The Elevator Effect: How Collegiality Impacts Dissent

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Scholars and judges routinely cite collegiality concerns to explain judicial behavior, suggesting that judges sometimes suppress public dissent for fear of angering colleagues. Outside of judicial politics, "collegiality" is theorized to affect nearly every aspect of politics, from patronage-fueled explanations of the appointments process to logrolling in legislative chambers. Yet, few studies have tested the extent to which collegiality concerns actually drive elite behavior. We explore collegiality by examining the effect of three measures of interpersonal contacts between federal circuit judges: whether they have their home chambers in the same city, the probability of serving together on a future panel, and years of cotenure on the circuit bench. We show that all of these measures can lead to a lower probability of dissent and substantially dampen the effect ideology has on the decision to dissent. We also demonstrate that shows cotenure decreases dissent in the Supreme Court.

*We thank Steven Morgan, Steven Saroka, Trevor Bachus, and Patience Kapfer for exceptional research assistance.

> When I joined the D.C. Circuit three years ago, I began to appreciate that the court was different in significant respects from the other courts of appeals with which I was familiar around the country. Some of these differences are very obvious. For example, all the D.C. Circuit judges are in the same building, along with all the district court judges. This allows the circuit judges the unique opportunity of sitting down to lunch right next to a judge who, moments before, they had announced was guilty of abuse of discretion or clear error. *It can make for a very short lunch* (Roberts 2006, 376, emphasis added).

Introduction

Groups make most important political decisions: legislators work together on committees and vote together on proposed legislation, and appellate judges, whether on intermediate or high courts, resolve cases sitting together in panels. While the inherent difficulties in collective choice are well-known (e.g., Arrow 1951), group decisionmaking often involves repeated interactions and long-term relationships that further complicate decisions. Especially in small-group settings, maintaining collegial relations with one's colleagues is an important consideration for group members. At times, it may be better to acquiesce on a short-term suboptimal outcome to maintain collegial relations in the long-term. Applied to groups that produce policy, these social difficulties complicate standard ideological accounts of decisionmaking. They suggest that political actors might sacrifice a policy-minded gain to preserve a relationship with a colleague for the long-term.

While scholars acknowledge the importance of these repeated interactions, collegiality has rarely been given sustained attention in our studies of decisionmaking. As Epstein, Landes, and Posner (2013, 48), discussing federal judges, put it:

> [J]udges frequently refer to the importance of collegiality (e.g., Edwards 2003, Wald 1987), and just as frequently, scholars reject it. We should not. As most of us know all too well, maintaining good collegial relations is not some abstract, squishy concept; it has a direct effect on job satisfaction. In the case of judges, good relations with colleagues, law clerks, other staff, and lawyers add to their personal utility, while animosities, usually from or toward judicial colleagues and usually resulting from disagreement, subtract from it.

The few studies of collegiality in political settings underscore the importance of the concept:

for example, in his vital study of the U.S. Senate, Matthews (1960) suggests that increased collegiality among members of the chamber translates to positive legislative results. Thus, the role of collegiality in decisionmaking deserves scholarly attention.

There are reasons to believe that collegiality may be particularly important in the judicial branch, particularly the federal courts. First, compared to other types of policymakers, judges decide cases in small groups, heightening the importance of collegial relations (Murphy 1966; Martinek 2010). Second, U.S. federal judges serve for life, making the long-run collegiality calculation especially important because two judges might serve together for decades (Maltzman, Spriggs, and Wahlbeck 2000). Third, federal judges are freed from reappointment concerns, but still must deal with internal deliberation (Epstein et al. 1998). Fourth, judges may feel pressure to maintain legitimacy by being seen as discovering and/or applying the law, which is heightened by unanimous opinions (Zink, Spriggs, and Scott 2009). Finally, judges and empirical legal scholars have recently been engaged in a high-profile debate about the extent to which collegiality affects outcomes in the U.S. federal courts, though neither side of this debate has assessed the effect of collegiality empirically (c.f. Edwards and Wood 1999; Revesz 1999). Thus, there is compelling reason to believe that collegiality concerns color decisionmaking in these institutions.

We examine the effect of collegiality on a judge's decision to dissent. Judges on appellate courts resolve cases based on majority rule, and they have the opportunity to explain their disagreement with the majority's decision in a written dissent. There is evidence that decisions with dissents are received differently than unanimous decisions by other courts (Benjamin and Desmarais 2012) and, perhaps, the public (Zink, Spriggs, and Scott 2009; Salamone 2014; c.f. Gibson, Caldeira, and Spence 2005). Thus, probing the factors that influence dissent is important for our understanding of the path of the law over time.

At the same time, existing theory and scholarship provide reasons to believe that collegiality may play a key role in determining when a judge dissents. There is evidence that judges do not always dissent from majority opinions with which they likely disagree (Epstein,

Segal, and Spaeth 2001; Hazelton, Hinkle, and Jeon 2016), giving the illusion of consensus. Additionally, some theorize that collegiality influences the persuasive ability of one judge to influence another, thereby reducing conflict overall (Baum 2006; Edwards 2003).

We argue that collegiality conditions the effects of ideological disagreement, and that the effect of collegiality varies according to how frequently two judges interact. The extent of both past and anticipated future interaction between two judges can change the level of benefit that is derived from maintaining a cordial relationship. Consequently, we hypothesize that judges who disagree on policy are less likely to dissent if they have more frequent interpersonal contact with the opinion author. We test this expectation with three measures of contact between judges. First, we leverage the geographic dispersal of U.S. Courts of Appeals judges to examine whether judges who work in the same city on a daily basis are less likely to dissent from each other's decisions in order to avoid (among other things) awkward elevator rides. Second, we measure the effect of anticipated future interaction using the probability that two judges will be randomly assigned to serve on a panel together and the effect of past interactions using the length of time two judges have served on the circuit court. Finally, we test our theory to the extent possible in the U.S. Supreme Court by examining the effect of cotenure on the probability each justice decides to cast a dissenting vote. After taking ideology into account, all of these measures of collegiality have an impact on the decision to dissent.

Our results have implications for salient debates both inside and outside of the judiciary. First, by underscoring the effects of collegial relations for deliberative judicial decisionmaking, our results have obvious implications for the long-simmering debate over the size of the 9th Circuit Court of Appeals, suggesting that a smaller circuit would have more consensual decisions and, by extension, a more stable body of law. Second, both inside and outside of the judicial branch, our results provide another argument against term limits for political officials (e.g. Kousser 2005). Term limits, our results imply, create decisionmaking environments that are characterized by more dissensus, leading to more fractured political

outcomes.

Judicial Collegiality, Suppressed Disagreement, and Consensus

There are two reasons to suggest that increased collegiality concerns will lead to fewer dissents. First, colleagues in collegial environments care more about personal relationships and may be, on the whole, less likely to dissent because their increased collegiality concerns raise the cost of a dissenting opinion (Epstein, Landes, and Posner 2011; Fischman 2011). Second, colleagues in collegial environments may be able to reduce disagreement before an opinion is issued, negating the need for a dissent. For example, collegial colleagues may be better able to make effective private arguments that change the content of the majority opinion during the opinion drafting process toward the dissenter's preferences, thereby negating the need to dissent.

Regardless of whether the mechanism is dissent suppression or the moderation of opinion content, existing theory suggests that collegiality should moderate the effect of ideological disagreement (Edwards 2003; Baum 2006). As Edwards (2003, 1645) has written, "collegiality plays an important part in *mitigating* the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another." Thus, these theories are important to consider and underline the importance of accounting for the impact of collegiality on judicial decision-making.

Collegiality and Hidden Dissensus

The first way in which scholars have theorized that collegiality influences a judge's likelihood to dissent is increasing the costs of publicizing disagreement (e.g. Epstein, Segal, and Spaeth 2001; Fischman 2011; Hazelton, Hinkle, and Jeon 2016). In such accounts, judges are juggling multiple goals, which may include being liked by their colleagues, as well as advancement, leisure, and legitimacy (Baum 1997; Epstein, Landes, and Posner 2013; Ginsburg 1990). When a majority of appellate judges agree on the outcome and rationale in a published

opinion, they bind future judges to that interpretation of the law (Hinkle 2015; Lee III 2003). In so doing, they create policy. Like other actors in the political system, judges are motivated by this policy goal, seeking to bend the path of the law in the direction of their preferences (Epstein et al. 1998). Yet judges are not entirely "single-minded seekers of legal policy"; they have other goals as well, including maintaining collegial relations with colleagues (Baum 1997).

Judges incur costs when they write dissenting opinions. First, a judge risks the good will of other judges when she files a dissent (Epstein, Landes, and Posner 2011; Fischman 2011). Furthermore, the judge must expend both time and effort to draft a dissent (Carrubba et al. 2011; Epstein, Landes, and Posner 2011; Farhang and Wawro 2004; Fischman 2011; Kastellec 2011). Finally, a dissenter on an intermediate court risks weakening the signal she sends if she dissents too often (Beim, Hirsch, and Kastellec 2014). These costs come in the face of only minuscule benefits. While judges may get some expressive benefit from publicly stating their dissent, dissenting opinions are not legally binding and are rarely cited (Hinkle and Nelson 2017). Thus, at the point an appellate judge dissents publicly, she has already made her case to her colleague privately, she knows that she has lost, and she has chosen to publicize her disagreement. In this way, dissenting opinions have little-to-no policy benefits but potentially large collegiality costs. Thus, collegiality may cause judges to fail to voice disagreement.

Collegiality and Consensus

Of course, collegiality does not only imply that judges are choking down dissents for the sake of relationships. Rather, it may also reflect an increased ability among colleagues to reach a consensus (Edwards 2003; Baum 2006; Kim 2009). As Edwards (2003) writes, collegial environments foster free and open decisionmaking brought about by increased trust among colleagues. In these environments, colleagues possess a large store of private information about each other's likes and dislikes. Colleagues are therefore better able to "read" each other, tailoring arguments they make at conference and throughout the opinion-writing

process toward ones that have the highest likelihood of swaying the colleague with whom they disagree. In this way, judges maximize their ability to attract concessions from their colleagues. Similarly, Baum (2006, 60) argues that "[a] judge will be more open to influence from colleagues who are more relevant at a personal level." At the same time, colleagues in collegial arguments know how hard to "push" their colleagues; at some point, they know that further attempts at persuasion are more likely to ire their colleague than to be successful. As members of a small group that will decide cases together for years to come, judges may choose to dissent silently rather than publicizing their disagreement and risking making an enemy of a colleague.

Importantly, the public release of a dissenting opinion comes at the end of a lengthy private opinion-writing process. In virtually all appellate courts, judges privately circulate drafts of majority, concurring, and dissenting opinions as part of the opinion-writing process. Judges comment on each others' opinions, respond to claims made in opposing opinions, and eventually sign on to an opinion that best fits their views (Maltzman, Spriggs, and Wahlbeck 2000). As part of this process, a judge can circulate a draft dissent, extract concessions from the majority opinion author, and then "drop" the dissent, not releasing the dissenting opinion publicly and then signing on to the majority opinion.

These theories are consistent with the psychological research on group dynamics. Research has shown that familiarity among group members mitigates problems with information processing (see Janis 1972; De Dreu 2006; Schulz-Hardt, Mojzisch, and Vogelgesang 2008) that arise in groups. Group members who are familiar with each other through prior work together experience less anxiety while completing tasks, which increases the fluency and flexibility of their thoughts, aiding in information processing (Goodman and Leyden 1991; Nemeth 1986). Similarly, as Gruenfeld et al. (1996, 3) note, "familiar group members' knowledge about one another and what is or is not acceptable behavior in the group can inoculate them against the pressure to suppress unique information as a means of avoiding social ostracism." Indeed, groups composed of colleagues with positive relationships are better able

to manage conflict than groups composed of strangers, further increasing information sharing and lessening the threat of social alienation (Valley, Neale, and Mannix 1995).

Of course, virtually all of the psychological evidence about group conflict is based upon laboratory experiments in which group members are making decisions without any real-world consequences. Policymakers, on the other hand, also make decisions in small groups but their decisions affect real-world outcomes for their constituents. Still, the conclusions drawn by psychologists fit well with Harry Edwards's (2003) description of the collegial environment in which judges make decisions: not devoid of conflict but characterized by sincere disagreements discussed in good-faith. Still, unlike participants in lab experiments, judges have to balance their desire to maintain collegial relations with their colleagues with their desire to make legal policies that align with their preferences. This trade-off, between collegiality and policy, is vital to understand a judge's decision to dissent publicly.

Collegiality and Ideology

A judge who agrees with the majority opinion from the outset need not balance collegiality concerns with policy preferences. Consequently, any effect collegiality has on the decision to dissent should be conditional on ideology. The interaction between collegiality and ideology is important under both accounts of the influence of collegiality. First, the larger the ideological distance between a judge and majority opinion, the less likely a judge is to suppress a dissent. When two colleagues are ideologically compatible, there is typically little need for one to dissent from the other's opinion: they are likely to agree on the outcome and rationale. But, as the level of ideological disagreement between two judges increases, the calculations of costs and benefits change. The policy loss of acquiescing also increases. If an opinion is written by an ideological neighbor, a judge who disagrees is more likely to be concerned with the conclusions of that opinion only at the margins, so silently dissenting means signing onto an opinion with which the judge basically agrees. Were that opinion written by a colleague with whom a judge has grave policy disagreements, silently dissenting means publicly signaling agreement with a decision that the judge believes is patently incorrect. Also, under these

conditions, a judge has increased incentive to "whistleblow" (Cross and Tiller 1998; Beim, Hirsch, and Kastellec 2014), signaling to others—be they higher courts, the public, or other branches of government—that the court has reached a decision that needs to be rectified: a judge has an increased need to explain to these external audiences just why the majority opinion is wrong and increasing her need to publish a formal dissenting opinion.

Second, increased ideological disagreement conditions the effect of collegiality by limiting the amount and nature of concessions that a judge is able to get from the majority opinion writer or the ability of two judges to come to a consensus. Just as increased ideological disagreement can increase one judge's desire to whistleblow, it limits the concessions the majority opinion author is willing and able to offer his colleague. After all, any concessions the author offers to a potential dissenter moves the opinion away from the author's preferred policy. Furthermore, persuasion becomes increasingly difficult as judges see things very differently.

Whereas increased ideological disagreement should directly increase the likelihood that a judge dissents, collegiality should reduce this relationship. A judge who is ideologically distant from the majority opinion writer should be less likely to dissent as the importance of collegiality increases because the increased collegiality cost of dissenting mitigates the expressive or policy benefits of dissenting. Thus, we hypothesize that *collegiality dampens the relationship between ideological disagreement and the likelihood of a public dissent.*

Measuring the Impact of Collegiality

Having stated our two general hypotheses: that increased collegiality concerns (a) reduce the frequency of dissent and (b) dampen the effect of ideological disagreement on the probability of dissent, we now turn to the challenging task of measurement. Courts do not generate any publicly available data describing which decisions are driven by collegiality and which are not, and judges unlikely to provide valid and reliable answers survey or interview questions about which of their colleagues they dislike. To do so would undercut the very purpose

of bowing to considerations of collegiality. In order to overcome this apparent catch-22, we observe that variation in how frequently judges interact with one another creates variation in the costs and benefits of behaving in a collegial manner (i.e., forgoing ideologically-preferred dissents). While we cannot directly observe the underlying reasons for a dissent, we can infer the importance of collegiality if judges dissent less frequently from judges who they come into contact with more often. Other explanations for judicial behavior simply cannot account for such variation.

Our approach is built on the often-recognized idea that the frequency of interaction between two judges plays a role in collegiality. For example, Wilkinson (1994, 1173) argues that "I believe nonetheless that at heart the appellate process is a deliberative process, and that one engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd. Collegiality personalizes the judicial process." Likewise, Wasby (1980, 369) argues that "decreased frequency of communication among appellate judges leads to less consistency in their decisions. Where judicial interaction is infrequent, because of increased numbers of judges on a court or the judges' geographic dispersion, the 'law of the circuit' tends toward disharmony." Lindquist (2006, 702) even states the expectation directly: "[w]here judges have less interaction with their colleagues, they may feel freer to dissent from a colleague's majority opinion."

This idea that contact increases collegial behavior has deep historical roots. After all, the most famous period of unanimity in the Court's history—the Marshall Court—is also the time in the Court's history when frequency of interaction was at its highest. At Chief Justice Marshall's insistence, the justices lived together, dined together, drank together, all the while discussing and debating the issues before the Court. As Ginsburg (2003, 191) put it: "[Marshall's] aim was to use the camaraderie of boarding-house life to dispel dissent and achieve a one-voiced Opinion of the Court, which he usually composed and delivered himself." As noted historian White (1984, 40-41) explains the effects of this environment, "[t]he boardinghouse provided not only an informal forum in which the justices could discuss

issues until they were resolved but also a fraternal setting in which one justice might not want to disagree openly with another justice. Even justices who would have liked to disagree or to explain their reasoning were likely not to dissent to avoid discord among the Court's members."

Of course, today's judges do not return home to a boardinghouse to resolve cases. But, judges on the U.S. Courts of Appeals vary in the extent to which they return home from an oral argument sitting to share a courthouse with a fellow panel member. Judges on the U.S. Courts of Appeals decide cases in panels of three judges, traveling to a central location to hear oral argument. After argument, the judges return to their home chambers in cities dispersed throughout the circuit. Figure 1 shows the location of judges' home chambers across the United States. Some judges have their home chambers with other judges—some of whom they may have just sat on a panel with—while other judges are the only circuit judge in their courthouse.

[Figure 1 about here.]

The location of a circuit judge's home chambers provides variation in *frequency* of contact among judges. Because judges on the U.S. Supreme Court are all housed in the same courthouse, their frequency of contact is uniform. Judges on the Courts of Appeals differ in this respect. The U.S. Courts of Appeals each cover a region of the United States, and judges' home chambers are disbursed across the region; judges come together periodically to hold oral argument and conference and then return to their home city to draft opinions. For judges whose chambers are located in the same courthouse, frequency of contact is increased because colleagues will see each other day in and day out: in the cafeteria (as then-Judge Roberts noted in the quote that opened this article), in the elevator, and in the hallway. When judges do not share a courthouse, they interact with each other less frequently. The increased frequency of contact between judges from the same courthouse applies to both past contact and anticipated future interactions. As a result, if judges dissent less frequently from colleagues within the same courthouse, such a pattern would be consistent with either

theoretical explanation of collegiality. Anticipating frequent future contacts could lead a judges to suppress dissent to avoid tension in future day-to-day encounters. More extensive past contact can increase how much information two judges have about one another, and such information can facilitate negotiation and persuasion. We thus measure this type of collegiality with a dichotomous variable that indicates whether two judges are housed in the same city.[1]

In addition to looking at the impact of shared courthouses we formulate two other measures of the interpersonal contact between two judges. Moreover, these two measures focus on future and past contacts separately, thus providing an opportunity to distinguish between the underlying theories regarding the reasons judges might behave in a collegial manner. Larger circuits (in terms of the number of judges in the circuit) necessarily imply a decreased probability that any two judges will sit together on the same panel. In this way, circuit size might reduce collegiality by reducing the anticipated frequency of future interaction (Cohen 2002). As Bowie, Songer, and Szmer (2014, 106-7) summarize their interviews with U.S. Courts of Appeals judges,

> While none of the judges we interviewed directly discussed the impact of circuit size on the efficiency of the opinion-writing process, there was frequent mention of the positive effect that high levels of collegiality and knowing the other judges on the panel had on the ability of a panel to quickly reach agreement on an opinion. Thus, as larger size would seem to invariably to reduce how well the judges know each other and is likely to reduce the extent of collegiality, circuit size may indirectly result in a less efficient opinion-writing process.

In short, variation in the number of judges across both circuits and time creates concomitant variation in the frequency with which a judge sits on a panel with each of her colleagues: the *likelihood of future contact*. In a large circuit, a judge may be less concerned about a dissent riling up a colleague since a relatively small percentage of her future panels will include that

[1]In most cases, judges who are housed in the same city are also housed in the same courthouse; however, there are some exceptions. We use the same city variable because of uncertainty in data collection with respect to courthouse mailing addresses and chambers locations.

judge. Conversely, on a small circuit, the costs incurred by dissenting might loom large in light of much greater certainty about shared panel service in the near future. If collegiality creates dissent suppression in an effort to smooth over future interactions, this effect should be larger where two judges are more likely to sit on a future panel together.

Finally, we consider *past contact*. To the extent that collegiality effects stem from deliberation and persuasion that build true consensus, it should be enhanced by more frequent past contactbecause the two judges know more about one another based on prior shared experience. We measure variation in this information by simply looking at how long two judges have served on the same court. As two judges serve together, they should get to know each other and better understand each other's likes and dislikes. Stapleton (1995) has noted the relationship between length of association and collegiality, writing "[i]t is difficult to listen, much less give up something important to you in compromise, if you are dealing with strangers. It is only when you come to know a colleague in some depth as a human being that you accept without question his or her good faith. Only when the good faith of your colleagues is taken as a given is it possible to find wisdom in a thought of another in conflict with your own" (36-7). In this way, collegiality concerns should, on average, increase with cotenure. Variation in cotenure is not unique to federal circuit courts. As a result we are able to perform a supplemental analysis in the context of the U.S. Supreme Court to shed light on the generalizability of our findings from the circuit courts.

Data and Research Design

Our research design focuses primarily on the U.S. Courts of Appeals in order to take advantage of the variation in interpersonal contacts between judges across time and circuits. We utilize a database of all published[2] Fourth Amendment search and seizure opinions from

[2]Unpublished opinions are excluded because they typically involve clear-cut legal questions, rarely generate dissents (Hazelton, Hinkle, and Jeon 2016), and are not readily available for the time-span covered here (Sunstein 2006).

1953 to 2010. This topic incorporates a discrete set of legal issues that are routinely raised in litigation within the context of both civil and criminal cases. We identify relevant cases by using Lexis to locate all published opinions from the eleven numbered geographical circuits that cite the Fourth Amendment of the United States Constitution. After excluding all opinions that do not address the merits or do not contain the word "search" or the word stem "seiz*" at least once, the resulting dataset contains 12,045 authored opinions in panel cases.[3] The unit of analysis is the vote level, and the outcome variable is whether a judge chooses to dissent, so we use a probit model with standard errors clustered on the case. There is an observation for each non-authoring home-circuit judge in each case. There is not an observation for the opinion author since they are not faced with making the decision to dissent.[4] Furthermore, we exclude votes cast by judges sitting by designation in order to tightly focus on the level of collegiality among the circuit judges who serve together on the same circuit.

Our primary explanatory variables measure the level of interpersonal contact between each judge and the author of the majority opinion in a given case. The first measure of interpersonal contact is whether the two judges have their home chambers in the same city. Since most circuit judges in the same city also share the same courthouse, such judges should come into contact considerably more frequently. Next, we measure the probability that a judge will be assigned to sit on another panel with the opinion author. While this calculation is linked to circuit size, there is not a linear relationship between circuit size and the probability of serving together on a future panel. Therefore, we calculate the probability

[3]We exclude per curiam opinions since our research design requires being able to identify the opinion author. We exclude the small number of en banc opinions since cost-benefit analyses concerning dissents is likely to be substantially different in those particularly important and salient cases.

[4]Although it is technically possible for the opinion author to also dissent, this is exceedingly rare.

that the judge in question will serve on another panel with the author using the number of other active judges in each circuit and each year. This number will overstate the probability somewhat because it does not take into account the number of senior and visiting judges who will serve on future panels, but it is a better measure than simply using the number of judges on the circuit. Finally, we count the number of years the judge and opinion author have served together at the time of the relevant case. This measure of *Cotenure* reflects the extent of past interactions between two judges.

As we discussed above, understanding the impact collegiality may have on the decision to dissent requires accounting for how closely the ideology of the judge in question reflects the ideology of the opinion author. We use Judicial Common Space ("JCS") scores to create the necessary variable.[5] *Ideological Distance* is the absolute value of the difference between the JCS score of a judge and the JCS score of the opinion author in the relevant case. It has a theoretical range from zero to two and higher values indicate greater ideological disparity. *Ideological Distance* is interacted with *Same City*, *Pr(Future Panel)*, and *Cotenure*, in turn, in the empirical models.

We also control for features of the case, hierarchical configuration, and time. Opinions that affirm the lower court ruling are less likely to involve contentious legal issues than those that reverse the lower court either entirely or in part. Therefore, we control for whether an opinion fulling affirms the lower court ruling. Next, we take hierarchical configuration into account. A judge may be more likely to dissent when they are in a position to "whistleblow," that is, bring a case to the attention of a reviewing court (Cross and Tiller 1998; Beim, Hirsch, and Kastellec 2014). Although the dynamics of whisleblowing can be complex, in general judges who are more closely aligned with a potential reviewing court are in a better position to benefit from the whistleblowing function of a dissent. Circuit panel opinions can

[5]JCS scores are based on the ideology of the political elites who appointed a judge and are located on a scale from -1 (liberal) to 1 (conservative) (Epstein et al. 2007; Giles, Hettinger, and Peppers 2001; Poole 1998).

be reviewed by two sources, the Supreme Court or the full circuit re-hearing a case en banc. Consequently, we include controls for the distance between a judge and the Supreme Court median and the full circuit median. These variables also utilize JCS scores. Finally, we include a variable for the year of each case.

This set of control variables is smaller than is often typical in models of judicial behavior. While plenty of factors are correlated with a judge's decision to dissent, relatively few are also correlated with where two judges have their home chambers, how frequently two judges expect to serve on a future panel, or how many years two judges have served together. At first glance it might appear that we should include controls for circuit-level characteristics such as the circuit dissent rate (Hettinger, Lindquist, and Martinek 2006) or even fixed effects for circuit. However, a substantial portion of the variation in interpersonal contact among judges is across circuits rather than within circuits. Moreover, collegiality may very well provide the fundamental theoretical reason why different rates of dissent have become the norm in different circuits. To the extent that large circuits generate more dissent because judges face each other less frequently, our research design accounts for that by calculating the probability of being on a future panel together. To the extent that circuit characteristics influence dissent in ways that are not captured in our measures of interpersonal contact, the bulk of that variation should also be uncorrelated with collegiality (leaving our results free from omitted variable bias).

Although the Supreme Court does not contain nearly the variation in collegial interaction evident in the circuit courts, there is variation in how long two justices have served on the Court together. Consequently, we perform a supplemental analysis on Supreme Court data to shed some light on the generalizability of our circuit court results. Drawing on the Supreme Court Database[6] we use all orally argued Supreme Court cases from 1955 to 2008 to construct the same type of vote-level analysis used for our circuit court model. There is an observation for each justice in each case who did not author the majority opinion. Once

[6]Available at www.scdb.wustl.edu.

again, per curiam opinions are necessarily excluded. We use Martin-Quinn scores (Martin and Quinn 2002) to calculate *Ideological Distance* in this model and *Cotenure* is calculated the same way. We interact these two variables, and also control for whether the Court is affirming the decision below and the year of the decision. In addition, we control for the salience of the case (Clark, Lax, and Rice 2015), and we include fixed effects for issue area and justice.

Results

Since multiple measures are interacted with *Ideological Distance*, normal regression results are not particularly helpful. Instead, we graph the marginal effect of each covariate at low and high values of *Ideological Distance*. Figure 2 illustrates the marginal effects when *Ideological Distance* is at its 25% and 75% value in turn while holding all other variables at their median or mode as applicable. The triangles and solid lines denote the estimate and related 95% confidence interval when a judge is ideologically distant from the author. As anticipated, (conditional on ideological disagreement) serving in the same city, the increased probability of future service together, and increased *Cotenure* all have a negative impact on dissent. However, only the latter two effects are statistically significant.

[Figure 2 about here.]

In order to further unpack the influence of each measure of interpersonal contact, we turn to a more detailed examination of each across a range of values. We begin by looking at both marginal effects and predicted probability of dissent across the range of *Ideological Distance* broken down by judges who serve in the same city as the author and those who don't. The left panel in Figure 3 shows that when two judges are in the same city, the confidence interval for the marginal effect of *Ideological Distance* always includes zero. Although we expected to find that collegiality can dampen the effects of ideology, the extent is rather remarkable. There is no evidence that ideology impacts the decision to dissent from an opinion written by a neighbor. However, the generally expected ideological pattern emerges

when the two judges do not work in the same city. Under those circumstances the marginal effect of *Ideological Distance* is positive and significant for all values of *Ideological Distance*. Furthermore, the predicted probabilities in the right panel of Figure 3 show that for higher values of *Ideological Distance*, the probability of dissenting is significantly lower when two judges work in the same city than when they work in different cities.

[Figure 3 about here.]

Next we turn to look at the impact of future interpersonal contact in greater detail. The left panel of Figure 4 shows that marginal effects for high and low levels of anticipated future contact exhibit a similar pattern as the previous figure. When a judge expects a high level of future contact with the author, *Ideological Distance* does not have a statistically significant effect. However, when a judge expects a low level of future interaction, *Ideological Distance* has the expected positive and significant effect on dissent. The right panel in Figure 4 shows how the predicted probability of dissent varies across the range of *Pr(Future Panel)* for minimum and maximum values of *Ideological Distance*. While ideology matters quite a bit for the decision to dissent when a judge does not anticipate frequent shared panel service, those judges with a 40% or greater chance of serving on a future panel with the author dissent at such low levels that moving *Ideological Distance* from its minimum to maximum value does not significantly change the probability of dissent.

[Figure 4 about here.]

Third, we examine the effect of cotenure in greater detail. Once again, the marginal effects in the left panel of Figure 5 show a familiar pattern. However, this time the marginal effect for *Ideological Distance* at a high level of years of shared service is statistically significant, although only for low values of *Ideological Distance*. For most values of *Ideological Distance*, a high level of *Cotenure* dampens the impact *Ideological Distance* has on dissent to a nonsignificant level. As observed before, lower levels of past interpersonal contact result in *Ideological Distance* having the expected positive, significant impact on dissent. The predicted probabilities in the right panel of Figure 5 also show the same pattern as the pre-

vious figure. If a judge has served on the court with the authoring judge for more than 25 years, even moving *Ideological Distance* from its minimum to maximum does not generate significantly different predicted probabilities.

These individual results provide support for our theoretical exceptions. But they are all reflections of the same underlying concept, the extent of interactions between two judges. Consequently, we consider the substantive size of these effects together to get a sense of how much these factors influence the decision to dissent. We calculate the difference in the predicted probability of dissent when all three measures of personal interaction are held at low levels and when all three are at high levels (while holding everything else, including *Ideological Distance*, at median or modal values). When two judges are located in different cities and *Pr(Future Panel)* and *Cotenure* are set at their 25% values, the predicted probability of dissent is 0.06. This decreases to 0.05 when they have home chambers in the same city and *Pr(Future Panel)* and *Cotenure* are set at their 75% values. While this is a fairly modest effect size, the substantive effect size of *Ideological Distance* is on a similar scale. Changing *Ideological Distance* from its 75% value to its 25% value (holding everything else at its median or mode) decreases the predicted probability of dissent from 0.06 to 0.04.

[Figure 5 about here.]

Finally, we turn to one final test of how collegiality might influence the decision to dissent. Figure 6 shows the marginal effects from our Supreme Court model for both low and high levels of *Ideological Distance*. Even at the Supreme Court level, *Cotenure* has a significant, negative effect on the probability of dissent, although that effect is fairly small in size. Figure 7 provides a more detailed look at the impact of *Cotenure*. The left panel shows that a longer relationship between two justices decreases the predicted probability of dissent for both ideologically near and distant judges. The right panel further illustrates that for levels of *Ideological Distance* below 6, the predicted probability of dissent when *Cotenure* is at its minimum is significantly higher than when *Cotenure* is at its maximum. Even though the impact of *Cotenure* is modest in size, it suggests the impact of collegiality even in an

institutional context without a strong norm of consensus (Epstein, Segal, and Spaeth 2001).

[Figure 6 about here.]

[Figure 7 about here.]

Discussion and Conclusions

These results broadly support our two general theoretical expectations about collegial behavior. First, in many situations judges are less likely overall to dissent from an opinion written by an author they come into contact with more frequently. Having home chambers in the same city as the author decreases the probability of dissent, at least for higher levels of *Ideological Distance*. Anticipating a higher level of future contacts decreases dissent in general while longer cotenure does so for higher levels of *Ideological Distance*. Second, increased interpersonal connections matter more to the decision to dissent when dissent itself is more likely; that is to say when the judge and author are more ideologically distant. As a result, increased contact between two judges has the expected dampening effect on *Ideological Distance*. In fact, for the most part this dampening effect is so pronounced that for judges with high levels of contact with the opinion author, *Ideological Distance* is not a significant predictor of dissent.

While the theory of collegial behavior is quite well developed in terms of both judges and other group decisionmakers, empirical evidence has remained somewhat elusive. Our approach does not provide the ability to distinguish how much behavior is driven by collegiality compared to other motivations. But we are able to demonstrate that variation in factors that influence the costs and benefits of behaving in a collegial manner generate the expected variation in collegial behavior. This provides strong evidence that judicial decisonmaking is influenced by collegiality, because other explanations would not predict such results. The appearance of the theorized patterns across multiple indicators of interpersonal connections strengthens this conclusion. Even if there might be an alternative explanation for one measure, it would have to apply to all three to undermine the conclusion that judges

take collegiality considerations into account. For example, the effect of two judges working in the same city might possibly be generated by the norm of senatorial courtesy generating greater (unmeasured) similarity in the circuit judges within each state.[7] Yet this would not explain the observed patterns for *Pr(Future Panel)* and *Cotenure*.

Another benefit of using a variety of measures for how often judges interact is that it gives us the opportunity to at least begin to untangle the two primary explanations for collegiality influencing dissent: dissent suppression and persuasion. Our results for *Cotenure* indicate the operation of the latter theory. An increased ability to persuaded a colleague is grounded in more extensive past contacts which provide the opinion author with greater information about a fellow judge. This more extensive information makes it easier for the author to convince a colleague that a dissent is not merited. As two judges serve, they continue to accumulate information and the dissent rate decreases. Conversely, a judge suppressing dissent out of fear of suffering in future interactions should be driven by forward-looking concerns. Our results for *Pr(Future Panel)* provide evidence for this theoretical explanation for collegiality decreasing dissent. Those judges who anticipate a higher probability of future interactions are less likely to dissent. This conclusion is not quite as clear-cut because judges who have a high expectation of interacting with an author in the future have probably also interacted with that judge more in the past. However, a supplemental analysis using only data where two judges have served together for five years or less continues to show the same impact for *Pr(Future Panel)*, suggesting that it is largely capturing future anticipation rather than the accumulation of past contacts.

Since our research design is based on leveraging variation in interpersonal contact, the U.S. Courts of Appeals provide a particularly useful context. Yet the structure of our approach can also be adjusted to apply to virtually any group of decisionmakers. We demon-

[7]This is not the case. An alternative model measuring whether two judges are in the same state instead of the same city shows no significant differences between dissenting from an opinion written by a judge in the same state and a different state.

strate this broader utility by exploring the role of *Cotenure* in the U.S. Supreme Court. Not only is there limited variation in interpersonal contacts among justices, the long-ago demise of the Court's norm of consensus makes it an unlikely forum to uncover evidence of collegiality influencing votes. Yet such evidence exists. To be sure, the effects of *Cotenure* are quite modest. A dissent is only 5% less likely when *Cotenure* is at its maximum compared to its minimum. Nevertheless, this small significant effect suggests the importance of exploring the role of collegiality in a variety of other institutional settings. There is also reason to further explore the role of collegiality further in federal circuit courts. Collegiality may operate differently in other issue areas or on other decisions such as the decision to publish or decisions about interpreting precedent. These are all topics ripe for further exploration.

Figures

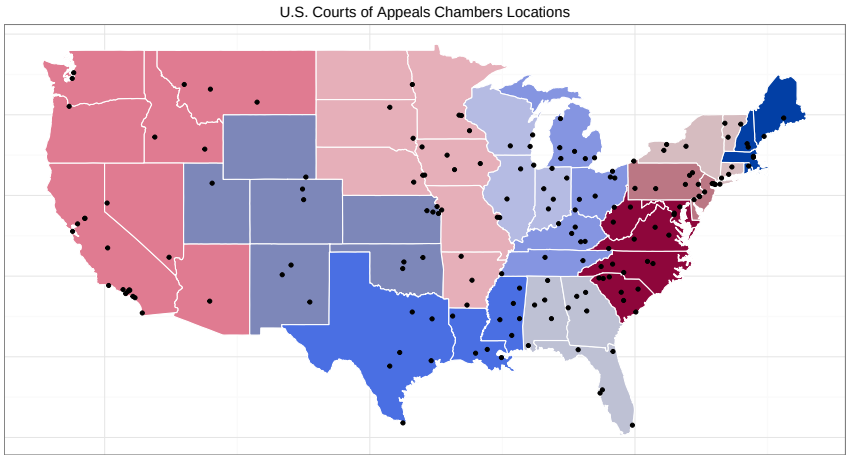

Figure 1: The location of U.S. Courts of Appeals chambers.

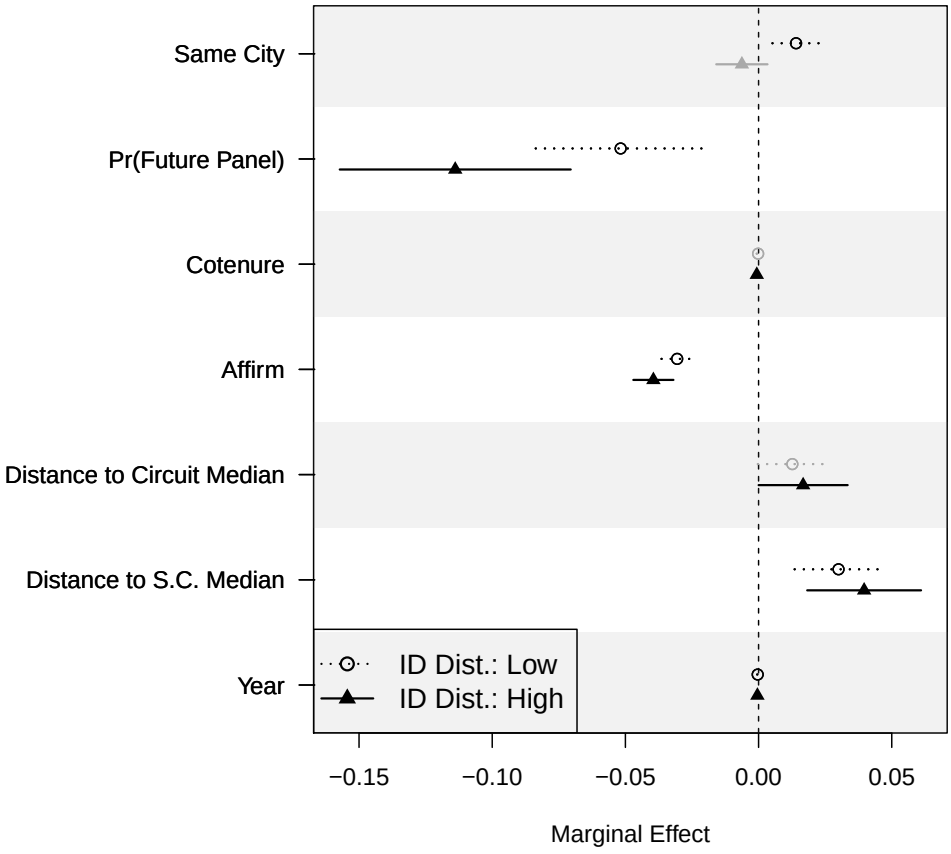

Figure 2: Circuit Court Model: Marginal effect of each variable on the predicted probability of dissent when holding all other variables at their median or mode with the exception of *Ideological Distance*. Circles and dotted lines depict estimates and their 95% confidence interval when *Ideological Distance* is held at its 25% value. Triangles and solid lines depict estimates and their 95% confidence interval when *Ideological Distance* is held at its 75% value. Estimates in gray (instead of black) have a confidence interval that includes zero. Full regression estimates are available in the appendix.

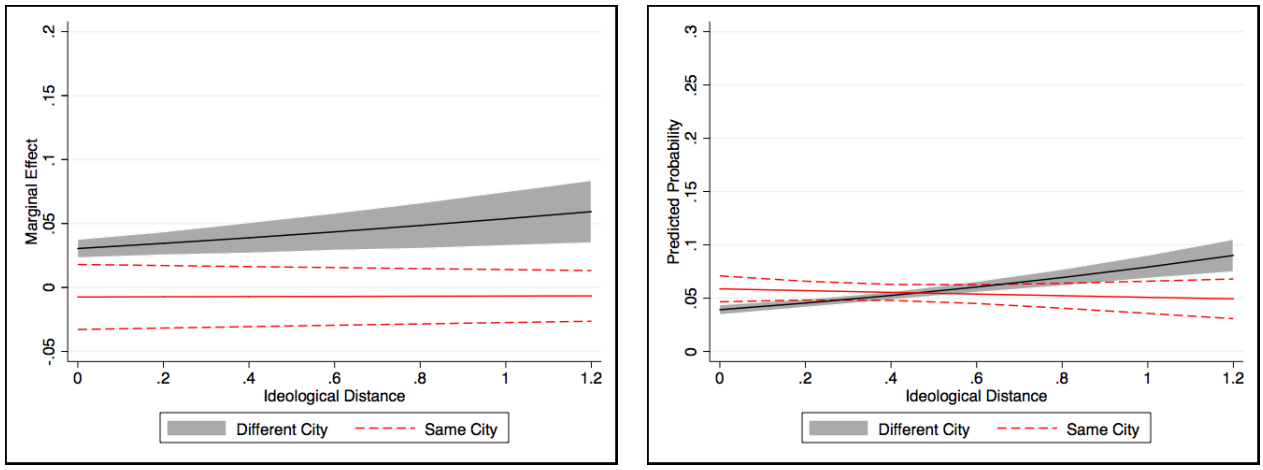

Figure 3: Impact of *Same City*: This figure shows the marginal effect of *Ideological Distance* (left panel) and predicted probability of dissent (right panel) over the entire range of *Ideological Distance* when both judges have home chambers in the same city (red line) and when they do not (black line). The shaded region and the region outlined by dashed red lines depict the 95% confidence intervals.

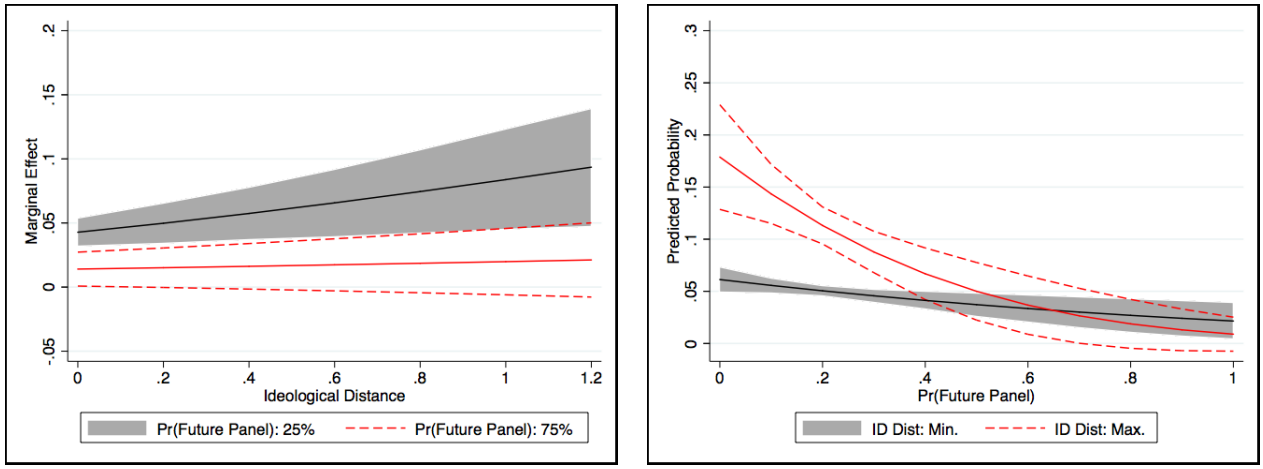

Figure 4: Impact of *Pr(Future Panel)*: The left panel shows the marginal effect of *Ideological Distance* over its entire range while holding *Pr(Future Panel)* at its 75% value (red line) and 25% value (black line). The right panel shows the predicted probability of dissent over the range of *Pr(Future Panel)* when holding *Ideological Distance* at its minimum and maximum values in the data. In both panels the shaded region and the region outlined by dashed red lines depict the 95% confidence intervals.

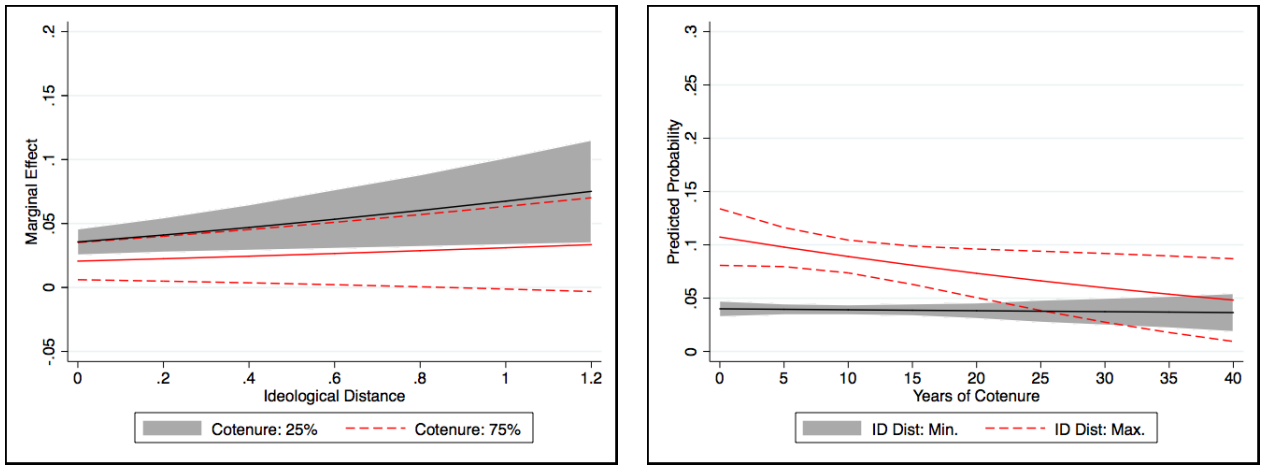

Figure 5: Impact of *Cotenure*, Circuit Court Model: The left panel shows the marginal effect of *Ideological Distance* over its entire range while holding *Cotenure* at its 75% value (red line) and 25% value (black line). The right panel shows the predicted probability of dissent over the range of *Cotenure* when holding *Ideological Distance* at its minimum and maximum values in the data. In both panels the shaded region and the region outlined by dashed red lines depict the 95% confidence intervals.

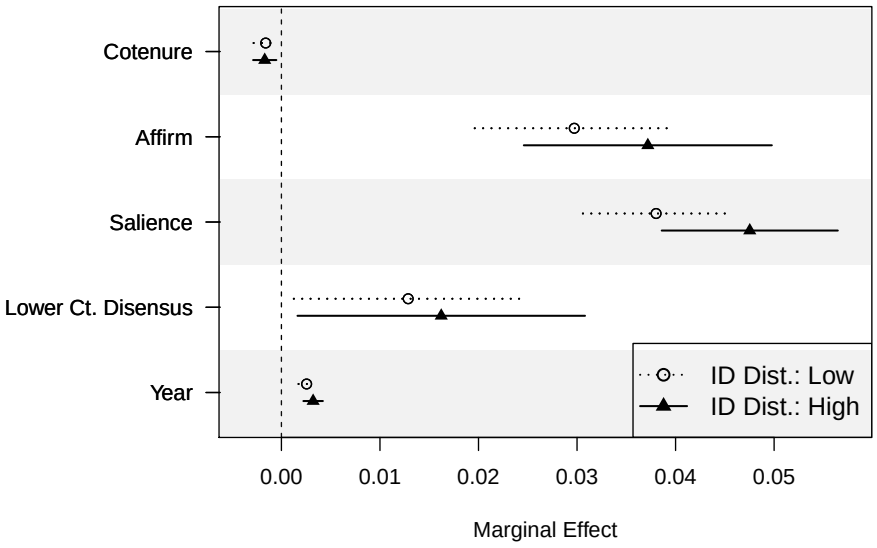

Figure 6: Supreme Court Model: Marginal effect of each variable on the predicted probability of dissent when holding all other variables at their median or mode with the exception of *Ideological Distance*. Circles and dotted lines depict estimates and their 95% confidence interval when *Ideological Distance* is held at its 25% value. Triangles and solid lines depict estimates and their 95% confidence interval when *Ideological Distance* is held at its 75% value. Estimates in gray (instead of black) have a confidence interval that includes zero. Full regression estimates are available in the appendix.

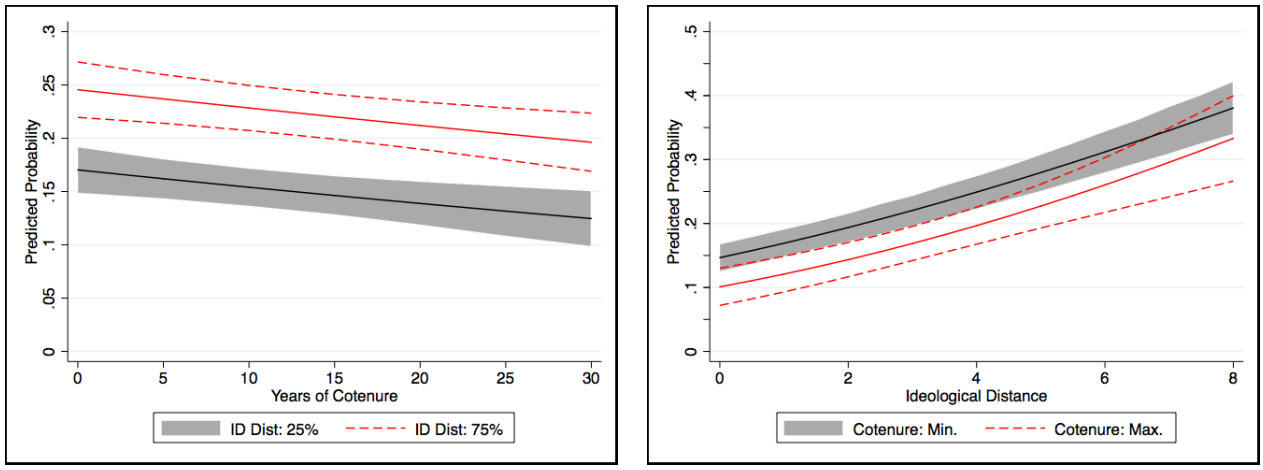

Figure 7: Impact of *Cotenure*, Supreme Court Model: The left panel shows the predicted probability of dissent over the range of *Cotenure* while holding *Ideological Distance* at its 75% value (red line) and 25% value (black line). The right panel shows the predicted probability of dissent over a range of values of *Ideological Distance* when holding *Cotenure* at its minimum and maximum values in the data. In both panels the shaded region and the region outlined by dashed red lines depict the 95% confidence intervals.

Appendix

	Coef.	S.E.	p-value
Same City	0.195*	0.057	0.001
Pr(Future Panel)	−0.484*	0.216	0.025
Cotenure	−0.001	0.004	0.771
Ideological Distance	0.584*	0.127	0.000
ID Dist. X Same City	−0.422*	0.115	0.000
ID Dist. X Pr(Future Panel)	−0.810	0.471	0.085
ID Dist. X Cotenure	−0.008	0.007	0.273
Affirm	−0.279*	0.026	0.000
Distance to Circuit Median	0.138	0.071	0.051
Distance to S.C. Median	0.329*	0.089	0.000
Year	−0.004*	0.001	0.001
Intercept	5.740*	2.175	0.008
N		20,090	

Table 1: Circuit Court Model: Probit regression estimates of the effect of interpersonal contacts, *Ideological Distance*, their interaction, and a range of control variables on the decision of whether to dissent. The reported standard errors are robust standard errors that are clustered on the case and * denotes a p-value less than 0.05.

	Coef.	S.E.	p-value
Cotenure	−0.007*	0.003	0.023
Ideological Distance	0.093*	0.008	0.000
ID Dist. X Cotenure	0.000	0.001	0.573
Affirm	0.118*	0.020	0.000
Salience	0.152*	0.014	0.000
Lower Ct. Disensus	0.052*	0.024	0.029
Year	0.011*	0.002	0.000
Intercept	−21.941*	3.083	0.000
N		49,361	

Table 2: Supreme Court Model: Probit regression estimates of *Cotenure*, *Ideological Distance*, their interaction, and a range of control variables on the decision of whether to dissent. Fixed effects for issue and justice are not shown. The reported standard errors are robust standard errors that are clustered on the case and * denotes a p-value less than 0.05.

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