An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions

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Almost without exception, scholars have tested theories of judicial behavior by relying on published case decisions. Though understandable given the inaccessibility of unpublished cases, this focus means that scholars may be drawing conclusions regarding judicial behavior that do not accurately describe the motivational forces behind all judicial decisions. This study employed the attitudinal model of judicial behavior to empirically test whether published judicial opinions are representative of all opinions in litigation challenging the U.S. Forest Service. Results indicate that the effects of ideological preferences are different in published and unpublished opinions issued by appellate judges: judges’ decisions followed their ideological preferences in published opinions, but they did not in unpublished opinions. At the district court level, judges did not follow their ideological preferences in either published or unpublished opinions and there was no difference between judges’ decisions in published and unpublished opinions. This research supports the contention that the process of judicial decision making in the courts of appeals differs between published and unpublished opinions and that scholars should use caution in drawing conclusions from examinations of published opinions alone.

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I. Introduction

Federal courts do not publish all their decisions. The decision to publish selective cases is primarily driven by a desire to control growth in case law and concerns of judicial efficiency. Although federal district courts have experienced significant increases in volume (Weaver 1998), concerns regarding case load volume have centered on the appellate courts because the rate of increase at the appellate level is higher and “there is general consensus that increased demand is more difficult to accommodate at the appellate level” (Carlton 1997:1). “Between 1960 and 1994, filings in the courts of appeals . . . soared 1,139%” (Dragich 1996:25). Limiting opinion publication to those opinions that establish law or have precedential value increases judicial efficiency (Shuldberg 1997). Selective publication is intended to serve as a sorting device, separating opinions that have general precedential value or other public significance from those that do not.

The U.S. district courts have never published all their opinions. Prior to 1964, U.S. courts of appeals published all their decisions; however, in that year the Judicial Conference authorized the appellate courts to issue opinions not designated for publication. In 1971, the Federal Judicial Center suggested that judges and attorneys not cite unpublished opinions and the Center asked circuit courts to develop rules regarding the publication of opinions. By 1974, federal courts had adopted a variety of different practices regarding publication of opinions and the citation of unpublished opinions. Generally, the circuits have issued publication rules based on two assumptions: (1) certain opinions serve no law-making function, and (2) publishing decisions is costly in a number of ways (Weresh 2001; Wasby 2005).

Historically, unpublished opinions were issued exclusively for the involved parties, were nonprecedential, and circuit court rules either prohibited or actively discouraged citation to unpublished opinions (Wasby 2004; Gant 2006). When the rules regarding unpublished opinions emerged several decades ago, the designation of a decision as published or unpublished actually bore some relationship to its availability. Initially, opinions designated as unpublished were not disseminated to the public or legal publishers, although they have always been available by request to the clerk’s office. Today, many unpublished opinions are accessible through electronic legal databases, but researchers cannot simply rely on these now easily accessible unpublished opinions since the databases still do not contain all or a random sample of unpublished opinions and availability varies greatly
among the circuits over time (Wasby 2004). The remaining unpublished opinions are generally only available in the courthouse where the case was decided or from the National Archives and Records Administration Centers. Thus analysis of all or random samples of unpublished judicial opinions still requires investing substantial human and financial resources.

Criticism of unpublished decisions, no-citation rules, and their use as precedent has been widespread since the rules evolved (Weresh 2001), culminating in a new Federal Rule of Appellate Procedure that ends the long and contentious debate over no-citation rules (Gant 2006). Federal Rule of Appellate Procedure 32.1 is a noteworthy shift in procedure providing for intercircuit consistency by designating unpublished opinions as citable in all circuits, starting with opinions rendered in January 2007 (Gant 2006). Importantly, however, the new rule fails to dictate the degree of persuasive or precedential authority due an unpublished opinion and leaves intact the practice of selective publication, thus allowing continued inconsistency regarding the actual effect of citing unpublished opinions (Gant 2006).

A plethora of research analyzing judicial opinions exists. For example, more than 140 articles and books have empirically examined how judges make decisions (Pinello 1999). Almost without exception, scholars have tested hypotheses regarding judicial behavior by relying on published case decisions (i.e., the Songer database) (see Songer et al. 2000). Though understandable given the relative inaccessibility of unpublished cases, this focus means that “we have ignored between 90 and 95 percent of all data while trying to expand our understanding of judicial contributions to policymaking” (Ringquist & Emmert 1999:8). Recent research has uncovered the potential seriousness of this shortcoming (Atkins 1992; Rowland & Carp 1996; Songer 1988; Songer & Sheehan 1992; Songer et al. 1989), but little has changed since Carp and Rowland (1983:17) lamented that “we know very little about the content or impact of these many unreported decisions.” Benesh (2001:7) reiterated other scholars’ conclusions and stated that the assumption that published and unpublished judicial decisions are identical “is quite tenuous and scholars have begun to note problems . . . [with] such an assumption.” By analyzing published case decisions exclusively, judicial scholars are not only overlooking a rich source of additional information that has become easier to access, but may be drawing conclusions regarding judicial behavior that do not accurately describe the motivational forces behind the majority of judicial decisions.

This study provides empirical evidence to help inform scholars’ concerns about whether published opinions are a representative sample of all
judicial opinions. We utilized the attitudinal model of judicial behavior to investigate differences between published and unpublished judicial opinions for district and court of appeals U.S. Forest Service land management cases initiated from 1989 to 2002. After reviewing the attitudinal model and research on unpublished opinions, we describe our methods and examine whether there are differences between published and unpublished opinions.

II. ATTITUdINAL MODEL OF JUDICIAL BEHAVIOR

Although Pritchett (1948) did not develop a theory of judicial decision making, he did find that justices were motivated by their own preferences (Segal & Spaeth 1993). Pritchett’s findings were the basis for the attitudinal model first developed by Glendon Schubert (1954). Schubert’s model refocused scholars’ inquiries from what judges say to what makes judges behave as they do. Subsequent scholars refined Schubert’s general theory and found that judges’ decisions were based on their personal policy preferences. The modern attitudinal perspective suggests that judges are rational actors seeking to maximize the degree to which case outcomes coincide with their individual policy preferences (Segal & Spaeth 1993). Some researchers, such as Rhode and Spaeth (1976) and Segal and Spaeth (1993, 1996), theorized that judges’ attitudes toward particular issues caused them to vote differently, others hypothesized that judges’ decisions were exclusively a function of their personal ideology (Tate 1981).

Ideology is a vitally important concept to the empirical study of political behavior (Knight & Erikson 1997; Levine et al. 1997) and this is no less true for judicial behavior (Songer 1982; Sheehan et al. 1992). Ideology typically is measured along a conservative (Republican) to liberal (Democrat) continuum in U.S. politics. The attitudinal model manifests judicial behaviorists’ belief in the centrality of ideology, holding that “the Supreme Court decides disputes in light of the facts of the case vis-a-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal” (Segal & Spaeth 1993:65). Since direct measures of justices’ ideological preferences do not exist, scholars commonly employ the ideology of the appointing president as an indicator of judicial ideology. The attitudinal model posits that judges appointed by Republican (conservative) presidents will make more conservative decisions and judges appointed by Democrat (liberal) presidents will make more liberal decisions.
The attitudinal model is viewed as most powerful in explaining and predicting the behavior of Supreme Court Justices due to their position at the top of the federal judicial hierarchy. As Segal and Spaeth (1993) note, the Supreme Court’s docket is not bound by the rulings of, nor can it be reversed by, a higher court. Although opportunities for Supreme Court Justices to promote their policy preferences abound and disincentives are few, the same may not be true for lower court judges. Researchers have developed evidence showing that circuit and district court judges are generally responsive to the policies announced by their superiors because of legal and institutional factors that appear to constrain these judges’ expression of their policy preferences (Gruhl 1980; Stidham & Carp 1982; Johnson 1987; Songer & Sheehan 1990; Songer & Haire 1992).

Despite constraints on district and circuit court judges’ freedom to vote their policy preferences, the attitudinal model has been utilized and proved useful in explaining these judges’ decisions. A number of empirical studies point to the same conclusion: circuit judges’ policy preferences affect their decision making (Goldman 1975; Howard 1981; Johnson 1987; Songer & Haire 1992; Songer et al. 1994). For example, Songer et al. (2000) found that the appointees of every Democratic president were more liberal in their voting than the appointees of any Republican president in both criminal and civil rights cases. Slotnick (1983) reinforces the conclusions of others that, with few exceptions, presidents appoint district court judges who share the president’s party affiliation, judicial philosophy, and basic policy predilections. In their study of district courts, Rowland and Carp (1996:129) found that “Democratic judges are 1.42 times more likely to render a liberal decision than are judges of Republican backgrounds.” Numerous studies have reported relationships between a judge’s political ideology, as measured by the appointing president’s ideology, and judicial voting on the Supreme Court (Segal & Spaeth 1993, 1996; Handberg 1991), the courts of appeals (Goldman 1966, 1975; Songer 1982; Songer & Davis 1990; Songer & Haire 1992; Songer et al. 1994), the federal district courts (Carp & Rowland 1983; Rowland & Carp 1996; Rowland et al. 1988; Dudley 1989), and the state courts (Emmert & Traut 1994; Hall & Brace 1996).

A half-century of empirical scholarship has firmly established that the ideological values and the policy preferences of justices have a profound impact on their decisions. Judicial scholars acknowledge that “the dominant approach for explaining judicial behavior has been to focus on judicial values” (Emmert & Traut 1994:42) and that the “attitudinal model . . . dominates the study of judicial politics” (Epstein & Knight 1998:11). By any criteria, however,
the major issues in the explanation of judicial behavior are far from settled and to say that judges’ policy preferences matter in the disposition of cases is not tantamount to saying they are the only influence that matters. For example, legal scholars focus on doctrine and precedent and scholars who work from a rational choice perspective, which underlies the attitudinal model, have considered and posited a wide range of other motivations for justices, including institutional roles and goals, interpreting the law well, and strategic behavior as explanatory theories of judicial behavior (Baum 1997).

Since the attitudinal model is well accepted and has proven capacity to explain and predict judicial decisions, we use the attitudinal model to test for differences in judicial behavior that may exist between published and unpublished opinions. Although this study will add to the large body of research on the attitudinal model, our purpose is not to test the attitudinal model per se; rather, it is to use a well-accepted and documented model of judicial behavior as a vehicle for testing whether judges’ decisions in published opinions are different than their decisions in unpublished opinions. Since the effects of political ideology cannot be systematically explored without recognizing the different institutional influences that may constrain appellate and district court judges’ freedom to vote their policy preferences, we test district and court of appeals judges’ opinions separately.

III. Unpublished Judicial Opinions

Scholars offer two arguments to support their reliance on published cases in judicial behavior research. Some scholars contend that published cases represent the most important judicial decisions (Shuchman & Gelfand 1980; Carp & Rowland 1983; Siegelman & Donohue 1990). If unpublished opinions are legally or politically unimportant, excluding such opinions from scholarly analyses has little or no effect on our understanding of judicial behavior. However, this assertion contradicts Vestal (1966), Fra (1977), and Reynolds and Richman (1978), who all found numerous examples of important contributions to common law in unpublished appellate court decisions. Likewise, both Songer (1988) and Olson (1992) find no difference in complexity or importance between published and unpublished opinions, and conclude that they do not vary in precedential value. In addition, unpublished opinions can have important policy implications and sometimes “serve as battlegrounds that manifest the effects of the democratic subculture on judicial decision-making” (Rowland & Carp 1996:134).
Other scholars contend that relying on published opinions makes little difference because published opinions are representative of all opinions and researchers can make inferences about the characteristics of all judicial opinions from published opinions (Carp & Rowland 1983). However, the circuit courts’ publication criteria almost guarantee that published opinions will not be representative of other opinions. The few studies of unpublished judicial opinions have validated this assertion. In their study of civil lawsuits brought by the Environmental Protection Agency, Ringquist and Emmert (1999) found that cases in which higher civil penalties were assessed were significantly more likely to be published. Hannon (2001) reported that unpublished U.S. court of appeals’ judicial opinions affirm “far more” lower court rulings than published opinions. When Hannon (2001) compared his results to Reynolds and Richman’s (1981) study of U.S. courts of appeals unpublished opinions decided from July 1, 1978 to June 30, 1979, he found that the rate of reversal in unpublished opinions had increased. However, Songer (1988) found that circuit court judges reverse the unpublished district court judges’ decisions as often as they reverse their published decisions. Songer et al. (1989) found a statistically significant higher rate of publication for opinions in which “upperdog” parties (government and corporations) had appealed than in appeals by “underdogs.” Similarly, Songer and Sheehan (1992) found intercircuit publication rate differences in judicial opinions in which “underdogs” were appellants. Federal district court judges were also significantly more likely to publish opinions featuring “upperdog” parties as well as opinions that met official circuit guidelines, and in jurisdictions where the court of appeals publish heavily (Swenson 2004). Wasby’s critique of Songer’s and his colleagues’ studies led him to conclude that we do not know “whether published cases are representative of . . . federal court of appeals cases” (Wasby 2001:331).

There is limited empirical literature concerning possible differences between published and unpublished opinions utilizing attitudinal theory. Songer and Sheehan (1992) found that the party of the appointing president was an important predictor of appellate judges’ rulings in both published and unpublished opinions and that there were few differences in judges’ attitudinal influences in published and unpublished appellate judge’s decisions. When Rowland and Carp (1996) compared political influences on judges’ decisions in published and unpublished district court decisions, they reached two general conclusions. First, in almost all instances, judges’ decisions in published cases were more liberal than judges’ decisions in unpublished cases. This was true for all policy areas they studied, and is
consistent with Donohue and Siegelman’s (1989) findings in the area of employment discrimination law. Judges’ decisions were more liberal in published opinions, even for judges appointed by conservative presidents. Second, more often than not, presidential appointment effects were greater in published opinions than in unpublished opinions (i.e., the decisions of Republican- and Democrat-appointed judges diverged more in published than in unpublished opinions).

A few scholars have investigated the concern that limited publication rules are susceptible to exploitation and manipulation by judges seeking to advance their policy preferences consistent with the attitudinal model. Wasby’s (2001, 2004) work on publication practices in the court of appeals leads him to dismiss complaints that federal appellate judges deliberately “hide” opinions that are inconsistent with other circuit opinions or poorly reasoned. Likewise, Law (2006) finds no evidence to support the contention that judges exploit nonpublication to “hide” ideologically-driven decisions. In their study of the publication of court of appeals decisions in unfair labor practice cases, Merritt and Brudney (2001) rejected the hypothesis that panels with more Democratic appointees would demonstrate a tendency to publish pro-union decisions. However, Democratic appointees did tend to favor relief in published Ninth Circuit asylum cases, supporting the contention that some judges attempt to influence precedent by favoring publication of cases congruent with their own ideological preferences (Law 2006). At the district court level, Swenson (2004) found no evidence that judges’ ideological preferences (measured by appointing president ideology) influenced publication decisions.

Political ideology remains an important predictor of judges’ decisions. However, research utilizing the attitudinal model has reached opposing conclusions concerning whether the influence of judges’ policy preferences were the same in published and unpublished opinions, and only one study has provided evidence that federal appeals court judges make use of limited publication rules to steer the influence of precedent in a particular ideological direction. The contradictions found in previous research may be based on the limitations of the studies themselves.

The best method of obtaining a representative sample is to examine federal courthouse records (Rowland & Carp 1996; Ashenfelter et al. 1995). Since this method is time consuming and expensive, researchers have adopted several strategies. Most scholars have chosen to geographically limit the scope of the opinions utilized (Reynolds & Richman 1981; Carp & Rowland 1983; Songer et al. 1989; Songer & Sheehan 1992; Rowland & Carp
to at most three circuit courts and two district courts. The importance of this geographic limitation is supported by Songer and Sheehan’s (1992) findings of intercircuit publication rate differences and Vestal’s (1966) and Siegelman and Donohue’s (1990) conclusions that the probability of publication varies significantly across district court jurisdictions. Alternatively, many scholars have chosen to focus on a particular type of case or area of law (Donohue & Siegelman 1989; Ringquist & Emmert 1999; Merritt & Brudney 2001) over a very short period of time (usually one to three years). Law’s (2006) study combined these two approaches and further narrowed the focus to a particular type of case within one circuit. Hannon’s (2001) study was based on an examination of unpublished decisions in the Westlaw legal database—a database that does not contain all or a random sample of unpublished decisions. Similarly, Songer (1988) and Swenson (2004) rely on Westlaw and Lexis to locate court of appeals decisions, from which they draw inferences about the district court opinions. Since only about 10 to 20 percent of district court opinions (published and unpublished) are appealed any given year (Federal Judicial Center 2005) and the decision to appeal is made by the parties involved, these studies cannot be considered as drawn from a random sample.

This study addresses the limitations of previous research since it is based on an institutionally, geographically, and temporally diverse population of federal court opinions. Our approach differs from previous research in that we studied litigation brought against a particular agency. Although this approach most closely resembles other scholars’ choices to limit their study to a particular area of the law, our study of Forest Service land management litigation includes cases in the categories of environmental, administrative, and constitutional law. Moreover, the data include opinions from more than 40 district courts and all 12 of the circuit courts over a 14-year period. Also, as described in detail in the methods section, our study represents the universe of these cases since documents were located from a variety of sources, including the best-known method for achieving a representative sample—federal courthouse records.

IV. METHODS

A. Cases

This research was part of a larger study based on the same case population and the methods reported here are in part adapted from Keele et al. (2006).
The data for this study were comprised of all federal court cases filed from January 1, 1989, to December 31, 2002, in which the U.S. Forest Service was a defendant in a lawsuit challenging a land management decision. We included all cases in which the plaintiff (1) argued that a Forest Service decision affecting the use, classification, or allocation of a resource violated the law, and (2) sought a court order directing the Forest Service to change its management decision. We did not analyze cases in which the following obtained:

- The plaintiff’s lawsuit requested only monetary compensation, such as U.S. federal claims court cases adjudicating the payment or terms of timber contracts;
- The plaintiff disputed only the federal government’s ownership of the land in a national forest or grassland, such as quiet title actions;
- Forest Service employees challenged employment decisions;
- The plaintiff’s lawsuit was based solely on a violation of a state law;
- The lawsuit’s purpose was only to gain access to information or meetings, such as cases based on the Freedom of Information Act or the Federal Advisory Committee Act; and
- The Forest Service did not have the discretion to make the final management decision, as when the Forest Service made recommendations to the Federal Energy Regulatory Commission (FERC) about licensing a FERC project located in a national forest, but FERC retained decision-making authority.

Locating cases that met our criteria was difficult. No one, including the Forest Service and the USDA Office of General Counsel (OGC), has a list of all Forest Service cases during this period, and the data required cannot be generated exclusively through the electronic legal databases. Nor can a list be generated by physically visiting the court clerk offices in each of the nation’s 94 district courts and its 12 courts of appeals, since many of the court records for this time period have been moved to National Archives and Records Administration Centers. To address this problem, we utilized a three-step cross-checking methodology.

First, the National Litigation Coordinator, who works in the Forest Service’s Ecosystem Management Coordination Office, provided us with a list of all the cases known to his office. Second, we used three electronic legal databases to add cases to this list. Two of these electronic legal databases, Westlaw® and Lexis-Nexis®, contain legal opinions from all published cases and a few unpublished cases during the study’s period. We searched these
databases using search terms such as “Forest Service” and “national forest.” The third legal database, Public Access to Courts Electronic Resources® (PACER®), contains information by court jurisdiction on all published and unpublished cases filed in U.S. district courts and U.S. courts of appeals. We searched PACER’s records for cases in which the Forest Service was a defendant and eliminated cases that did not meet our criteria. Third, the National Litigation Coordinator asked Forest Service and OGC employees to review the list for completeness and notify us of missing cases. Although this methodology does not ensure that we located every case that met our criteria, it utilized the best resources available and represents the most complete list of national forest management cases yet assembled.

Two documents were analyzed for most cases: (1) the docket sheet, and (2) one of the following: (a) for cases decided by the court, the judicial opinion, (b) for settled cases, the court-approved settlement, or (c) for cases withdrawn by one or both parties, the notice of withdrawal. The docket sheet contains the name of the judge and the case’s procedural history; however, it does not contain information about the purpose of the lawsuit. To understand the purpose of the suit and thus the nature of the judge’s decision, we needed the court’s final decision, settlement agreement, withdrawal notice, or other documents. We obtained the majority of the docket sheets through PACER; we located the remaining docket sheets directly from district court and court of appeals court clerks. We obtained copies of documents for published cases and some unpublished cases from Westlaw and Lexis-Nexis. The Forest Service’s litigation coordinator provided us with documents for some unpublished cases, and we obtained copies of other unpublished opinion from the court clerks. We were unable to obtain complete documentation for some cases because case folders were archived at the National Archives and Records Administration (NARA) facilities, and the cost of obtaining further documentation was prohibitive.

We identified 729 completed legal challenges to Forest Service land management during the 14 years examined. Twenty-six (3.6 percent) of the cases were withdrawn by the plaintiffs before judges made decisions on the cases’ merits. One-hundred-twenty-eight (17.6 percent) cases settled.1 Since there is little previous research utilizing the attitudinal model to explain settlements (some studies do exist; see Ashenfelter et al. 1995) or

1We coded the case a “settlement” if the parties agreed to a court-ordered stipulated agreement to settle their dispute.
withdrawals, we omitted these cases from analysis. We only analyzed judges’ opinions on the merits of the case in this study. Researchers have also only used the attitudinal model to explain life-tenured federal judges appointed by the president pursuant to Article III of the U.S. Constitution, thus we omitted 62 magistrate judges’ opinions from further analysis.

The final outcome on the case’s merits was decided by a federal judge or panel of judges in 513 (70.4 percent) cases. We were unable to obtain complete documentation for 32 (5.6 percent) of the cases decided by a judge or panel of judges because of the prohibitive cost of obtaining these case folders from NARA. Since the nature of the judges’ decision was unknown in these cases, they were omitted from this study. Litigants appealed 257 (44.7 percent) of the 575 cases decided by a U.S. district court judge to the U.S. courts of appeals. Twenty-eight of these appeals were procedurally terminated without judicial action and were omitted from our analysis of court of appeals judges’ opinions. We also removed consolidated cases from our analysis. There were 24 instances of one or more cases that were consolidated at the district court level, and one instance where three cases were consolidated at the court of appeals level. This resulted in a total of 28 cases removed; however, only two of these cases were not included in the categories already omitted from analysis. Thus, the data utilized in this research were comprised of 479 Forest Service land management district court cases decided by one judge and 227 court of appeals cases decided by a panel of three judges.

B. Judges

We read and coded the documents for each case. For cases that were appealed to the court of appeals, we read and coded these documents at each court level. We used the judges’ opinions as the unit of analysis. For each case, we recorded the identity of the district court judge and for those cases that were appealed, the identity of the three judges on the court of appeals panel. We coded each judge’s name, court level, political ideology, whether the opinion was published or unpublished, and the judge’s decision. We categorized the opinions based on whether a judge’s opinion was published. We coded each judge’s opinion in each case as a binary variable of 1 = published opinion and 0 = unpublished opinion.

1. Judge’s Decision

Under conventional practice in judicial behavior research, the ideological direction of a case outcome is defined in terms of the party favored by it
(Spaeth 1997). In environmental law studies, liberal rules benefit parties seeking greater environmental protection (Kovacic 1991; Revesz 1997; Klein 2002). We adopted these procedures and coded the dependent variable, judge’s decision, as 1 if the judge’s opinion was pro-environment (liberal) and 0 if it was not (conservative). We used the purpose of the lawsuit and the case’s procedural history of court decisions to determine whether the judge’s decision was conservative or liberal. We classified each case’s purpose as either for less resource use (more protection) or for greater resource use. If the purpose of the suit was less resource use, we coded the judge’s decision in favor of the plaintiff as liberal; if the judge’s decision was against the plaintiff, we coded his or her decision as conservative. If the purpose of the suit was greater resource use, we coded the judge’s decision in favor of the plaintiff as conservative; if the judge’s decision was against the plaintiff, we coded the decision as liberal. For example, if a recreation outfitter brought a lawsuit to prevent the Forest Service from conducting a timber sale in an area used by the outfitter, we classified the purpose of the lawsuit as “less resource use” and if the plaintiff won, the judge’s decision was coded as liberal. If a recreation outfitter brought a lawsuit to prevent the Forest Service from decreasing the number of special-use permits available to outfitters, we classified the purpose of the lawsuit as “greater resource use” and if the plaintiff won, the judge’s decision was coded as conservative.

2. Judge’s Ideology

We followed the majority of judicial behavior researchers’ methodology and used Tate’s (1981) definition of the attitudinal model that judges’ decisions are exclusively a function of judges’ attitudes. Judges’ attitudes are defined by their political ideology (Songer 1982; Sheehan et al. 1992), which is typically measured along a conservative (Republican) to liberal (Democrat) continuum. Since direct measures of justices’ ideological preferences do not exist, scholars commonly employ the ideology of the appointing president as an indicator of judicial ideology. Underlying this perspective is the expectation that presidents of the same party often vary in terms of their position along the liberal to conservative continuum and that presidents will appoint federal judges who hold similar ideological predispositions. Support for this assertion comes from studies on all three levels of the federal courts, which have found a relationship between judicial behavior and appointing president (Tate 1981; Carp & Rowland 1983; Songer & Davis 1990).

We measured the appointing president’s political ideology in three ways (see Table 1). First, we created the binary variable “appointing
president party” and we coded the political party of the appointing president as 0 if Republican (conservative) and 1 if Democrat (liberal). Second, we created the scale variable “appointing president score” from the Poole (W-Nominate webpage 2006) common space ideology score of the appointing president. The presidential ideology scores range from −1 (extremely liberal) to +1 (extremely conservative). Poole and Rosenthal (1997) scaled the roll-call votes of congressmen and Poole (1998) extended this procedure to provide common space scores for presidents. Poole derived each president’s score from the “CQ Presidential Support Roll Calls” and they are treated like any other member of the House and Senate for the purposes of fitting them into the common space (Poole & McCarty 1995). Third, we created an ordinal variable “appointing president rank” and coded the rank of the president based on the Poole (2005) common space ideology scores for the 10 presidents (Eisenhower through G. W. Bush) who appointed the judges in this study. For example, former President Reagan’s ideological score was the most conservative (0.749) and was assigned the rank of 1. Former President Carter’s ideological score was the most liberal (−0.663) and was assigned the rank of 10.

3. Judge’s Court Level

Decisions of the Supreme Court have received close attention by attitudinal scholars of judicial behavior, but we know less about the decision-making processes and policy implications of decisions made by federal appellate
courts and federal district courts. In general, the attitudinal model is seen as most powerful in explaining and predicting the behavior of Supreme Court Justices. Although opportunities for Supreme Court Justices to promote their policy preferences abound and disincentives are few, the literature suggests the same may not be true for lower court judges. Since researchers have pointed out several differences in the independence of district courts and court of appeals, we separated opinions by district court and court of appeals judges. We coded the court level as a binary variable where 0 = district court judge opinion and 1 = court of appeals judge opinion.

4. Judge’s Opinion Selection

Although judges are randomly assigned cases in both district courts and courts of appeals, this study only examines U.S. Forest Service land management litigation. Thus, the judges who heard these cases can no longer be considered a random sample of judges. Furthermore, the data are not comprised of independent observations. At the district court level, 479 opinions were issued by only 173 different judges and at the court of appeals level, 681 opinions were issued by only 184 different judges. Thus, many judges issued more than one opinion. To resolve this nonindependent observation problem and not bias the results of the attitudinal model, we randomly selected one opinion from each judge for each court level. To account for institutional factors affecting judges’ decision making and to understand whether judges’ decisions differ between published and unpublished opinions, we first separated the data by court level and then we separated the data into published and unpublished opinions. Thus, we randomly selected one judge’s opinion from each database: (1) district court published opinions, (2) district court unpublished opinions, (3) court of appeals published opinions, and (4) court of appeals unpublished opinions. If a judge issued both an unpublished and published opinion for a court level, we could have selected one of his or her opinions for use in the unpublished data set and one of the judge’s opinions for use in the published data set for that court level.

5. Judicial Opinion Analyses

We examined three measures of the independent variable judicial political ideology: (1) appointing president party, (2) appointing president rank, and (3) appointing president score in relation to the dependent variable, judge’s decision. First, we used descriptive statistics to identify patterns of ideological
voting in published and unpublished opinions. Second, we tested the three different measures of judicial political ideology for a significant relationship with the judge’s decision in published and unpublished opinions. An appropriate statistical method was chosen for each of the three independent variables with an alpha level of 0.05. We utilized chi-square tests to determine if the binary independent variable “appointing president party” was significantly associated with the dependent variable “judge’s decision.” Chi-square tests determine whether two variables are statistically independent and evaluate “whether or not . . . differences between the expected and observed frequencies could have arisen by chance” (Reynolds 1984:15). Somer’s $d$ provided a measure of association for the ordinal independent variable “appointing president rank” and detected whether it was statistically associated with the dependent variable “judge’s decision” (Reynolds 1984). We used an independent sample $t$ test to evaluate whether the mean value of the continuous scale independent variable “appointing president score” differed significantly between judge’s decisions that were conservative and those that were liberal (Reynolds 1984). Diagnostic tests were performed and confirmed that the data meet the assumption of normality.

V. Results

Forest Service land management litigation initiated from 1989 to 2002 yielded 1,160 opinions by federal judges on the merits of the case. Of these, 510 (44.0 percent) were published and 650 (56.0 percent) were unpublished. There were 479 (41.3 percent) cases and corresponding opinions by district court judges, of which 127 (26.5 percent) were published and 352 (73.5 percent) were unpublished. Court of appeals judges issued 681 (58.7 percent) opinions in 227 cases, of which 383 (56.2 percent) were published and 298 (43.8 percent) were unpublished.

We selected one judicial opinion from each judge who decided a case from the four data sets: (1) district court unpublished opinions, (2) district court published opinions, (3) court of appeal unpublished opinions, and (4) court of appeal published opinions. Selection of opinions utilized for analyses resulted in: (1) 139 unpublished district court judge opinions, (2) 86 published district court judge opinions, (3) 121 unpublished court of appeals judge opinions, and (4) 145 published court of appeals judge opinions.
A. District Court Judge Opinions

1. Descriptive Analysis

Overall, judges made more conservative than liberal decisions in both published (47) and unpublished (74) opinions (Table 2). Judges appointed by Republican presidents issued more published (50) and unpublished (81) opinions than judges appointed by Democrat presidents. Judges appointed by Republican presidents made the expected conservative decision in 31 (62.0 percent) of their published opinions, but only 40 (49.4 percent) of their decisions were conservative in unpublished opinions. Judges appointed by Democrat presidents made the expected liberal decision in 20 (55.6 percent) of their published opinions, but only 24 (41.4 percent) of their decisions were liberal in unpublished opinions. Judges appointed by the most conservatively ranked president, Reagan, made the expected conservative decision in 17 (56.7 percent) of their published opinions; however, they made liberal decisions in 19 (54.3 percent) of their unpublished opinions.

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| Appointing President (Party-Rank) | Published Opinions | | | Unpublished Opinions | | |
|---|---|---|---|---|---|
| | Conservative Decision | Liberal Decision | Total | Conservative Decision | Liberal Decision | Total |
| Reagan (R-1) | 17 | 13 | 30 | 16 | 19 | 35 |
| GW Bush (R-2) | 0 | 0 | 0 | 2 | 5 | 7 |
| GH Bush (R-3) | 8 | 5 | 13 | 13 | 13 | 26 |
| Ford (R-4) | 1 | 0 | 1 | 1 | 1 | 2 |
| Nixon (R-5) | 5 | 1 | 6 | 7 | 3 | 10 |
| Eisenhower (R-6) | 0 | 0 | 0 | 1 | 0 | 1 |
| Johnson (D-7) | 1 | 1 | 2 | 1 | 1 | 2 |
| Clinton (D-8) | 9 | 12 | 21 | 22 | 11 | 33 |
| Kennedy (D-9) | 0 | 0 | 0 | 0 | 0 | 0 |
| Carter (D-10) | 6 | 7 | 13 | 11 | 12 | 23 |
| Republican appointing presidents’ total | 31 | 19 | 50 | 40 | 41 | 81 |
| Democrat appointing presidents’ total | 16 | 20 | 36 | 34 | 24 | 58 |
| Total number of decisions | 47 | 39 | 86 | 74 | 65 | 139 |
Likewise, judges appointed by Clinton made the expected liberal decision in 12 (57.1 percent) of their published decisions, but they made conservative decisions in 22 (66.7 percent) of their unpublished opinions. Thus, judges made a higher percentage of decisions that agreed with their ideological preferences in published opinions, and a higher percentage of decisions that disagreed with their ideological preferences in unpublished opinions.

2. Statistical Analysis

We tested three independent variables measuring judge ideology (appointing president party, appointing president rank, and appointing president score) for a significant relationship with the dependent variable, judge’s decision, for both published and unpublished district court opinions (Table 3). All three independent variables failed to reveal a significant relationship between judge decisions in published and unpublished opinions. This indicates that, subject to limitations on inferences imposed by sample size, district court judges did not follow their ideological preferences in either the published or unpublished opinions they issued.

B. Court of Appeals Judge Opinions

1. Descriptive Analysis

Overall, judges made slightly more conservative than liberal decisions in both published (74) and unpublished (68) opinions (Table 4). The
number of published and unpublished opinions was almost evenly split
between judges appointed by Republican presidents (73 and 72, respec-
tively) and judges appointed by Democrat presidents (59 and 62, respec-
tively). Judges appointed by Republican presidents made the expected
conservative decision in 50 (68.5 percent) of their published opinions and
in 36 (61.0 percent) of their unpublished opinions. Judges appointed by
Democrat presidents made the expected liberal decision in 48 (66.7
percent) of their published opinions, but only 30 (48.4 percent) of their
decisions were liberal in unpublished opinions. Judges appointed by
Democrat presidents made the expected liberal decision in 48 (66.7
percent) of their published opinions, but only 30 (48.4 percent) of their
decisions were liberal in unpublished opinions. Judges appointed by the
most conservatively ranked president, Reagan, made the expected conser-
vative decision in 29 (72.5 percent) of their published opinions and in 17
(63.0 percent) of their unpublished opinions. Likewise, judges appointed
by Clinton made the expected liberal decision in 17 (58.6 percent) of their
published opinions and in 15 (51.7 percent) of their unpublished opin-
ions. Thus, judges made a higher percentage of decisions that agreed with
their ideological preferences in published opinions than in unpublished
opinions.

Table 4: Number of Judges’ Conservative and Liberal Decisions in Court of
Appeals Published and Unpublished Opinions by Appointing President
Party and Appointing President Rank (Where 1 = Most Conservative and
10 = Most Liberal)

<table>
<thead>
<tr>
<th>Appointing President (Party-Rank)</th>
<th>Published Opinions</th>
<th>Unpublished Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Conservative</td>
<td>Liberal</td>
</tr>
<tr>
<td>Reagan (R-1)</td>
<td>29</td>
<td>11</td>
</tr>
<tr>
<td>GW Bush (R-2)</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>GH Bush (R-3)</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>Ford (R-4)</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Nixon (R-5)</td>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td>Eisenhower (R-6)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Johnson (D-7)</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Clinton (D-8)</td>
<td>12</td>
<td>17</td>
</tr>
<tr>
<td>Kennedy (D-9)</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Carter (D-10)</td>
<td>10</td>
<td>21</td>
</tr>
<tr>
<td>Republican appointing</td>
<td>50</td>
<td>23</td>
</tr>
<tr>
<td>presidents’ total</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Democrat appointing presidents’</td>
<td>24</td>
<td>48</td>
</tr>
<tr>
<td>total</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total number of decisions</td>
<td>74</td>
<td>71</td>
</tr>
</tbody>
</table>
2. Statistical Analysis

We tested three independent variables measuring judge ideology (appointing president party, appointing president rank, and appointing president score) for a significant relationship with the dependent variable, judge’s decision, for both published and unpublished court of appeals opinions (Table 5). All three independent variables had a significant relationship with the judge’s decision in published opinions. None of the independent variables were significantly associated with the judge’s decision in unpublished opinions. These results suggest that, again subject to sample size limitations, judges do vote their ideology in published opinions, but not in unpublished opinions, and that judges are more likely to follow their preferences in published opinions. If one combines the district court and court of appeals results, judges voted with their president’s party’s ideology in 149 of 231 published opinions (64.5 percent) and in 130 of 260 unpublished opinions (50 percent), a highly statistically significant difference ($p = 0.001$).

VI. Discussion

Previous studies reached opposing conclusions concerning whether the influence of judges’ policy preferences were the same in published and unpublished opinions. This study employed the attitudinal model of judicial behavior to detect differences between published and unpublished opinions in district court and court of appeals judges’ decisions in Forest Service land management cases initiated from 1989 to 2002. Our study addresses many of
the limitations of previous research since the data are comprised of an institutionally, geographically, and temporally diverse population of federal court opinions. However, our approach, studying litigation brought against a particular federal agency, may have its own limits to generalization. Since the federal government is the quintessential repeat-player in federal litigation and standards for judicial review of an administrative agency are generally deferential (see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) and *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984)), judges may have been constrained from following their ideology by legal rules. These factors may help explain our concurrence and contradiction with previous studies in the following discussion.

As previous research suggested, different institutional constraints between district court and court of appeals judges affected the performance of the attitudinal model in this study. Ideology was not significantly associated with district court judges’ decisions in either published or unpublished opinions. However, ideology was significantly associated with court of appeals judges’ decisions in published opinions. Researchers have shown that lower court judges tend to comply with and otherwise adjust their decision making in response to precedents from higher courts (Gruhl 1980; Stidham & Carp 1982; Songer & Sheehan 1990; Songer & Haire 1992). The position of the district courts at the base of the federal judicial hierarchy imposes constraints on these judges’ decisions in the form of precedent from both the court of appeals and the Supreme Court (Segal & Spaeth 1996). About 20 percent of all district court cases are appealed in any given year (Rowland & Carp 1996), but fewer than 1 percent of all court of appeals cases ever reach the Supreme Court (Davis & Songer 1989). Howard’s (1981:8) survey of circuit court litigation led him to conclude that “Courts of Appeals are mini-Supreme Courts in the vast majority of their cases.” Thus, the results of this study support researchers’ conclusions that there are less institutional constraints on court of appeals judges than on district court judges, leaving appellate jurists more freedom to follow their ideological preferences.

Consistent with Rowland and Carp (1996), descriptive analysis revealed that district court judges did make a higher percentage of decisions that agreed with their ideological preferences in published opinions, and a higher percentage of decisions that disagreed with their ideological preferences in unpublished opinions. These results offer some support of Law’s (2006:219) conclusion that “if anything judges are less likely to vote their ideological preferences in unpublished cases than in precedential
decisions.” However, similar to Swenson (2004), this study found no statistically significant relationship between ideology and district court judges’ decisions in either their published or unpublished opinions. This suggests there is no difference between published and unpublished opinions issued by district court judges and that these judges’ did not follow their ideological preferences. Therefore, there may be little concern with scholars continuing to rely on district court published opinions to make inferences about ideological effects on the population as a whole.

At the court of appeals level, this study contradicts Songer and Sheehan’s (1992) conclusion that there were few differences in judges’ attitudinal influences in published and unpublished opinions. All three measures of the attitudinal model independent variables, judicial ideology, had a statistically significant relationship with the judges’ decision in court of appeals published opinions, whereas none of the attitudinal model independent variables were a significant predictor of judges’ decisions in court of appeals unpublished opinions. These results indicate that the effects of ideological preferences may be different in published and unpublished opinions issued by appellate judges. Similar to Law (2006), results indicate that some judges may attempt to influence precedent by favoring publication of cases that agree with their ideological preferences. Likewise, our results concur with several scholars’ (Merritt & Brudney 2001; Swenson 2004; Wasby 2001, 2004; Law 2006) findings that there is no evidence to support the contention that judges exploit nonpublication to hide ideologically-driven decisions. Since this research indicates that published opinions do not accurately describe the motivational forces behind all judicial decisions, scholars should use caution in drawing conclusions about ideological effects from examination of published court of appeals opinions alone.

VII. Conclusion

The findings of this study have implications for researchers utilizing theories of judicial decision making. The attitudinal model failed to perform at the district court level in both published and unpublished opinions, most likely due to the institutional constraints on these judges. Although there was no difference in ideological effects between published and unpublished district court opinions, the vast majority of these opinions remain unpublished and the effect of this large population of opinions on other models of judicial behavior (strategic, institutionalism, etc.) remains unknown. Our results
indicate that more research on differences between district court judges’ published and unpublished opinions, especially utilizing models other than the attitudinal, is necessary to determine whether published opinions can be considered a representative sample of all opinions. Of particular importance for continued research utilizing federal agency cases may be the legal model.

At the court of appeals level, the attitudinal model only performed in published opinions. Since most other models of judicial behavior include ideology, albeit in modified forms, as a predictor of judicial decisions, our results suggest scholars’ conclusions would be affected by their choices to include (or not) unpublished opinions in their research. It is unclear from this research whether models not based on ideology, such as the legal model or precedential impact studies, would be affected by the sole use of published opinions, but certainly this may be an important consideration for future research involving federal agency litigants. As other scholars have begun to investigate, the decision to publish may itself be a strategic decision (Merritt & Brudney 2001; Swenson 2004; Law 2006). Our results for court of appeals judges’ decisions concur with many other scholars’ (Atkins 1992; Ringquist & Emmert 1999; Rowland & Carp 1996; Benesh 2001; Hannon 2001) conclusions that in solely examining published cases we are investigating an unrepresentative subset of decisions that, in turn, may seriously compromise the validity of conclusions regarding judicial behavior.

Past scholars’ reliance on published opinions is certainly understandable given the historic inaccessibility, no-citation rules, and nonprecedential value of unpublished opinions. However, these limitations and the role of unpublished opinions have changed dramatically in recent years. Today, many unpublished opinions are available through electronic legal databases, such as Westlaw and Lexis, and scholars agree that over time even more unpublished opinions will become available through these sources (Mead 2001; Gant 2006). Moreover, the E-Government Act of 2002 requires that all opinions, published and unpublished, be posted on every federal court’s own website (PACER). Perhaps most importantly, Federal Rule of Appellate Procedure 32.1 designates unpublished opinions as citable in all circuits, starting with opinions rendered in January 2007 (Gant 2006). Although the degree of precedential authority granted to unpublished opinions remains uncertain, their inclusion in arguments will necessarily impact the calculus of judicial decision making. Given these improvements in accessibility, the expanded use of unpublished opinions in the courtroom, and the many studies reporting that published opinions are not representative of all
opinions, future scholars should not continue to ignore the rich source of information available in unpublished opinions when drawing conclusions regarding judicial behavior.

REFERENCES


