, divided government is likely to lead to confirmation delays, but not to denials.

The results here shed considerable light on how the party of the Senator who recommends a judicial nominee for a federal district court seat (in jurisdictions that "divide the spoils") will fare before the Senate. One question that remains is how nominations proceed where *neither Senator* shares political affiliation with the President. Professors Giles, Hettinger, and Peppers assume that the President chooses nominees free and clear, but some accounts suggest that this is not the case (see Glaberson 2003 (noting brokered arrangement between Democratic New York Senator Charles Schumer and Republican New York Governor George Pataki to recommend district court nominees to Republican President George W. Bush)). In short, there is considerably more research to be done in this area.

In addition, the analysis here suggests both the need and the opportunity to develop a formal game-theoretic model of federal district court nominations across various possible arrangements between the President and the home-state Senators.

The findings here demonstrate that it is possible for political actors to allow a bipartisan judicial nomination arrangement to flourish. Senators in the majority party in the Senate could

have remained loyal to party, and thus voted against numerous nominees proposed by the minority-party New York Senator and/or deployed discriminatory delay tactics against the minority-party Senator's nominees. But they did not. Instead, Senators seemed overall to respect the New York Senators' arrangement: They did not generally slow-track those nominees, except to deny confirmation to a few nominees at the margins. In other words, Senators elevated loyalty to the Senate as an institution over loyalty to political party.

The fact that political actors can abide bipartisan nomination arrangements provides optimism for calls for the appointment of more moderate judges, and more judges supported by each political party. Professors Emerson Tiller and Frank Cross have advanced a proposal to populate court of appeals panels with judges appointed by Presidents of both parties (Tiller & Cross 1999: 226-34). Professor Cass Sunstein and Dean Thomas Miles suggested (though they did not ultimately endorse), as a possible response to ideological decision making by judges in the administrative law area, the "appoint[ment] [of] "judges whose voting patterns are less likely to be politicized, perhaps by appointing a mix of judges whose overall patterns would be less ideological" (Sunstein & Miles 2009: 2228-29; see Shapiro & Murphy 2012: 355-57 (considering such a proposal); Pierce 2011: 97 (considering the proposal, but rejecting it out of "fear that treating judges as members of a political party might reinforce their tendency to think and act as members of a political party")). And Professor Eric Posner has suggested that, where the legislative process produces "efficient statutes," reducing judicial ideological bias could be desirable (Posner 2008: 869 (though noting that, in such a case, "an even better reform would be to reduce or eliminate judicial review altogether")). The success of New York's bipartisan nomination arrangement suggests that perhaps implementation of these notions might be within the realm of political possibility.

The research here suggests numerous avenues for future research. Future research should focus not only on the Senate's role in accelerating and slowing confirmation processes, but also on the President's role in timing a nomination so as to set that nomination up for success, failure, or delay. For example, perhaps President Reagan tended to nominate recommendations from Senator D'Amato faster than he did nominations from Senator Moynihan. Indeed, perhaps he strategically held Senator Moynihan's nominations back until later in a Senate session so as to make confirmation less likely. Questions like this, though perhaps difficult to investigate, deserve attention.

Finally, the results here highlight the value in drilling down into the precise mechanism by which federal judges are appointed. In other work, I have found that, while the party of the appointing President affects the decision-making of district judges in New York, the party of the recommending Senator does *not* affect the decision-making of judges who in fact are appointed to the bench (Nash 2015: 678-81). It would be worthwhile to explore the relationship between the party of the suggesting Senator and nomination success, and substantive decision-making, in other states that have had similar arrangements at various times.

3. Evaluating District Judge's Incentives to Appoint Magistrate Judges Based on Merit Instead of Ideology

3.1. Introduction

While they are not appointed under Article III of the U.S. Constitution, magistrate judges are an integral part of the federal judiciary. (*Peretz v. United States*, 501 U.S. 923, 928 (1993); McCabe 2014: 7.) The work done by magistrate judges aids tremendously in the processing of litigation through the federal judicial system (e.g., Resnik 1994: 1026; Puro & Goldman 1982: 145). And there can be little doubt but that the work performed by magistrate judges alleviates the workload of the district judges, and thus improves the efficiency of the federal judicial system (Spaniol 1974: 773-74; McCabe 2014: 356).

Despite this, commentators have largely overlooked magistrate judges. Moreover, to the extent that scholars do consider magistrate judges, they disagree as to the value that they bring to the judicial function. Some scholars argue that, insofar as magistrate judges are appointed by the federal district judges in the district in which they serve, they are ideological actors who will reflect the ideology of the majority of appointing district judges. Others argue that district judges seek to appoint magistrate judges who are skilled practitioners who will alleviate the district judges' dockets.

In this chapter, I argue that district judges will tend to appoint expert lawyers, rather than ideologues, to magistrate judge posts. I use a game-theoretical model to highlight the benefits that a district judge reaps from the appointment of a magistrate judge with expertise, as opposed to a magistrate judge with ideological leanings. The basic model considers district judges' freedom to refer dispositive motions to magistrate judges. It shows that, under plausible assumptions, expert—or "nonideological"—magistrate judges will provide district judges with a larger benefit

than ideological magistrate judges. Even if under limited circumstances the referral of a dispositive motion in an ideological case provides a greater benefit to the district judge than does the referral of a dispositive motion in a nonideological case to a nonideological magistrate judge, the net benefit will still favor selecting a nonideological magistrate judge provided that—as is likely the case—the number of nonideological cases far exceeds the number of ideological ones.

An extension of the model introduces the notion of resource-constrained magistrate judge resources through the strong incentive to refer discovery supervision to magistrate judges. The extension shows how the resource constraint will further induce district judges to select nonideological magistrate judges, given the likelihood that the marginal benefit from referring dispositive motions in nonideological cases to nonideological magistrate judges exceeds the corresponding marginal benefit from referring such motions in ideological cases to ideological magistrate judges.

Finally, institutional features, legal constraints, and informational constraints further bolster the attractiveness to district judges of selecting nonideological magistrate judges. Since these points lie beyond the model, they indicate that (if anything) the model understates the pull in favor of nonideological magistrate judges.

The model suggests three hypotheses that should hold if district judges are indeed appointing expert magistrate judges. First, we should see district judges referring to magistrate judges more dispositive motions in non-ideological cases than in ideological cases. Second, we should observe district judges adopting magistrate judges' suggested resolutions of dispositive motions—so-called "reports and recommendations"—more frequently in non-ideological cases than in ideological cases. Third, to the extent that the resource constraint is real, we should

typically observe district judges referring discovery supervision to magistrate judges. An empirical study provides support for all three of these hypotheses.

3.2. Overview of Magistrate Judges

In this Part, I first provide a brief overview of how the office of what is now known as "magistrate judge" as an aid to Article III federal trial judges has evolved over the years. I then summarize the current features of the office. In particular, I discuss the law governing the selection and powers of magistrate judges.

3.2.1 A Brief History of the Office of "Magistrate Judge"

Almost from the country's founding, Congress has seen fit to empower certain individuals to assist federal trial judges. In 1817, Congress expanded these assistants' jurisdiction and dubbed them "United States Commissioners." An 1898 act directed that district courts, not circuit courts, would henceforth appoint commissioners, and also regulated the compensation of commissioners through fees. In 1940, Congress empowered district courts to authorize commissioners to try petty offenses committed on property under the exclusive and concurrent jurisdiction of the federal government—provided that the commissioner first informed the defendant of her right to proceed before a district judge and obtained the defendant's consent to proceed. (See McCabe 1979: 345-47; Lindquist 1970.)

The Federal Magistrates Act of 1968 (82 Stat. 1107 (Oct. 17, 1968)) abolished the office of United States Commissioner, and established in its place—within the federal judiciary—the office of "United States Magistrate." One of the primary goals of the 1968 Act was to increase

the ways in which magistrates could take on some of the workload faced by the federal district courts, and thus render the federal judicial system more efficient. In order to facilitate this, the 1968 Act granted magistrates jurisdiction far broader than their predecessors. (See Spaniol: 565-68; McCabe 1979: 347-50; Streepy 1980: 81-82; Puro & Goldman 1982: 138.)

In response to a Supreme Court decision that narrowly construed magistrates' powers (*Wingo v. Wedding*, 418 U.S. 461 (1974)), Congress amended the Act in 1976. The 1976 legislation codified a broad grant of authority to magistrates. (McCabe 1979: 353-55.) Legislation enacted in 1979 further confirmed the expansive and varied responsibilities that magistrate judges were authorized to perform. (See McCabe 1990: 362-90; Puro & Goldman 1982: 143-45.)

Over the years since the advent of the magistrates system, magistrates have enjoyed greater acceptance, and legitimacy, in the eyes of the public, lawyers, and members of the federal judiciary. Both in recognition of that legitimacy and in the hope of further legitimating the office and its holders, Congress saw fit in 1990 to rename magistrates as "United States Magistrate Judges." (See McCabe 2014: 14; Resnik 1990: 946-47.)

3.2.2 The Role and Selection of Magistrate Judges

Unlike their Article III counterparts—like Supreme Court Justices and federal circuit and district judges—magistrate judges do not receive a constitutional guarantee of life tenure, nor a constitutional guarantee that their salaries will never be reduced. Full-time magistrate judges are appointed for eight-year terms, while part-time terms expire after four years. Individuals may be reappointed for successive terms. (28 U.S.C. § 631(a), (e).)

The compensation paid magistrate judges is set annually by the Director of the Administrative Office of the U.S. Courts and is capped at 92 percent of the compensation for federal district judges. Magistrate judges enjoy statutory protection against salary reduction during a term in office. And, by statute, they may only be removed from office in the middle of a term (by the district judges in the district) "only for incompetency, misconduct, neglect of duty, or physical or mental disability." (28 U.S.C. §§ 631, 633, 634.)

Magistrate judges enjoy the support of law clerks and assistants. They have Chambers, and make use of courtrooms, in federal courthouses. The Federal Judicial Center provides training to magistrate judges. (28 U.S.C. §§ 635, 637.)

3.2.2.1 The Role of Magistrate Judges

The fact that magistrate judges do not fall within the ambit of Article III limits the functions they may constitutionally perform (Silberman 1989:1304-21). Still, with the consent of the parties, magistrate judges are empowered to try "class A" criminal misdemeanors and civil matters (28 U.S.C. § 636(a)(5)).

Even without the consent of the parties, Congress has authorized magistrate judges to perform—and magistrate judges regularly undertake—additional responsibilities. On the criminal side, magistrate judges are authorized to try petty offenses, i.e., "class B" and "class C" misdemeanors, and infractions. They are also authorized to handle a number of matters that may arise during pretrial proceedings in criminal matters. These include conducting probable cause hearings, issuing search warrants, and holding initial court appearances, preliminary hearings, and arraignments. (28 U.S.C. § 636(a)(1), (a)(4).)

Congress has further empowered district judges to "designate a magistrate judge to hear and determine" the vast majority of "pretrial matter[s]" in both criminal and civil cases (28 U.S.C. § 636(b)(1)(A)). A district judge is to reconsider such a determination by a magistrate judge only where "it has been shown that the magistrate judge's order is clearly erroneous or contrary to law" (28 U.S.C. § 636(b)). The statutory limitation of appellate to "final decisions" of the district court renders district court rulings on discovery disputes—whether originating with a magistrate judge or not—generally unreviewable by the courts of appeals. (See 28 U.S.C § 1291; e.g., In re Clinton, 973 F.3d 106, 112 (D.C. Cir. 2020.)

Congress also has authorized district judges to designate a magistrate judge to conduct hearings on, and to prepare "proposed findings of fact and recommendations"—usually referred to as a "report and recommendation" or "R&R"—for the disposition of various dispositive motions—including a motion for judgment on the pleadings and a motion for summary judgment—and of "applications for post[-]trial relief made by individuals convicted of criminal offense and of prisoner petitions challenging the conditions of confinement" (28 U.S.C. § 636(b)(1)(B)). If a party objects to a magistrate judge's R&R, the portions of the R&R thereby put at issue are to be reviewed de novo by the district judge (28 U.S.C. § 636(b)(1)(C)). By virtue of the rule limiting appellate review to "final decisions" of district courts, courts of appeals enjoy appellate jurisdiction where district courts have granted dispositive motions (at least in part). Denials of dispositive motions are appealable only where they are appealable collateral orders—such as, for example, where the order denies immunity to a defendant government official—or under other limited circumstances; otherwise, they are effectively unappealable. (Nash 2016: 103-07.) (To the extent that a party fails to object to some portion, or all, of an R&R, then the district

court can employ a lesser standard of review (to the extent it must undertake any review at all), and review by the court of appeals may be waived. (*Thomas v. Arn*, 474 U.S. 140, 142 (1985).)

Finally, the governing statute further asserts that "[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States" (28 U.S.C. § 636(b)(3).) The Supreme Court has interpreted that grant broadly (*Peretz v. United States*, 501 U.S. 923, 932 (1991).

So much for the outer reaches of the statutory powers of magistrate judges. It bears great emphasis that (leaving to the side instances where the parties consent to magistrate judge jurisdiction) the magistrate judge cannot exercise these powers without proper designation. That can happen in one of two basic ways: either (i) on a case-by-case or issue-by-issue basis, a district judge designates the magistrate judge to act, or (ii) the district judges on the bench of a district court as a whole designate magistrate judges to act in certain capacities—whether through the use of a local district court rule or a standing order—and the district judge presiding over a case in which a designated capacity arises does not withdraw the designation. (McCabe 2014: 24.)

This structure reveals—consistent with the legislative history of the various Acts defining magistrate judges' jurisdiction and powers—the great flexibility enjoyed by district judges to determine how to deploy magistrate judges in their districts. This is not to say that many district courts do not put their magistrate judges to similar uses. For example, a survey of district court deployment of magistrate judges found that many districts use their magistrate judges to aid in settlement, and to supervise social security disputes. Still, flexibility, and concomitant variation across districts, persists. Indeed, it is precisely through the freedom of district judges in a district to use magistrate judges as they see fit that the magistrate judge system offers the promise of

increased efficiency in the federal litigation process. (McCabe 2014: 7, 23, 45, 50; Smith 1990: 61, 115-41; Puro & Goldman 1982: 139; Puro, Goldman & Padawer-Singer; Seron 1983: 35-46.)

3.2.2.2 The Selection of Magistrate Judges

Since magistrate judges do not fall within the ambit of Article III, they are not (as are Article III judges) appointed by the President with the advice and consent of the Senate. Magistrate judges are appointed by a majority of the district judges within the district. (28 U.S.C. § 631(a).)

Statutory law requires that magistrate judges be "selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States." Those standards and procedures must "contain provision for public notice of all vacancies in magistrate judge positions and for the establishment by the district courts of merit selection panels, composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions." Reliance on merit selection panels for the selection of magistrate judges arrived with the 1979 amendments to the governing statute. (28 U.S.C. § 631(a); Smith 1990: 32.)

The statute sets out very minimal qualifications for the magistrate judge position, including that (absent special circumstances) a magistrate judge have been "for at least five years a member in good standing of the bar" (28 U.S.C. § 631(b).) The Judicial Conference regulations ("Reg.") further direct, to be qualified for appointment as a magistrate judge, a candidate must "[h]ave been engaged in the active practice of law for a period of at least five years" (Reg. § 1.01(b)(4)). Further, "[a] district court may establish additional qualification standards appropriate for a particular

magistrate judge position, taking into account the specific responsibilities anticipated for that position" (Reg. § 1.02).

When an opening (for which an incumbent magistrate judge is not seeking reappointment) arises, the court or panel first must publicize the position and solicit applications. Anyone interested in being considered for the position should file an application. (Reg. § 2.01; Administrative Office of the U.S. Courts 2010: 14.)

Judicial Conference regulations implement the statute's merit selection panel requirement, directing that, "[b]efore the appointment or reappointment of a United States magistrate judge, the court, by majority vote of the district judges, shall appoint a merit selection panel which shall recommend to the court for consideration individuals whose character, experience, ability, and commitment to equal justice under the law fully qualify them to serve as a United States magistrate judge" (Reg. § 3.01). The panel then holds meetings and examines applications, in large measure as it sees fit (subject to "rules of procedure for the panel to follow") (Administrative Office of the U.S. Courts 2010: 21).

The Judicial Conference regulations also leave the panel with discretion as to how to evaluate the applicants. At the same time, the Administrative Office offers "suggestions" as to how a panel might proceed. The suggested factors include an applicant's "qualities and professional skills most often demanded for the specific duties to be assigned"; the applicant's judicial temperament and promise; the applicant's "academic record and related achievements in law school and college"; the extent and type of the applicant's legal practice; the applicant's knowledge of the federal judicial system; and the applicant's personal attributes." (Administrative Office of the U.S. Courts 2010: 25-28.)

Once the panel has concluded its review of the applicants, it should "collectively" forward to the district court "the five applicants the panel has determined as best qualified." The district judges of the district are to select the magistrate judges from the list of names submitted by the panel. (Reg. §§ 3.04, 4.01; Administrative Office of the U.S. Courts 2010: 29.)

If a sitting magistrate judge seeks reappointment, the Judicial Conference regulations call upon the district court judges first to "determine, by majority vote . . . , whether . . . to consider the reappointment of the incumbent." In making this determination, the regulations direct that "[t]he court should give due consideration to the professional and career status of the position of United States magistrate judge." Guidance from the Administrative Office of the U.S. Courts is clearer still: "Normally, an incumbent magistrate judge who has performed well in the position should be reappointed to another term of office." (Reg. § 6.02, Administrative Office of the U.S. Courts 2010: 37.)

If the court decides against reappointment, then "it shall so notify the incumbent" and then is to follow the procedures applicable for initial appointments. If, instead, the court decides in favor of reappointment, then the court must (i) provide public notice of the proposed reappointment and invite comments from the public; (ii) appoint a merit selection panel to "review the incumbent's current service as magistrate judge and other experience, the comments from members of the bar and public, and other evidence of the incumbent's good character, ability, and commitment to equal justice under the law"; and (iii) "[a]fter due consideration of the report of the panel, . . . determine whether to reappoint the incumbent by majority vote of all district judges." (Reg. §§ 6.02, 6.03.)

3.3. Literature Review

The bulk of the literature on judicial behavior focuses on the Supreme Court and, failing that, the courts of appeals or state supreme courts. The district courts that lie at the bottom of the totem pole—let alone the magistrate judges who work beneath the district judges—have attracted comparatively little attention. In short, magistrate judges have largely remained under the academic radar. (Alexander et al. 2020: 313; Gulati et al. 2013.)

Legal scholarship has investigated to some degree the jurisdictional basis for—and limits on—actions by magistrate judges (Silberman 1975: 1304-21; Posner 1989: 2216-17), but in general has not seen fit to examine how in theory magistrate judges should be used, or in practice how they are used. Other than that, the political science, economic, and legal literatures have largely ignored magistrate judges, with rare exceptions. (For exceptions, see Dessem 1993; Puro et al. 1981; Puro & Goldman 1982; Seron 1983; Smith 1990; Boyd & Sievert 2013.)

The scant literature that addresses magistrate judges debates whether they are selected based predominantly on merit or for ideological compatibility with the district judges who appoint them. Many commentators—perhaps especially those in political science—subscribe to the latter view. Political scientist Christina Boyd assigns magistrate judges ideology scores equal to judicial common space score of "the median district court judge . . . for the year that they assumed their position." Professor Boyd—along with political scientist Joel Sievert—hypothesize that magistrate judges will tend to hew to the district's average district judge's ideology, both when deciding cases on consent of the parties and when issuing reports and recommendations. They empirically find support in the first context, but only weak support in the latter context. (Boyd 2009: 68; Boyd & Sievert 2013: 252-62, 266-69.)

Political science scholar Bruce Carroll argues that the close proximity within which magistrate judges work with their selectors—the district judges—favors a proximate selectorate theory of magistrate judge behavior, under which magistrate judges decide cases similarly to district judges. Carroll hypothesizes that there should be "[n]o significant differences between the collective [ideological] decision-making of Magistrate Judges and District Judges" within a district, and offers empirical evidence in support of that hypothesis. (Carroll 2004: 24-26, 39, 74, 83-86.)

Other commentators advance arguments to the contrary. Observing that district judges "have incentives to pick stellar candidates" to serve as magistrate judges, law professor Judith Resnik asserts that "the judiciary has selected a high-quality and relatively nonpolitical corps of judges in a relatively inexpensive fashion." (Resnik 1999: 670-71.)

Though he expected to find evidence of ideological motivations influencing the magistrate judge selection process, political scientist Christopher Smith's interviews with relevant actors instead revealed "surprisingly little evidence of political party affiliations affecting the selection of magistrates." He explains:

> Magistrates are viewed by judges as important resources. They are generally considered to be essential to the management of large and growing caseloads in the federal courts and thus judges emphasize competence rather than patronage in appointing new magistrates. Political conflicts occur over the definitions of selection criteria and competence, but apparently magistrates are too valuable in the resource-scarce judiciary to permit primary emphasis on partisan political considerations. Interviews revealed numerous examples of judges appointing magistrates from the opposite political party or not knowing the partisan inclinations of the selected appointee. (Smith 1990: 44-45.)

Legal analytics scholars Charlotte Alexander, Nathan Dahlberg, and Anne Tucker undertake a focused empirical examination of employment discrimination cases in the U.S. District Court for the Northern District of Georgia. As relevant here, they uncover some minor evidence of ideological motivations driving district judge review of magistrate judges' R&Rs: They find that district judges appointed by Republican Presidents were less likely to affirm magistrate judges' R&Rs. Insofar as it seems that the vast majority of the district's magistrate judges were appointed by majorities of district judges appointed by Democratic Presidents, one can read this finding to suggest that the likelihood of rejection of an R&R increases when the district judge and magistrate judge subscribe to opposing ideologies. That said, the external validity of the finding to other districts—and other ideological combinations of district judges and magistrate judges—is unclear. And none of that directly bears on whether in the first instance district judges look to appoint magistrate judges based predominantly on merit or ideology. (Alexander et al. 2020: 324-45.)

Law professors Tracey George and Albert Yoon observe: "Since district judges will be relying on magistrate judges to assist them in their Article III work, district judges have an incentive to pick effective magistrate judges." They undertake an empirical examination of magistrate judges' biographies, with results that are inconclusive, and perhaps ambivalent, as to whether district judges look for merit in selecting magistrate judges. First, they find that, while "both district and magistrate judges attended, on average, high-ranking law schools," "district judges were much more likely to attend law schools described as 'elite'." Of course, merely graduating from an elite law school is hardly the touchstone for being a technically skilled attorney. (George & Yoon 2016: 826, 836-43.)

Second, George and Yoon find that magistrate judges are less likely than district judges to have prior judicial experience. This may be a result of the fact that the federal judiciary—perhaps because of larger pay and the guarantee of a lifetime appointment—can attract state court judges (including state appellate judges) to serve as federal district judges. In addition, district judges are sometimes drawn from the ranks of magistrate judges (but not vice versa).[10] (George & Yoon 2016: 839; Nash 2017: 1930-32.)

Third, George and Yoon find, contrary to their expectations, that magistrate judges are far less likely than district judges to have prosecutorial experience and that, like district judges, are unlikely to have experience working as a public defender. They explain this result by noting that "[e]lected officials generally have not run on a pro-criminal liberties platform" and, as such, may look to "support 'law-and-order' judicial candidates." At the same time, George and Yoon remain at a loss to explain the relative dearth of magistrate judges with experience working as a public defender. In the end, it may be that most districts do not use magistrate judges to handle much in the way of criminal cases—or, to the extent that they do deploy magistrate judge resources in criminal cases, the issues that they are assigned are, even if time-consuming, not terribly challenging from a legal perspective (see Sunstein 2006: 61)—rendering criminal law expertise is less valuable. (George & Yoon 2016: 839.)

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[10] While not the norm, the elevation of magistrate judges to higher federal judicial offices has become more common over the years. See, e.g., McCabe 2014: 19 ("In 1976, two Magistrate Judges were appointed by President Ford as United States District Judges, inaugurating a pattern followed by every succeeding president to appoint Magistrate Judges to Article III judgeships. As of June 15, 2014, 162 full-time Magistrate Judges and 7 part-time Magistrate Judges had each been appointed as Article III judges – to serve as U.S. District Judges and, in one or more instances, as U.S. Circuit Judges. Magistrate Judges have been appointed to District Judgeships in 68 of the 91 Article III District Courts and 5 of the 12 circuit courts of appeals."); Smith 1990: 155 ("The fact that a number of magistrates have been appointed to district judgeships and that the issue has been mentioned and discussed in law reviews and legislative hearings indicates that magistrates can serve a cognizable function as ready-made judges for the judicial system."); Resnik 1999: 671 ("[T]he ranks of Article III judges are increasingly populated by individuals who once served as statutory judges."); see also George & Yoon 2016: 837 ("the magistrate judge position can serve as a path to a district judgeship").

Finally, when George and Yoon dig deeper into examination of hiring practices in five judicial districts, they find heterogeneity in the biographical profiles of magistrate judges across districts. They speculate that the local legal labor market may affect prospective applicants' perceptions of the appropriateness of a magistrate judge position: "One possibility is that in jurisdictions with larger legal labor markets, a magistrate judgeship is viewed more as a mid-career attainment, while in smaller legal labor markets, this judgeship is more of a senior-level attainment, at least for a subset of lawyers." They alternatively speculate that the factors that determine who is selected as a magistrate judge will turn on "the preferences of the district judges themselves": "Since district judges ultimately decide who becomes appointed to the magistrate bench and the tasks that they perform, their choices may simply reflect their own preferences." (George & Yoon 2016: 840-43.)

3.4. Modeling District Court Decisions to Make Referrals of Matters to Magistrate Judges as Decision Trees

In this Part, I use a decision-tree model to provide insights into how and when district judges will make referrals to magistrate judges. The model suggests that district judges have an incentive to appoint nonideological, as opposed to ideological, magistrate judges.

I first introduce a basic model, and then an extended model. The basic model rests on the distinction between ideological and nonideological judges, and ideological and nonideological cases. Ideological judges are concerned primarily with resolving ideologically salient legal questions favorably to their ideological bent. Nonideological judges are unconcerned with ideological questions; they instead resolve questions according to their best understanding of the law, and are more likely to have acquired—or at least to be better able to deploy—detached legal

expertise to legal questions. The model assumes that all district judges are ideological judges, while magistrate judges can be ideological or nonideological.

Ideological cases raise ideologically salient issues about which ideologically-minded judges might be concerned. Nonideological cases, in contrast, are cases that are largely devoid of ideologically salient issues. Instead, ideological judges will often see the issues raised in these cases as secondary and even boring. They also may find nonideological cases to raise complicated or arcane questions of law (or applications of law to fact); they thus may prefer to have a nonideological magistrate judge—i.e., a relative expert—involved in such cases. (Nash 2014: 1611; Sunstein et al. 2004: 309-10; Cardozo 1921: 164-65; Epstein et al. 2013: 126, 136; Miles & Sunstein 2008: 842; Pacelle 1995: 252; Hausegger & Baum 1999: 171, 183; Nash & Pardo 2012.)

Given discussion in the literature about the related concept of "hard" and "easy" cases (Fischman & Law 2009: 141; Edwards 1992: 44), it bears emphasis that, while a case may be "easy" in the sense that almost all judges would reach the same conclusion in the end, that does not mean that reaching the "correct" resolution of the case—that is, a resolution that is proper and impervious to appellate review—requires little effort. The applicable law may be undisputed, yet complex and difficult to apply without prior exposure and training. For example, it is said that social security cases often raise arcane issues that stand as a hurdle to determining the "correct" resolution (Fraiser 2013: 67; see Nash 2014: 1631, 1637 (similar point for sentencing guidelines and bankruptcy cases)). But a nonideological can be one where the district judge well could anticipate the correct resolution in advance, if explaining and defending that resolution will require substantial effort. Consider, for example, cases where a prisoner (other than one facing the death

penalty[11]) seeks a writ of habeas corpus: Even if the outcome is clear (as it is in most habeas cases), the chore of explaining why is not.[12] Alternatively, the law may not be complicated, but other difficulties may present themselves. Consider cases litigated by pro se litigants: While many of the argumenta advanced by pro se litigants may in the end prove meritless, the law calls upon judges to construe pro se pleadings "liberally" (e.g., Bernhardt v. Los Angeles County, 339 F.3d 920, 925 (9th Cir. 2003)). This requires the judge to consider what the pro se litigant *should be arguing*, which—given the limited way in which many pro se litigants express themselves in their court filings—may again prove a far easier task for a more skilled judge.

While the basic model imposes no limit on the number of referrals a district judge can make to a magistrate judge, the extended model considers magistrate judge services as resource-constrained. It highlights the reality of the constraint on district judges to refer dispositive motions by introducing the notion of referrals to magistrate judges for discovery supervision. These referrals will provide the maximum benefit to district judges, and thus possibly crowd out referrals of dispositive motions.

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[11] The Supreme Court has recognized that "the penalty of death is qualitatively different from a sentence of imprisonment, however long." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). As a consequence death penalty cases are worthy of our distinct jurisprudence. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (The fact that "'death is different' [has led the Court to] impose[] protections that the Constitution nowhere else provides."). Along these lines, one might expect that a judge who is predisposed against the death penalty might take greater ideological interest in a case where the death penalty was imposed than in a case where the death penalty was not imposed but is otherwise identical to the first case.

[12] Consider that a law school casebook on federal habeas corpus includes lengthy chapters on (i) the scope of federal habeas authority (Garrett & Kovarsky 2013: 99-167); procedural limitations on federal post-conviction relief (pp. 169-297); and the guidelines for review of habeas petitions on the merits in federal court (pp. 299-416).

3.4.1 The Basic Model

The only strategic actor in the model is the district judge. The actions of the other players—the magistrate judge and the court of appeals—are grounded in intuition and logic, but entirely predictable (including to the district judge).

The district judge and the court of appeals judges have ideological preferences. The possible ideological beliefs are represented as +1 and -1, i.e., ideology is measured along a single axis and varies by polarity, not intensity. I assume without loss of generality that the district judge has ideology of +1. Every case that is appealed to the court of appeals is heard by a panel of three judges drawn from a complement of court of appeals judges. I use τ to denote the expected fraction of panels that have a majority (i.e., at least two judges) who share the same ideological position with the district judge.[13]

The district judge has the choice of appointing a magistrate judge in ideological alignment with her (i.e., ideology of +1), a magistrate judge with ideology opposed to her own (i.e., ideology of -1), or an expert magistrate judge; an expert magistrate judge has neutral ideology (i.e., ideology of 0). The magistrate judge with neutral ideology offers more expertise—that can be deployed to decide dispositive motions in nonideological cases.

The judge makes her choice based upon the utility that each type of appointment produces. The utility is not based upon the appointment choice itself, but rather upon how the district judge benefits, or suffers cost, by virtue of the magistrate judge's decision making.

[13] Even if a court of appeals includes in its complement many judges aligned with a district judge, still the fact that a panel of judges is drawn randomly and only after the district judge has ruled limits the district judge to relying upon the median ideology of the likely panel composition.

The district judge's utility is determined by three components: costs of reversal, effort costs, and ideological benefit. Reversal costs—which I represent by R—are the costs a district judge incurs when the court of appeals reverses one of its decision. Even beyond wasted effort (Smith 2006: 231), reversals by a higher court can impose reputational (W. Murphy 1959: 1030; Smith, 2006: 31), as well as psychological (Caminker 1994: 78 n.273), costs, and may affect a judge's prospects of future elevation (Caminker 1994: 77). The literature suggests that reversal costs are especially large (Posner 1990: 224; Smith 2006: 33-43). The model accordingly assumes that reversal costs far exceed both effort costs and ideological benefits.

Effort costs are the costs that the district judge incurs when handling a matter herself. One can think of these as the costs of drafting an opinion and/or time spent considering and researching how to rule on a matter. All else equal, the district judge would prefer to minimize her effort costs. (Posner 1993: 20-21)

A district judge enjoys an ideological benefit I when a case that is infused with ideological issues reaches a final outcome—i.e., following appellate review—that aligns with the district judge's ideology. The model distinguishes between cases that are ideologically salient—so-called "ideological cases—and cases that are "nonideological." The ideological benefit can only arise in ideological cases, not nonideological cases.

The model assumes that a dispositive motion arises in each case that comes before the district judge. The district judge can choose to decide that motion herself; then, with a probability of α_{NR}, the losing party then will seek appellate review. Alternatively, the district judge can choose to refer the motion to the magistrate judge. If the district judge makes a referral, the magistrate judge will generate an R&R that recommends to the district judge how to rule on the motion. The district judge then must decide whether to accept or reject the magistrate judge's

R&R; then, with probability α_R, there may be appellate review. Since (in addition to normal uncertainty as to whether appellate review will be sought) the failure by the losing party to have objected to the R&R may waive appellate review, it follows that $\alpha_R < \alpha_{NR}$.

Let us begin with nonideological cases, where the only components of the district judge's utility are reversal and effort costs. Insofar as they lack any strong ideological component, nonideological cases can be said to have some "correct" answer. As such, the court of appeals panel (regardless of its ideological makeup) will reverse the district judge's decision only if it can discern that that decision is incorrect. The district judge also has no ideological preference in a nonideological case, and so will strive to arrive at the correct resolution.

If the district judge does not refer the motion to the magistrate judge, then she will expend effort e_n[14] to draft an opinion in the case. That opinion will resolve the motion correctly subject to an error rate ϵ_i.[15] Assuming an appeal, the court of appeals will discern that the district court has erred in its resolution—and thus reverse the district court—μ_i of the time.[16] Thus, the district judge's expected utility from deciding a motion in a nonideological case without referral will be $-e_n - \alpha_{NR}\mu_i\epsilon_i$.

If the district judge decides instead to refer the motion to the magistrate judge, then the district judge's utility will depend upon the type of magistrate judge whom she has chosen to

[14] To explain the nomenclature, the letter "*n*" in the subscript refers to a nonideological case ("*i*" would refer to an ideological case).

[15] Here, the letter "*i*" in the subscript refers to the notion that the district judge tends to decide cases ideologically case ("*n*" would refer to a nonideological judge).

[16] Owing to the fact that it decides cases by means of a multimember panel, the court of appeals is better situated to identify errors than is the district judge. First, to the extent that there is a "correct" answer (as the model presupposes for nonideological cases) and each judge has a greater than 50% chance of reaching that answer on his or her own, then the Condorcet Jury Theorem predicts that multiple judges will increase the likelihood of arriving at the correct solution. *See* Nash & Pardo 2008: 1748. Second, to whatever extent the requirements of the Jury Theorem are not met, *see* Nash 2003: 112-13 & n.112 nn.130-31 "there is an argument that the collegial nature of multimember appellate panels contributes to reflective decisionmaking and thus to the quality of appellate review," Nash & Pardo 2008: 1748.

appoint. If the magistrate judge is of either ideological type (i.e., the magistrate judge has ideology +1 or -1), then—since the magistrate is no more of an expert than the district judge—the magistrate judge will have an error rate the same as the district judge. And, since the district judge is no better positioned to resolve the motion correctly, the district judge will simply adopt the magistrate judge's recommendation, leaving the court of appeals to review for error. And, since the magistrate judge and district judge are similarly situated, the court of appeals will identify error at the same error rate (if there is an appeal). Thus, the district judge's expected utility from referring a motion in a nonideological case to an ideological magistrate judge will be $-\alpha_R \mu_i \epsilon_i$.[17] Note that this is an improvement over the district judge's utility from not referring the motion at all.

The district judge's utility from referring a dispositive motion in a nonideological case to a nonideological magistrate judge will be greater still. The nonideological—i.e., expert—magistrate judge's error rate is ϵ_n—considerably less than the error rate of the district judge and any ideological magistrate judge. Since the district judge's error rate is worse than the expert magistrate judge's error rate, the district judge should simply adopt the magistrate judge's R&R. The court of appeals will discern error in the lower court decision μ_n of the time. This rate is less than the corresponding rate where the lower court decision is that of the district judge or an ideological magistrate judge, the logic being that (i) the appointment of an expert magistrate judge sends a signal to the court of appeals, and (ii) the expert magistrate judge is better able to craft an opinion more susceptible to appellate scrutiny. In the end, then, the district judge's utility from

[17] The model thus assumes that a district judge who refers a motion to a magistrate judge "offloads" the effort needed to resolve the motion to the magistrate judge and need exert no effort of her own. While there are some outcomes under which a district judge might feel free to accept an R&R without examination (where there are no objections by any party and the district judge declines to review), often the district judge must, or will choose to, review the R&R (as discussed below). Even there, the effort required will presumably be dwarfed by the effort required to actually decide the motion and draft a full opinion. On this understanding, one can see the model to normalize this minimal effort to zero.

referring a dispositive motion in a nonideological case to a nonideological magistrate judge will be $-\alpha_R \mu_n \epsilon_n$. This provides the district judge her highest (or more aptly her least negative) utility.

In sum, it will always be in the district judge's interest to refer dispositive motions in nonideological cases to a magistrate judge. (Puro & Goldman 1982: 141.) The benefit, however, will be larger with a nonideological magistrate judge than with an ideological magistrate judge.

Let us turn now to the district judge's utilities where the dispositive motion arises in an ideological case. In this setting, I will restrict the discussion in the text to explaining the intuitions underlying the model, leaving the mathematical details to the footnotes and Appendix.

In the setting of dispositive motions in ideological cases, there are no error rates. The court of appeals will affirm the district judge's decision if the court of appeals panel is ideologically in favor of that decision and reverse it otherwise. If the district judge does not refer the motion to a magistrate judge, then she must exert effort e_i to draft an opinion in the case. While hardly negligible, this effort is less than the effort required to draft an opinion in a nonideological case—i.e., $e_n < e_i$—because nonideological cases are (as explained above) likely to rely more on technical legal arguments than ideological policy arguments.[18]

Now the district judge's payoff will depend upon whether there is an appeal, and if so whether the court of appeals panel will affirm the district judge; the last point will turn on whether the court of appeals panel shares ideological preferences with the district judge. Since the district judge cannot know whether there will be an appeal and (if so) which appellate judges will populate a court of appeals panel in any one case, the district judge will rationally make her decisions based

[18] Beyond actual effort, a district judge judges may simply find drafting opinions in more technical cases less enjoyable. (Cf. Woodward & Armstrong 1979: 190 (noting that Justice Blackmun "felt that he had suffered" under Chief Justice Burger's reign, in part by virtue of having received "more than his share of tax . . . cases").)

upon expectations. Were appeal a certainty (i.e., were $\alpha_{NR} = 1$), then (since the district judge's largest motivation is avoiding reversal) the district judge would rule in line with her own ideological preferences if $\tau > \frac{1}{2}$, and against her preferences if $\tau < \frac{1}{2}$. On the other hand, if there is no possibility of appeal (i.e., if $\alpha_{NR} = 0$), then the district judge should always decide in line with her preferences. On the assumption that there will be some substantial possibility of appeal across motions, there will be some cutpoint τ_c ($0 < \tau_c < \frac{1}{2}$), such that the district judge is better off deciding in accordance with her own ideological preferences if $\tau > \tau_c$,[19] and better off deciding the other way if $\tau < \tau_c$.[20]

If the district judge refers a motion to an ideological magistrate judge, her decision as to what type of ideological magistrate judge to seek out similarly depends upon whether τ is greater than, or less than, τ_c. Either way, the district judge will recoup the effort $-e_i$ it takes the district judge to draft an opinion in the case.[21] (Note that the district judge could reject the magistrate judge's R&R—albeit at the cost of writing an opinion justifying that conclusion—but the district judge has no incentive to do so.)

What if the district judge opts instead to appoint, and refer motions to, a nonideological magistrate judge? The model assumes that a nonideological magistrate judge will decide

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[19] If $\tau > \tau_c$, then, when appeal is likely, τ of the time the district judge will receive utility $(-e_i + I)$, and $(1-\tau)$ of the time she will receive utility $(-e_i - R)$. And, when appeal is not likely, she will simply decide in accordance with her preference and receive utility $(-e_i + I)$. Thus, the total expected utility will be $\alpha_{NR}\big[\tau(-e_i + I) + (1-\tau)\big(-e_{i,idm} - R\big)\big] + (1-\alpha_{NR})(-e_i + I) = -e_i + \alpha_{NR}\big(I\tau - R(1-\tau)\big) + (1-\alpha_{NR})I$.

[20] If $\tau < \tau_c$, then, when appeal is likely, τ of the time the district judge will receive utility $(-e_{i,idm} + I - R)$, and $(1-\tau)$ of the time she will receive utility $-e_i$. And, when appeal is not likely, she will simply decide in accordance with her preference and receive utility $(-e_i + I)$. Thus, the total expected utility will be $\alpha_{NR}[\tau(-e_i + I - R) + (1-\tau)(-e_i)] + (1-\alpha_{NR})(-e_i + I) = \alpha_{NR}(-e_i + I\tau - R\tau) + (1-\alpha_{NR})I$.

[21] If $\tau > \tau_c$, then the district judge should appoint a magistrate judge of the same ideological bent as herself; the district judge's resulting utility will be $\alpha_R\big(I\tau - R(1-\tau)\big) + (1-\alpha_R)I$. And if, by contrast, $\tau < \tau_c$, then the district judge should appoint a magistrate judge of opposite ideology; the district judge's resulting utility will be $\alpha_R(I\tau - R\tau)$.

ideological cases orthogonally to any ideological concerns; thus, a nonideological magistrate judge will decide (randomly) half of all ideological cases in line with the district judge's ideology and half in the other direction. If the district judge accepts the magistrate judge's R&R, then (factoring in the likelihood of an appeal) the district judge's utility will be $\alpha_R\left(\tau I - \frac{R}{2}\right) + \frac{(1-\alpha_R)I}{2}$.[22]

But the district judge retains the power to reject the magistrate judge's R&R. If the district judge chooses to reject the R&R, she must draft an opinion justifying that decision. Drafting such an opinion will entail effort equal to the effort she would have exerted to draft an opinion in the case had she not referred the motion to the magistrate judge for decision,[23] i.e., an effort of e_i. It also will invite the possibility of appeal by the party that now (after the rejection) has lost the motion.

The district judge will have no incentive to reject the R&R if either (i) $\tau > \frac{1}{2}$ and the R&R aligns with the district judge's (and court of appeals' likely) ideology, or (ii) $\tau < \frac{1}{2}$ and the R&R aligns with the court of appeals' expected ideology (though against the district judge's preferred ideology). Some algebra reveals that, if $\tau > \frac{1}{2}$ and the R&R goes *against* the district judge's (and court of appeals' likely) ideology, then the district judge should reject the R&R if and only if $\tau >$

[22] Half the time, the nonideological magistrate judge will decide the motion in alignment with the district judge's ideology. In that circumstance, the court of appeals will affirm the district judge τ of the time, and reverse the district judge $(1-\tau)$ of the time. Thus, the district judge's utility will be $\tau I - (1-\tau)R$. The other half of the time, the magistrate judge will decide the motion against the district judge's ideology—with the court of appeals still affirming τ of the time and reversing the rest of the time—and the resulting utility will be $\tau I - R$. Thus, the total expected utility will be $\frac{1}{2}[\tau I - (1-\tau)R] + \frac{1}{2}[\tau I - \tau R] = \tau I - \frac{R}{2}$.

[23] The intuition behind the idea that these two efforts should be the same is that (i) on the one hand, the effort required to draft such an opinion is reduced by virtue of the magistrate judge having already sorted through the relevant materials and prepared his own opinion, but (ii) the effort required is in another sense higher than it would be for the district judge to draft a standalone opinion since now the district judge must address and rebut the arguments the magistrate judge has made in favor of his position.

$\frac{1}{2}+\frac{e_i}{2R}$.[24] Similarly, if $\tau<\frac{1}{2}$ and the R&R goes *against* the likely court of appeals' ideology (but aligns with the district judge's ideology), then the district judge should reject the R&R if and only if $\tau<\frac{1}{2}-\frac{e_i}{2R}$.[25]

Figure 3-1 summarizes the utility-maximizing options, as τ varies from 0 to 1, for the district judge receiving back an R&R from a nonideological magistrate judge in an ideological case. I leave to the footnotes the expected utility the district judge obtains in each region, but intuitively one can readily see that a nonideological magistrate judge is least beneficial where the alignment between the ideologies of the district judge and court of appeals τ is high, i.e., in Region 3.[26] There, after all, the district judge can reliably predict what the court of appeals seeks, but the nonideological magistrate judge generates that outcome only half the time. To make up for that deficit, the district judge must expend effort.

Region 1 is another setting where the court of appeals' preferred outcome is relatively predictable (albeit counter to the district judge's preferences). Accordingly, one would expect once again the benefit of a nonideological magistrate judge to be limited.[27]

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[24] The district judge receives utility of $-\tau(R-I)$ if she accepts the R&R, and $-e_i+\tau I-(1-\tau)R$ if she rejects the R&R. And $-e_i+\tau I-(1-\tau)R>-\tau(R-I)$ if and only if $\tau>\frac{R+e_i}{2R}$.

[25] The district judge receives utility of $\tau I-(1-\tau)R$ if she accepts the R&R, and $-e_i-\tau(R-I)$ if she rejects the R&R. And $-e_i-\tau(R-I)>\tau I-(1-\tau)R$ if and only if $\tau<\frac{R-e_i}{2R}$.

[26] If $\tau>\frac{1}{2}$ and the district judge rejects the R&R if it comes back with ideology opposed to the district judge but accepts it otherwise, then the district judge's overall utility will be

$$\frac{1}{2}[(-e_i+\tau I-(1-\tau)R)+(\tau I-(1-\tau)R)]=-\frac{e_i}{2}+\tau I-(1-\tau)R$$

That payoff will obtain if an appeal is likely; if instead an appeal is unlikely, then the district judge will accept the R&R and receive an ideological payoff I exactly half the time. Thus, the total expected utility will be

$$\alpha_R[-\frac{e_i}{2}+\tau I-(1-\tau)R]+\frac{(1-\alpha_R)I}{2}.$$

[27] If $\tau<\frac{1}{2}$ and the district judge rejects the R&R if it comes back with ideology opposed to the court of appeals but accepts it otherwise, then the district judge's overall utility will be

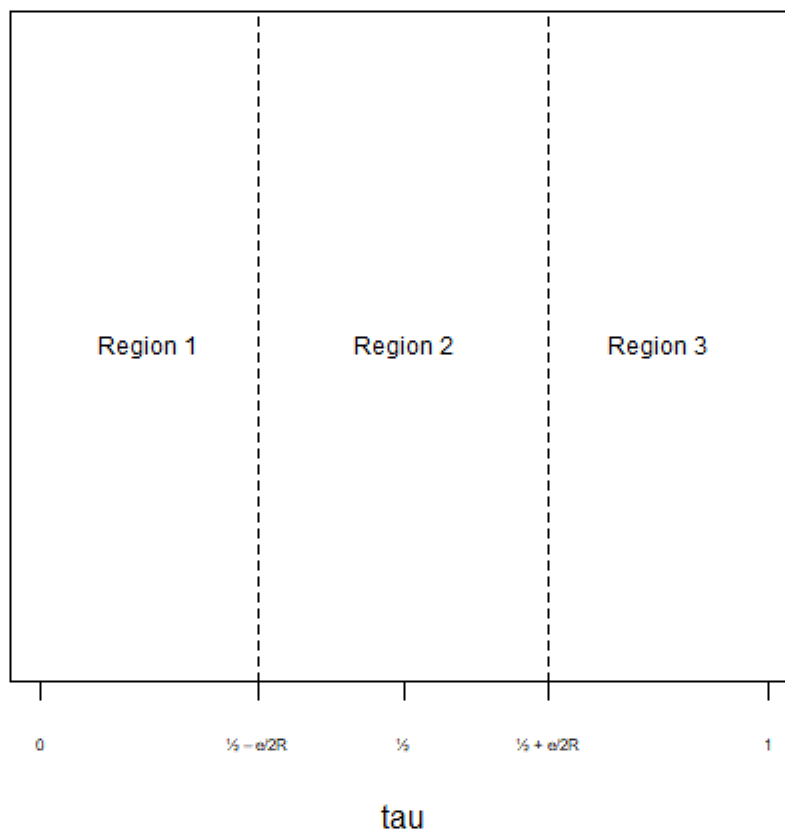
$$\frac{1}{2}\left[\left(-e_i-\tau(R-I)\right)+\left(-\tau(R-I)\right)\right]=-\frac{e_i}{2}-\tau(R-I)$$

In contrast, in Region 2, the preference of the court of appeals is hard to predict. The nonideological magistrate judge's practice of reaching results consistent with each ideological pole half the time makes a reasonable approximation, thus requiring less in the way of district judge corrective effort.[28]

That payoff will obtain if an appeal is likely; if instead an appeal is unlikely, then the district judge will accept the R&R and receive an ideological payoff I exactly half the time. Thus, the total expected utility will be

$$\alpha_R\left[-\frac{e_i}{2}-\tau(R-I)\right]+\frac{(1-\alpha_R)I}{2}.$$

[28] The payoff here will be $\tau I-\frac{R}{2}$ if an appeal is likely and $\frac{I}{2}$ otherwise, for a total utility of $\alpha_R\left(\tau I-\frac{R}{2}\right)+\frac{(1-\alpha_R)I}{2}$.



Region	Optimal Strategy
1	Reject the R&R if appeal is likely and the recommendation does not align with the court of appeals' expected ideology; accept the R&R otherwise.
2	Accept the R&R.
3	Reject the R&R if appeal is likely and the recommendation does not align with the court of appeals' expected ideology; accept the R&R otherwise.

Figure 3-1: The district judge's expected utility from referring a dispositive motion in an ideological case to a nonideological magistrate judge, as τ varies from 0 to 1.

We turn next to whether the district judge is better off referring a motion in an ideological case to an ideological or nonideological magistrate judge.[29] The precise utility payoff differentials

[29] Since (as shown above) it is a dominant strategy for the district judge to refer a motion in an ideological case to an ideological magistrate judge than to decide the motion herself, we need not further consider that possibility.

to the district judge are derived and analyzed in the Appendix. Intuitively, however, one can see that, while nonideological magistrate judges strictly dominate ideological magistrate judges with respect to motions in *nonideological* cases, ideological magistrate judges will often not often a benefit—or at least not a substantial benefit—over nonideological magistrate judges with respect to motions in *ideological* cases.

One can readily see that an ideological magistrate judge offers a district judge the surest, and greatest, benefit, as compared to a nonideological magistrate judge, when the alignment between the ideologies of the district judge and court of appeals judges is large – i.e., in Region 3. There, an ideological magistrate judge will reach the result the district judge wants—and secure for her an ideological payoff—most of the time; in contrast, a nonideological magistrate judge will reach that result only half the time.

Ideological magistrate judges also offer a benefit in Region 1, but there (because the court of appeals wants results ideologically opposite to those sought by the district judge) the ideological benefits dissipate. For this reason, the benefits of nonideological magistrate judges should come closer to (if they do not overtake) the benefits of ideological magistrate judges in this region.

Finally, in Region 2—where the court of appeals is not dominated by other ideology—the benefit of an ideological magistrate judge is at its nadir. Here, it would not be surprising to find a nonideological magistrate judge offering a benefit greater than an ideological one.

With all this in place, we turn to the question of whether we should expect a district judge to appoint an ideological or nonideological magistrate judge. The choice of a nonideological magistrate judge strictly dominates in the context of motions in nonideological cases, while the

better strategy is ambiguous in the context of ideological cases. Still, for three reasons, one can reason that a nonideological magistrate judge is for a host of circumstances the better option.

First, it may well be—likely in Region 2, but also sometimes in Region 1—that a nonideological magistrate judge may offer a greater benefit in ideological cases than an ideological one. If that is so, then nonideological magistrate judges will preferable in both ideological and nonideological cases, and the choice will be clear. It is worth noting that this will in reality often the case, insofar as it is not common for a court of appeals to be heavily dominated by adherents of one ideology. (Nash 2020.)

Second, even if an ideological magistrate judge offers a greater benefit in ideological cases than his nonideological counterpart, that marginal benefit may be small, and dwarfed by the large marginal benefit the nonideological magistrate judge offers over the ideological magistrate judge in nonideological cases. In that case, overall, the benefits of a nonideological magistrate judge may swamp the benefits offered by an ideological magistrate judge.

Third, even if—likely in Region 3—the marginal benefit that ideological magistrate judges offer in ideological cases is more than the marginal benefit offered by nonideological judges in nonideological cases, the fact remains that the number of nonideological cases is probably greater than, and indeed likely dwarfs, the number of ideological cases. (Cardozo 1921: 164.) If that is true, then the total benefit from nonideological magistrate judges still will likely outstrip the total benefit from ideological magistrate judges.

In short, only if the number of ideological cases to be referred exceeds the number of nonideological cases—and, even then, likely only if the benefit from referring ideological cases is more than (or at least isn't much less than) the benefit from referring nonideological cases—might

the appointment of an ideological magistrate judge provide a greater benefit. But this is very unlikely, and even more unlikely with the resource constraint that the extension of the model in the next Section introduces.

3.4.2 Extending the Model: Resource Constraint

Up to now, the model has assumed that the magistrate judge can handle as many referrals as the district judge metes out. This, however, may be quiet unrealistic (especially, as I discuss below, on a typical court with multiple district judges and a ratio of magistrate judges to district judges below one).

Instead, the resource of magistrate judge referrals may be constrained.[30] (Smith 1990: 85; Dessem 1993; Puro & Goldman 1982: 145-46) Introducing an additional element to the game—one very much grounded in reality—highlights the likelihood of constrained magistrate judge resources. The basic model contemplated the district judge referring only dispositive motions to a magistrate judge. But there is another area in which referral to a magistrate is authorized and very much likely to be an attractive option: resolution of discovery disputes. While some cases may require little in the way of discovery supervision, discovery disputes in general require a substantial effort on the part of the district judge. In line with the logic of the basic model, a

[30] District judge resources may also be constrained, and may also have an effect on district judge-magistrate judge interactions. *See* Boyd & Sievert 2013: 269 (finding a correlation between higher district judge caseloads and adoption of magistrate judges' R&Rs).

On the general topic of judicial resources as constrained, see, for example, Spitzer & Talley 2000: 654 n.15 (discussing judicial auditing costs, and noting that at the least they constitute opportunity costs to the reviewing court); Kornhauser 1995: 1610 (discussing the assumption of resource constraint on courts).

nonideological magistrate judge will have a lower error rate in discovery supervision as compared to an ideological magistrate judge.

But the real attraction of referring discovery supervision to a magistrate judge is the limited scope of judicial review. If appealed, the district judge generally reviews a magistrate judge's discovery decisions only for abuse of discretion or clear error, i.e., under an extremely deferential standard (which requires little if any effort). Moreover, there is virtually no threat of review by the court of appeals: Federal courts of appeals generally only review final judgments of district courts, and a decision on discovery is almost never such a decision; the avenues for appellate review are narrow indeed. In the model's nomenclature, $\alpha_{DISC} \sim 0$. In short, there is every reason for a district judge to refer discovery supervision to a magistrate judge. Indeed, to the extent referral of discovery supervision has a large upside and virtually no downside, such referrals should take precedence over referrals of other matters.

The priority of referring discovery supervision increases the resource constraint that a district judge faces with respect to dispositive motions. To the extent that the basic model suggests that a district judge would prefer to have a nonideological magistrate judge to whom to refer matters, the expanded model makes that prediction more strongly.

Moreover, the basic model predicted that only in a very limited circumstance would an ideological magistrate judge possibly offer a greater benefit than a nonideological magistrate judge: only if there were enough ideological cases such that the benefit derived from referral in nonideological cases could be overcome. The resource constraint removes even this narrow path in favor of an ideological magistrate judge: Even if there are a lot of ideological cases on the docket, it is likely that the magistrate judge simply cannot handle referrals in enough of them.

3.4.3 Institutional Features

It is worth noting how four institutional features are likely further to increase the model's prediction in favor of nonideological magistrate judges. First, the model presents a static view of the court of appeals' ideology, when in fact over time the composition of the court of appeals well may change. Thus, even if a district judge could conclude at *time 1* that the value of τ was such that it could be beneficial to select an ideological magistrate judge, it is entirely possible that that decision could be a poor one at *time 2*, when the ideology of the court of appeals has shifted such that τ is closer to ½, and a nonideological magistrate judge would be preferable. In contrast, the benefit offered by nonideological magistrate judges does not vary with the ideology of the court of appeals.

Second, every district court has more than one district judges (some have many more), and many have multiple magistrates judge on its bench. (28 U.S.C. § 133(a); Resnik 2002: 614-15.) While a majority of judges in a district has the prerogative in the end to select the magistrate judges in the district, there are reasons to believe that an ideological majority would not select ideological magistrate judges to the exclusion of the ideological minority. For one thing, collegiality might motivate some judges to consider their colleagues. But even from a self-interested perspective, a district judge of one ideology has an interest in all judges in the district being able to make good use of the district's magistrate judges. If some judges are not able to do so and as a result are unable efficiently to manage their dockets, then the other district judges—including the district judges in the ideological majority might have to "pick up the slack" for those judges.[31]

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[31] *See, e.g.,* Southern District of New York Rules for the Division of Business Among District Judges, Rule 17 ("The assignment committee . . . may, in the event of . . . an excessive backlog, transfer any case or cases pending on the docket of that judge by distributing them to any judge or visiting judge willing to accept such case and thereafter, distributing them as equally as is feasible by lot, to all remaining active judges and to such senior judges who are

Moreover, to the extent that different ideological majorities (at different times) select different magistrate judges, the issue arises that district judges from one ideological bloc may be matched in any given case with a magistrate judge of the opposite ideological leaning. To the extent that the district assigns a district judge and magistrate judge at the outset of a case (or on an ongoing basis[32]), at least the district judge would know of that mismatch, and could make referral decisions accordingly. Sometimes, however, the magistrate judge is assigned *after the referral decision*, leaving district judges to factor in the expected ideology of an assigned magistrate judge in deciding whether to refer.[33] Even largely self-interested district judges might act to avoid such situations by opting unilaterally to appoint nonideological magistrate judges.

Third, while it might be said in a broad sense that a majority of judges share an ideological bent, the odds are that they do not share precisely the same ideological views. As such, some judges in what might be thought to be the court's ideological majority (probably the more ideologically moderate judges) might not vote with their colleagues to appoint ideologically-minded magistrate judges. (From the perspective of the model, more moderate district judges are likely to have values of τ closer to ½, and as such are likely to have more of a preference for nonideological magistrate judges.)

Fourth, a different use to which many districts put their magistrate judge may further favor district judge selection of nonideological magistrate judges. Many judicial districts have moved toward a model under which magistrate judges are included with the district's district judges for

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willing and able to undertake them."), *available at* https://www.nysd.uscourts.gov/sites/default/files/local_rules/rules-2018-10-29.pdf.

[32] *See, e.g.,* Amended Order Related to Utilization of Magistrate Judges (D. Del. July 11, 2013), *available at* https://www.ded.uscourts.gov/sites/ded/files/general-orders/Utilization-of-Mag-Judges-Amended.pdf ("Until further notice, Magistrate Judges shall be assigned individually to a District Judge or Judges . . . .").

[33] *See, e.g.,* Harris v. Friendship Pub. Charter Sch., No. CV 18-00396 (RCL), 2019 WL 954814, at *1 (D.D.C. Feb. 27, 2019) ("This Court referred the matter to a magistrate judge for a report and recommendation, . . . and the case was randomly assigned to Magistrate Judge Harvey." (citation omitted)).

random assignment of most civil cases; each litigant in a case assigned to a magistrate judge is then given the choice of consenting to having that magistrate handle the case in lieu of a district judge, or of exercising the option to have the case reassigned to a district judge.[34]

Just as assigning dispositive motions in nonideological cases to nonideological magistrate judges likely will produce a greater benefit for the district judge than assigning such motions in ideological cases to ideological judges, so too will convincing litigants in nonideological cases to consent to magistrate judge jurisdiction likely provide a greater benefit than in ideological cases. Such consent would likely be more forthcoming to the extent magistrate judges are nonideological, both because nonideological judges might be expected to move more quickly (given their expertise) through nonideological cases, and because nonideological judges offer a clearly different option from (presumably ideological) district judges. Beyond that, the exercise of such "consent jurisdiction" will, just like referrals to magistrate judges to supervise discovery, utilize scarce magistrate judge resources, again accentuating the benefit from nonideological magistrate judges.

3.4.4 Legal Features

Legal features are also likely to push in the direction of the selection of nonideological magistrate judges. First, as discussed above, the statute calls for the appointment of magistrate

[34] For discussion, see Alexander et al. 2020: 322-23 (noting that thirty judicial districts had such a program in 2019). One reason cited by districts for implementing such a system is efficiency: To have a district judge rule on matters that a magistrate judge has already adjudicated results in duplicative effort. *See, e.g.*, Direct Assignment of Civil Cases to Magistrate Judges, Administrative General Order 2014-03 (D. Wyo. Aug. 26, 2014), *available at* https://www.wyd.uscourts.gov/sites/wyd/files/General_Order_re_Direct_Assignment_of_Civil_Cases_to_MJs.pdf ("[I]n instances where only discovery or procedural motions are referred to a magistrate judge, both the magistrate judge and the referring district judge must become familiar with the core legal and factual issues raised in the case and monitor the case's progress. This duplication of judicial resources is not ideal.")

judges based on merit, and it calls for it in a way that makes it very likely in fact to happen. The statute requires that, in elucidating the procedures for selection, the Judicial Conference of the United States (the "Judicial Conference") mandate "the establishment by the district courts of merit selection panels . . . to assist the courts in identifying and recommending persons who are best qualified" to be magistrate judges (28 U.S.C. § 631(b)(5)).[35] By removing the initial screening from the district judges, the statute restricts the ability of district judges to use ideology to identify candidates. The regulations direct merit selection panels to solicit candidates on a broad basis, so that the field of candidates cannot be restricted to handpicked choices. They also direct the panels to focus on merit-based qualities and qualifications.

Second, the extent to which the system relies on process transparency at some points, and process opacity at other points, further assures a merit-based result. The composition of the merit selection panel is publicly divulged, thus limiting district judges' ability to populate the panel with ideologues. At the same time, the interviews of the candidates by the panel, as well as the deliberations of the panel and of the district judges, are allowed to proceed outside the public eye. This opacity in process may allow collegiality to flourish, where public scrutiny might otherwise call partisan behavior to the fore. (Pardo 2009: 647-48; Resnik 1999: 671.)

Third, the statutory requirement for tracking motions that remain on a district judge's docket for more than six months (28 U.S.C. § 476(a)(1); de Figueiredo et al. 2020: 372-83) will likely weigh in favor of the selection of nonideological magistrate judges. While the so-called "six-month list" only entails publication of the judges who have motions pending for more than six months (i.e., there is no sanction), Law professors Miguel de Figueiredo, Alexandra Lahav,

[35] But see Smith 1990: 155-56 ("[T]he operation of the supposedly merit-based procedures [employed during the Carter administration for Article III judgeships] often ultimately involved the same sorts of partisan political considerations that characterize the usual nomination process for federal judges.").

and Peter Siegelman have found empirical evidence that district judges tend to decide motions in bunches upon the approach of the six-month list deadline, and moreover that motions that are not resolved in time to avoid appearing on one such list tend to remain unresolved until the approach of the next six-month list. (de Figueiredo et al. 2020: 398-402)

The empirical findings of de Figueiredo, Lahav, and Siegelman empirical findings suggest that it may be important to district judges to conserve time in resolving motions. Referring motions to magistrate judges offers district judges just such an opportunity. While the model spoke of the "effort" required of a district judge to resolve a motion, one might as easily think of that effort as describing a judge's temporal investment. I described above the intuition behind the model's assumption that a district judge saves more in the way of effort—here seen as time—when she refers a nonideological motion, as opposed to an ideological motion, to a magistrate judge. Moreover, the model predicts that, for a district judge to benefit fully from the referral of ideological motions to an ideological magistrate judge, the district judge will sometimes have to reject the magistrate judge's R&R. But such rejections will call for the district judge to expend effort and time, which might undercut the district judge's ability to keep motions off the six-month list. (*See* Puro & Goldman 1982: 141 ("[M]agistrates are often referred cases that have remained on district judges' dockets for a long time period . . . .").)

3.4.5 Informational Constraints

Even if—despite all the foregoing points—a district's district judges would prefer to ensconce an ideologically sympathetic magistrate judge, it is not easy actually to choose a judge who decides cases in line with those ideological preferences. Consider first that evidence of the

ideological preferences of a candidate for a magistrate judge position may be far from clear; most candidates will presumably not have prior judicial experience (George & Yoon 2016: 839). Even for prospective nominees for the district court—who are more likely to have at least some prior judicial experience—information may be limited. (See § 2.2.3.1, above.)

Moreover, even when a President appoints a Justice to the Supreme Court—i.e., when the information on a candidate's ideological preferences, and the efforts to unearth that information, are likely to be greatest—still the sitting Justice may not live up to the President's expectations. (See Nash 2006: 2186 n.53.) And a Justice who initially vindicates a President's ideological expectations may experience ideological drift over the course of her appointment (Epstein et al. 2007); an eight-year term may afford a magistrate judge a similar opportunity. And a magistrate judge's own aspirations for higher judicial office may convince her to factor in the ideological preferences of the President and Senate, rather than the district judges.

3.4.6 Evaluating the Impact of Possible Shortcomings in the Model

As any model does, the model here simplifies matters and minimizes and ignores certain realities. None of these shortcomings should gravely affect the model's predictive power.

First, one might object that the choice between ideology and expertise is a false dichotomy: One can find expert judges who are also ideological. The point remains, however, that the selection process can emphasize one value over the other. Alternatively, one can understand ideology to lie on a scale, so that, even if the dichotomy is not absolute, there is at least a tradeoff, with magistrate judges selected predominantly on the basis of merit less likely to have more extreme ideologies.

Second, one might object that the dichotomy between ideological and nonideological *cases* is a false one. But, even if one grants that it can sometimes be hard to draw the line, the literature confirms that the difference has at least some purchase. Moreover, to the extent that a district judge has a case that she cannot squarely categorize as nonideological or ideological, then perhaps—and perhaps especially with looming resource constraints—the district judge opts against making a referral with respect to a dispositive motion in the case.

Third, the model does not consider the possibility of en banc review by the court of appeals. For one thing, this assumption does not have a large effect on the model: En banc review will simply elevate the median ideology of the full court complement over the likely ideology of a three-judge panel. More importantly, courts of appeals rarely hear cases en banc. (*See* Giles et al. 2006: 852 (courts of appeals "typically do not exercise" en banc review); George 1999: 214.) And it is plausible, if not likely, that district judge can spot likely candidates for en banc review (or, for that matter, Supreme Court review) in advance, and retain those for decision without referral so as to be sure to "take no chances."

A fourth objection is that the model fails to take sufficient account of the likelihood that the district court's resolution of the dispositive motion will not be appealed, since many motions will simply be denied. The answer here is that the model is designed to address cases where referral to a magistrate judge is a plausible possibility, and that is not the case where a dispositive motion is so obviously destined to be denied. If the goal or expectation of the district judge is simply to deny the motion and thus move the case toward trial, the district judge can do that—without referring the matter to a magistrate judge—with very little effort, by simply entering a very short (or even single-word) order. (Gertner 2012: 113.)

Last, one might object that the principal-agent approach to judicial decision making—which argues that lower courts decide cases as agents with an eye to the interests of higher-court principals—suggests the model is not structured properly. To be sure, the model does include some of this notion: It assumes that fear of reversal will dominate the district judge's decision making when a case might be appealed to the court of appeals. But commentators argue in the context of magistrate judges that monitoring by the district court will to some degree at least cause magistrate judges to hew the ideological line. (Carroll 2004: 24-26; Boyd & Sievert 2013: 251-56.) Put another way, the argument is that the relative dearth of judicial independence enjoyed by magistrate judges—lacking the protections of Article III—are likely to live up to the ideological terms of their appointment. On this understanding, the magistrate judge should aim to draft R&Rs that the district judge will accept; in turn, this means that the magistrate judge should draft R&Rs in ideological cases in line with the ideological preferences of the court of appeals.

One answer to this argument is that, if indeed a nonideological magistrate judge could fulfill this charge, then (as the existing model already predicts) the district judge should appoint such a magistrate judge over an ideological one: After all, such a nonideological magistrate judge could then maximize the district judge's utility in all cases.

But a more fundamental response is that ideological and nonideological magistrate judges think differently and have enough independence to act differently. On the first point, under the model a magistrate judge with technical expertise will bring that approach to bear even in ideological cases. The model recognizes this.

Further, the model recognizes that, contrary to some commentators' assertions, magistrate judges enjoy some freedom to decide cases in their own way. The circumstances under which magistrate judge serve affords them considerable judicial independence. They are appointed for

lengthy eight-year, and renewable, terms, they can only be removed for "incompetency, misconduct, neglect of duty, or physical or mental disability," and the norm is that they will receive reappointment if they seek it. By statute, their compensation may not be reduced below the level at which it was set upon initial appointment. As Rafael Pardo and I have observed in the context of other non-Article III judges (bankruptcy judges), "[w]hen one considers the type of jurist produced by the judicial selection process for [magistrate] judges in conjunction with their term of appointment, the standard for their removal, and the treatment afforded to their compensation, it would appear that [magistrate] judges have achieved a considerable degree of judicial independence" (Nash & Pardo 2008: 1769).

Indeed, Pardo and I have found empirical evidence of judges likely to have been appointed for their expertise deciding cases in a nonideological way, i.e., evidence inconsistent with the predictions of the principal-agent approach to judging. We found no evidence of bankruptcy judges voting ideologically when they cast votes as appellate judges subject to direct appeal by the court of appeals judges who appoint them. (Nash & Pardo 2013: 353-54.) The model as structured is thus grounded in reality and existing empirical evidence.

3.5. Empirical Analysis

In this Part, I lay out three hypotheses arising out of the model I developed in the previous Part. I then test those hypotheses empirically.

3.5.1 Hypotheses

The model predicts that district judges will tend to prioritize expertise over ideological leanings in selecting magistrate judges. While it is difficult to observe that precise dichotomy directly, the model predicts that, to the extent that district judge have indeed prioritized in that way, then will be a couple of observable implications. First, since nonideological magistrate judges offer their greatest benefit in nonideological cases, we should observe district judges referring dispositive motions to magistrate judges more frequently in nonideological cases than in ideological ones. Second, since nonideological magistrate judges perform far better (i.e., reach the "correct" conclusion) in nonideological cases than do (ideological) district judges, we should observe district judges accepting magistrate judges' R&Rs in nonideological cases the vast majority of the time. By comparison, while acceptance rates may still be high with respect to ideological cases, still a district judge may more often feel justified in not accepting a magistrate judge's R&R in that setting. These points are formalized in the following two hypotheses.

Hypothesis 1: District judges will refer dispositive motions to magistrate judges more frequently in nonideological cases than in ideological cases.

Hypothesis 2: District judges will accept magistrate judges' R&Rs with respect to dispositive motions more frequently in nonideological cases than in ideological cases.

Finally, the extended model suggested that resource constraints might sharpen the basic model's predictions. That resource constraint might be driven in large measure by the attraction of referring discovery matters to magistrate judges (thus displacing some magistrate judge capacity that could otherwise be deployed to considering dispositive motions). Thus, the pressure of a

resource constraint might be confirmed by observing that the referrals of discovery supervision is typical.

<u>Hypothesis 3</u>*: Referral by district judges of discovery supervision to magistrate judges will be relatively commonplace.*

3.5.2 Data

I compiled two novel datasets. First, I collected data on district court presumptive referral practices (the "Presumptive Referral Dataset"). To do this, I gathered data[36] on local rules, and standing orders, as of January 1, 2021 in the 91 federal district courts that are staffed by Article III district judges.[37] I coded each district for whether the district had either a local rule or standing (or general) order that established a presumptive rule[38] in favor of referring matters or types of cases (including the resolution of dispositive motions) to magistrate judges.[39] I only coded a district as having a presumptive referral rule if there was such a rule that applied generally throughout the district. Thus, while a few districts had standing orders that applied to particular divisions within a district, or standing orders for individual district judges such that the vast

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[36] I previously had gathered similar data as of December 15, 2015. Charlotte Alexander, Nathan Dahlberg, and Anne Tucker gathered somewhat similar data as of January 2019. *See* Alexander et al. 2020: 320-21 & 349-52 tbl.12.

[37] Guam, the Northern Mariana Islands, and the United States Virgin Islands all have territorial courts that are called "district courts" but staffed by non-Article III judges. I do not include them in the survey. (In contrast, the District of Columbia and Puerto Rico have district courts staffed by Article III district judges; accordingly, I included them in the survey.)

[38] Local rules and standing orders generally make it explicitly clear that an individual district judge remains free to override any presumptive referral in any case.

[39] The Northern District of California has issued a general order that precludes (absent exemption by the court's executive committee) a district judge from referring dispositive motions, prisoner civil rights cases, and habeas corpus cases, unless "the matter requires an evidentiary hearing which can be conducted by a magistrate judge without being repeated before a district judge." *See Limitations on Referrals of Matters to Magistrate Judges*, Gen'l Ord. No. 42 (N.D. Cal.) (adopted Jan. 23, 1996 & amended Jan. 16, 2001), *available at* https://www.cand.uscourts.gov/wp-content/uploads/general-orders/GO-42.pdf. I did not code this "rule of presumptive nonreferral" as a rule of presumptive referral in the dataset.

majority of judges agreed to refer certain kinds of motions, I did not code those districts as having any such presumptive referral rules. Thus, the resulting data if anything *undercount* the amount of broad-based presumptive referrals in the federal district courts.[40]

Of the 91 districts in the survey, 53—or 58.24%—included some kind of referral in their local rules or standing orders. Breaking this down by type of referral, 28 districts—or 30.77% of the total 91 districts, and 52.83% of the 53 districts that include any rules on referrals at all—have presumptive rules in favor of referring the supervision of discovery and/or pretrial matters. Turning to dispositive motions, no district presumptively referred all dispositive motions regardless of case type. Seven districts—or 7.69% of the total 91 districts, and 13.21% of the 53 districts that include any rules on referral at all—presumptively refer dispositive motions in cases with *pro se* litigants. For the most part, however, districts that referred dispositive motions did so based upon particular case types. In total, 37 districts—or 40.66% of the total 91 districts, and 69.81% of the 53 districts that include any rules on referrals at all—have presumptive rules in favor of referring dispositive motions in at least one category of cases.

Most districts that referred dispositive motions did so in one of three types of cases: habeas corpus cases, prisoner civil rights cases, and social security cases. Thus breaking down the types of referrals for dispositive motions, we find that

- 30 districts—or 32.97% of the total 91 districts, 56.60% of the 53 districts that include any rules on referrals at all, and 81.08% of the 37 districts that have any presumptive

[40] Charlotte Alexander, Nathan Dahlberg, and Anne Tucker took the opposite approach: "If a referral rule applied to part of the district (i.e., one or more locations in a district), we coded the entire district as having a referral rule." Alexander et al. 2020: 321 n.62.

rules in favor of referring dispositive motions—have presumptive referrals in non-death habeas corpus cases;[41]

- 28 districts—or 30.77% of the total 91 districts, 52.83% of the 53 districts that include any rules on referrals at all, and 75.68% of the 37 districts that have any presumptive rules in favor of referring dispositive motions—have presumptive referrals in social security cases; and

- 27 districts—or 29.67% of the total 91 districts, 50.94% of the 53 districts that include any rules on referrals at all, and 72.97% of the 37 districts that have any presumptive rules in favor of referring dispositive motions—have presumptive referrals in prisoner civil rights cases.

The next most common presumptive referral rules draw far fewer enactors. Seven districts had presumptive referral rules for cases with *pro se* litigants, a category of cases that can well be categorized as nonideological. (Districts that already have presumptive referral rules for habeas cases and/or prisoner civil rights actions may not have felt a need to have a rule for *pro se* cases, since many such cases would already fall under the former categories.)

More surprising is that four districts had in place presumptive referrals for employment discrimination cases. This category, as opposed to the other categories underlying popular

[41] Some districts that refer habeas corpus cases specifically exclude 28 U.S.C. § 2255 (federal post-conviction review) cases, while others do not. I included in the count districts that referred habeas corpus cases, regardless of whether the presumptive referral included § 2255 cases.

presumptive referral orders, is a category of cases that many would categorize as at least somewhat ideological.[42]

Second, I gathered data on district judge's considerations of magistrate judges' R&Rs with respect to dispositive motions (the "Dispositive Motions Dataset"). I collected a random sample of 600 decisions by district judges issued with respect to magistrate judges' R&Rs as to dispositive motions during the 2019 calendar year.[43] Sixty-six judicial districts from forty states are represented in the Dispositive Motions Dataset. No single district generates more than 6.67% of the cases.[44]

I coded each case for the general subject matter of the case,[45] whether at least one litigant was proceeding *pro se*, and whether the district judge adopted the R&R. In all, 352 cases—or

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[42] *See* Sunstein et al. 2006: 30-31, 35-36 (finding evidence of ideological voting on federal courts of appeals in sex discrimination and Title VII cases). *Cf.* Boyd, Epstein & Martin 2010 (finding evidence that gender of judge affected decision-making only in sex discrimination cases).

Charlotte Alexander, Nathan Dahlberg, and Anne Tucker examine decision making in employment discrimination cases in the Northern District of Georgia—one of the districts that presumptively refers such cases. They do not consider ideological leanings of magistrate judges, but they do find evidence of ideological decision making by district judges. *See* Alexander et al. 2020: 328-45.

[43] To the extent that a case raised multiple claims, I coded the case based on the fundamental area under which the case seemed to arise. If a case raised a federal claim and supplemental state claims, I coded the case according to the federal claim. If I could not tell from the district court opinion what the relevant subject matter was, I looked at the magistrate judge's R&R or, failing that, the docket sheet on Westlaw.

[44] The heterogeneous referral practices across districts doubtless had some effect on the representation of districts and case types in the dataset. For example, the Northern District of California has erected obstacles to the referral of dispositive motions to magistrate judges. (That district nevertheless contributed four cases to the Dispositive Motions Dataset.)

[45] I randomly drew 50 cases per month for each month in the calendar year 2019. I did this by using the search 'adv: DA(1/2019) & report /2 recommendation & magistrate % JU(magistrate)' (along with an appropriate time constraint) in Westlaw's database of federal district court opinions. I rejected (and found replacements for) cases that (i) merely cited to an R&R (or an order adopting an R&R) in another case, (ii) merely referenced an R&R as procedural history, (iii) simply referenced R&Rs as part of boilerplate language for litigants, (iv) considered a motion to reconsider the adoption of an R&R, (v) presented a joint motion to vacate an R&R, (vi) resulted in a remand by the district judge to the magistrate judge to reconsider an R&R in light of new evidence, and (vii) took place in a district court staffed by non-Article III district judges (specifically, the District of the Virgin Islands). I also rejected cases where the district judge assumed without deciding that the motion in question was in fact dispositive. *See, e.g.*, Toussie v. Allstate Ins. Co., No. 1:15-CV-5235, 2019 WL 2082462, at *3 (E.D.N.Y. May 13, 2019) (motion to amend complaint). Finally, I rejected one case because it was an R&R authored by a magistrate judge; the case fit the search because the word "Magistrate" was misspelled. In the end, just under 10% of the cases I initially pulled had to be replaced.

58.9% of the 600 cases in the dataset—had at least one *pro se* litigant. The district judge adopted the R&R in 556 cases—or 92.7% of the 600 cases.[46]

3.5.3 Empirical Analysis of Hypothesis 1

Hypothesis 1 predicts that district judges will refer dispositive motions to magistrate judges more frequently in nonideological cases than in ideological cases. I used both datasets to validate this hypothesis. First, as discussed above, the Presumptive Referral Dataset reveals that the three most common types of cases that are presumptively referred are (i) non-death penalty habeas cases, (ii) prisoner civil rights cases, and (iii) social security cases. All three of these categories of cases can readily be seen to fall under the umbrella of nonideological cases. As I explained above, social security is a complicated area of law. Next, while the outcome in most non-death penalty habeas corpus cases may be easy to predict, nevertheless the defense of that outcome requires confronting habeas jurisprudence's arcane procedural hurdles. While prisoner civil rights cases may raise issues not as challenging as those typically raised in habeas cases, still these cases can raise complicated inquiries, such as whether a government official is entitled to immunity. Finally,

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There were 18,624 total cases for all of 2019 that met the terms of my search. Discounting that by the 10% replacement rate I found necessary to collect the 600 cases, it seems that the Dispositive Motions Dataset has approximately 3.5% of the 2019 universe of cases.

[46] I coded for whether the district judge (i) adopted the magistrate judge's R&R in full, (ii) rejected it in full, or (iii) adopted it in part and rejected it in part. District judges adopted the R&R in part and rejected it in part in thirty-eight cases. In only six cases did district judges full reject the R&R.

I performed the empirical analysis below using whether the district judge adopted the R&R in full or not, on the reasoning that (i) since a district court can reject in whole or in part the R&R based on a disagreement with the R&R's reasoning and still reach the same outcome recommended by the R&R, an adoption in part may mean a meaningful disagreement with the R&R's reasoning; (ii) even a partial rejection of an R&R results in effort for the district judge to justify that rejection: and (iii) a few district court opinions addressed more than a single R&R, so that "adoption in part" may actually represent full rejection of (at least) one R&R.

many habeas and prisoner civil rights cases will involve *pro se* litigants, which (as discussed above) itself may make a case outcome easier to predict yet harder to justify.

The Presumptive Referral Dataset reveals that many districts establish presumptively referrals in cases that fall under the rubric of "nonideological."[47] But this only tells part of the story. For one thing, it leaves open the question of the (affirmative) referral practices of district judges not in these districts. For another, in districts that have standing presumptive referrals, the possibility remains that district judges often "pull back" the presumptive referral.

The Dispositive Motion Dataset acts as a complement to the Presumptive Referral Dataset here, and addresses these concerns. Even if there is no objection by any party to an R&R, and even if the district court does not disagree in any way with the recommendations in the R&R, the district judge *must* take action—either accepting, rejecting, or accepting in part and rejecting in part, the R&R. Thus, short of cases settling before an R&R is generated—or after the R&R is generated but before the district court takes action with respect to the R&R—the Dispositive Motion Dataset is a random sample of all district court referrals of dispositive motions to magistrate judges. Analysis of the Dispositive Motion Dataset allows insight into the actual referral practices of district judges.

In order to determine which cases are nonideological and which are not, I first drew upon the discussion above and the descriptive data from the Presumptive Referral Dataset to code dispositive motions in all habeas, social security, criminal, prisoner civil rights cases,[48] and cases

[47] It is also possible that these types of cases continue to receive presumptive referrals because they have historically been the province of magistrate judge, such that path-dependence explains at least some of what we observe today. (See Smith 1990: 82-88.)

[48] Here I included cases under 42 U.S.C. § 1983 against state officials, and *Bivens* cases—that is, cases brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)—against federal officials.

arising under the Employee Retirement Income Security Act (29 U.S.C. §§ 1001-1461) (a complex federal statute governing employee benefit and pension plans) as nonideological.[49]

Second, I coded dispositive motions in pure state law cases—that is, cases brought solely under the federal courts' diversity-of-citizenship jurisdiction (28 U.S.C. § 1332)—as nonideological. The logic here is that, while a few questions of state law could raise salient ideological issues, most of the 'meat-and-potatoes' that state courts handle—e.g., torts and contracts cases—are unlikely to raise such issues. Moreover, state law cases can involve complex legal analysis, or at least analysis that, if it is not inherently complex, is rather unfamiliar to the typical district judge.

Third, I coded certain dispositive motions as nonideological if they fell into certain categories, regardless of the underlying subject matter. One such category, in line with the discussion above, was cases with at least one *pro se* litigant.

Another category I coded as nonideological was dispositive motions for entry of a default judgment. In such cases, while the plaintiff proceeds unopposed, the judge must nevertheless independently ensure that the plaintiff has actually proven all the elements of the underlying legal claim, and also independently determine the correct measure of damages; analogously to *pro se* cases, the absence of an opposing party may actually make the judge's tasks more difficult.

[49] The dataset includes seven patent cases. While I would ordinarily have been inclined to identify those cases as "nonideological," *see* Cooper 2020 (suggesting that patent cases have little ideological salience), five of those seven cases were from the U.S. District Court for the Eastern District of Texas, a federal district that commentators have identified as actively trying to "forum sell" as an attractive venue for those patentees asserting patent infringement. (See Klerman & Reilly 2016: 247-80; see also Anderson 2018: 1575-86.) The incentives of "forum selling" may distort district judges' ordinary incentives with respect to magistrate judges in ways that lie beyond the scope of this paper.

A third category of dispositive motions I coded as nonideological was motions seeking attorney's fees and costs after entry of judgment on the primary claims in the case. The award, and calculation, of fees and costs is an enterprise unto itself. It can be complicated and/or uninteresting (depending on the case), and in any event is unlikely to raise salient ideological issues.

Using this measure of nonideological, the data reveal that referrals in nonideological cases constituted 545 cases, or 90.8% of the 600 cases in the dataset. Like the finding from the Presumptive Referral Dataset, this finding is consistent with Hypothesis 1.

3.5.4 Empirical Analysis of Hypothesis 2

Hypothesis 2 predicts that district judges will accept magistrate judges' R&Rs with respect to dispositive motions more frequently in nonideological cases than in ideological cases. As Table 3-1 reflects, data from the Dispositive Motions Dataset supports the hypothesis.

	District judge did *not* adopt the magistrate judge's R&R in full	**District judge adopted the magistrate judge's R&R in full**	***Total***
Ideological cases	10 (18.18)	45 (81.82)	55 (100.00)
Nonideological cases	34 (6.24)	511 (93.76)	545 (100.00)
Total	44 (7.33)	556 (92.67)	600 (100.00)

Note: Row percentages are reported in parentheses. Fisher's exact: $p = 0.004$***

Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 3-1: Correlation between whether a dispositive motion was nonideological and whether the district judge fully adopted the magistrate judge's R&R.

To see the effect of the ideological valence of cases on the likelihood of the district judge adopting the R&R in full, note that, in the absence of such a relationship, one would expect to see full R&R adoptions in approximately 92.67% of all cases (i.e., the proportion of cases in which referrals were observed in the study population). The data reveal, however, that district judges adopted R&Rs in 92.67% of nonideological cases, compared to only 81.82% of the time in ideological cases. The difference between the observed and expected values is statistically significant. The odds of full adoption were 15.03:1 in nonideological cases, and 4.50:1 in ideological cases. The odds ratio (15.03/4.50) indicates that full adoption in a nonideological case was approximately 3.34 times more likely than in an ideological case.

An objection that can be voiced is that in many cases the district court does not actually examine the R&R before adopting it. While the requirement is that the district court review any part of an R&R to which a party has lodged an objection, if there are no objections, then neither the governing statute nor the governing Federal Rules explicitly require any review at all (*Thomas v. Arn*, 474 U.S. 140, 150 (1985)). Perhaps this lack of review occurs disproportionately in nonideological cases—especially since that category includes *pro se* cases—such that the result here is driven by that, and not by honest belief that the magistrate judge reached the correct conclusions in the R&R.

To respond to this argument, I rely on the fact that the view that a district judge need not review an R&R in the absence of objections is far from universal. The 1983 Advisory Committee notes to Rule 72 state: "When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation" (Federal Rules of Civil Procedure, Rule 72, Advisory Committee's Note). And some court of appeals opinions have enunciated just such a requirement (e.g., *Diamond v. Colonial Life & Accident Ins.*

Co., 416 F.3d 310, 315 (4th Cir. 2005); *Summers v. State of Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991)).

More importantly (and whatever the reason), the district judges in many of the opinions in the dataset recite that they had undertaken some type of review of the magistrate judge's R&R.[50] I coded each opinion in the dataset for whether it recited that the district judge had undertaken any sort of review of the R&R, or not.[51] Of the 600 cases in the dataset, 530 (or 88.3%) featured some level of district court review; the fact that the R&R in a case received district court review was not correlated with statistical significance with whether the case was nonideological.

Rerunning the statistical analysis above only with the cases in which the R&R received at least some modicum of district court review produces substantially the same results, as reflected in Table 3-2.[52] In short, the evidence supporting Hypothesis 2 is strong.

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[50] The level of review ranged from de novo (usually where there were specific objections, but sometimes even when there were not. (See, e.g., *Huete v. Sanchez*, No. 118CV1485AJTIDD, 2019 WL 4195336, at *1 (E.D. Va. Sept. 4, 2019) (noting that, though "[n]o objections ha[d] been filed," the court would "[h]a[d] conducted a *de novo* review of the record")), to "thorough review" of the R&R, see, e.g., *Shuler v. S.C. Law Enforcement Div.*, No. CV 3:19-1016-MGL-SVH, 2019 WL 5617940, at *1 (D.S.C. Oct. 31, 2019), to clear error, see, e.g., *Handy v. Davis*, No. 7:18-CV-374, 2019 WL 313353, at *1 (S.D. Tex. Jan. 24, 2019), to amorphous statements that indicate that some degree of review occurred, see, e.g., *Martinez v. Children of Sultan Religieusmen*, No. 19-11816, 2019 WL 6894391, at *1 (E.D. Mich. Dec. 18, 2019) ("[T]he failure to object to the magistrate judge's report releases the Court from its duty to independently review the matter. . . . However, the Court agrees with the findings and conclusions of the magistrate judge." (citation omitted)).)

[51] For a case where the district judge did not purport to undertake any review. (See, e.g., *Merry v. Sandoval*, No. 316CV00164MMDWGC, 2019 WL 6329333, at *1 (D. Nev. Nov. 25, 2019) ("To date, no objection to the R&R has been filed. For this reason, the Court adopts the R&R.").)

At least one court declining review cited efficiency concerns as a justification. (See *Acoff v. Comm'r of Soc. Sec.*, No. 1:18CV1444, 2019 WL 2358969, at *1 (N.D. Ohio June 4, 2019) ("To date, no objections have been filed in this matter. Any further review by this Court would be a duplicative and inefficient use of the Court's limited resources.").)

[52] The data indicate that full adoption of an R&R in a nonideological case was approximately 3.30 times more likely than in an ideological case (as opposed to 3.34 times with the full dataset).

	District judge did *not* adopt the magistrate judge's R&R in full	District judge adopted the magistrate judge's R&R in full	*Total*
Ideological cases	10 (19.61)	41 (80.39)	51 (100.00)
Nonideological cases	33 (6.89)	446 (93.11)	479 (100.00)
Total	43 (8.11)	487 (91.89)	530 (100.00)

Note: Row percentages are reported in parentheses. Fisher's exact*:* $p = 0.005$***

Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 3-2: Correlation between whether a dispositive motion was nonideological and whether the district judge fully adopted the magistrate judge's R&R (subset of cases where the district court indicated that it had considered the content of the R&R).

3.5.5 Empirical Analysis of Hypothesis 3

Hypothesis 3 predicts that referral by district judges of discovery supervision to magistrate judges will be relatively commonplace. The descriptive data from the Presumptive Referral Database 28 districts (30.77% of the total 91 districts, and 52.83% of the 53 districts that include any rules on referrals at all) having presumptive rules in favor of referring the supervision of discovery and/or pretrial matters. The frequency with which such rules appear is evidence consistent with Hypothesis 3.[53] Empirical investigation by Christina Boyd in employment

[53] Unfortunately, it would be challenging to enlist a data source similar to the Dispositive Motion Referral Database to further examine Hypothesis 1. Even when the district judge refers it to a magistrate judge, discovery supervision will often not generate any opinion on Westlaw. Magistrate judges' decisions on discovery matters may never be appealed to the district judge in the first place; as discussed above, the appellate standard of review is not very stringent. Moreover, decisions on discovery may not be committed to writing, and indeed may not arise at all even in the wake of a referral.

To be sure, districts without a presumptive referral rule may record affirmative referrals on the docket. (A proper docket search would also consult districts with presumptive referral rules to check whether district judges in individual cases had overridden the presumption.) But docket searches may not be very revealing. Many cases may settle before substantial discovery. And district judges may assess whether a case is like to raise discovery disputes (or at least a substantial number of discovery disputes), or wait until a discovery dispute has actually arisen, before entering a referral.

discrimination cases brought by the Equal Employment Opportunity Commission confirms that magistrate judges in fact play a much larger role in deciding discovery motions than do district judges. (Boyd 2016: 959-60.) It thus seems that scarcity of resources further pressures district judges to select nonideological magistrate judges.

3.6. Conclusion

This chapter has presented a model that predicts that district judges will consider merit over ideology in selecting magistrate judges. The basic model predicts that nonideological magistrate judges will provide a greater benefit to district judges with respect to referrals of dispositive motions in nonideological cases than will ideological magistrate judges. Nonideological magistrate judges will also provide a greater benefit in ideological cases for a large swatch of alignments between the district judge's and court of appeals' ideological preferences. Even if circumstances are such that an ideological magistrate judge provides a greater benefit in ideological cases, that marginal benefit is likely outweighed by the marginal benefit provided by a nonideological magistrate judge in nonideological cases.

The predictions of the basic model are enhanced by institutional and informational constraints. They are also enhanced to the extent that the resource of magistrate judge services is constrained.

While it is difficult to observe the precise prediction of the model—that magistrate judges will be selected based predominantly on merit—the model does give rise to certain observable implications. First, we should expect district judges to refer dispositive motions more frequently in nonideological cases than ideological cases. Second, we should see district judges adopting

magistrate judges' R&Rs more frequently in nonideological cases than in ideological cases. And, third, to the extent that a resource constraint applies pressure, we should expect to see district courts typically refer discovery supervision to magistrate judges.

The chapter provides empirical evidence consistent with all three hypotheses. District judges behave as we would expect if they were appointing magistrate judges based predominantly on merit.

4. Measuring Collegiality Through the Language of Dissenting Opinions

4.1. Introduction

The dominant view among political science scholars is that ideology drives judicial decision-making (Segal & Spaeth 2002). Legal scholars, too, have found evidence that ideology plays an important role in how judges decide cases (Cross 2007: 27-29; Sunstein et al. 2004: 324-25; Miles & Sunstein 2008: 842; Revesz 1997: Miller & Curry 2009: 855-57). 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 (Edwards 1998; Edwards 2003).[54] 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 (Edwards & Livermore 2009). Judge Edwards asserts that collegial judges "are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect" (Edwards 2003: 1645). 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" (Coffin 1994: 215). Former Tenth Circuit Judge Deanell Reece Tacha asserts that "judicial collegiality enhances the quality of appellate decisionmaking." She similarly describes

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[54] *See* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 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*"].

"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." (Tacha 1985: 586-87.) 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" (M. Murphy 2000: 456). 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" (Levine 2016 (describing talk by Judge Harris). 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 maintain friendship across ideological lines" (Wasby 1987: 76; see Wald 1993: 524 (similar remark by D.C. Circuit Judge); Songer et al. 2012: 66 (reporting similar quotations from interviews with Canadian Supreme Court Justices)).

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'" (Cross & Tiller 2008: 259 (quoting Greenhouse 2002)). 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 (Edwards 2017: 20).

In order to resolve these competing claims over the role and importance of judicial collegiality—and over 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. Judge Edwards has emphasized the unanimity with which the federal courts of appeals (including the court on which he sits) decide cases. 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. 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." 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. In the end, however, they concede that the "Edwards/Coffin concept" of collegiality is "difficult to measure or model." (Cross & Tiller 2008: 260, 271.)

Judge Edwards has tried to marshal empirical evidence of unanimity of decision on the federal courts of appeals to argue that these courts decide cases collegially (Edwards 2017: 22-23; Songer et al. 2012: 92 (noting arguments that collegiality contributes to unanimous decision-

making on the Supreme Court of Canada). Yet, as I discuss below, 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.

This chapter 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 chapter 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 show that any ideological divide between the majority judges and dissenting judges does not prompt dissenting judges to 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 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 chapter 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.

4.2. Theorizing Judicial Collegiality

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.

4.2.1 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. 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. (Segal & Spaeth 2002)

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; a majority decision of the Supreme Court may only be overridden by a subsequent Court decision, 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. (But see Epstein & Knight 1997: 9-18 (arguing that Justices casts votes with the reactions of the political branches in mind; Maltzman et al. 2000 (same)). 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 (Nash & Pardo 2013: 336).

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. 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. 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." (Revesz 1997: 1719, 1760-64).

Dean Revesz's 1997 initial study of panel effects drew a strongly critical response from Judge Harry Edwards. 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" (Edwards 1998: 1336). The debate developed into a colloquy (see Revesz 1999). More recently, Judge Edwards—with Professor Michael Livermore—has taken on empirical judicial studies scholars more generally. 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." 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." Finally, writing for himself, Judge Edwards 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." (Edwards & Livermore 2009: 1917, 1943, 1951.).

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.'" (Tacha 1995: 586). As the late Judge Frank Coffin put it, judicial collegiality affects "the flavor, quality, and—at their best—the wisdom of appellate opinions" (Coffin 1994: 172).

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 (Cross & Tiller 2008: 257-58). 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" (Cross & Tiller 2008: 258), 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.

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 authority or legitimacy, and (d) participation in a routine" (Gillman 1996-97: 8). Professor Adeno Addis and I have argued that judicial deliberation takes place where four criteria are met: (i) The judges must sincerely have as their goal the search for the truth or the most defensible result; (ii) the judges must "advance and defend their proposals and propositions with reasons that are acknowledged as such by and are accessible to others"; (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"; 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" (Addis & Nash 2009: 615-16).

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 paper again touts unanimity as establishing the existence of collegiality.

Yet there is reason to question whether unanimity in decision making is either 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'" (Revesz 1999: 834 (quoting Revesz 1997: 1732-33)). 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" (Levine 2016), while Sixth Circuit Judge Bernice Donald has argued that "dissent and collegiality should not be seen as binary opposites" (Donald 2017: 1129).

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 (Cross & Tiller 2008: 260). But evidence 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" (Cross & Tiller 2008: 271).

In this chapter, I use a measure other than directionality of, or changes in, 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.

4.2.2 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 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 (Ingersoll et al. 2017: 69-70); Prat 2002: 1200). 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 (M. Murphy 2000: 456; Staudt et al. 2008: 367-72).

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 pervades the court (Hettinger et al. (2006): 39). Judges and commentators argue that repeated interactions among judges make this more likely (M. Murphy (2000): 458; Tacha (1995): 588) (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 repeatedly (Solomon & Theiss 2012): 338)). This logic suggests that collegiality should be more common on courts with fewer judges, and on courts with judges sitting in fewer courthouses (i.e., with more judges sitting together in the same courthouses) (Cohen 2002: 153-57, 161).

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 (compare Bernstein 2001: 1745-54). A judge might be concerned that, if her

colleagues perceive that she has acted uncollegially, they may in turn act uncollegially toward her. A judge also might worry about other informal sanctions, such as for example that judges responsible for opinion assignment might assign authorship responsibility for undesirable opinions to the uncollegial judge (Hall 1989: 210; Cross & Lindquist 2006: 1673).

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, 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).

Third, a judge might act collegially to satisfy her perception of what an external "audience" to whom she is playing would prefer (Fischman & Law 2009: 135). 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 (Haden 2001: 545-46). Similarly, a judge would have an incentive to act collegially if she believes that acting collegially would burnish her reputation (White 2014: 209-10).

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 judge is concerned. That being so, 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 (Wald 1993: 523-25).

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 (Scalia 1994: 42), 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 (Hettinger et al. 2006: 20).

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. Expressing collegiality would seem even less costly than behaving civilly, although there may be the cost of communicating that point to law clerks to the extent that clerks actually draft a judge's opinions (Cohen 2002: 13).

4.3. 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. 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.

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.

4.3.1 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 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 (see Hettinger et al. 2006: 33-41).

4.3.1.1 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).[55]

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 ideology[56] is a good predictor of how a judge will vote. In particular, on courts of appeals, ideological divergence

[55] 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.")

[56] It is generally impossible to measure a judge's ideology directly. 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., Fischman & Law 2009: 143-45, 166-76.)

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 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 (Sunstein et al. 2004: 309-10).

4.3.1.2 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 (see Epstein et al. 2011: 103-20).

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. 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 (Donald 2017: 1130). While the Supreme Court (as the highest court) need only concern itself with the response of the legislature (and then only in statutory and common law cases, not constitutional ones (Epstein & Knight 1997: 141-45)), 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 banc (Hettinger et al. 2004: 124-25).

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 4-1 summarizes these factors.

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

Table 4-1: Factors favoring, and disfavoring, dissent, where disagreement is present among the judges.

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 (Epstein et al. 2011: 104; Donald 2017: 1130). It has been argued that collegiality can be measured by unanimity of decision. Even if the relationship is not purely linear, still it stands to reason that collegiality is reduced (or not at a high level to begin with) where a judge who might dissent *never* is won over by her colleagues' arguments.

Second, also from an institutional perspective, the desire to ensconce and maintain judicial legitimacy may reduce dissent (Donald 2017: 1130). It is well accepted that unanimous decisions generally increase a court's legitimacy, which in turn makes it easier to enforce a court's

judgments. Thus, a judge who is otherwise inclined to dissent might hesitate to do so to the extent that dissent undermines the court's legitimacy. (Hettinger et al.: 2006: 19.) (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 Baum 2008: 65).)

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 (Posner 1993). Drafting a dissent—and then the subsequent back-and-forth between the dissenting judge and the judges in the majority—consumes time and effort. A lone judge reasonably might question whether it is worth surrendering time and effort in a lost cause. (Epstein et al. 2011: 104.)

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 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.' Finally, a judge might think that dissenting too frequently could dilute the signal the dissents send to reviewing courts (see Beim et al.: 2014).

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 (Niblett & Yoon 2015).

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 commitment

to the legal principle or outcome in the case (Hettinger et al. 2006: 34; Kornhauser & Sager 1993: 58). 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 (Hettinger et al. 2006: 39).[57]

Second, a judge is more likely to dissent if she believes it important to increase the likelihood of review by a higher judicial actor (Donald 2017: 1130). Studies have shown that the presence of a dissent increases the likelihood of discretionary appellate review (Caldeira et al. 1999: 563.). That being the case, it is understood that filing a dissent is a way to "signal" a higher court that review is appropriate (George 1999: 247; Hettinger et al. 2006: 41; Cameron et al. 2000: 103-07). In the case of a court of appeals panel 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 (Giles et al. 2006: 861; Caldeira et al. 1999: 563; George 1999: 259-60; Scalia 1994: 36-37). 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 (Scalia 1994: 38).[58]

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 of law in the case is one that deserves greater dialogue among judges and courts (Nash 2008: 1917; Hettinger et al.

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[57] 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.

[58] *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).

2006: 19; Scalia 1994: 41; Addis & Nash 2009: 616), or is an issue or area of law that would benefit from legal evolution (Hettinger et al. 2006: 19; Donald 2017: 1130; Schapiro 2005: 1417-20). A dissent also might signal lawyers that the issues in the case are ripe for further adjudication. 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. (Hettinger et al. 2006: 20.)

4.3.2 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 her dissenting opinion. As I have discussed above, with the exception of conveying the notion to law clerks, expressing collegiality is comparatively inexpensive. Thus, all else equal, one would expect a dissenting judge to express collegiality 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 not insubstantial benefit from the *external* consumption—i.e., public consumption—of such expressions that she would include some collegial language in her dissenting opinion.

4.4 Measuring Expressions of Collegiality in Dissent

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.

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 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 (Livermore et al. 2018: 996-97). 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 impulses.

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, 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. (Note 2011: 1325-26; Cross & Pennebaker 2014: 877.)

Because expressions of "respect" have become so commonplace (Note 2011: 1325; Donald 2017: 1145), it is important to have in place other 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." 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. 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." (Placone 2011: 195, 201, 219.)

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 4.5 below, I return to these databases to perform empirical tests of various hypotheses.)

4.4.1 Case-Level Database

For the case-level dataset, I gathered all cases decided during the calendar year 2016 by the twelve regional courts of appeals[59] in which there was a dissenting opinion.[60] I 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

[59] I collected no data for the United States Court of Appeals for the Federal Circuit.

[60] 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 dissents.

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 4-2 presents a summary of the distribution of the cases across the federal circuits.

Circuit	**Number (and Percentage) of Cases**	**Number (and Percentage) of Cases, Excluding Per Curiam Cases**	**Number (and Percentage) of Published Cases**	**Number (and Percentage) 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

Table 4-2: Frequency of cases in case-level dataset, by circuit.

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.[61] 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").[62]

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 (Note 2011: 1324). 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 opinion either (i) used the word "respect" in referring to the majority

[61] In coding, I abided 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.

[62] 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).

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 4-3 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.

	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)

Table 4-3: Frequency of various means of expressing collegiality in court of appeals dissenting opinions (row percentages in parentheses).

4.4.2 Court-Level Database

I used the data from the case-level dataset to generate overall circuit measures of collegiality.[63] 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

[63] 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.

measures of collegiality. I determined each of these circuit-level measures using alternatively 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) of cases from that circuit where either opinion exhibited any form of collegiality toward the other opinion.

For the various "total collegiality" measures, I coded a 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.

Table 4-4 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.

Circuit	*All Cases (N = 527)* Any Collegiality	Total Collegiality	*All Cases Except Cases where the Dissenting Judge is Sitting by Designation (N = 504)* Any Collegiality	Total Collegiality	*All Published Cases (N = 372)* Any Collegiality	Total Collegiality	*All Published Cases Except Cases where the Dissenting Judge is Sitting by Designation (N = 358)* Any Collegiality	Total Collegiality
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**

Table 4-4: Collegiality measures (and each circuit's ranking under each measure) (all cases).

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;[64] (ii) the number of courthouses housing active circuit judges during the 2016 calendar year; (iii) the court's caseload per authorized judgeship;[65] (iv) the court's dissent rate, calculated as the number of cases the court terminated on the merits in 2016[66] 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 ½ less the fraction of active circuit judges appointed by Republican presidents; (vi) the total geographic area encompassed by the circuit;[67] and (vii) the fraction of population within the circuit categorized by the census as rural.[68]

4.4.3 Validating the Measures

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 and 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

[64] I counted a circuit judge as "active" if he or she was an active judge for more than half of 2016.

[65] For caseload data, I used the cases pending as of Dec. 31, 2016 as reported by the Federal Judicial Center. See http://www.uscourts.gov/sites/default/files/data_tables/stfj_b1_1231.2016.pdf. I obtained the number of authorized judgeships from 28 U.S.C. § 44(a).

[66] 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* http://www.uscourts.gov/sites/default/files/data_tables/stfj_b5_1231.2016.pdf.

[67] I relied on census data and, for those circuits that include U.S. territories, included those territories in the data.

[68] I relied on census data and, for those circuits that include U.S. territories, included the population in those territories in the data. Because I relied on census data, the population numbers count all residents within the circuit boundaries.

reached by the majority). Dissent aversion turns at least in part on notions of collegiality, and thus it makes sense to expect a measure of dissent aversion to produce results at least somewhat similar to a measure of collegiality. (Epstein et al. 2011: 104.)

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. They operationalize those variables and find support for those hypotheses on the federal courts of appeals. (Epstein et al. 2011: 106-09, 129-30.)

I find similarly that expressions of collegiality in dissent correlates inversely with both the size of a court and the court's workload. As reflected in Table 4-5, I find—much as Epstein, Landes and Posner found with respect to dissent rate—that expressions of collegiality in dissent correlates inversely with court size. The inverse correlation with court workload is weaker but still evident. Notably, as Table 4-5 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. (Adcock & Collier 2001: 540.)

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

Table 4-5: Correlations of the measures of collegiality with number of judgeships, caseload, and dissent rate.

4.5 Empirical Analysis

4.5.1 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, features 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.

4.5.1.1 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, opinion. 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 reduces the likelihood of expressions of collegiality. Second, resort to deciding cases by unpublished opinion is often a response to time constraints: Unpublished opinions provide a way for courts to resolve cases quickly (Vladeck & Gulati 2005: 1668-73; Kozinski & Reinhardt 2000: 43-44). And pressures of time may correlate with a reduction in the frequency of expressions of collegiality. Third, even if current law permits their citation (Federal Rules of Appellate Procedure, Rule 32.1(a)), unpublished cases technically lack binding precedential authority and as such are less likely to be read and cited. 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 (Kozinski & Reinhardt 2000: 44). 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.

> <u>*Hypothesis Case-2 (Partial Dissent Hypothesis)*</u>*: Expressions of collegiality in dissent are more likely to 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 (Fischman & Law 2009: 167-68). 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. (See Jacobi & Schweers 2017: 1472 (finding evidence supporting the notion that conservatives tend to interrupt liberals, and liberals tend to interrupt conservatives, at Supreme Court oral arguments.)) 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, or on the logic that in fact such cases reflect truly divergent policy preferences. Finally, the core conception of judicial collegiality holds that judges will respect each other's views and be *open to* those with differing views. (Cf. Edwards & Livermore 2009: 1956-57 (portion of article

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").) On 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 (Eckel & Grossman 1998: 730). 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 frequently than do female Justices at oral argument (Jacobi & Schweers 2017: 1463). 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 (Wasby 1987: 118-21). The discussion above provides competing predictions as to whether such settings will be more, or less, likely to generate expressions of collegiality. (Cf. Wald 1993: 524.) 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.*

4.5.1.2 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 (28 U.S.C. § 46(b), (c)), 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 (28 U.S.C. § 44(a)). 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 (Kuersten & Songer 2001: 1; Yung 2010: 1137. 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.*

4.5.1.3 Court-Level Hypotheses

Consider first that judges who are more familiar with one another will be more collegial. It stands to reason that the larger 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 larger 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 (M. Murphy 2000: 458-59). 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 workload may displace some expressions of collegiality (Wald 1983: 768; Wald 1993: 527). Hypothesis Court-3 asserts this, making use of court docket size as a proxy for workload.

> *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 (Wald 1993: 523), and judges' ideologies (Kastellec 2011), respectively, as a proxy 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.

> *Hypothesis Court-4 (Rate of Dissent Hypothesis): The greater the percentage of cases in which a judge dissents, 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.*

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.[69] 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 (Newman & McCauley 1977). 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 politer or friendlier than other regions (Renfrow et al. 2013: 1006-07). If politeness breeds collegiality, then perhaps courts that include portions of those regions will exhibit more frequent expressions of collegiality in dissent.[70] Hypothesis Court-8 captures this notion.

[69] Some judges suggest that the geographic size of a circuit may have a direct effect on court collegiality. (See Wasby 1987: 79-81; Tacha 1995: 589; Wald 1993: 527.) 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 2002: 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").

[70] The Fourth Circuit may provide an example of a circuit seeming to conform to its regional collegial identity. See U.S. Court of Appeals for the Fourth Circuit, *Courtroom Protocol for Counsel*, *available at* 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 (2016).

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

4.5.2 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.[71] 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 4-6 presents the results for the logistic regression, and Table 4-7 presents the results for the ordered logistic regression.

[71] I explored the possibility of a Heckman probit analysis using a dataset of all court of appeals cases decided in 2016 by three-judge panels, with the question of whether the panel was mixed (i.e., consisted of judges appointed by both Democratic and Republican Presidents) as an instrumental variable for whether there would be a dissent in the case. To this end, I compiled a dataset of 19,168 cases for 2016. However, while a mixed panel was a statistically significant predictor of whether a case had a dissent, the fact remained that the vast majority of cases lacked dissents, whether the panels were mixed (13,636/14,044 = 0.971) or not (5,005/5,124 = 0.977).

Variable	Coefficient (Robust Standard Error)
Was the opinion published?	0.75*** (0.22)
Was the dissent partial?	0.06 (0.24)
Did the majority and dissent break along ideological lines?	0.06 (0.22)
Was the dissenting judge male?	-0.12 (0.23)
Was the dissenting judge appointed by a Republican President?	0.15 (0.22)
Constant	0.68*** (0.26)

N = 527. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level.
Pseudo-R^2 = 0.022.

Table 4-6: Logistic regression of whether a dissenting opinion used any collegial language in respect of the majority opinion.

Variable	Coefficient (Robust Standard Error)
Was the opinion published?	0.89*** (0.18)
Was the dissent partial?	0.19 (0.20)
Did the majority and dissent break along ideological lines?	0.12 (0.18)
Was the dissenting judge male?	0.05 (0.18)
Was the dissenting judge appointed by a Republican President?	0.36 (0.18)

N = 527. *** = significant at the 1% level. ** = significant at the 5% level. * = significant at the 10% level.
Pseudo-R^2 = 0.026.

Table 4-7: Ordered logistic regression of the Collegial Sum used by dissenting opinions.

Tables 4-6 and 4-7 provide strong evidence to support Hypotheses Case-1. As Table 4-6 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.[72] Table 4-7 reports a similar result for the Collegiality Sum measure. (Interestingly, Table 4-7 also indicates 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.)

Hypothesis Case-2 contended that expressions of collegiality would be more common in partial dissents than in full dissents. As Tables 4-6 and 4-7 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 4-6 and 4-7 show, the data do not support this hypothesis.

[72] 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 1993: 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.").

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 4-8 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.[73] This is consistent with Hypothesis Case-5A.

	Dissent did *not* use *any* collegial language in respect of the majority opinion or judges	**Dissent used collegial language in respect of the majority opinion or judges**	***Total***
Dissenting judge not sitting by designation	70 (19.55)	288 (80.45)	358 (100.00)
Dissenting judge sitting by designation	0 (0.00)	14 (100.00)	14 (100.00)
Total	70 (18.82)	302 (81.18)	372 (100.00)

Note: Row percentages are reported in parentheses. Fisher's exact: $p = 0.082$*

Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 4-8: 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.

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 4-9 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 4-8), Table 4-9 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

[73] 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.

(at the 1% level), than did judges not sitting by designation.[74] Table 4-9 reveals, however, not only that judges sitting by designation were more likely to express some 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.

	Number of Ways the Dissent Used Collegial Language in Respect of the Majority Opinion or Judges				
	0	*1*	*2*	*3*	*Total*
Dissenting Judge Not Sitting by Designation	70 (19.55)	194 (54.19)	86 (24.02)	8 (2.23)	358 (100.00)
Dissenting Judge Sitting by Designation	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)

Note: Row percentages are reported in parentheses. Fisher's exact: $p = 0.007$***

Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 4-9: 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.

4.5.3 Empirical Analysis of Comparative Court Hypotheses

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

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

include multiple dissents, the unit of analysis in the Supreme Court database is the dissent.[75] I used the 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.[76] The Supreme Court dataset consists of 46 dissenting opinions (spread over 36 cases). Table 4-10 presents a summary of the distribution of these dissents.

	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)

Table 4-10: Frequency of various means of expressing collegiality in Supreme Court dissenting opinions (row percentages in parentheses).

I used the Supreme Court and case-level court of appeals datasets to check the accuracy of Hypothesis Comparative-1. As Table 4-11 reflects, consistent with Hypothesis Comparative-1's prediction, Supreme Court dissents reflect collegiality toward the majority opinion and Justices,

[75] 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.

[76] 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.

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.[77]

	Dissent did *not* use *any* collegial language in respect of the majority opinion or judges	**Dissent used collegial language in respect of the majority opinion or judges**	***Total***
Court of appeals cases	121 (22.96)	406 (77.04)	527 (100.00)
Supreme Court cases	0 (0.00)	46 (100.00)	46 (100.00)
Total	121 (21.12)	452 (78.88)	573 (100.00)

Note: Row percentages are reported in parentheses. Fisher's exact: $p < 0.001$***

Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 4-11: Correlation between whether the dissent was filed in a court of appeals or Supreme Court case and whether the dissenting opinion uses any collegial language in respect of the majority opinion or judges.

4.5.4 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 4-12 presents these correlations (for all hypothesis except Hypothesis Court-7), broken down in panels for (a) all cases, (b) all published

[77] 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").

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.

Perusal of Table 4-12 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: 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 coefficient 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.

	Authorized Judgeships	Courthouses	Caseload per Judgeship	Dissent Rate	Court Ideological Homogeneity	Total Area[78]	Rural Fraction[79]
				All Cases			
Any Expression of Collegiality	-0.402	-0.315	-0.241	-0.313	-0.420	-0.376	-0.004
Total Expressions of Collegiality	-0.530	-0.572	-0.487	0.206	-0.121	-0.418	-0.229
				All Cases Except Those with Dissents Authored by Judges Sitting by Designation			
Any Expression of Collegiality	-0.442	-0.352	-0.254	-0.254	-0.383	-0.396	-0.006
Total Expressions of Collegiality	-0.528	-0.588	-0.484	-0.481	-0.102	-0.418	-0.235
				Published Cases			
Any Expression of Collegiality	-0.217	-0.167	-0.137	-0.204	-0.468	-0.193	-0.073
Total Expressions of Collegiality	-0.401	-0.508	-0.411	0.369	-0.081	-0.300	-0.290
				Published Cases Except Those with Dissents Authored by Judges Sitting by Designation			
Any Expression of Collegiality	-0.254	-0.198	-0.205	-0.150	-0.458	-0.218	-0.055
Total Expressions of Collegiality	-0.391	-0.497	-0.417	0.375	-0.086	-0.291	-0.280

Table 4-12: Correlations of the measures of collegiality with court-level variables.

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 hypothesis.

[78] 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.

[79] In running these correlations, I excluded the District of Columbia Circuit.

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 the 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 4-3 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 worth 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 (Brown & Lee 2000: 1044-65). More recently, some Sixth Circuit judges have alleged improprieties in selecting the relevant judges to decide cases.[80] 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 or symptoms of uncollegiality at the time that yet persists today.

[80] *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); *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 (Procedural Appendix to op. of Boggs, J., dissenting) (alleging procedural irregularities in constituting the court to hear the case).

4.6 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 4-13 presents a summary of the findings.

Hypothesis	Was there support for the hypothesis?
Case-level hypotheses	
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 (**).
Supreme Court-courts of appeals comparative hypothesis	
Hypothesis Comparative-1 (Frequency Hypothesis)	Yes (***)
Court-level hypotheses	
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

Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 4-13: Summary of findings.

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 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 heterogeneity—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 courts of appeals (Hypothesis Comparative-1).

The evidence here provides some support for Judge Edwards' arguments about collegiality, but also draws some of his contentions in question. The evidence bolsters Judge Edwards' point that ideological disagreement does not drive, or detract from, collegiality. 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. Nor does the evidence support Judge Edwards' argument that the courts of appeals are more collegial bodies than the Supreme Court. Rather, as Professors Cross and Tiller have argued and as I hypothesized, the Supreme Court exhibits more collegiality, at least on this measure.

4.7 Conclusion

In this chapter, 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.

5. Concluding Notes

The research here sheds light on confirmation politics and judicial behavior involving lower courts. The second and third chapters expand the relatively scant literature on federal district courts. The second chapter emphasized that the Senate majority will tend not to generally deploy institutional delay tactics in a way that would undermine agreements between Senators. On the other hand, the Senate well may act to frustrate nominees recommended by Senators of the minority party. This distinction highlights how the Senate, as an institution, will respect arrangements between its members, though perhaps not to the point of confirming potentially ideologically undesirable judges.

The third chapter addresses judicial behavior on multimember courts—in particular, the federal courts of appeals. It offers novel measures of collegiality based on language used by judges in dissenting opinions. After validating the measures, it tests empirically various hypotheses about collegiality at the judge- and court-level.

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Appendix to Chapter Three

This Appendix elucidates how, under the model, referring dispositive motions to an ideological magistrate judge can sometimes offer a district judge some, but often not a substantial, benefit as compared to referring such motions to a nonideological magistrate judge. I consider the three regions –based on the value of τ, the extent of the alignment between the ideologies of the district judge and the court of appeals – as set out in Figure 3-1 above.

The marginal benefit is greatest in Region 3, where, $\tau > \frac{1}{2} + \frac{e_i}{2R}$. The benefit a district judge receives from referral to an ideological magistrate judge is

$$\alpha_R[I\tau - (1-\tau)R] + (1-\alpha_R)I,$$

while the corresponding benefit from referral to a nonideological magistrate judge is

$$\alpha_R\left[-\frac{e_i}{2} + \tau I - (1-\tau)R\right] + \frac{(1-\alpha_R)I}{2}.$$

Some algebra confirms that there will be a positive marginal benefit: The difference between the two is $\left(\frac{1-\alpha}{\alpha}\right)I + e_i$, which is always positive (though, as one would intuitively expect, larger when the likelihood of appeal α is small.

Consider next Region 2, where $\frac{1}{2} - \frac{e_i}{2R} < \tau < \frac{1}{2} + \frac{e_i}{2R}$, and the expected utility derived from referral to a nonideological magistrate judge is

$$\alpha_R\left(\tau I - \frac{R}{2}\right) + \frac{(1-\alpha_R)I}{2}.$$

We address first the portion of the Region 2 where $\tau > \tau_c$, where the benefit from referral to an ideological magistrate judge is the same as in Region 3. Now the marginal benefit from referral to an ideological magistrate judge as compared to a nonideological magistrate judge will be

$$(2\tau - 1)R + \frac{(1-\alpha_R)I}{2}.$$

This will always be positive provided that $\tau > \frac{1}{2} - (\frac{1-\alpha_R}{2\alpha_R R})I$. That will always hold if $\tau > \frac{1}{2}$. However, as τ dips below ½, it is conceivable that the benefit could be net negative—i.e., that the benefit could be greater with referral to a nonideological magistrate judge. In any event, it seems that the benefit will not be substantial (whether positive or negative).

We address next any portion of the Region 2 where $\tau < \tau_c$. While the expected utility earned from referral to an ideological magistrate judge remains the same, the benefit from referral to an ideological magistrate judge (now of ideology opposite to that of the district judge) will be $-\alpha_R \tau(R - I)$. Here, the net benefit will be

$$\alpha_R R\left(\frac{1}{2} - \tau\right) - \frac{(1-\alpha_R)I}{2}.$$

Whether the net benefit will be positive, and the magnitude of the benefit, will turn on the relative magnitude of the two terms.

We come finally to Region 1, where $\tau < \frac{1}{2} - \frac{e_i}{2R}$, and the benefit derived from referral to a nonideological magistrate judge will be

$$\alpha_R\left[-\frac{e_{i,idm}}{2} - \tau(R - I)\right] + \frac{(1-\alpha_R)I}{2}.$$

Here again, it is possible that τ could be greater than, or less than, τ_c. If $\tau > \tau_c$, then the net benefit will be

$$\alpha_R e + (1 - \alpha_R)I - 2\alpha_R R(1 - 2\tau).$$

Whether this net benefit is positive, and the magnitude of the benefit, will turn on whether the first two (positive) terms outweigh the third (negative) term.

Finally, if $\tau > \tau_c$, then the net benefit will be

$$\alpha_R e - (1 - \alpha_R)I.$$

Once again, whether the benefit is net positive, and the magnitude of the benefit, will turn on the relative magnitude of the terms.