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THE FEDERAL DISTRICT JUDGE AND THE DECISION TO PUBLISH: CAUTIOUS CONTRIBUTOR TO PRECEDENT OR UNCONSTRAINED POLICY ADVOCATE?

DISSERTATION

Presented in Partial Fulfillment of the Requirements for the Degree Doctor of Philosophy in the Graduate School of the Ohio State University

By
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****

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Federal district court judges decide to publish just one or two out of every ten opinions that they write. Only published opinions are readily available to persons beyond the parties to the lawsuit, only published opinions create public policy by establishing precedent that the legal community and the public will rely on. Is it possible to explain why judges publish opinions in some cases and not others? Prior studies of federal district court publication have found important differences between the pools of published and unpublished opinions. I take a slightly different tack and test for the influence of several legal and extra-legal factors on the judges' decisions to publish. This study thus contributes to the literature on judicial decision making by examining the goals operative when judges make publication decisions, an important decision left largely to individual judges' complete discretion. Specifically, I test for the influence of the one legal constraint on publication, the official publication guidelines. I also test for the influences of presidential appointment, judicial career experience, and powerful, well-placed litigants and counsel on federal district judges' publication decisions.

For the independent variables, I examined a random sample of all U.S. court of appeals opinions available on LEXIS which were appealed from the federal district courts in 1996. From these I gleaned information about published and unpublished
decisions made by district court judges in 1996. I also consulted several other sources such as the *Almanac of the Federal Judiciary* and *Martindale-Hubbell Law Directory*. The dependent variable is whether the district court opinion is available on LEXIS. Several multivariate models of the district judge's publication decision are tested using maximum likelihood logit procedures.

I find that federal district court judges seem likely to publish opinions that meet the official publication guidelines, that were decided in a liberal direction, and that feature powerful, well-placed litigants and counsel. I also find some evidence that judges with particular career backgrounds are influenced by this background in deciding which opinions to publish. There is not evidence that the appointing presidents' ideological preferences influence their appointees' publication decisions.

One implication of this study is that district court judges use publication as a means of pursuing a goal central to many judges, achieving legal accuracy and clarity. Other goals that are often attributed to judges, particularly promoting their policy preferences or those of their appointing presidents, may indeed be less central. Another implication of this study is that the three traditional models of judicial decision making, the attitudinal, strategic and legal models, are less than satisfactory in explaining the publication decision. Instead, a model recognizing that judges' behavior is motivated by a wide range of goals (the multiple-goal-based framework) is the most useful in modeling publication by federal district court judges.
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I also thank those fellow graduate students who have been supportive of this project. These include Linda Trautman, and especially Keith Eakins, who has persisted in his encouragement and has served as an example. I also thank Kevin Townsend, a graduate student in Statistics who unselfishly offered his time and expertise even though no longer employed to do so as a research assistant in the Political Science Department.
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CHAPTER I

INTRODUCTION

1.1 PROLOGUE

The federal district court judge decides the outcome of a case; the judge settles a
dispute between parties. Then, like the Supreme Court, the judge often writes an opinion
explaining the decision and setting forth legal rules. But that is not the last important
decision the judge must make concerning the opinion; should this opinion be submitted
for publication? If the judge does not choose to publish the opinion, the opinion will do
no more than explain to the parties (and, if the case is appealed, to the court of appeals)
why one won and the other lost; if the judge does choose to publish, however, she has
created public policy by establishing precedent that others will rely on.

How does the judge decide which decisions shall be published and which will
remain essentially private? This is an important question, and not simply because it
underlies normative and descriptive questions about the development of legal precedent
by United States courts. Analysis of the judge's decision process concerning publication
provides a unique window into the motives of judges. Other decisions that judges make,
decisions on the merits of cases and decisions on whether to grant discretionary review,
have yielded considerable insight into motivations. Compared to these types of decisions, the district court judge's decision to publish is unconstrained by external rules, oversight, or pressure from fellow jurists.

Selective publication is the rule in the federal district courts as it is in the circuit courts of appeal, where it has been studied at some length. Although there are formal rules governing publication, they are quite broad. The district court judge has wide discretion in deciding to publish her opinion, unmatched even by that of the circuit judge who must, at minimum, gain the support of the majority participating in the decision.¹

Since district judges act without much external constraint in choosing what to publish, studying the publication decision allows the researcher to tap pure judicial motives. Do judges try to follow the legalistic factors provided by the formal publication guidelines? Do they choose to publish opinions that they decide in accordance with their policy preferences? Do they primarily publish opinions which will satisfy audiences that they care about? As these questions illustrate, the behavior of district judges, like other political actors, is driven by a variety of potential motives. Publication is an opportunity to advance various goals a judge might have, be they impacting the direction of legal policy, improving her standing with court audiences, advancing her career, or simply improving the quality of the judge's life on and off the federal district court (see Baum 1997).

¹ Increasingly, circuit courts of appeal are requiring on-line publication of all written appellate decisions.
This study will primarily use statistical analysis to probe the nature of the federal
district judge's publication decision. The dependent variable is whether an opinion is
published or not. This will be tested against a variety of variables concerning the
background of the judge and characteristics of the lawsuit.

1.2 THE PUBLICATION PROCESS

It is important to have at least a rudimentary understanding of the opinion
publication process in order to fully appreciate the importance of my research project,
and thus I will proceed with a description. The publication process operates as follows.
Federal district court judges often issue written opinions when they rule on the ultimate
disposition of a case after a bench trial, or rule on motions, dispositive or otherwise.
This opinion is available to the litigants and is a public record, as part of the case file.
Only about 10% of these written opinions are published so that the public and legal
community have ready access to them, however (Vestal 1970). A more recent study
reports that about 15% of federal district court cases are published in one form or
another, including on computerized legal research databases (LEXIS or WESTLAW)
(Siegelman and Donohue 1990). My research for this dissertation reveals that 18.3% of

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2 More specifically, this project will consider an opinion to be published if it appears on LEXIS.
3 Occasionally, judges will rule on motions without issuing written opinions. It is unlikely, however, that the
judge will not write an opinion on an important matter that is disputed by the parties. It is my intention for
this project to sample district court decisions that are of a nature that they would be set forth in a written
opinion.
4 The F.Supp. and the F.R.D. do not even report the outcome of unpublished district court decisions. This is
different than the practice of the Federal Reporter, which publishes the outcome of unpublished opinions of
the Circuit Courts of Appeal in tabular form.
federal district court cases decided in 1996 were published on LEXIS. Thus, though the advent of computerized legal research databases has expanded the availability of district court opinions, the bulk of the output of the federal district courts remains unpublished.

Opinions are published in volumes of the Federal Supplement (F. Supp.) and the Federal Rules of Decision (F.R.D.), both compiled by a private company, West Publishing Company. All of the cases published by West, plus an additional number of cases, also appear in loose-leaf form topical compilations called "services," such as those published by Commerce Clearinghouse and the Bureau of National Affairs. Vestal (1966b) found that of all those district court cases found in reporters, 75% were in a West publication only, with an additional 25% in a loose-leaf service. Most inclusive of all are West's computerized legal research database WESTLAW, and LEXIS, a service provided by Reed Elsevier, Inc.

With a near-monopoly on publication of district court opinions, the F.Supp. and F.R.D. have "semi-official status" (Vestal 1966b), a status West has assiduously maintained since it began its Federal Cases series in 1880 (Domnarski 1996). West's citation system has become so prevalent that modern competition from publishers of federal court decisions cannot be successful unless they include a case's West citation. West has a copyright interest in its citation system; thus any competitor (such as LEXIS) seeking to publish lower court decisions which wishes to refer to a case's West citation must obtain West's permission. West also invests substantial lobbying efforts (including campaign contributions) into maintaining good relations with influential members of Congress (Schmickle and Hamburger 1995). One recent example of the success of these...
efforts is the defeat of a proposed alternative public citation system developed by the Justice Department. West further fosters its own exclusivity by, for example, deleting parallel citations to non-West reporters from opinions furnished by judges. The bible of official citation styles, *A Uniform System of Citation* (1984) or the "bluebook," also perpetuates West's primacy by admonishing citation to its reporters without parallel citations to services, and citation to a service only if the opinion is not published in a West reporter. It must be noted that West would probably not be successful in maintaining its monopoly if not for its consistently excellent product.

The F.Supp. and F.R.D. are widely available to the public primarily in law libraries throughout the United States, as are loose-leaf services to a lesser degree. LEXIS and WESTLAW are restricted in availability in that they are expensive; they are thus most widely used by legal researchers with access to the resources of large institutions such as large law firms or the government. West exercises some editorial judgment in deciding to publish a district court opinion (Moire 1997; Olson 1992), though researchers of federal district courts have determined that "generally speaking" West will publish any decision sent to it by the federal judge (Rowland and Carp 1996; see also Siegelman and Donohue 1990; Carp and Rowland 1983; Vestal 1962a; Vestal 1962b). What is published on WESTLAW is more inclusive than what is published in West's paper reporters (West Publishing Co. 1994). LEXIS puts anything sent to it on-line. (Siegelman and Donohue 1990). My research for this project indicates that the content of LEXIS and WESTLAW is virtually identical. It would certainly make sense that one company would not want the reputation of being less inclusive than the other.
It is generally left to the initiative and discretion of the individual district judge (or law clerk, as judges sometimes delegate this duty to the clerk⁵) to submit his or her opinion to West and/or LEXIS for publication (Martineau 1994; Olson 1992; Vestal 1962b). West and LEXIS contact judges upon their appointment to the bench, and notify them that the company wishes to publish submitted opinions. Occasionally, the companies solicit specific opinions from judges (e.g., if the opinion appears in a competitors' publication). Also on occasion, an opinion is submitted upon request by a party to the case (almost always the winning party), whereupon the judge's permission to publish is solicited (Olson 1992; Vestal 1962b). This request is made directly to the judge's office or via the publishing company. Under either condition, the decision to submit is still ultimately approved by the judge. Some judges are more amenable to accommodating these requests than are other judges.⁶

Why is it customary that so few district court opinions are published? In large part, this is a public policy based on weighing the costs and benefits of limiting publication. In 1964 the Judicial Conference of the United States addressed the burgeoning federal court caseload and its impact on publication, and noted that the

⁵ This was the case during my own experience as a law clerk to a federal magistrate judge. The effect of law clerk influence is difficult to evaluate, and won't be attempted in this project, however. Clerks, like judges, will exercise varying degrees of care in making the decision to publish, and will be subject to many of the same influences outside of the official publication criteria. As with most studies of judicial decision making, this project will not attempt to take the skin off the process. The publication submission request made to LEXIS or West bears the name of the judge, not his or her clerk. Thus the decision to publish will be attributed to the judge.

⁶ My interviews with district judges reveal that requests by winning counsel to publish were not uncommon. Whereas some judges routinely grant these requests, others almost never do. My data are not extensive enough to get a sense of what types of litigants are more prone to making these requests. One judge, a former U.S. Attorney, opined that the U.S. government would not have the effrontery to request a judge to publish an opinion.
increasing number of published opinions was straining the resources of public and private law libraries. The Conference passed a resolution recommending that federal district court and appeals court judges limit publication to those opinions "which are of general precedential value." (Martin 1999, p.184).

Cost-benefit analysis applies to the individual judge's efforts as well. Preparing an opinion for publication is substantially more time consuming than preparing one simply for consumption by the parties to the case. Thus, a judge may feel that she must select only a few opinions for publication in order to properly allocate her own scarce resources.

The formal guidelines governing publication of district court opinions (as well as those of the circuit courts of appeal)^7 are set forth in the 1973 Advisory Council for Appellate Justice Report, which clarified the vague standard enunciated by the Judicial Conference of the United States. The Report proposes that an opinion be published if it does any one of the following: 1) "lays down a new rule of law, or alters or modifies an existing rule;" 2) "involves a legal issue of continuing public interest," rather than "general public interest of a fleeting nature;" 3) "criticizes existing law," especially calling for change by a higher court or legislature; or 4) resolves a conflict of authority and "rationalizes apparent divergencies in the way an existing rule has been applied" (Martineau 1994, p. 124).

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^7 There is no official guidance with respect to judicial submissions to on-line reporters, according to information I have received from research staff at the Federal Judicial Center. Nonetheless, my interviews with district judges did not reveal that judges feel less bound by the criteria when sending an opinion to LEXIS rather than West Publishing Co.
1.3 THE IMPORTANCE OF STUDYING PUBLICATION BY DISTRICT COURTS

The federal district courts are important political actors. Because they are trial judges, district court judges are the first line of contact with members of the public seeking access to the courts and with the members of the legal community representing them. For most federal lawsuits, this forum with the trial judge is also the final contact with the judicial system. Only 20% are appealed to the Circuit Courts of Appeal in any given year, and of these, 1990 figures indicate that only 16% are reversed (Rowland and Carp 1996). These figures combine to create an average likelihood of reversal of any given district court opinion of 3%. As a consequence, not only do district judges interface with more individuals and attorneys more often than do appellate judges, but they issue more final interpretations of the law. They also have enormous fact-finding discretion. Even if appealed, a trial judge's findings of fact are unlikely to be reversed due to the highly deferential "clearly erroneous" standard of review. Many decisions primarily based on factual conclusions are important to more than the litigants at hand in that they require a large expenditure of public money. One need only consider the orders to remedy constitutional violations in large public institutions such as schools, prisons, and mental hospitals. Final interpretations of the law have widespread effect in another manner as well: if published, they serve as precedent for future lawsuits in the same judge's district and are often adopted by jurists in other districts.
Because federal district courts are major political actors, political scientists and legal scholars have long found it fruitful to study their published output (see, e.g., Vestal 1966a and 1966b and Rowland and Carp 1996). Study of the district court judge's publication decision is also worthy of scholarly attention for several substantial reasons.

1.3.1 STUDY OF THE PUBLICATION DECISION SERVES AS CORRECTIVE TO EXISTING STUDIES

Nonpublication of opinions by federal district courts is an important phenomenon to understand precisely because most scholarly work has focused only on published opinions. If patterns in how the two vary are established, and the decision to publish is better understood, researchers will have a better idea if examining published opinions alone is adequate for their research question. Perhaps an adjustment factor can be developed for analysis of published opinions, although that is not an immediate goal of this project.

The focus of what other little research there is comparing reported and unreported district court opinions calls into question studies of district court decision making that rely on opinions in the Federal Supplement as their sole data source for judicial output. Siegelman and Donohue (1990) conclude that one cannot draw adequate conclusions about federal trial court treatment of employment discrimination cases by examining published opinions alone. The authors compared all unpublished employment discrimination cases (available via a tape compiled by the Administrative Office of the U.S. Courts) filed in a single district (the Northern District of Illinois) over a 15 year
period with those published by any source, including LEXIS and WESTLAW. The authors document that published opinions differ from those unpublished in a variety of important ways, including occupation of the plaintiff, kinds of discrimination complained of, laws alleged to have been violated, and the outcome of the litigation. Ringquist and Emmert (1999) report significant differences between published and unpublished decisions involving civil lawsuits brought by the U.S. Environmental Protection Agency. This research documents, among other things, that civil penalties in published cases are higher than those in unpublished cases.

These studies and others establish beyond contention that studying the published output of district courts is not adequate to understanding them.

1.3.2 STUDY OF THE PUBLICATION DECISION ASSISTS IN EVALUATING LEGAL INSTITUTIONS

A second, broader reason for focusing scholarly attention to the nonpublication of opinions is its impact on legal institutions: the publication decision affects the body of law and the impact of district courts' work. From a normative standpoint, nonpublication is troublesome to the orderly creation and transmission of precedent. Unless a district court opinion is published, it is not effectively precedent for other cases, but merely settles the dispute at hand. Legal decision making in the U.S. operates on precedent; like cases are decided in like manner, and a judge (and the lawyers in their briefed arguments) decide if a case is like others by comparing it with cases in the F.Supp. and other official reporters of cases. The good judge's opinion and lawyer's brief are replete with citations
to cases in the reporters. Nonpublication of any opinion with precedential value thus
distorts the judicial decision-making process. Martineau (1994) goes so far as to argue
that opinions that raise no new issue of law are important as well, because the frequency
with which issues are raised is a key indicator of the issues' importance. On a practical
level, nonpublication of worthy decisions results in confusion and uncertainty to litigants
due to inconsistencies between courts (Rowland and Carp 1996).

Nonpublication may be troublesome for a related institutional reason. Publication
is important because it is a mechanism of judicial accountability to the public. Federal
judges, who are appointed for life and can be removed from office only by impeachment,
are not directly accountable. Public observation of their output, however, helps keep
them honest and ensures that they are carrying out their duties with quality and integrity.
Two studies of state appellate courts, however, refute the notion that unpublished
opinions in fact foster irresponsibility. The studies document that Wisconsin and
California appellate courts do not attempt to hide potentially controversial or unpopular
decisions through nonpublication (Martineau 1994).

1.3.3 STUDY OF THE PUBLICATION DECISION ASSISTS IN UNDERSTANDING
JUDICIAL DECISION MAKING

Thirdly, and most central to this project, study of the publication decision is
important to the development of understanding of judicial behavior. Much research has
been conducted analyzing judicial decision making by examining the decision on the
merits of a case and the prior decision of whether to exercise discretionary jurisdiction.
Research has been conducted both at the level of individual judges' votes and by examining the decision-making process of collegial bodies as a whole. Decision-making models are developed to explain these judicial choices, data is assessed, and the models are refined in light of the data (see, e.g., George and Epstein 1992, proposing mixed attitudinal and legal model; and Epstein and Knight 1995 & 1998, refining strategic choice model of Supreme Court decision making in light of data.) Analysis of the publication decision may provide one more beam of light into the black box of judicial behavior.

1.4 OVERVIEW OF DISSERTATION

Chapter 2 will set forth the theoretical bases for including various explanatory variables in a model of the district court publication decision. This will begin with a consideration of what scholars have theorized about the broader research question of the motivations of judges, followed by discussion of the theory behind the specific hypotheses I pose to probe the broader question.

The methodological details of how each hypothesis is to be tested are set forth in Chapter 3. I explain the various sources of the data, and the manner in which I coded them. I also elaborate on the statistical methods used to test the hypotheses; in short, the strength of the relationships between the independent variables and the publication decision will be analyzed by way of multivariate and bivariate analysis.
Chapter 4 sets forth several multivariate statistical models used to test the hypotheses specified in Chapter 2. The results of the testing are set out and interpreted. When helpful to clarify the multivariate findings, bivariate analyses are included as well. Chapter 5 offers conclusions and suggestions for directions of future research.
CHAPTER 2

THEORY: RELEVANT SCHOLARSHIP AND HYPOTHESES

This chapter will set forth the theoretical bases for including various explanatory variables in a model of the district court publication decision. This will begin with a consideration of what scholars have theorized about the broader research question of the nature of judicial decisional behavior, followed by discussion of the theory behind the specific hypotheses posed to probe the broader question. After relevant scholarship is set forth for each category of independent variables, I will formulate the hypothesis or hypotheses to be tested. In total, twelve hypotheses will be posed.

2.1 THEORIES OF JUDICIAL DECISION MAKING AND THE PUBLICATION DECISION

What model of judicial decision making is most successful at describing decision making by federal district court judges? In particular, which should this project use to describe the district judge’s publication decision? This section will address the three traditional models— the attitudinal, strategic and legal— as well as a newer one, which I will call the multiple-goal-based framework. This project will borrow from all four
models to develop hypotheses about the district judge's publication decision. In Chapter 5, the findings of this project— the results of testing the hypotheses about the publication decision— will be used to evaluate the theories of judicial decision making.

The traditional model with the most currency among political scientists is the attitudinal model, which maintains that judges are unconstrained policy advocates who almost always vote with the goal of asserting their personal policy preferences (Segal and Spaeth 1993). This assumption is derived from decades of research on Supreme Court behavior analyzing justices' votes on the merits, which demonstrates consistency of votes along issue dimensions (see, e.g., Pritchett 1948; Segal and Spaeth 1993). In short, patterns of votes are assumed to reflect patterns of policy preferences.

The attitudinal model has some usefulness for this project in that it meshes with the notion that a judge's party identification or other features of the judge's background are associated with the decision to publish or not. The publication decision as modeled by this project, however, credits the judge with a wider range of goals than this.

The attitudinal model has an additional shortcoming. One property of the attitudinal model is that it leaves very little room for strategy, especially in contrast to rational choice models. The attitudinal theory assumes that judges are "naive actors who merely vote their unconstrained preferences into law" (Epstein and Knight 1995 p. 9). The model thus leaves something to be desired in explaining the publication decision, in that the publication decision has the potential to be an exercise of strategy— a power selectively used in furtherance of certain goals.
Moreover, the attitudinal model is arguably unsuitable to describe the behavior of lower court judges. Segal and Spaeth argue that what allows Supreme Court justices to behave as unconstrained policy advocates is that they are appointed for life and sit on a court of last resort. District court judges share the former attribute but not the latter. Though the predominant researchers of the federal district courts once used the attitudinal model to explain district court decision making (Carp and Rowland 1983), their position has evolved. Rowland and Carp (1996) conclude that the pure attitudinal model and its behavioral paradigm, though perhaps suited to understanding appellate court behavior, does not adequately describe the primarily fact-finding judgments of trial courts. Instead, they set forth a cognitive model of district court decision making that incorporates the findings of attitudinal data with psychological research. They argue that it is more accurate and appropriate to view attitudes as "information filters or intermediaries that influence the cognitive processes of perception, memory, and inferences" (p. 150). Attitudes serve as "cognitive shortcuts" that assist judges in making decisions especially when evidence is ambiguous or complex (p. 172).

Despite its refinement of the attitudinal model, this model specifies no special role for strategy. It is thus not entirely useful for this project in describing the publication decision. As its name indicates, the strategic model does not share this shortcoming. This model is not, however, entirely satisfactory in describing the publication decision either.

Rational choice theory is of growing importance to scholars in the field of judicial decision making, and it has spawned the strategic model. The strategic model posits that judges act strategically to further their goals, and that their interactions are structured by
institutions (Murphy 1964; Epstein and Knight 1998). Though the model theoretically leaves room for judges to advance a wide range of goals, in practice, judges are often presumed to advance only policy goals (see, e.g., Epstein and Knight 1998). Assuming the predominance of policy goals without requiring proof of judges' motives is especially a hallmark of game-theoretic formal modeling of inter-institutional (or inter-justice) interactions (see, e.g., Eskridge 1991).

The emphasis on this single goal at the expense of other goals judges may have lends the strategic model the same limitation as the attitudinal model. Aspects of the strategic model are, nonetheless, very useful in explaining the publication decision. District judges have less opportunity than Supreme Court justices to write their policy preferences into law because, as courts of mandatory jurisdiction, many cases they hear have only one correct legal outcome (Baum 1997). A district judge's vote in a given case is further constrained by the appellate review process. Thus selective publication may be one of the few opportunities a district judge has for acting on behalf of ideological or other views. These constraints, along with the formal and informal norms of publication, are the institutions structuring a district judge's strategic behavior.

The attitudinal and strategic models are two of the three classic models in the field, and are generally regarded as the best articulated of the judicial decision-making theories holding that judges are primarily influenced by extra-legal factors. Though mainly the target of "debunking" by political scientists, the third traditional model, the legal model, has considerable hold in some circles.
The legal model holds that good interpretation of the law is the primary determinant of judicial decision making because judges are constrained by the need to adhere to the doctrine of stare decisis and the dictates of statutes and constitutions. This view continues to dominate legal education. Aspects of the legal model are helpful in describing and explaining the publication decision to the extent that judges adhere to the formal publication guidelines. As with the other models, however, the emphasis on a single goal seems incomplete.

For these reasons, the three traditional models are less than satisfying in explaining judicial behavior generally, and the decision to publish in particular. The legal model plus the strategic model plus the attitudinal model, as updated with findings from political psychology, provide some perspective on examining the decision to publish, but using them as a framework ultimately becomes too confusing for the researcher.

A more satisfactory starting point for analyzing and explaining judicial behavior is provided by a model set forth in recent works of several scholars of judicial politics; a useful descriptive label for it is the multiple-goal-based framework. In essence, this framework was developed by scholars who began to demand and amass evidence and theoretic support for the assumptions underlying the strategic model (see Baum (1997) and Epstein and Knight (1998)). A model explicitly recognizing that judges have multiple goals embraces aspects of each of the three traditional models, but furnishes a fresh perspective. This framework assumes that political actors have a wide range of specifiable goals or motives, and behave or act in a manner intended to best achieve
these goals. Thus political behavior such as that of the district judge when he or she publishes or does not publish certain opinions can be explained as designed to achieve certain of the judge's goals.

Accordingly, a sensible place to start in analyzing district judges' publication decisions is to specify their goals. Baum (1994 and 1997) writes about the various goals a judge might have. District judges, like Supreme Court justices, are motivated to make good law which either reflects their policy preferences or is a high quality opinion by the standards of legal scholars. They may also seek to enhance their prestige among their reference group (other judges, lawyers, legal scholars, and political cronies), and avoid alienating friends and associates in the community in which they live. This may be an end in itself, or a means to further the goal some district judges share of promotion to the court of appeals. Many judges share a more modest goal of easing their day-to-day work life, and may similarly strive for good relations with those with whom they work regularly, such as the local U.S. Attorneys' Office and other lawyers frequently appearing before their court. Selective publication can serve as a tool for furthering many of these goals. Due to its workability, this project will primarily depend on the multiple-goal-based framework to develop hypotheses concerning the publication decision. The traditional models will be used as well where appropriate.
2.2 INDEPENDENT VARIABLES IN A MODEL OF THE PUBLICATION DECISION

This section will set forth several categories of independent variables capturing how the publication decision furthers various judicial goals. After discussing the theoretical basis behind including the independent variables, including what scholars have theorized about each subject, I will formulate specific hypotheses.

As an initial matter, I will provide a brief overview of the literature providing the foundation for the hypotheses about publication developed by this project. Relative to other areas of judicial decisional behavior, not much research by social scientists has been dedicated to publication by the federal courts. Most of it has occurred in the past fifteen years, and was initiated by Professor Donald Songer. Prior to Songer's work, publication by the federal district courts attracted the attention of legal scholars; this work was pioneered by Professor Allan Vestal in the 1960's.

Because not a great deal of research has examined the publication decision, this project also borrows from related research, especially studies of judicial decision making on the merits. Works of legal scholars have been helpful as well, particularly in providing background for the publication process and in assisting my analysis of the impact of the official publication guidelines.

I will identify the social science research specifically addressing publication by the federal courts, because it is most directly on point for this project. Most of these studies are described at some length in the following discussions of specific influences on publication. In addition to the studies of publication at the federal district court level by Siegelman and Donohue (1990) and Ringquist and Emmert (1999) described in
Chapter 1 at section 1.3.1, other important studies include those by Songer (1988), Olson (1992), and Ashenfelter et al. (1995). Rowland and Carp's 1996 book *Politics and Judgment in Federal District Courts* has been particularly influential for this project. Significant studies of publication at the U.S. court of appeals level include those by Songer (1990) and Merritt and Brudney (2001).

2.2.1. THE CONFOUNDMENT PROBLEM AND COMPLEXITY

One problem should be addressed before launching into a discussion of the independent variables. If research demonstrates that extra-legal factors are not associated with publication, this would seem to provide support for the conclusion that primarily legal factors underlie the publication decision. On the other hand, a pattern of greater appointment effects\(^1\) in published opinions than unpublished opinions could also be consistent with the legal model. A judge primarily considering the formal publication guidelines in deciding to submit a case for publication will submit opinions that lay down new rules of law or resolved conflicting authority, or even those that involved a painstaking factual determination. These are the kinds of cases that are most complex, and they are also the most difficult to decide in that one outcome is not readily discernible as the right one. These cases consequently involve the most exercise of judicial discretion, which allows for (but does not require) the influence of extra-legal factors in making decisions. An extra-legal factor such as ideology could thus reasonably be expected to have a greater impact on these difficult or close cases. Rowland and

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\(^1\) Party of the appointing president is only (arguably) the most interesting and important extra-legal factor that could be associated with propensity to publish, and thus is the prevalent example in this section. The confoundment problem could arise with other independent variables as well.
Carp's (1996) "cognitive shortcut" mechanism is plausible, as is a more consciously utilized mechanism. Ashenfelter et al. (1995) explain that "[i]n close cases, something must make a difference. It could be random fluctuation, what the judge ate for breakfast, the judge's background, or other less obvious factors. It is not self-evidently disturbing when the judge's world view (as revealed by party affiliation and other variables) dominates over some competing sources of decision" (p. 263). Thus, the judge primarily motivated by a desire to promote legal accuracy might bear superficial resemblance to the judge motivated by other goals, such as those goals served by strategizing on behalf of ideology.

The following demonstrates how different paths could result in the propensity to publish:

CASE IS LEGALLY COMPLEX

- judge determines that opinion meets official criteria
- judge chooses to PUBLISH (legal model)

CASE IS LEGALLY COMPLEX

- judge relies on ideology in decision making
- opinion reflects judge's ideology
- judge chooses to PUBLISH (strategic or attitudinal model)

The above highlights a challenge for this project. I would like to shed light on the applicability of different models of decision making to the publication decision, and on the pervasiveness of certain judicial goals. It is not enough to simply identify the existence or nonexistence of different patterns in published and unpublished opinions, it is important to know why they exist. In particular, it is difficult to document the existence of strategic behavior when its indicators can be confounded with something
else. One possible solution is to conduct a multivariate analysis of the different variables that could contribute to the publication decision; this procedure should control for the complexity factor, allowing for the influence of ideology and other factors to be measured independently.  

2.2.2 EFFECTS OF THE OFFICIAL PUBLICATION GUIDELINES ON THE DISTRICT JUDGE'S PUBLICATION DECISION  

2.2.2.a. JUDICIAL GOALS SERVED BY ADHERENCE TO PUBLICATION GUIDELINES  

Several important judicial goals could be served by publication of particularly complex cases, or those that are the archetype of what the Judicial Conference of the United States recommends that a district judge publish. Most obviously, the judge placing high stock in achieving legal accuracy and clarity will take the guidelines seriously because they are the primary source of law on the matter of what a judge should and should not publish. That the guidelines are hortatory and not mandatory does not matter a great deal; they are this way because this is how judges prefer to be addressed. The guidelines are eminently reasonable, and are the result of a respected rulemaking.

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2 A methodological struggle of this project has been to operationalize "complexity." My original efforts involved measuring the length of the opinion, but this variable was unacceptably collinear with the variable measuring adherence to the official publication guidelines. The solution I arrived at was to accept that the official publication guidelines variable measures complexity to a degree.
process. It is unlikely that any judge will not take them seriously, and it is likely that some judges will regard them as the only criteria to use in deciding whether to publish or not. Making decisions in this manner is, of course, characteristic of the legal model.

In a related manner, the judge primarily concerned with enhancing his or her prestige in the legal community and enhancing prospects of promotion to the court of appeals may also tend to publish only those cases adhering to the publication guidelines. A judge known for publishing cases that do not meet the official criteria could be viewed as behaving in a frivolous manner or as self-promoting. On the other extreme, a judge who does not display interest in contributing to the development of the law would not be regarded as having the proper judicial comportment (or intellect) to merit promotion to an appellate court.

2.2.2.b. SCHOLARSHIP ON THE IMPACT OF PUBLICATION GUIDELINES

Previous social science research interested in the impact of the formal publication guidelines on district judges' publication habits has failed to uncover real differences in complexity or importance between published and unpublished opinions. Both Songer (1988) and Olson (1992), using indirect measures of publication worthiness, reached this conclusion. Songer's (1988) research demonstrates that unpublished opinions do not have a significantly different likelihood than published opinions of reversal by the court of appeals or to be decided on appeal without dissent. (The only exception to this is that for one issue area, criminal cases, those that are published are somewhat more likely to be reversed than those that are not.) Songer further hypothesized that unpublished cases
should not display party effects in the votes of the appeals court judges in that unpublished cases should provoke consensus. The only support Songer garnered for this hypothesis was among labor cases. Based on these findings, Songer concludes that unreported district court opinions are almost as likely as published opinions to have precedential value, contribute to the development of public policy, and involve significant exercise of discretion by the federal district court judge.3

Olson (1992) developed her own measures of an opinion’s importance and reached a similar conclusion to Songer’s. She compared a sample of published and unpublished district court opinions from one district over two years. Olson submitted surveys to plaintiffs’ attorneys asking whether an interest group was present on the plaintiff’s side, whether the case was a class action, and if they considered the case to be important to interests beyond their clients’. She reports that neither interest group presence nor attorney opinion of the case’s importance is significantly different between published and unpublished cases; the class action variable is significant, but its importance is discounted by Olson due to the small number of class actions in her sample.

In contrast to Songer’s and Olson’s findings that published and unpublished cases do not differ significantly, Siegelman and Donohue (1990) demonstrate that published employment discrimination cases are more complex than those that are unpublished.

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3 Songer’s research on district court opinions was based solely on sampling cases that had been appealed and published by the courts of appeals. The possibility that this sampling strategy unacceptably skewed the representativeness of his sample is explored further in Chapter 3, as it inspired the sampling method used in this study. Songer’s study sometimes garners the additional criticism that it employs only bivariate analysis. This is a feature shared by many of the studies described in my dissertation.
These researchers measured complexity by a variety of case characteristics, including the thickness of the file, number of plaintiffs, seriousness of the plaintiffs' claims, and whether the lawsuit was filed under the Age Discrimination in Employment Act, a particularly complex statute. A recent study conducted by Ringquist and Emmert (1999) bolsters Siegelman and Donohue's findings. Ringquist and Emmert report significant differences between published and unpublished decisions involving civil lawsuits brought by the U.S. Environmental Protection Agency. On the basis of their findings that civil penalties in published cases are higher than those in unpublished cases, the authors conclude that "more important cases receive published decisions" (p. 27).

Thus there is some empirical evidence that an opinion's complexity bears a relationship to publication, and some evidence that the two are virtually unrelated. In their pathbreaking book chapter on unpublished district court decisions, Rowland and Carp (1996) conclude that "despite the restraint urged by [official publication guidelines], the publication decision is ultimately a function of idiosyncratic determinations made by the trial judges themselves" (p. 118). They summarize previous research as demonstrating that "written [published] decisions are atypical and somewhat idiosyncratic representations of federal court decisions" (p. 118).

Of course, the above studies do not purport to do more than indirectly estimate the relationship between district court opinion publication and the official publication guidelines, if the authors even go that far in interpreting their results. Some legal scholars have attempted to address the issue directly, in the context of normative concerns with the precedential value of unpublished opinions. These concerns usually arise in the
context of assessing limited publication rules or rules barring or limiting citation of unpublished opinions adopted by the U.S. courts of appeal and some state appellate courts. These rules have generated much commentary, and a few studies, demonstrating that many precedent-worthy opinions are not published. (See Martineau (1994) at footnote 39, p. 126, collecting articles.)

I will discuss the efforts of some of these researchers in more detail in Chapter 3 in the context of attempting to operationalize a measurement to determine whether an opinion meets the official publication guidelines. At this point, however, their findings can be summarized. Although some legal commentators have found that some judicial opinions meeting the official criteria are not published, (See, e.g., Robel (1989); Render (1984-1985); Reynolds and Richman (1981); Mueller (1977); Foa (1977)), the legal community would not agree with Rowland and Carp's assessment of the idiosyncratic nature of published opinions. There remains widespread belief in the desirability of publication guidelines, and the effectiveness with which judges apply the guidelines. See, e.g., Martineau (1994).

The different perspectives of social scientists and legal scholars on this issue are consistent with their differing perspectives on judicial decision making generally. Testing the extent to which district court judges apply the official publication guidelines seems an excellent means to further probe this great divide, and add to the debate on the relative merits of the attitudinal and legal models. As my formal interviews and other contacts with district judges have convinced me that judges are legalists at heart, I hypothesize the following:
HYPOTHESIS #1: Judges will disproportionately publish opinions meeting official guidelines for publication worthiness.

This is not to say that judges will publish all written opinions meeting the guidelines, and that all that do not meet the guidelines will go unpublished, but simply that meeting the official criteria should be a significant predictor of publication. An opinion's adherence to the official publication guidelines will be operationalized in Chapter 3.

2.2.3 EFFECTS OF APPOINTING PRESIDENT ON THE DISTRICT JUDGE'S PUBLICATION DECISION

2.2.3.a. JUDICIAL GOALS SERVED BY PUBLICATION OF OPINIONS

IDEOLOGICALLY CONGRUENT WITH THE APPOINTING PRESIDENT

If ideology affects publication rates, it may be because judges place more stock in or have more attachment to opinions that agree with their ideology, and thus are more likely to accord these opinions the esteemed status of publication worthiness. The longer term implication may be that judges strategically choose to publish certain cases in order to "stack the deck" in favor of their preferred ideology. If, for example, a greater percentage of reported cases reflect a conservative ideology, this shapes future lawmaking along conservative lines because the storehouse of available precedent will be stocked with conservative precedent.
This is consistent with the notion that one of a judge's prime motivations is affecting the content of legal policy. The attitudinal and strategic models posit that judges care about the content of legal policy because this is how they advance their policy goals, whereas adherents to the legal model theorize that judges care about the content of legal policy because they strive for legal accuracy and clarity. Opinions that match a judge's own ideology may be perceived as meeting a higher standard of legal accuracy and clarity than those that do not.

A judge could also strategically publish opinions reflecting ideological bias as a means of garnering acclaim from his or her reference group or persons able to influence promotion to the court of appeals. An opinion that is not published, after all, may be essentially invisible\(^4\) whereas those that are published are capable of attracting attention from audiences ranging from the media to Senate staff to law professors. Concern with career advancement might cause a district court judge to focus on publishing opinions reflecting the appointing president's ideological direction and policy priorities.\(^5\) As a president's appointments to the lower federal courts are traditionally influenced by the desires of the senators (especially of the president's party) from the jurisdiction with the vacancy, one would expect the career-minded judge to publish with an eye towards the policy preferences of these political players and their cronies as well.

\(^4\) Of course, local media covering their federal court often become aware of opinions as soon as they are filed with the clerk's office or orally delivered from the bench. It almost goes without saying, however, that most of what transpires in the federal trial courts is not regarded by the media as newsworthy. And, unless a ruling attracts media attention immediately as a matter of timely local news, an opinion that is not eventually published is unlikely to attract attention again.

\(^5\) One might suppose that an ambitious district judge would wish to curry favor with the sitting president as well. If the sitting president is of a different party than the appointing president, however, it is unlikely that a judge would shift his or her allegiances on the remote chance of gaining a cross-party promotion. The judge would do best not to create the appearance of having transient loyalties, and to wait for a president of his or her own party to again win office.
2.2.3.b. SCHOLARSHIP ON THE IMPACT OF JUDGES' PARTISAN BACKGROUNDS

The hypothesis that ideology affects publication behavior is only a short step beyond what previous research on district court decision making has established. Research on reported opinions has firmly established that partisan background is correlated with patterns of decision making on the merits by district court judges, as it is for appeals court judges and Supreme Court Justices. Rowland and Carp (1996) explain that the primary reason for this is executive branch motivation to engage in intensive screening of potential nominees, and political ability to have political choices confirmed by the Senate. Indeed, a president's fortunes in appointing judges that will vote to carry out his agenda appear to rise and fall with his clout in the Senate. Carp et al. (2001) document that Democrat Bill Clinton's hostile relationship with a Republican-dominated Senate for six of the eight years of his presidency is linked to the relatively less liberal decision-making patterns of the district court judges he appointed during that period.

Several studies of reported decisions have found significant "appointment effects" on the legal interpretations of district court judges. Franklin D. Roosevelt was the first chief executive with the desire and political clout to place like-minded liberal judges on the federal bench, and appointment effects have been apparent for seventy years. Rowland and Carp (1996) and Carp and Rowland (1983) found that between 1933 and 1988, judges appointed by Democrats decided 48% of their cases in a liberal direction, whereas Republicans only decided 39% liberally. The gap between Democrats and

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Republicans became particularly conspicuous in 1969 with Johnson appointees, and has held strong through Nixon, Carter, Reagan and Bush appointees. Bill Clinton's appointees narrowed the gap somewhat, casting 44% of their votes in a liberal direction compared to the 52% liberalism rate of Carter and Johnson appointees.

Rowland and Carp (1996) also demonstrate that the partisan differential varies according to the primary issue concerns of the appointing president. Specifically, Nixon and Reagan's concern with law and order has resulted in their appointees voting more conservatively than average on criminal justice issues. Carter and Reagan/Bush's contrasting concern with civil rights has led to "astonishing" differences in their appointees' records on these issues (p. 49). Other studies have found that Johnson and Kennedy appointees were much more supportive of economic regulation, civil rights, civil liberties, and the rights of the accused than were Nixon appointees (Navasky 1974); and that Carter appointees were twice as likely as Reagan appointees to support civil rights claims and the claims of criminal defendants (Rowland et al. 1984; Stidham and Carp 1987).

Research on unreported opinions has been far less conclusive in documenting appointment effects. As discussed above, Songer (1988) reports that unpublished district court cases provoke party effects in the votes of the appeals court judges (see also Songer (1990)). Recent and important work has been done on party effects in the votes of district court judges in their unreported opinions. Ashenfelter et al. (1995) examined all federal civil rights and prisoner cases on the dockets of three district courts for one year. They controlled for a variety of background characteristics (including party of the appointing
president, judge's party, and Senate ADA scores), and report that none are related to which party won the suit and whether a case settled or not. Though this study did not examine whether an opinion was published or not, it is an important study in that it concludes that appointment effects vanish once a judge's entire output is examined. On the other hand, Ringquist and Emmert's recent study (1999) of penalties in civil environmental cases reports that judges are more apt to publish those cases where they assess harsher penalties, and that this behavior is related to partisan background. A harsher penalty for a defendant found guilty of polluting the environment is not only the hallmark of more complex cases, as discussed above, but is consistent with the environmental policy agenda of Democratic presidents. The authors document that this tendency to publish cases assessing larger fines is particularly true for Republican appointees, discounting the thesis that Republican judges favor publication of their conservative opinions.

Rowland and Carp (1996) have completed the most ambitious work to date comparing published and unpublished district court opinions. They examined unpublished opinions from 1981-1987 penned by Nixon, Carter and Reagan cohorts sampled from case files in Detroit and Kansas City, and compared them with a sample of published opinions. Though the authors document different rates in the liberalism of Nixon, Carter and Reagan appointees' published opinions as expected in both cities, appointment effects are not significant for unpublished cases.
Rowland and Carp speculate as to why appointment effects are apparent for the published opinions of judges of both cities, but not significant for their unpublished opinions. Like Ashenfelter et al., they theorize that differential complexity explains the discrepancy: cases with factual complexity or legal ambiguity are more likely to be submitted for publication, and are more likely to provide opportunity for the influence of political variables. Rowland and Carp's study is important as a first of its kind in assessing the relationship between a judge's ideological background and likelihood of publication. They do not consider, however, the proposition that ideological background could have a direct effect on the publication decision; for them, it is merely a coincidental variable with the real causal variable, i.e., the degree of discretion exercised by the judge. The hypothesis posed by these important scholars of unpublished district court opinions, that appointment effects vary between published and unpublished opinions because published opinions are more complex, will be taken into account in this research project by creating multivariate statistical models that control for both complexity and ideological congruence. Indeed, part of their data do support my hypothesis. Among Detroit judges, Carter appointees demonstrate a tendency to publish their liberal decisions and Reagan appointees have a tendency to publish their conservative decisions. (This pattern does not hold for Kansas City judges.)

It is hoped that analysis of new data can shed new light on the goals of federal district court judges. If a judge favors the publication of opinions that are congruent with his or her ideology, i.e., those opinions where the ideological direction of the decision and the judge's party identification are in the same direction, this can be interpreted as
evidence that a judge is attempting to carry out the policy goals of the appointing president, or to carry out his or her own policy-related goals which are, by constitutional design, consistent with the administration's. If ideologically congruent opinions are not particularly favored for publication, this could indicate that judges' goals are less focused on impacting the larger political environment than with only making good law (or imposing their policy preferences) in the case at hand.

One work examines this issue directly. In their study of the publication of U.S. court of appeals' decisions in unfair labor practice cases, Merritt and Brudney (2001) tested a hypothesis concerning strategic publication very similar to the one I pose below. These law professors, skilled in quantitative research methods, used logistic regression models to test a variety of hypotheses concerning publication. One hypothesis posed that panels with more Democratic appointees would demonstrate a tendency to publish pro-union results and to suppress cases rejecting union claims. The authors' data did not support this hypothesis. Democratic court of appeals judges are not attempting to carry out liberal policy goals in the area of labor law through selective publication, at any rate. Merritt and Brudney's adverse results do little to dampen my enthusiasm, because district court judges have more room to exercise publication strategies than does a collegial court. Accordingly, I pose the following:

HYPOTHESIS #2: Judges will disproportionately publish opinions which are ideologically congruent with judge's ideological background.
2.2.3.c. SCHOLARSHIP ON THE SPECIAL NATURE OF LIBERAL OPINIONS

Strategic behavior by judges may manifest itself in ways other than differential publication rates on behalf of ideology, however. I must be alert to other patterns of published versus non-published opinions and ideological direction of the decision that could serve as evidence of judges' goals. In other words, any pressures connected with the appointing president's ideology might be offset by other concerns. One possibility is that district court judges deliberately attempt to appear nonpartisan and well-balanced in the opinions they choose to publish, which is the face they put on before the world.

Another strategy that could be employed by the outward-looking district judge is to lean towards publication of liberal opinions, regardless of his or her partisan background. Judges of any party may be attracted to the publication of innovative opinions due to desire for recognition in the legal community and the desire to produce a widely cited work (see Baum 1991). It seems natural that innovative opinions, which break new legal ground, especially in interpreting federal or state constitutions, are more likely to be cited, and will have a tendency to be liberal. Caldeira's (1985) work on the frequency with which state supreme courts cite each others' opinions concludes that the courts cited most often are among the most liberal courts, and accordingly, that the most-cited precedent is liberal.

That novel or innovative opinions are more likely to be liberal may be a function of the contemporary era rather than a value inherent in liberal ideology. In their study of the process by which 23 liberal tort law doctrines diffused through state judicial systems, the authors indicate that their selection of liberal doctrines was necessitated by the fact
that most doctrine in fact adopted by courts in the last 100 years has been liberal (Canon and Baum 1981). Tort doctrine is likely typical in this regard (see, e.g., Baum (1991) describing other examples of judicial policy innovation). Thus even conservative judges who might choose to innovate in the direction of conservative change, are limited by the pool of viable innovations. Though viable conservative innovative doctrine is no doubt more developed today in a variety of areas than in 1975 (the latest year of the period studied by Canon and Baum), it still may be skewed towards liberal doctrine.\(^7\)

In addition, it is worth noting that the media generally may be more attracted to reporting on liberal opinions due to liberal bias of reporters, and are more interested in reporting on opinions that break ground rather than endorse the status quo. For all these reasons, a hypothesis considering the effect of a judge's appointing president on the ideological direction of the opinions the judge chooses to publish must allow for the possibility that the urge to innovate will counter the urge to strategize on behalf of ideology. It is perhaps equally reasonable to hypothesize that liberal opinions are more likely to be submitted for publication, among both liberal and conservative judges.

Existing studies provide some support for this view. Rowland and Carp's (1996) data display higher liberalism rates among published than unpublished opinions regardless of a judge's ideological background, though the authors do not offer an explanation for the phenomenon. Ringquist and Emmert (1999) also report that judges of

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\(^7\) The phenomenon limiting Canon and Baum's choice of tort doctrines to liberal innovations is described as a function of the judicial role in mitigating the costs to society of the industrial revolution; indeed, most tort doctrine of the 19th century was conservative, assisting the accumulation of capital. As such, the liberal trend in 20th century judicial policy innovations may transcend the influence of the Warren Court. Furthermore, many would argue that the development of liberal civil liberties doctrine of the Warren Court has slowed but not reversed with the changed makeup of the high court.
all partisan backgrounds are significantly more likely to publish those cases imposing higher fines on violators of environmental laws (i.e., liberal cases). And, though they did not control for the district judge’s partisan background, Siegelman and Donohue (1990) report that published employment discrimination cases are somewhat more liberal than unpublished cases. (Among cases decided in favor of the plaintiffs, 35% were published, whereas cases decided against the plaintiffs were published at the lower rate of 25%.) The findings of the Merritt and Brudney (2001) study do not support this theory, however. These authors report that decisions rejecting union claims (i.e., conservative cases) rather than favoring the union are more likely to be published.

HYPOTHESIS #3: Judges will disproportionately publish opinions which are liberal.

2.2.4 EFFECTS OF CAREER EXPERIENCE ON THE DISTRICT JUDGE’S PUBLICATION DECISION

2.2.4.a. JUDICIAL GOALS SERVED BY PUBLICATION OF OPINIONS CONGRUENT WITH CAREER EXPERIENCE

This section will examine the question of whether features of a judge’s career experience, primarily prior to taking the federal bench, affect the judge's publication behavior. Some types of career experience could affect the types of cases the judge chooses to publish. I hypothesize that cases in certain issue areas or involving certain classes of counsel (i.e., counsel for various levels of government) are published at higher
rates than others, and that differential rates are linked to professional background characteristics of individual judges. For example, judges who, prior to elevation to the bench, had work experience as criminal lawyers may be more likely to publish an opinion involving the rights of criminal defendants or involving trial judge discretion under the federal sentencing guidelines. Or, a judge formerly employed as an assistant U.S. Attorney may be more likely to publish an opinion from a case wherein the U.S. Government is a party.8

The primary reason for suspecting this pattern is that judges are likely to be more comfortable publishing in areas where they have greater expertise and interest, and thus will do so more often than in areas where they do not. Judges interested in creating high quality legal opinions may feel they have a better chance of doing this in an area where they already have some experience. A related reason for suspecting this pattern is that judges may make efforts to impress their reference groups, to which they have probably retained at least psychic ties after promotion to the judiciary. Impressing the reference group serves judicial goals of enhancing prestige and promotional opportunities, and reducing chances of alienating the community when judges make unpopular decisions. Direction of decision is taken into account in further hypothesizing about a judge's motive to please or demonstrate loyalty to the former government employer (see Hypothesis #4A).

8 Hypotheses regarding judges' publication of decisions demonstrating responsiveness to the interests of previous employers is limited to government lawyers due to data availability.
On a more general level, I also hypothesize that other career-related characteristics will make a judge more prone to publish all types of cases. These backgrounds include prior experience as a judge, experience as a law professor, and receipt of a law degree from an elite law school. These backgrounds should produce judges more confident in using the mechanism of publication to advance their goals.

2.2.4.b. SCHOLARSHIP ON THE IMPACT OF JUDGES' CAREER BACKGROUNDS

Previous research has explored the possibility that judicial behavior is affected by features of judicial background. The features of judges' backgrounds that have been the subjects of the most research interest can be put into three categories: partisan background, demographic qualities, and career characteristics. (Because it is so integral to examining judicial pursuit of policy goals, the topic of partisan background was explored first in the previous section.) The personal attribute model of judicial decision making was the first to measure the relationship between a judge's background characteristics and voting behavior. The underlying theoretical basis for including background characteristics as variables comes from the attitudinal model. Background characteristics may be the primordial bases of personal and policy preferences, and thus may be correlated with the decisions judges make. (See generally, Schmidhauser (1961); Tate (1981).)

Though this study will not test any variables directly assessing a judge's demographic characteristics, relevant scholarship in that area will be addressed briefly. Research examining linkages in voting behavior and a judge's demographic
characteristics, such as gender, race, and birth order have generally met with limited success at best (see Tate 1981, discussing studies of U.S. Supreme Court justices’ votes). An exception, however, is Gryski and Main’s (1986) focus on the particularized policy area of sex discrimination. These authors report significant correlation between state high court justices’ votes and several judicial background factors considered in the aggregate: gender, religion and birthplace, and law school type and location. The little research that has been done comparing a judge’s demographic characteristics with judicial behavior other than votes on the merits has not yielded significant results. Ashenfelter et al. (1995) report no correlation between case settlement rates plus plaintiff victory rates and a federal district judge's race, sex, age, law school, and prior experience.

This research project will not focus further on a judge’s demographic characteristics per se, but intends to examine some background factors related to a judge’s legal career, from law school on to assuming the federal bench. (Experience as a law professor is the one variable that will be measured whether it occurs prior to or concurrently with service as a federal judge.) This is not to discount the importance of other personal attributes that may indirectly influence judicial behavior, including the publication decision. Career factors, however, more readily fit into a model specifying the goals a judge is striving towards through selective publication. The weak or nonexistent linkages found in some previous studies should not deter a test of background factors in the instant study. It is possible that personal attributes could impact judicial choices other than vote or settlement push. In deciding what to publish, the

9 Legal education may be treated as a demographic personal attribute or one more akin to career characteristics, as it is treated in this project.
judge's choice is less structured by the law than in these more typically-studied areas of
decision making. As such, the decision to publish may be more open to extra-legal
influences. It is not difficult to imagine a judge commenting that he decides to publish
most of his tax cases because his previous employment as a tax attorney rendered him an
expert in the matter, and he has a great deal to offer the legal community through their
publication. This judge would not admit, however, that he decides most of his tax cases
in favor of the government, because his previous employment with the government
convinced him that the government is usually right in its position on tax cases. Though
both scenarios are plausible to an attitudinalist, only the former is plausible to other
students of judicial behavior (and to most judges themselves).

2.2.4.b.1. PRIOR LAW-RELATED EXPERIENCE (VOCATIONAL AND
AVOCATIONAL)

Research examining linkages in voting behavior and a judge's career
characteristics can be portrayed as meeting with limited success no more impressive than
the research testing the impact of a judge's demographic characteristics. Gryski and Main
(1986) examined state high court justices' prior judicial experience and prior elective
office, and report no linkage to votes in sex discrimination cases. And, as mentioned
above, Ashenfelter et al. (1995) report no linkage between a judge's prior experience as a
state judge and the judge's case settlement rate. Tate (1981) and others, however,
document linkages between Supreme Court justices' votes and career background characteristics, such as prior judicial experience, prosecutorial experience, elective office held, federal administrative office.

The grounds that scholars articulate for suspecting that previous employment could influence a judge’s votes or actions as a judge vary with the type of previous employment, but are usually not very particularized. Taking the career path of a judge or elective official is often simply an indicator that a judge will tend towards liberal votes, whereas former prosecutors vote conservatively on the bench (see, e.g., Tate (1981)).

A more particularized inquiry, and one further relevant to this study because it examines the impact of career background characteristics on a judge’s publication practices, is the Merritt and Brudney (2001) study of the publication of U.S. court of appeals’ unfair labor practice cases. The authors include in their model of the characteristics of the court panel deciding the outcome of the case and whether it would be published a variable for the background of the judge as a former labor lawyer, either for management or for the union. Interestingly, experience as a labor lawyer (of management variety) is a significant predictor of nonpublication, counter to the hypothesis. (Experience as a union-side labor lawyer is not associated with publication). Merritt and Brudney further took the direction of the decision into account in an effort to unearth strategic publication practices by the judges. Consistent with their hypotheses concerning strategy, the authors report that judges with prior career experience representing management clients are less likely than their colleagues to publish opinions favoring the union. Interestingly, the authors ultimately reject a strategic interpretation.
for these results, on the grounds that the data do not demonstrate that judges with this background characteristic disfavor the union in their decisions on the merits. The authors further reject the suggestion of former management attorneys' strategic motive to suppress pro-union decisions on the grounds that this pattern is also consistent with a non-strategic explanation: these judges have more expertise in labor law than other judges, and may sincerely view a higher percentage of cases as routine and unworthy of publication.

The Merritt and Brudney study supports the notion that a judge with career experience related to the issue in the case at bar will be more inclined to publish that opinion. Hypotheses #3 and #4 are formulated to further test this concept. The inclination to publish may be further enhanced if the case was decided in a direction consistent with the position he or she took as an advocate, a notion explored by Hypothesis #4A. (On the other hand, the inclination to publish may be suppressed if the judge's decision was unfavorable to the former employer.)

HYPOTHESIS #4: Judges will disproportionately publish opinions concerning issue areas related to the judge's previous career experience.

HYPOTHESIS #5: Judges with previous career experience as government lawyers will disproportionately publish opinions involving government parties related to the judge's government experience.

HYPOTHESIS #5A: Judges with previous career experience as government lawyers will disproportionately publish opinions involving government parties related to the judge's government experience when the direction of the decision favors these actors;
conversely, these judges will disproportionately fail to publish opinions involving government parties related to the judge's government experience when the direction of the decision disfavors these actors.

2.2.4.b.2. LAW SCHOOL BACKGROUND AND EXPERIENCE AS A LAW PROFESSOR

One of the variables Merritt and Brudney (2001) include in their model of the characteristics of the court panel is whether the judge graduated from an elite law school. The authors report that panels with more graduates of elite law schools are significantly more likely to publish their opinions than are panels with graduates of less prestigious law schools. The authors explain these findings on the grounds that "[e]lite law schools . . . may breed a special respect for law as a public institution or for the development of legal principles through case-by-case decision making. On a less flattering note, graduates of these schools also may possess a sense of self-importance predisposing them to publication." (pp. 100-101)

As mentioned earlier, a judge's elite law degree (or lack thereof) has also been used as a variable to explain case outcome. Ashenfelter et al. (1995) found it not significant in predicting the behavior of federal district court judges. Gryski and Main (1986), on the other hand, document that state supreme court justices with law degrees from private institutions are significantly more likely to vote conservatively on sex discrimination cases.
The same rationale forwarded by Merritt and Brudney as to why judges with elite law degrees would be publication-prone should apply to judges with employment experience as law school professors. (Merritt and Brudney included this variable in their model and did not find it significant, however.)

HYPOTHESIS #6: Judges who received their law degrees from elite law schools will publish more opinions than those without this background.

HYPOTHESIS #7: Judges who have experience as law professors will publish more opinions than those without this background.

2.2.4.b.3. PRIOR EXPERIENCE AS A JUDGE

As mentioned earlier, previous experience as a judge is also a career-related background factor that has been tested (largely unsuccessfully) to explain judicial decisions on the merits. (See Ashenfelter et al. (1995), Gryski and Main 1989, and Tate 1981). Merritt and Brudney, furthermore, did not find service on a different court before appointment to the court of appeals to have significant explanatory power for publication.

Nonetheless, it is plausible to suspect that the longer a judge has served as a judge, either through previous judgeships or length of tenure in the present job, the more comfortable the judge will be with publishing cases. Ashenfelter et al. (1995), for example, hypothesized that a federal judge’s previous experience as a state judge will assist him or her in quicker adaptation to the federal bench. Carp and Rowland (1983)
suggested (but did not test the notion) that the number of years on the bench, as well as
the judge's ego size,¹⁰ should affect likelihood of a federal district court judge's
submission of cases for publication.

It is possible that judicial behavior will be the reverse of this hypothesis, however.
It is plausible that new judges may be heady with the power that comes with their new
jobs, and more likely to flaunt its exercise through the easy act of publication.

HYPOTHESIS #8: The longer a judge's tenure on the bench as a federal district
court judge, the more opinions he or she will publish.

HYPOTHESIS #9: Judges with previous experience as a judge on a court with a
regular practice of publication will publish more opinions than judges without this
experience.

2.2.5 EFFECTS OF POWERFUL, WELL-PLACED LITIGANTS AND COUNSEL ON
THE DISTRICT JUDGE'S PUBLICATION DECISION

2.2.5.a. JUDICIAL GOALS SERVED BY PUBLICATION OF OPINIONS FEATURING
POWERFUL, WELL-PLACED LITIGANTS OR COUNSEL/SCHOLARSHIP ON THE
IMPACT OF REPEAT PLAYERS

A theory related to the previous theory concerning the influence of a judge's
career experience on his or her publication practices involves a judge's attraction to cases
involving powerful litigants or counsel, personal reference group aside. Models of

¹⁰This project will not attempt to use this characteristic as a variable, but "ego size" is captured in part by the
variables measuring law school background and experience as a law professor.
judicial votes often include variables determining whether the parties or their lawyers are "repeat players," i.e., frequent participants, in the litigation game (Galanter 1974). In contrast to "repeat players," "one shotters" without the accumulated experience, resources, and institutional connections are less likely to succeed in winning lawsuits. Repeat players are also more likely to experience favorable outcomes from other exercises of judicial discretion, such as the Supreme Court's decision to grant certiorari (Caldeira and Wright 1988) and the decision of state high courts to grant jurisdiction to decide a case (Eakins 2000).

Perhaps a judge's decision to publish is also an act of judicial discretion that is more often exercised in favor of those with "repeat player" status. There are some reasons to assume that publication, especially publication of a favorable opinion, benefits some litigants and counsel. (This is not to suggest, however, that getting published confers close to the direct benefits that winning a lawsuit or having a certiorari petition granted.) There is also reason to assume that judges will be more receptive to the interests of powerful, well-placed litigants and counsel than to those with lower status.

Which litigants, if any, might seek publication? Those with the long-term strategy to "play for the rules" as opposed to those who view each lawsuit in isolation and "play for immediate gain" would wisely treat publication of favorable precedent as part of their strategy. Suppressing the publication of unfavorable precedent would also serve this strategy. To a lesser degree, there is psychic benefit in having one's business branded "important" enough to merit publication; for example, publication may generate interest in an attorney's law practice. These benefits of publication do not assist the "one-shotter,"
such as an unfairly fired employee seeking her job back, to the same degree as the "repeat player," such as the large corporate or government employer who must defend against many employment discrimination lawsuits. Moreover, the "one-shotter" is less likely to have the economic resources and knowledge of the procedures to attempt to take the extra step to get her opinion published. This also applies to litigants that are not powerful and well-placed or organized, such as prisoners, who do anticipate future lawsuits and would benefit from the publication of favorable precedent. In contrast, a large law firm has tremendous resources at its disposal, and is skilled at pursuing all avenues on behalf of its clients; similarly, a top 500 corporation has considerable resources at its disposal to hire the best attorneys.¹¹

There are also reasons to assume that judges will cooperate in publishing opinions featuring "repeat players" or counsel, either consciously or not. As discussed in Chapter 1, some judges routinely accede to a party's request to publish. Even without being asked, some judges may be interested in conferring the benefit of publication on "repeat players" because doing so may assist the judge in attaining certain goals. It is possible that currying favor with the economic "upper dogs" in the community, i.e., top corporations, parties that can afford to hire top law firms, and top law firms and their attorneys themselves, could benefit the judge seeking public support and approval. Important players in the business and legal communities are also classic sources of political

¹¹Interest groups are a good example of repeat players as well. Their potential impact on publication will not be discussed here, because not enough turned up in the sample for this research project to merit consideration as a variable.
influence, and thus their support may enhance a district judge's chances of promotion to the court of appeals. Pleasing state and local government officials feeds into both public support and promotion goals.

Easiest of all to appreciate is that maintaining the support and approval of the federal government is in the best interest of many judges. Promotion is directly in the hands of federal officials. Even the district judge with no ambitions beyond having an agreeable working environment will want to be on good terms with the staff of the U.S. Attorney's office he or she interacts with daily in the processing of criminal cases. These are similar reasons to those explaining why the solicitor general, as representative of the federal government, enjoys consistent success on the merits and especially as a petitioner in obtaining certiorari in the Supreme Court. These reasons include its routine appearance before the Court, its close institutional relationship with the Court, that it has substantial amount of resources at its disposal, and that it produces work of consistently high quality that the Justices can rely on (see Caldeira and Wright 1988).

Judges may also be unaware that they have a publication bias in favor of "repeat players." "Cue theory" advanced by Tanenhaus et al. (1963) remains a popular explanation for the process judges use in selecting cases for discretionary review. This theory posits that because courts do not have adequate time and resources to review all petitions in a thorough fashion, judges look for certain "cues" as shortcuts. If a cue is discovered, the case is earmarked for more careful scrutiny. Loose formal rules governing
case selection allow for reliance on cues as shortcuts. Powerful or well-placed parties and attorneys are common cues examined by researchers attempting to explain case selection. (see Tanenhaus et al. (1963); Eakins (2000)).

Similarly, the prominence, prestige, and presumed competence of certain parties or attorneys may create the suggestion that a given case is more important than others and thus worthy of publication. Government actors, large corporations, unions and large law firms all share in possessing these assets. It is reasonable to suspect that judges would rely on shortcuts to determine publication; even more than for case selection, the formal rules governing the publication process allow for judicial discretion.

Existing studies on publication have examined the presence of powerful, well-placed litigants with mixed success. Olson (1992) reports that interest group involvement does not enhance the likelihood of publication. In their study of factors affecting the publication of employment discrimination cases, however, Siegelman and Donohue (1990) report that a plaintiff's status as employed in a high-wage or high-prestige job classification significantly improves the chances of publication.

There is thus ample reason to hypothesize that a judge's publication decision will be motivated by the status of the litigants or counsel, perhaps especially so if the judge's decision favored the powerful, well-placed actor. For theoretical reasons and due to the availability of data, the actors examined in this project will be the U.S. government, state governments, local governments, large corporations, large law firms, and unions. Either because they enjoy the assets of "repeat players" or because they are simply powerful and well-placed, the presence of one or all of these actors may influence publication.
HYPOTHESIS #10: Judges will disproportionately publish opinions wherein the parties or attorneys are powerful and well-placed.

HYPOTHESIS #10A: Judges will disproportionately publish opinions wherein the parties or attorneys are powerful and well-placed when the direction of the decision favors these actors; conversely, judges will disproportionately fail to publish opinions wherein the parties or attorneys are powerful and well-placed when the direction of the decision goes against these actors.

Next I turn to Chapter 3, which sets forth the methodological details of how each of these twelve hypotheses is to be tested.
CHAPTER 3

METHODOLOGY

This chapter specifies the research questions and hypotheses that guide this inquiry, operationally defines key variables and terms, and then describes the data sources and data-collection methods used in this analysis. The data collected as specified in this methodology section are analyzed in the following chapter, demonstrating the effects of the official publication guidelines, presidential appointment, judicial career experience, and powerful, well-placed litigants and counsel on federal district judges’ publication decisions.

3.1 DATA SOURCES

3.1.1 COURT OF APPEALS OPINIONS AS SOURCE FOR SAMPLING DISTRICT COURT OPINIONS

Data concerning judicial opinions are gleaned from reading opinions issued by various U.S. courts of appeals. The data set includes most opinions issued by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuit Courts of Appeal docketed in 1996.
These opinions include those appealed from 49 U.S. district courts located in 29 states. Standards for excluding opinions due to missing data or other unworkable features are explained below in the sampling subsection.

The rationale for using opinions docketed in 1996 is to include one year of opinions issued by federal district court judges. Opinions docketed with the appeals courts in 1996 are highly likely to have been issued by the district judge this same year, due to time limitations on the losing parties in the trial court for filing appeals. The correspondence between opinions issued by the district court in 1996 and those docketed with the court of appeals in 1996 is imperfect for a few reasons; the most common reasons are that decisions issued by the district court in late 1996 may not be appealed until 1997, and decisions issued by the district court in late 1995 may be appealed in 1996. Research convenience outweighed these imperfections. Docket date is readily ascertainable from the case docket number assigned by the court of appeals, whereas date of the district court opinion is rarely available from reading the court of appeals opinion on LEXIS.

LEXIS is my preferred source for court of appeals opinions. Phone contacts with three court of appeals' clerks offices revealed that the clerks offices routinely make all opinions available to on-line services, either directly or by daily posting or subscription service. Phone contact with personnel at LEXIS confirms that LEXIS posts all opinions available to it from the U.S. Courts of Appeal on-line (Collins 1999). WESTLAW and LEXIS appear to carry the same court of appeals opinions, but LEXIS routinely posts more information about the cases of interest to me (e.g., names of attorneys for the
parties) than does WESTLAW. Other on-line sources (such as databases maintained by the circuits, or PACER [Public Access to Court Electronic Records], maintained by the Judicial Conference of the United States) do not routinely have complete coverage as far back as 1996.

I am fairly confident that LEXIS carries all opinions issued by the above courts of appeals in 1996. The number of opinions I located on LEXIS (13,137) corresponds favorably with data from the Administrative Office of the U.S. Courts for 1996 (13,292) (see Administrative Office 1997). Further, many of the opinions on LEXIS are so short as to be of utterly no research value other than to those seeking a complete record of the output of the appeals courts (or to those seeking to know the outcome in a particular case).

The reason for excluding the remaining circuits is because LEXIS has incomplete information about these circuits' unpublished opinions (see Colker 1999, p. 104 n. 30). The Fifth Circuit does not make unpublished opinions available. The Third and Eleventh Circuits' unpublished opinions contain no reasoning. Opinions of the Eighth and Tenth Circuits omit the name of the district court judge at an unacceptable rate. I chose to exclude the opinions of the Federal and D.C. Circuits because their caseload is unique and not typical of the regular courts of appeal.

The decision to use court of appeals opinions to sample district court opinions was difficult and considered extensively.
The best method for getting a representative sample is to examine federal district courthouse records (see, e.g., Rowland and Carp (1996), Ashenfelter et al. (1995)). Because this is time-consuming (and expensive), researchers have limited their scope to at most three cities. Alternatively, some researchers have located databases for one particular type of case; e.g., Ringquist and Emmert (1999) sampled civil environmental cases.

Instead of adopting one of these strategies, I examined court of appeals decisions, and from there gleaned the nature of the appealed district court opinion. Paring my sample down in this manner allowed me to gather a nationwide sample of all case types. In addition, I saved time, money and inconvenience. This method of examining unreported district court opinions was used by Songer (1988) in his study concluding that unreported district court opinions are almost as likely to have precedential value as reported opinions.

This is an admittedly imperfect manner of sampling unreported district court opinions. Only about 10-20% of contested district court opinions are appealed, and they are not a random sample of all district court opinions. A case is appealed if the losing party before the district court judge chooses to appeal, and this is not a random decision.

In order to assess the nature of the bias inherent in viewing district court opinions through the lens of appellate opinions, I performed an analysis of the difference between district court opinions that are appealed and those that are not. This analysis uses C.K. Rowland's (1990b) database "Federal District Court Civil Decisions, 1981-1987: Detroit, Houston and Kansas City," and is attached at Appendix A, but the highlights are
presented here. I determined that the cause of most significant differences between the pool of appealed and non-appealed cases is the greater propensity of prisoners to appeal their losses. Thus the pool of appealed cases contains proportionally more cases of types concerning prisoners (e.g., habeas corpus) and more prisoners and their adversaries (governments) as litigants.

Another difference between appealed and non-appealed cases of importance to this project is that appealed cases are somewhat more likely to be published than are non-appealed cases. This difference, however, is not large. Aside from these generalizations, appealed and non-appealed cases do not appear to differ in identifiable and significant ways.

This analysis has lead me to conclude that the merits of using a cases-appealed sample, especially the ability to collect a national sample, outweigh the disadvantages of using this unorthodox data source.

3.1.2 SAMPLING

From the universe of opinions issued by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuit Courts of Appeal docketed in 1996 and available on LEXIS, I drew a simple random sample of 800. The unit of analysis is the court of appeals docket number. As such, some cases represent more than one opinion issued by the court of appeals, and correspond to more than one opinion issued by the district court judge at separate stages of the trial litigation. In these cases, I selected the opinion of the court of appeals that addressed the opinion of the district judge that was the "most dispositive" of the case. For
example, an opinion addressing the district court’s ruling on a motion for summary judgment would be selected rather than a later-in-time opinion addressing the district court’s ruling on a motion for attorneys’ fees.

Of the sample of 800, I discarded those deemed unsuitable for the data set for the following reasons. Cases not decided by a federal district court were discarded, i.e., those decided by administrative tribunals such as the U.S. Tax Court, the Immigration and Naturalization Service, the National Labor Relations Board, and the Benefits Review Board. The reason for this is that only the behavior of the federal district court judge is the focus of research interest for this project. On a related note, cases which specified the involvement of a magistrate judge or bankruptcy court were discarded. The rationale is that in these cases, the district judge acts by reviewing an opinion issued by a colleague (the magistrate judge or bankruptcy judge), which is a different exercise than forming a judgment of the first order. In turn, the district judge’s decision to publish or not publish this opinion of review is not the same as the decision to publish or not publish an opinion he or she makes as the initial judicial decision maker.

Cases involving issues on appeal that were dismissed by the court of appeals as not suitable for appeal were excluded. Courts of appeal have jurisdiction only over final orders, and certain interlocutory and collateral orders (28 U.S.C. §§ 1291-1292 (1994)). This allowed exclusion of cases involving district court decisions essentially so trivial that they are not of interest to this study. Examples include a district court’s order directing service upon a party, district court orders denying a motion to amend a
complaint, and orders denying a motion to disqualify a judge. Though this study includes district court decisions beyond those that disposed of cases or potentially could have disposed of cases, orders of the most trivial nature were excluded.

Cases decided by more than one district court judge were omitted due to the complexity of attributing judicial behavior. Cases with opinions too summary to discern the nature of the issue at hand were discarded.

The end result was a data set of 568 cases.

3.2 OPERATIONAL DEFINITIONS

3.2.1 PUBLISH

An opinion is considered “published” by a district court judge if it appears on LEXIS. Personnel from LEXIS-NEXIS and WESTLAW assured me that they put everything sent to them by a district court judge on-line. A more rigorous editorial judgment is made by the publishing company to include the opinion in a paper reporter (the Federal Supplement or the Federal Rules of Decision). Appearance on the LEXIS database thus reflects the choice of the district judge to publish the opinion.

A complicating factor is that in some jurisdictions with busy legal scenes, publishing companies review the output of district judges and actively solicit judges to submit certain opinions. (MacCecheran 1999; Olson 1992). Such courting naturally

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1 My efforts were in vain for this project to get the publishing companies to identify these districts. An admission that the practice exists at all was difficult to come by.
influences a judge to publish more opinions than he or she otherwise would. Nonetheless, the decision to submit is still ultimately approved by the judge, and should be attributed to the judge.

"Publish" is the dependent variable in this study. This variable is coded 1 if the district court opinion appears on LEXIS, and 0 otherwise. As mentioned in Chapter 1, the publication rate for opinions in my sample of cases is 18.3%.

3.2.2 OFFICIAL GUIDELINES FOR PUBLICATION WORTHINESS

The official criteria guiding a district judge's publication are instructive, not mandatory. The Model Rule for Publication of Judicial Opinions states that an opinion should not be published unless it meets one or more of these criteria: "(1) the opinion establishes a new rule of law or alters or modifies an existing rule; or (2) the opinion involves a legal issue of continuing public interest; or (3) the opinion criticizes existing law; or (4) the opinion resolves an apparent conflict of authority." These formal guidelines governing publication of district court opinions (as well as those of the Circuit Courts of Appeal) are set forth in the 1973 Advisory Council for Appellate Justice Report, which clarified the vague standard enunciated by the Judicial Conference of the United States in 1964 (Martineau 1994; Martin 1999).

I attempted to operationalize criterion one only. Opinions meeting criterion (1) concerning an establishment of a new rule of law are by far the most prevalent. Opinions meeting criteria (3) or (4) almost always meet (1) as well. Furthermore, criterion (1) can be reduced to its first clause; for purposes of this project, "altering" or "modifying" an
existing rule is tantamount to establishing a new rule of law. Criterion (2) concerning continuing public interest seemed impossible to code objectively without excessive effort (e.g., consulting newspapers). This criterion would also seem to arise infrequently. Thus this criterion is ignored.

A review of literature from the fields of political science and law indicated that more work was needed to develop a workable coding scheme for the official publication criteria. Political science research approached the issue from the standpoint of finding a workable proxy for the official criteria. The most prominent efforts in this area, those of Songer (1988), Olson (1992) and Siegelman and Donohue (1990) were discussed in Chapter 2.

Though these approaches are interesting, I wanted to develop a scheme that would measure publication worthiness in a more direct manner. Research by legal scholars was some help towards this end. Though legal scholars have approached the publication worthiness of an opinion in a direct manner, they have not done so in a systematic fashion using a coding scheme allowing others to replicate their work. A descriptive or anecdotal approach is typical of studies reported in law reviews.

As described in Chapter 2, legal scholars' attempts to assess the precedential value of unpublished opinions usually arise in the context of assessing limited publication rules and rules barring or limiting citation of unpublished opinions adopted by the U.S. Courts of Appeal and some state appellate courts. One argument frequently leveled against said rules is that many precedent-worthy opinions are not published. Some authors conduct studies in support of this assertion; some do not.
Legal scholars conducting a systematic analysis of opinions read a sample of unreported cases, and often conclude that many should have been published on the grounds that they meet one or more of the official publication guidelines. Law review articles describing the studies typically give very little insight into the coding methods used. The authors characteristically describe several examples of unpublished cases that should have been published. The descriptions give enough detail of the case that it is not hard for the reader to agree that the opinion meets the publication guidelines. (See Reynolds and Richman 1981 (concluding that nonpublication of law-declaring opinions occurred in only 1% of their sample of 900 opinions, but there was a problematic frequency of non-publication of cases of public interest;) Robel 1989; Render 1984-1985; and Mueller 1977).

The Robel study did provide a good idea for coding, however. (Robel looked at all 9th Circuit cases decided during a one-year period during 1986-1987, both published and unpublished.) In discussing one unpublished opinion that should have been published, she stated "citations in the opinion on this issue were to district court opinions or opinions from other circuits, rather than opinions of the appeals court, indicating that local circuit authority on the issues in the opinion was sparse" (p. 951). This is evidence that the court deciding this case was challenged with making a new rule of law.

All this considered, I developed standards for coding criterion 1. The standards were refined through a preliminary exercise of coding 150 cases. The logic behind the coding scheme is identification of indicators that local circuit authority on the issues in the opinion was sparse. The best indicator is if the court of appeals comes right out and
states that this is the case. A secondary indicator is patterns in the court’s citation to other opinions for authority. In particular, if a court of appeals opinion cites no cases (in support of a given legal issue) from its own circuit or from the district court from which the case arose, this may be a reasonable indicator that the district court also (if it considered the issue correctly) was faced with establishing a new rule of law. The full coding scheme is attached at Appendix B.

Cases are coded as 0 if they meet the official criterion, 1 if they do. Most cases have multiple issues; only one needs to be publication worthy for the case to be coded as 1.

Opinions considered uncodable for this variable are those wherein the court of appeals stated as reasoning for the opinion that the decision was based on the reasoning set forth by the district court. These opinions are not coded because the reasoning is essentially set forth in a different document, the district court opinion, and is not available.

Seventy nine cases were not codable for this reason. The statistical programs I used to perform multivariate analysis (Stata and SPSS) use listwise deletion to discard all cases with missing data from the analysis. Exclusion of 79 cases out of 583 raises unacceptable risks of selection bias as well as loss of valuable information. (See King et al. 2001). I opted to replace the missing values using the SPSS "series mean" method of estimating missing values, which simply replaces missing values with the mean for the entire series.
Table 3.1 displays the frequencies for meeting the official publication criteria in my sample of cases as well as the percentage published.

<table>
<thead>
<tr>
<th>Variable</th>
<th># of Cases</th>
<th>% of Cases</th>
<th>% Published</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meets Official Publication Criteria</td>
<td>170</td>
<td>29.9</td>
<td>30.0</td>
</tr>
<tr>
<td>Does not Meet Official Publication Criteria</td>
<td>319</td>
<td>56.2</td>
<td>12.9</td>
</tr>
</tbody>
</table>

Table 3.1: Frequencies of meeting the official publication criteria and percentage published.

3.2.3 IDEOLOGICAL DIRECTION OF DECISION

The ideological direction of the decision is coded by using the standards for determining if a decision is liberal or conservative set forth in the U.S. Supreme Court Database codebook, pp. 85-86 (Spaeth 1994), and is attached at Appendix C.

Consistent with the Spaeth codebook coding scheme, I coded cases as 1 which were decided in a liberal direction by the district court, and 2, which were decided in a conservative fashion. Table 3.2 indicates the frequencies of ideological directions of the district court decisions in my case sample as well as the percentage published.

<table>
<thead>
<tr>
<th>Ideological Direction</th>
<th># of Cases</th>
<th>% of Cases</th>
<th>% Published</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liberal</td>
<td>72</td>
<td>12.7</td>
<td>40.3</td>
</tr>
<tr>
<td>Conservative</td>
<td>491</td>
<td>86.4</td>
<td>14.9</td>
</tr>
</tbody>
</table>

Table 3.2: Frequency of liberal and conservative decisions by district courts and percentage published.
3.2.4 PARTY

A judge's political party is inferred from the party of his or her appointing president. This is reasonable, because more than 90% of the district judges appointed since 1976 share the president's party identification (Goldman et al. 2001). Party identification, in turn, allows inferences to be made about the judge's ideology. It is generally accepted in the field that the party of the appointing president is a good proxy for a judge's ideology (see, e.g., Rowland and Carp 1996). District judges appointed by Democratic presidents (Clinton, Carter, Johnson and Kennedy) are considered liberal; those appointed by Republican presidents (Bush, Reagan, Ford, Nixon, Eisenhower) are considered conservative. Information about judges' appointing presidents was derived from the *Almanac of the Federal Judiciary* (1996).

Cases decided by judges appointed by Democratic presidents are coded as 1, and cases decided by judges appointed by Republican presidents are coded as 2. Table 3.3 indicates the frequencies of opinions decided by Democratic and Republican appointees in my sample. Percentage of opinions decided in a liberal direction is included as well to demonstrate the relationship between political party and ideological behavior. For added interest, Table 3.4 indicates the frequencies of opinions decided by the appointees of specific presidents in my sample, the percentage published, as well as the percentage of opinions decided in a liberal direction.
Table 3.3: Frequency of decisions by district court judges, percentage published and percentage of opinions decided in a liberal direction, by political party of appointing president.

<table>
<thead>
<tr>
<th>Party of Judge</th>
<th># of Cases</th>
<th>% of Cases</th>
<th>% Published</th>
<th>% Decided in a Liberal Direction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Republican</td>
<td>376</td>
<td>66.2</td>
<td>15.2</td>
<td>9.8</td>
</tr>
<tr>
<td>Democrat</td>
<td>192</td>
<td>33.8</td>
<td>24.5</td>
<td>18.2</td>
</tr>
</tbody>
</table>

Table 3.4: Frequency of decisions by district court judges and percentage of opinions decided in a liberal direction, by appointing president.

<table>
<thead>
<tr>
<th>Appointing President</th>
<th># of Cases</th>
<th>% of Cases</th>
<th>% Decided in a Liberal Direction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clinton</td>
<td>83</td>
<td>14.6</td>
<td>20.5</td>
</tr>
<tr>
<td>Bush</td>
<td>104</td>
<td>18.3</td>
<td>7.7</td>
</tr>
<tr>
<td>Reagan</td>
<td>221</td>
<td>38.9</td>
<td>10.4</td>
</tr>
<tr>
<td>Carter</td>
<td>78</td>
<td>13.7</td>
<td>15.4</td>
</tr>
<tr>
<td>Ford</td>
<td>14</td>
<td>2.5</td>
<td>21.4</td>
</tr>
<tr>
<td>Nixon</td>
<td>31</td>
<td>5.5</td>
<td>6.5</td>
</tr>
<tr>
<td>Johnson</td>
<td>35</td>
<td>6.2</td>
<td>20.0</td>
</tr>
<tr>
<td>Kennedy</td>
<td>1</td>
<td>.2</td>
<td>0</td>
</tr>
<tr>
<td>Eisenhower</td>
<td>1</td>
<td>.2</td>
<td>0</td>
</tr>
</tbody>
</table>

3.2.5 IDEOLOGICAL CONGRUENCE

An opinion is “ideologically congruent with judge’s ideological background” when judicial ideology and the ideological direction of the decision correspond. This includes liberal decisions decided by Democratic appointees, and conservative decisions decided by Republican appointees. For cases that are ideologically congruent, I coded them as 1, and 0 otherwise. Table 3.5 indicates the frequencies of ideological congruence in my case sample as well as the percentage published.
<table>
<thead>
<tr>
<th>Variable</th>
<th># of Cases</th>
<th>% of Cases</th>
<th>% Published</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideologically Congruent</td>
<td>372</td>
<td>65.5</td>
<td>16.7</td>
</tr>
<tr>
<td>Ideologically Incongruent</td>
<td>191</td>
<td>33.6</td>
<td>20.9</td>
</tr>
</tbody>
</table>

Table 3.5: Frequency of ideologically congruent decisions by district courts and percentage published.

3.2.6 CAREER EXPERIENCE

A judge's previous career experience is coded for several areas of special relevance to case background where data were easily obtainable: background as an attorney for the United States, a state, or a local government; and, as a subset of government experience, background as a criminal prosecutor. A series of variables addresses the presence or absence of a judge's background in these areas; and whether there is a convergence between this judicial background and features of the case. Specifically, variables assess the convergence of judicial background in the above areas and whether the cases involves the judge's former government employer as a party or attorney; and convergence of judicial background in the above areas and whether the case was decided by the district judge in favor of or against the relevant government actor.

In addition to variables related to the government specializations mentioned above, there is an umbrella variable assessing whether the judge has any career-related links to the case. This variable includes the information contained in the above government specialization variables; it also assesses a judge's prior private practice specialization in the issue area of the case, and a judge's other connections with the issue area of the case. These latter connections include membership in a professional association such as a particular subsection of the American Bar Association, service on a
government commission, teaching law school classes in a particular subject matter area, or publication of books or articles on a particular topic. For example, a case would receive a positive coding on this umbrella variable if the issue area was labor law and the judge's practice profile indicated that he or she specialized in employment law as an attorney for a private law firm. This variable is probably underinclusive, as complete information is not readily available concerning the nature of all judges' private practice.

Most of the information about judges' career backgrounds was derived from the *Almanac of the Federal Judiciary* (1996), an excellent source of biographical information on federal judges. This information was supplemented with various editions of the *Martindale-Hubbell Law Directory*, which contains more detailed information on the nature of some attorneys' and their law firms' private practice.

The existence of relevant career experience is coded as 1, 0 as otherwise. The existence of relevant career experience plus a convergence with the case type is coded as 1, 0 as otherwise. This convergence plus a decision in favor of the relevant actor is coded as 1, 0 as otherwise.

Table 3.6 displays the frequencies of cases featuring judges with relevant career experience in my case sample, as well as convergencies between judicial background and cases featuring the judge's former employer, and convergencies between judicial background and cases decided by the judge in favor of the judge's former employer.
Table 3.6: Frequencies of judicial career backgrounds; convergencies of backgrounds and case featuring former employer; and convergencies of backgrounds and decisions favorable to former employer.

<table>
<thead>
<tr>
<th>Career Background</th>
<th># of Cases</th>
<th>% of Cases</th>
<th># of Cases-Convergence with Case Type</th>
<th># of Cases-Convergence with Favorable Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Government Atty.</td>
<td>277</td>
<td>48.8</td>
<td>103</td>
<td>94</td>
</tr>
<tr>
<td>State Government Atty.</td>
<td>127</td>
<td>22.4</td>
<td>28</td>
<td>25</td>
</tr>
<tr>
<td>Local Government Atty.</td>
<td>116</td>
<td>20.4</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Criminal Prosecutor</td>
<td>201</td>
<td>35.4</td>
<td>92</td>
<td>83</td>
</tr>
<tr>
<td>Links to Case</td>
<td>218</td>
<td>38.4</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

3.2.7 LAW DEGREE FROM ELITE LAW SCHOOL

Elite law schools are operationalized as in the Merritt and Brudney (2001) study. This study used the 1977 Cartter Report to choose 15 schools for this elite group. The 15 schools are Harvard, Yale, Berkeley, Chicago, Columbia, Cornell, Duke, Michigan, NYU, Northwestern, Pennsylvania, Stanford, Texas, UCLA, and Virginia. Information about judges' legal education was derived from the Almanac of the Federal Judiciary (1996). Law degree is considered a J.D. or L.L.B., not mere attendance or receipt of an L.L.M.

This variable is coded 1 if the judge has a law degree from an elite law school, and 0 if otherwise. Table 3.7 displays the frequencies for cases decided by judges having a law degree from an elite law school in my sample of cases as well as the percentage published.

<table>
<thead>
<tr>
<th>Variable</th>
<th># of Cases</th>
<th>% of Cases</th>
<th>% Published</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law Degree from Elite Law School</td>
<td>210</td>
<td>37.0</td>
<td>22.4</td>
</tr>
<tr>
<td>Law Degree from Non-Elite Law School</td>
<td>358</td>
<td>63.0</td>
<td>15.9</td>
</tr>
</tbody>
</table>

Table 3.7: Frequencies of law degree from elite law school and percentage published.
3.2.8 EXPERIENCE AS A LAW PROFESSOR

Information about judges' background as law professors was derived from the 

This variable is coded 1 if the judge has experience as a law professor, and 0 if otherwise. Table 3.8 displays the frequencies of cases decided by judges having experience as a law professor school in my sample of cases. Experience as a law professor includes any type of law teaching, even as an adjunct while practicing law or serving as a judge as well as the percentage published.

<table>
<thead>
<tr>
<th>Variable</th>
<th># of Cases</th>
<th>% of Cases</th>
<th>% Published</th>
</tr>
</thead>
<tbody>
<tr>
<td>Experience as a Law Professor</td>
<td>157</td>
<td>27.6</td>
<td>22.3</td>
</tr>
<tr>
<td>No Experience as a Law Professor</td>
<td>411</td>
<td>72.4</td>
<td>16.8</td>
</tr>
</tbody>
</table>

Table 3.8: Frequencies of experience as a law professor and percentage published.

3.2.9 TENURE ON THE FEDERAL BENCH

Tenure on the federal bench is measured by number of years the judge has served as a federal district court judge prior to 1996. Service as a federal magistrate judge or bankruptcy judge is not counted for this tenure variable. Information about judges' district court tenure was derived from the *Almanac of the Federal Judiciary* (1996).

This variable is coded on an interval level. Table 3.9 displays the range and mean for this variable.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>Length</td>
<td>1</td>
<td>36</td>
<td>11.7</td>
</tr>
</tbody>
</table>

Table 3.9: Minimum, maximum and mean of number of years served as a district judge.
3.2.10 PRIOR EXPERIENCE AS A JUDGE

Prior experience as a judge counts for any type of judicial service prior to appointment as a federal district court judge, if the judicial service was on a court with a regular practice of publication. The only type of judicial experience excluded from counting for this variable was state trial court experience. Information about judges' prior judicial experience was derived from the *Almanac of the Federal Judiciary* (1996).

This variable is coded 1 if the judge has experience at the state appellate level or federal level, and 0 if otherwise. Table 3.10 displays the frequencies of cases decided by judges having the relevant prior experience as a judge in my sample of cases as well as the percentage published.

<table>
<thead>
<tr>
<th>Variable</th>
<th># of Cases</th>
<th>% of Cases</th>
<th>% Published</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prior Judicial Experience</td>
<td>90</td>
<td>15.8</td>
<td>16.7</td>
</tr>
<tr>
<td>No Prior Judicial Experience</td>
<td>478</td>
<td>84.2</td>
<td>18.6</td>
</tr>
</tbody>
</table>

(or state trial level only)

Table 3.10: Frequencies of prior judicial experience and percentage published.

3.2.11 POWERFUL AND WELL-PLACED ACTORS

"Powerful and well-placed" attorneys include those classified as working for one of the nation's top 700 law firms as classified by *Of Counsel 700* (1996). These are firms that employ around 50 or more attorneys. Though attorneys employed by the government are also considered powerful and well-placed, their appearance on a case is coextensive with government appearing as a party. The impact of government counsel is thus subsumed in the following set of variables.
“Powerful and well-placed” parties include any corporation classified in one of the Forbes 500 lists of top corporations for 1996. Unions are also considered powerful and well-placed. Governments are also considered powerful and well-placed.

A series of variables addresses the existence of specific powerful, well-placed actors as a party or counsel in a case. The existence of the powerful, well-placed actor is coded as 1, 0 as otherwise. A series of variables also addresses whether the case was decided by the district judge in favor of or against the powerful, well-placed actor. A decision in favor of the powerful, well-placed actor is coded as 1, a decision against the actor is coded as 0.

Table 3.11 displays the frequencies of cases featuring powerful, well-placed actors in my case sample, the percentage published, as well as the percentage of cases won by the actor of those in which the actor was a party.

<table>
<thead>
<tr>
<th>Powerful Actor</th>
<th># of Cases</th>
<th>% of Cases</th>
<th>% Published</th>
<th>% of all Cases Won</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top Law Firm</td>
<td>91</td>
<td>16.0</td>
<td>41.8</td>
<td>70.3</td>
</tr>
<tr>
<td>Top Corporation</td>
<td>44</td>
<td>7.7</td>
<td>50.0</td>
<td>81.8</td>
</tr>
<tr>
<td>Union</td>
<td>15</td>
<td>2.6</td>
<td>40.0</td>
<td>73.3</td>
</tr>
<tr>
<td>U.S. Government</td>
<td>303</td>
<td>53.3</td>
<td>9.6</td>
<td>86.5</td>
</tr>
<tr>
<td>State Government</td>
<td>108</td>
<td>19.0</td>
<td>13.0</td>
<td>89.8</td>
</tr>
<tr>
<td>Local Government</td>
<td>49</td>
<td>8.6</td>
<td>36.7</td>
<td>83.7</td>
</tr>
</tbody>
</table>

Table 3.11: Frequencies of powerful, well-placed actors, percentage published and percentage of cases won.

3.2.12 ISSUE AREAS

The issue area of the opinion is coded primarily so that statistical analyses can at times be broken down by issue type. Cases of all civil types are lumped together excluding motions for the writ of habeas corpus and prisoner civil rights (issue areas
entirely excluded from the sample are discussed above.) Criminal cases are lumped with motions for the writ of habeas corpus because the area of law at issue in the latter cases is criminal, and the same types of parties are litigants in both cases. Prisoner civil rights cases are categorized separately; litigants (and counsel) are quite different from those found in regular civil cases, and the legal issues are quite different from those in criminal cases.

Civil cases are coded as 1, criminal and habeas corpus are coded as 2, and prisoner civil rights coded as 3. Table 3.12 displays the frequencies for these issue areas in my sample of cases as well as the percentage published.

<table>
<thead>
<tr>
<th>Issue Area</th>
<th># of Cases</th>
<th>% of Cases</th>
<th>% Published</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil</td>
<td>239</td>
<td>42.1</td>
<td>36.0</td>
</tr>
<tr>
<td>Criminal and Habeas Corpus</td>
<td>273</td>
<td>48.1</td>
<td>4.0</td>
</tr>
<tr>
<td>Prisoner Civil Rights</td>
<td>56</td>
<td>9.9</td>
<td>12.5</td>
</tr>
</tbody>
</table>

Table 3.12: Frequencies and percentage published of civil, criminal and prisoner issue areas.

3.3 STATISTICAL ANALYSIS

3.3.1 MULTIVARIATE ANALYSIS

The most important analytic tool used in the process of attempting to verify the twelve hypotheses set forth in Chapter 2 is multivariate statistical analysis. I developed several multivariate models to test the various hypotheses. The models as a whole rest on the assumption that a number of factors simultaneously affect the judge’s publication
decision. Multivariate analysis is superior to bivariate analysis as a method of examining associations between independent and dependent variables, because it tests the effect of one variable on the dependent variable by holding other independent variables constant.

Because the dependent variable is nominal (as well as most of the independent variables) it is necessary to use a maximum likelihood logit procedure. This technique derives coefficients indicating the strength and direction of the relationship of the dependent and independent variables. I used both SPSS (Statistical Package for Social Sciences) Logistic Regression and Stata logit statistical software programs to produce estimates and to perform tests of significance.

The results of the models tested by multivariate analysis are set forth in tables in Chapter 4. The tables report the coefficients generated for each variable, the standard errors, the z-scores, and the significance levels. The Model Chi-Square is reported to provide an evaluation of the model as a whole. The Model Chi-Square is an assessment of the degree to which the model is an improvement over a mere constant-only model; the statistic generated is the difference in the -2 log likelihood between the model itself and the model with only a constant. The significance level for the Model Chi-Square is noted as well.

Probability estimates are also set forth in a table in Chapter 4. "Clarify," a program developed by Gary King et al. (2000) for use with Stata, produces estimates of the probability of the dependent variable occurring for each value of the independent variable while holding the other variables at their means. The uncertainty surrounding the
probability estimate is also estimated. This allows for a more meaningful interpretation and presentation of the regression coefficients than is possible using SPSS. (Or, at least, "Clarify" makes these interpretations easier to come by.)

Levels of significance at $p<.05$ will be assumed for this project to indicate that the relationship between two variables is statistically significant. The $p<.05$ level of significance is commonly accepted in the field as a cutoff for the acceptance or rejection of hypotheses. Significance levels of $p<.1$ will be noted as well, however, and the relationship will be treated as "approaching significance."

3.3.2 BIVARIATE ANALYSIS

I will sometimes supplement the multivariate models with bivariate analysis. The relationship between the dependent variable and one and or two independent variables will be tested using crosstabulation tables. The SPSS Crosstabs procedure performs this descriptive statistic, generating a table displaying counts and percentages of cases falling into each combination of the categories of two or more variables. Crosstabs also produces the Chi-Square test for independence and its significance level, and various measures of association.

The Chi-Square test for independence is used to assess the null hypothesis— that two variables are independent— which must be rejected before continuing to explore the strength of the relationship between two variables. This test calculates the difference
between observed frequencies and expected frequencies, and measures the probability that they could have occurred by chance. This Chi-Square value is reported and its significance level is noted.

Several tests are used to measure the strength of the relationship between two related variables: Tau, Phi and Cramer's V. The values of these statistics range from 0 and 1, with 1 indicating that the two variables are perfectly related and 0 indicating no relationship.

3.3.3. INTERVIEWS

Prior to quantitative data gathering, I conducted personal interviews with willing district judges of the Southern District of Ohio working in the federal courthouse in Columbus, Ohio. The purpose of these interviews was to gain more insight into the district judge's publication decision. I spoke with four judges and the career law clerk for a fifth judge. All interviewees were forthright and more than willing to elaborate on their personal decision-making process concerning publication. All regarded the decision to publish an opinion or not to be important, a decision they took seriously as part of their job duties. Insight from these interviews assisted me in testing the validity of some of my hypotheses, and in interpreting some of the results of the multivariate analysis.

I now turn to Chapter 4, in which I will examine whether any of the previously discussed variables affect a district judge's decision to publish.
The hypotheses posed in Chapter 2 predicted that the official publication guidelines, judges' ideological preferences, judges' career backgrounds, and powerful and well-placed litigants and counsel would be influential in affecting district judges' decisions to publish opinions. In this chapter, I evaluate these hypotheses. Most of the evidence I use is furnished by statistical analysis. Most of the statistical evidence is provided by several multivariate models, which in one instance is supplemented with bivariate analysis. My interviews with federal district judges also offer some evidence and assistance in interpreting the statistical findings. Interpretation of the findings is also aided by my personal experience as a law clerk for a federal magistrate judge, as well as relevant scholarship.

4.1 THE BASIC MODEL

Table 4.1 displays the results of a model of the publication decision (the "Basic Model"), and will be referred to frequently throughout this Chapter. The Basic Model tests most of the twelve hypotheses, but this Chapter presents several additional models.
A few of the hypotheses need to be tested with their own models because their testing requires substitution of one or more independent variables tested in the Basic Model. And, a few of the hypotheses are given supplemental testing beyond the Basic Model using a subset of the data. These additional models are presented and explained in later sections.

Table 4.2 shows the substantive importance of the variables in the Basic Model and of two significant variables tested in other models, in that it presents the estimated probabilities of publication for the values of the independent variables when all the other independent variables are set to their means.
| Variable | Coefficient | Std. Error | z       | P>|z|   |
|----------|-------------|------------|---------|--------|
|          |             |            | (two-tailed test) |       |
| Official Publication Guidelines | .80 | .26 | 3.07 | .002 |
| Ideological Direction of Decision | -.88 | .31 | -2.86 | .004 |
| Ideological Congruence of Decision and Judge's Party a | .13 | .26 | .51 | .612 |
| Judge has Degree from Elite Law School | .28 | .24 | 1.14 | .253 |
| Judge has Experience as Law Professor | .41 | .26 | 1.58 | .114 |
| Years Judge Served as District Judge | .01 | .01 | .72 | .470 |
| Judge has Prior Experience as Judge | -.08 | .34 | -2.23 | .816 |
| Top Company as Party | 1.21 | .37 | 3.27 | .001 |
| Top Law Firm for Party | .94 | .29 | 3.28 | .001 |
| Union as Party | .36 | .61 | .58 | .560 |
| Judge has Background Links to Case (Umbrella Variable) b | .11 | .26 | .43 | .666 |
| Constant | -1.06 | .68 | -1.55 | .120 |
| Model Chi-square | 71.59 |        |        | p<.000 |

a As explained in Chapter 3, this variable captures the interaction between the Ideological Direction of the Decision and the Judge's Party. A separate variable for the Judge's Party is omitted from this and subsequent models because of its high correlation with this variable.

b As detailed in Chapter 3, this variable is a compilation of several interactions. It captures the convergence of a judge's career background as a government attorney and the presence of that government as a party to the case; the convergence of a judge's prior private practice specialization and the issue area of the case; and the convergence of a judge's other expressions of professional specialization and the issue area of the case (these expressions of professional specialization include membership in a professional association, service on a government commission, teaching a law school class, and publishing books or articles).

Note: Includes all cases (N=568).

Table 4.1: The Basic Model: Logistic Regression Model of Publication by Federal District Judges.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Maximum</th>
<th>Minimum</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Official Publication Guidelines</td>
<td>.24***</td>
<td>.12***</td>
<td>.11***</td>
</tr>
<tr>
<td></td>
<td>(.04)</td>
<td>(.02)</td>
<td>(.04)</td>
</tr>
<tr>
<td>Ideological Direction of Decision</td>
<td>.14***</td>
<td>.28***</td>
<td>-.14***</td>
</tr>
<tr>
<td></td>
<td>(.02)</td>
<td>(.06)</td>
<td>(.06)</td>
</tr>
<tr>
<td>Ideological Congruence of Decision and Judge's Party</td>
<td>.16</td>
<td>.14</td>
<td>.02</td>
</tr>
<tr>
<td></td>
<td>(.02)</td>
<td>(.03)</td>
<td>(.03)</td>
</tr>
<tr>
<td>Judge has Degree from Elite Law School</td>
<td>.18</td>
<td>.14</td>
<td>.04</td>
</tr>
<tr>
<td></td>
<td>(.03)</td>
<td>(.02)</td>
<td>(.02)</td>
</tr>
<tr>
<td>Judge has Experience as Law Professor</td>
<td>.2</td>
<td>.14</td>
<td>.06</td>
</tr>
<tr>
<td></td>
<td>(.03)</td>
<td>(.02)</td>
<td>(.04)</td>
</tr>
<tr>
<td>Years Judge Served as District Judge</td>
<td>.2</td>
<td>.14</td>
<td>.06</td>
</tr>
<tr>
<td></td>
<td>(.06)</td>
<td>(.03)</td>
<td>(.08)</td>
</tr>
<tr>
<td>Judge has Prior Experience as Judge</td>
<td>.15</td>
<td>.16</td>
<td>-.01</td>
</tr>
<tr>
<td></td>
<td>(.04)</td>
<td>(02)</td>
<td>(.04)</td>
</tr>
<tr>
<td>Top Company as Party</td>
<td>.36***</td>
<td>.14***</td>
<td>.22***</td>
</tr>
<tr>
<td></td>
<td>(.08)</td>
<td>(.02)</td>
<td>(.08)</td>
</tr>
<tr>
<td>Top Law Firm for Party</td>
<td>.29***</td>
<td>.14***</td>
<td>.15***</td>
</tr>
<tr>
<td></td>
<td>(.05)</td>
<td>(.02)</td>
<td>(.05)</td>
</tr>
<tr>
<td>Union as Party</td>
<td>.22</td>
<td>.15</td>
<td>.07</td>
</tr>
<tr>
<td></td>
<td>(.1)</td>
<td>(.02)</td>
<td>(1)</td>
</tr>
<tr>
<td>Judge has Background Links to Case (Umbrella Variable)</td>
<td>.16</td>
<td>.15</td>
<td>.01</td>
</tr>
<tr>
<td></td>
<td>(.02)</td>
<td>(.03)</td>
<td>(.03)</td>
</tr>
<tr>
<td>Government is a Party and Won or Lost (Cases where Judge has Background as Government Attorney Only)</td>
<td>.28***</td>
<td>.42***</td>
<td>-.14***</td>
</tr>
<tr>
<td></td>
<td>(.24)</td>
<td>(.15)</td>
<td>(.14)</td>
</tr>
<tr>
<td>Government is a Party and Won or Lost (Cases Featuring Government Actors Only)</td>
<td>.2**</td>
<td>.1**</td>
<td>-.1**</td>
</tr>
<tr>
<td></td>
<td>(.05)</td>
<td>(.02)</td>
<td>(.06)</td>
</tr>
</tbody>
</table>

Standard errors are in parentheses below each coefficient; *p<.1, **p<.05, ***p<.01 (two-tailed test).

Table 4.2: Estimated Probabilities of Publication for Values of the Independent Variables.
4.2 EFFECTS OF THE OFFICIAL PUBLICATION GUIDELINES ON THE DISTRICT JUDGE’S PUBLICATION DECISION

In Chapter 2, I predicted that a judge's decision to publish an opinion would be influenced by whether the opinion complies with the official publication guidelines. Chapter 3 explained my efforts to operationalize these guidelines. In this section I examine the evidence supporting Hypothesis #1: Judges will disproportionately publish opinions meeting official guidelines for publication worthiness.

As discussed in Chapter 2, goals that are important to many district judges could be served by publishing opinions that meet the official publication guidelines, especially the goal of achieving legal accuracy and clarity. Legal scholars have generally found that the official guidelines are effective in guiding a judge's decision to publish. However, previous social science research addressing the impact of the formal publication guidelines on district judges' publication habits has failed to uncover real differences in complexity or importance between published and unpublished opinions. Both Songer (1988) and Olson (1992), using indirect measures of publication worthiness, reached this conclusion. My results, using a more direct measure of publication worthiness, dictate a different conclusion.

Table 4.1 shows that the coefficient for whether an opinion meets the official publication guidelines is statistically significant and signed positively, lending support to Hypothesis #1. Table 4.2 lends some substantive meaning to the coefficient in Table 4.1:
Holding all of the other variables to their means, meeting the official publication guidelines raises the probability that an opinion will be published by 11%. Adherence to the criteria, then, is a modest but meaningful predictor of publication status.

Though the effect of the official guidelines on publication is impressive from a statistical standpoint, it is impressive from a substantive standpoint that there are nonetheless so many opinions that meet the official guidelines which are unpublished, and that so many that do not meet the guidelines are published. Complying with the publication guidelines is, after all, the only justification recognized by the law for publishing an opinion. Though judges appear to make some effort to abide by the publication guidelines when submitting an opinion to LEXIS or West, it is striking that much more is going on as well.

As a caveat, I will not pretend that my operational definition of adherence to the official criteria captures all instances where an opinion meets the criteria. I believe the measure is overly inclusive, and should catch most, however. On the other hand, it is not hard to imagine opinions meeting my standards that most judges would choose not to publish for defensible reasons. My efforts to design a measure that could be applied objectively— in a manner replicable by other researchers and applied fairly quickly— lead to a necessarily crude set of standards. I do not doubt that a judge making a careful determination on a case-by-case basis as to whether to publish an opinion or not could argue that all cases he or she submits for publication meet the official criteria, and that those not submitted are not worthy. I believe that most of us would be persuaded by these arguments.
Despite this, it is also clear the publication guidelines leave ample room for a judge's discretion, and most judges are apt to incorporate this sense of discretion into their decision-making process. Not only are the guidelines broadly written, but the judge's assessment of publication worthiness is not subject to review or oversight in any meaningful manner. Several of my interview subjects freely admitted to the influence of other considerations in their decision-making process, though all pointed to a criterion or criteria incorporated in the official guidelines, if not the guidelines per se, as their benchmark.

Though the judges I spoke with claimed to take the decision to publish quite seriously, and to give each opinion substantial consideration on that front, I hesitate to assume that a methodical process characterizes how all judges make decisions to publish. First of all, the judges I interviewed were given notice that publication was the subject of my interest. This gave them time to ruminate on their criteria in advance of the interview. It is possible that the judges declining my interview request did so in part because they did not have much to offer me in describing their decision-making process. Even among those interviewees not giving forethought to my interview subject, the desire to appear professional and indeed to be helpful during the interview might have caused them to speak with some certainty on the subject. All in all, my interviewees may not have been typical federal district court judges with respect to their publication decision-making.

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1 One judge stated he did not like to publish cases in complex issue areas where he had no expertise, e.g., patent law. Another stated that his own background as a trial attorney in tort cases gave him special insight into what should be published in this area, and probably influenced what he published. This same judge also explained that he was more apt to publish cases concerning "the big issues of our time," e.g., issues involving the limitations of judicial power and the importance of deference to the legislature, issues incorporated in the philosophy of his appointing president, Ronald Reagan. Three judges admitted to giving consideration to requests from parties to publish a case.
processes. It is not unreasonable to suspect that many judges make a snap decision on whether to publish a given opinion. Many probably leave the decision entirely to the discretion of their law clerks.

This project cannot probe the interesting question of the extent to which a judge's consideration of extra-legal factors is conscious or not. Based on the foregoing discussion, however, one would be remiss not to explore considerations other than the official criteria that might be at work in influencing the publication decision. The remainder of the variables analyzed for this project do just that.

4.3 EFFECTS OF APPOINTING PRESIDENT ON THE DISTRICT JUDGE'S PUBLICATION DECISION

In Chapter 2, I predicted that a judge's decision to publish an opinion would be influenced by whether the opinion's ideological direction reflects the ideology of the appointing president. In this section I first examine the evidence supporting Hypothesis #2: Judges will disproportionately publish opinions which are ideologically congruent with judge's ideological background. Next I examine the evidence supporting a hypothesis that rests on different assumptions. Hypothesis #3 posits that judges will disproportionately publish opinions which are liberal.

As discussed in Chapter 2, goals that are important to many district judges could be served by publishing opinions that are consistent with their political party's ideology, especially the goals of affecting the content of legal policy and achieving promotion to the court of appeals. Research is abundant demonstrating that the ideology of district
judges' appointing presidents influences how judges make decisions on the merits, and thus it is reasonable to suspect that ideology will also influence the publication decision. My results do not support this intriguing suspicion, unfortunately.

The data show that most decisions of even Democratic judges are conservative, though generally less so than the decisions of Republican judges. Democratic appointees are twice as likely as Republican appointees to issue liberal opinions (see Table 3.3). These appointment effects on decision making are consistent with data from most other researchers, though not with Ashenfelter et al.'s (1995) findings that appointment effects vanished with consideration of unpublished as well as published opinions.

Thus the ideology of the judge's appointing president appears to influence the judge's decision on the merits of a case; does it also influence the judge's decision to publish? In Table 4.1, the coefficient for "Ideological Congruence of Decision and Judge's Party" though positively signed is not statistically significant, which leads me to reject Hypothesis #2. District judges are not using publication as a means of advancing the policy agenda of their political party, either deliberately or not.

Indeed, the negatively signed and significant coefficient for "Ideological Direction of Decision" in Table 4.1 leads to another conclusion. Hypothesis #3, that judges will disproportionately publish opinions which are liberal, is supported by the data. Table 4.2 indicates that when an opinion is liberal, this raises the probability that an opinion will be published by 14%, when all other variables are held at their means. The
general prevalence of conservative decisions does not translate into a tendency of judges to trumpet their conservative opus, but quite the opposite. This is true regardless of a judge's political party.

The bivariate relationships set forth in Table 4.3 demonstrate this for the judges appointed by particular presidents. Clinton, Bush, Carter, Ford, Nixon and Johnson appointees publish their liberal opinions at a notably higher rate than they do their conservative opinions. This is not the case for Reagan appointees, who publish their conservative opinions at close to the same rate as their liberal opinions.

This pattern provides evidence for the scenario that most judges— including all of those appointed by Democratic presidents— achieve satisfaction from publishing liberal opinions, more so than from publishing conservative opinions. The same cannot be said for judges appointed by President Reagan, but nor are Reagan's appointees engaging in a strategy of highlighting their conservative opinions through publication. Overall, the data reinforce the research highlighted in Chapter 2 indicating that liberal opinions are special— they are associated with innovation or novelty, qualities which attract attention in the legal community. Bringing attention to one's work feeds several of the goals of judges of any ideological stripe.
<table>
<thead>
<tr>
<th></th>
<th>Liberal Opinions</th>
<th>Conservative Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clinton</td>
<td>41% (7)</td>
<td>23% (15)</td>
</tr>
<tr>
<td>Bush</td>
<td>50% (4)</td>
<td>10% (10)</td>
</tr>
<tr>
<td>Reagan</td>
<td>17% (4)</td>
<td>14% (28)</td>
</tr>
<tr>
<td>Carter</td>
<td>42% (5)</td>
<td>16% (10)</td>
</tr>
<tr>
<td>Ford</td>
<td>67% (2)</td>
<td>18% (2)</td>
</tr>
<tr>
<td>Nixon</td>
<td>50% (1)</td>
<td>17% (5)</td>
</tr>
<tr>
<td>Johnson</td>
<td>86% (6)</td>
<td>11% (3)</td>
</tr>
<tr>
<td>Democratic</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appointees</td>
<td>49% (17)</td>
<td>18% (28)</td>
</tr>
<tr>
<td>Republican</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appointees</td>
<td>32% (12)</td>
<td>13% (45)</td>
</tr>
</tbody>
</table>

Chi-Square (for liberal opinions)=4.476  
Chi-Square (for conservative opinions)=4.798  
Tau (for liberal opinions)=.075  
Tau (for conservative opinions)=.011  
Phi (for liberal opinions)=.273  
Phi (for conservative opinions)=.107  
Cramer’s V (for liberal opinions)=.273  
Cramer’s V (for conservative opinions)=.107  
*p<.1, **p<.05, ***p<.01 (one-tailed test where available).

Table 4.3: Publication Rates of Liberal and Conservative Opinions (in percentages) (numbers in parentheses).

4.4 EFFECTS OF CAREER EXPERIENCE ON THE DISTRICT JUDGE’S PUBLICATION DECISION

In Chapter 2, I predicted that features of a judge’s career experience, primarily prior to taking the federal bench, would affect the judge’s publication behavior. More specifically, I predicted that some types of law-related experience could affect the types of cases the judge chooses to publish; I focused on commonalities between a judge's previous law practice areas or employers and the types of cases the judge chooses to publish. I also predicted that some features of a judge's career experience would lead to a
general tendency to publish more cases: these features include graduation from an elite law school, experience as a law professor, and prior experience as a judge. I consider the evidence in each of these areas in the following subsections.

The inspiration for suspecting linkages between a judge’s career characteristics and the publication decision is the extensive research examining the impact of these characteristics on judicial decision making on the merits. It is sensible to hypothesize that features of a judge’s career prior to assuming the federal bench would influence publication as well, because doing so could serve goals that are important to many district judges.

4.4.1. JUDGE’S PRIOR LAW-RELATED EXPERIENCE (VOCATIONAL AND AVOCATIONAL) AND CASE ISSUE AREA

This subsection considers the evidence supporting predictions that cases in certain issue areas or involving certain classes of counsel (i.e., counsel for various levels of government) are published at higher rates than others, and that differential rates are linked to professional background characteristics of individual judges. I surmised that judges would be more inclined to publish opinions in areas where they have greater expertise and interest, and thus will do so more often than in areas where they do not. Publication in this manner could serve a variety of judicial goals. In particular, judges interested in creating high quality legal opinions may feel they have a better chance of doing this in an issue area where they have mastery over the subject. Judges interested in
impressing their reference group, either as an end in itself or in furtherance of promotion goals, might also focus publication on familiar issues and parties. I formulated three hypotheses to test these concepts.

The first is Hypothesis #4: Judges will disproportionately publish opinions concerning issue areas related to the judge's previous career experience. This hypothesis examines the broadest array of a judge's law-related background factors and their congruence with case features. The specifics of how this broad "umbrella variable" is coded are set forth in Chapter 3. Examples of linkages between the judge and the case triggering a positive coding on this variable include congruence between a case issue area and a judge's private practice specialization; congruence between a case issue area and a judge's avocational legal specialization, as evidenced by, for example, article publication; and congruence between the appearance of a government as a party (or counsel) in a case and a judge's past employment with that level of government. Hypotheses #5 and #5A examine more closely this latter category, linkages between government as a party and a judge's government experience.

The evidence supporting the broad Hypothesis #4 will be examined in this subsection. Hypotheses #5 and #5A will be examined in the following subsection. Hypothesis #4 is tested with the Basic Model, and then is probed more deeply with an additional model. Hypotheses #5 and #5A require testing with models that substitute new variables for some of those in the Basic Model.

In Table 4.1, the coefficient for "Judge has Background Links to Case (Umbrella Variable)" though positively signed is not statistically significant, which leads me to
reject Hypothesis #4. Surprisingly, judges are generally not more likely to publish opinions involving issue areas or government parties with which they are particularly familiar.

Because the issue area of criminal law (including direct challenges to criminal convictions or sentences and habeas corpus challenges) is so prevalent, comprising close to half of the opinions in my data set (see Table 3.12), it is sensible and easy to examine this subset of cases separately from civil cases. In doing so, I created a model including the judge's experience as a criminal prosecutor. This type of career experience is also prevalent among district judges, affecting 35% of the cases in my data set (see Table 3.6). The results are set forth in Table 4.4, and are in striking contrast to the results of testing the Basic Model, which includes cases of all issue areas. The coefficient for a judge's prosecutorial experience is positively signed and significant, indicating that the likelihood that a judge will publish a criminal case is enhanced if the judge has served as a prosecutor. Accordingly, Hypothesis #4 is borne out for the subset of criminal cases. Former prosecutors, at least, may have a particular interest in publishing opinions in the issue area with which they have the most familiarity and expertise. This serves the judge's goals of creating high quality legal opinions and assisting in the development of the law, and may also serve as a means of connecting with the judge's reference group.

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2 A variable reflecting this experience is substituted for the broader "Judge has Background Links to Case (Umbrella Variable.)"

3 A model of civil cases only did not produce a significant coefficient for a the existence of a judge's background links to the case. The results of this model will not be set forth here.
| Variable                                                                 | Coefficient | Std. Error | z    | P>|z|   |
|-------------------------------------------------------------------------|-------------|------------|------|-------|
| Official Publication Guidelines                                         | .80         | .78        | 1.02 | .306  |
| Ideological Direction of Decision                                        | a           |            |      |       |
| Ideological Congruence of Decision and Judge's Party^b                   | .14         | .76        | .19  | .851  |
| Judge has Degree from Elite Law School                                  | 1.29        | .68        | 1.90 | .058  |
| Judge has Experience as Law Professor                                   | -.28        | .72        | -.40 | .689  |
| Years Judge Served as District Judge                                     | -.03        | .05        | -.054| .589  |
| Judge has Prior Experience as Judge                                     | .22         | .85        | .026 | .795  |
| Top Law Firm for Party                                                  | c           |            |      |       |
| Judge has Experience as Prosecutor                                      | 1.64        | .70        | 2.35 | .019  |
| Constant                                                                | -4.49       | 1.26       | -3.55| .000  |
| Model Chi-square                                                         | 10.73       | p<.295     |      |       |

a When the variable=2, it predicted a failure to publish perfectly and thus prevented the estimation of a coefficient.
b See note a to Table 4.1.
c When the variable=0, it predicted a failure to publish perfectly and thus prevented the estimation of a coefficient.

Note: Includes criminal and habeas corpus cases only (N=273).

Table 4.4: Criminal Cases and the Influence of Judicial Prosecutorial Background: Logistic Regression Model of Publication by Federal District Judges. (Supplementary Test of Hypothesis #4)

4.4.2. JUDGE'S PRIOR GOVERNMENT EMPLOYMENT AND GOVERNMENT AS A PARTY

This subsection considers the evidence supporting my predictions that a judge with employment experience with the federal, a state, or a local government will be more
apt to publish opinions involving that level of government as a party. The statistical
model\(^4\) with results displayed in Table 4.5 tests Hypothesis #5: Judges with previous
career experience as government lawyers will disproportionately publish opinions
involving government parties related to the judge's government experience.

Table 4.5 demonstrates that Hypothesis #5 is not supported by the data, in that the
coefficients are not significant for the variables measuring the congruence between a
judge's government employment experience and the appearance of that government as a
party in the case. Among cases where a government is a party, the likelihood that an
opinion will be published is not affected by the presence of a judge who used to work for
that government.

Hypothesis #5A takes the direction of decision into account, on the possibility
that a judge with the connections to the case specified in Hypothesis #5 will be
additionally influenced to publish or not depending on whether his or her previous
employer won or lost. Two statistical models\(^5\), with results displayed in Tables 4.6 and
4.7, test Hypothesis #5A: Judges with previous career experience as government lawyers
will disproportionately publish opinions involving government parties related to the
judge's government experience when the direction of the decision favors these actors;

\(^4\) Hypothesis #5 is not testable using the Basic Model, because this hypothesis requires a breakdown of the
broad "umbrella variable" tested in the Basic Model. Instead of this variable, the model includes three
variables capturing the congruence of a judge's federal, state, or local government employment experience
and the presence of that government as a party.

\(^5\) Hypothesis #5A is not testable using the Basic Model, because a variable testing the presence of a
government as a party and whether it won or lost must be substituted for the "umbrella variable." In
addition, the variable measuring ideological direction of decision must be omitted because it is highly
correlated with government wins and losses.
conversely, these judges will disproportionately fail to publish opinions involving
government parties related to the judge's government experience when the direction of
the decision disfavors these actors.

Table 4.6 displays the results of a model testing the effect of a government win or
loss on publication for cases where the judge has no background as an attorney employed
by that level of government. The coefficient for whether the government won or lost is
not significant, indicating that this factor did not affect publication. Among judges who
were not previously employed by a government party, whether that government party
won or lost matters not. Matters are far different, however, for judges who were
previously employed by the government party. Table 4.7 displays the results of a model
testing the effect of a government win or loss on publication for cases where the judge
has background as an attorney employed by that level of government. The coefficient for
whether the government won or lost is significant and negatively signed. Thus judges
formerly employed by the government are apt to publish cases where that government
loses. Table 4.2 indicates that among opinions decided by judges with government
employment experience, government losing the case raises the probability by 14% that an
opinion will be published, when all of the other variables are held to their means.

Why would a government loss in a case influence a judge to publish that case, if
that judge was formerly employed by that government? And then, why are other judges
seemingly immune from the urge to publish a government loss? For many district court
judges, serving as the U.S. attorney or having background as an assistant U.S. attorney
leads to an appointment to the federal bench. Why would these former employees of the
federal government behave differently from other judges when the U.S. government loses a lawsuit? Surely there is not an effort to sabotage the interests of the former employer. Federal, state and local governments are successful litigants, and it is not difficult to surmise that the unusual case where the government loses is a particularly interesting case. Perhaps the judge who presides over the case featuring his or her former employer finds the case all the more interesting, enough so that the judge decides to publish the opinion he or she writes.

Lack of support for Hypothesis #5A is intriguing, in that former government attorneys are emphatically not engaged in a strategy of trumpeting government wins. Though my data shows that judges who have been employed by the government are even more apt to decide in favor of the government on the merits than are other judges, this pro-government leaning does not affect the publication decision. Perhaps the publication decision is not seen as a means of achieving goals apart from those stemming from making good law, i.e., publishing those decisions that the judge genuinely feels meet the official publication criteria.

6 This tendency manifests itself equally among Democratic and Republican judges, casting doubt on the theory that Republican judges would desire to trumpet the losses of the Clinton administration (Clinton was the President during 1996, the year of the district court opinions used in this project.)
| Variable                                                        | Coefficient | Std. Error | z     | P>|z|   |
|----------------------------------------------------------------|-------------|------------|-------|--------|
| Official Publication Guidelines                               | .87         | .35        | 2.48  | .013   |
| Ideological Direction of Decision                             | -1.14       | .42        | -2.70 | .007   |
| Ideological Congruence of Decision and Judge's Party*         | -.26        | .34        | -.80  | .423   |
| Judge has Degree from Elite Law School                        | .46         | .32        | 1.44  | .150   |
| Judge has Experience as Law Professor                         | .42         | .34        | 1.25  | .210   |
| Years Judge Served as District Judge                          | .00         | .02        | .18   | .860   |
| Judge has Prior Experience as Judge                           | -.23        | .48        | -.47  | .637   |
| Top Company as Party                                          | b           |            |       |        |
| Top Law Firm for Party                                        | 1.39        | .46        | 3.01  | .003   |
| Union as Party                                                 | b           |            |       |        |
| Judge has Background with U.S. Gov't + U.S. Government is a Party* | .19         | .38        | .51   | .613   |
| Judge has Background with State Gov't + State Government is a Party* | .77         | .56        | 1.38  | .169   |
| Judge has Background with Local Gov't + Local Government is a Party* | .08         | 1.20       | .07   | .944   |
| Constant                                                       | -.63        | .92        | -.68  | .499   |

Model Chi-square 42.78 p<.000

a See note a to Table 4.1.
b When the variable=0, it predicted publication perfectly and thus prevented the estimation of a coefficient.
c This variable captures the interaction between a judge's career background as an attorney for the United States government and the presence of the United States government as a party to the case.
d This variable captures the interaction between a judge's career background as an attorney for a state government and the presence of that state government as a party to the case.
e This variable captures the interaction between a judge's career background as an attorney for a local government and the presence of that local government as a party to the case.

Note: Includes cases with government as a party only (N=447).

Table 4.5: Cases with Government as a Party and the Influence of Judicial Background as Employee of that Government: Logistic Regression Model of Publication by Federal District Judges. (Test of Hypothesis #5)
| Variable                                      | Coefficient | Std. Error | Z    | P>|z|   |
|----------------------------------------------|-------------|------------|------|-------|
| Official Publication Guidelines              | 1.02        | .42        | 2.45 | .014  |
| Ideological Congruence of Decision and Judge's Party\(^a\) | -.40        | .42        | -.96 | .335  |
| Judge has Degree from Elite Law School       | .14         | .39        | .36  | .720  |
| Judge has Experience as Law Professor        | .61         | .42        | 1.47 | .141  |
| Years Judge Served as District Judge          | -.01        | .02        | -.22 | .830  |
| Judge has Prior Experience as Judge          | -.17        | .60        | -.28 | .777  |
| Top Law Firm for Party                       | 1.36        | .55        | 2.49 | .013  |
| Union as Party                               | b           |            |      |       |
| Government is a Party and Won or Lost        | -.11        | .53        | -.21 | .830  |
| Constant                                    | -2.45       | .68        | -3.31| .001  |

Model Chi-square: 19.11, p<.014

\(^a\) See note a to Table 4.1. In addition, the Ideological Direction of Decision variable is omitted from this model because it is highly correlated with the variable Government is a Party and Won or Lost.

\(^b\) When the variable=0, it predicted publication perfectly and thus prevented the estimation of a coefficient.

Note: Includes cases featuring a government as a party decided by judges with no background as attorneys for that government only (N=311).

Table 4.6: Government Wins and Losses and the Influence of Lack of Judicial Background as Employee of that Government: Logistic Regression Model of Publication by Federal District Judges. (Test of Hypothesis #5A)
| Variable                                      | Coefficient | Std. Error | z     | P>|z| (two-tailed test) |
|----------------------------------------------|-------------|------------|-------|-------------------|
| Official Publication Guidelines              | 1.04        | .62        | 1.66  | .096              |
| Ideological Congruence of Decision and Judge's Party* | -1.13       | .59        | -2.21 | .830              |
| Judge has Degree from Elite Law School       | 1.47        | .62        | 2.37  | .018              |
| Judge has Experience as Law Professor        | .39         | .59        | .66   | .511              |
| Years Judge Served as District Judge         | -.00        | .04        | -.10  | .924              |
| Judge has Prior Experience as Judge          | -.41        | .82        | -.50  | .617              |
| Top Law Firm for Party                       | 1.87        | .89        | 2.10  | .036              |
| Union as Party                               | b           |            |       |                   |
| Government is a Party and Won or Lost        | -2.35       | .84        | -2.78 | .005              |
| Constant                                     | -1.03       | 1.05       | -.98  | .327              |
| Model Chi-square                             | 27.14       | p<.001     |       |                   |

a See note a to Table 4.1. In addition, the Ideological Direction of Decision variable is omitted from this model because it is highly correlated with the variable Government is a Party and Won or Lost.
b When the variable=0, it predicted publication perfectly and thus prevented the estimation of a coefficient.

Note: Includes cases featuring a government as a party decided by judges with background as attorneys for that government only (N=136).

Table 4.7: Government Wins and Losses and the Influence of Judicial Background as Employee of that Government: Logistic Regression Model of Publication by Federal District Judges. (Test of Hypothesis #5A)

4.4.3 LAW SCHOOL BACKGROUND, EXPERIENCE AS A LAW PROFESSOR, AND EXPERIENCE AS A JUDGE

In Chapter 2, I predicted that some features of a judge's career experience would lead to a general tendency to publish more cases: these features include graduation from
an elite law school, experience as a law professor, and prior experience as a judge. Career characteristics such as these should give a judge greater expertise and interest in the law in general, and result in higher publication rates. Now I will consider the evidence supporting the following hypotheses:

HYPOTHESIS #6: Judges who received their law degrees from elite law schools will publish more opinions than those without this background.

HYPOTHESIS #7: Judges who have experience as law professors will publish more opinions than those without this background.

HYPOTHESIS #8: The longer a judge's tenure on the bench as a federal district court judge, the more opinions he or she will publish.

HYPOTHESIS #9: Judges with previous experience as a judge on a court with a regular practice of publication will publish more opinions than judges without this experience.

All four of these hypotheses are tested by the Basic Model. As indicated by Table 4.1, not one of the above hypotheses is borne out by the data; the coefficients for all relevant variables are not significant. Among all case types and all judges, judges with the career background factors specified in the hypotheses do not have a tendency to publish more cases than judges without these backgrounds. This is especially so for judges with extensive prior judicial experience; there is a marked lack of evidence for Hypotheses #8 and #9.

There is, however, limited support for Hypotheses #6 and #7 provided by other than the Basic Model. Hypotheses #6 and #7 are supported when I analyze a large subset of the data set. Table 4.9 indicates that among cases featuring important actors as
parties, judges with law degrees from elite law schools and judges with experience as law professors are more apt to publish. The coefficients for these variables are significant and positively signed. Among opinions featuring important actors as parties, when the judge has a law degree from an elite law school this raises the probability by 6% that an opinion will be published, when all of the other variables are held to their means; when the judge has experience as a law professor this raises the probability of publication by 7%.

In addition, the coefficient for the elite law school variable is significant and positively signed in the model testing all cases decided by Democratic judges (see Table 4.11). Among opinions decided by Democratic appointees, when the judge has a law degree from an elite law school this raises the probability by 13% that an opinion will be published, when all of the other variables are held to their means.

Thus there is some tendency among more scholarly and elite judges to publish more frequently; Hypotheses #6 and #7 have limited support from the data. It is difficult to draw meaningful theoretical conclusions about the distinctions between different subsets of cases, however. It is interesting that experience in academia as a professor or as a student at an elite law school would result in the confidence to publish one's output, whereas lengthy tenure as a federal judge or previous experience as a judge would not have this effect.

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7 I created this analysis to test other hypotheses, not the hypotheses concerning the impact of judges' law schools and professorships. The results are discussed here only because they yield significant coefficients for these variables, not because I am probing the relationship between having important actors as parties and the impact of judges' law schools and professorships.
4.5 EFFECTS OF POWERFUL, WELL-PLACED LITIGANTS AND COUNSEL ON THE DISTRICT JUDGE’S PUBLICATION DECISION

In Chapter 2, I hypothesized that the presence of powerful, well-placed litigants or counsel would affect publication. In particular, traditional "repeat players" and those that are otherwise powerful and well-placed should receive favorable publication treatment by their mere status as parties or counsel, or when they win. This data set examines the following actors for their influence on publication: the U.S. government, state governments, local governments, large corporations, large law firms, and unions.

As set forth in Chapter 2, the literature establishing the influence of "repeat players" on judicial behavior is considerable. Furthermore, it is a sound speculation that goals that are important to many district judges could be well-served by publishing opinions that feature powerful, well-placed actors, or that feature these actors as winners. These goals range from promotion to improving the quality of relationships with professionals whom judges interacts with on a daily basis.

The Basic Model provides a partial test of Hypothesis #10: Judges will disproportionately publish opinions wherein the parties or attorneys are powerful and well-placed. This hypothesis is next probed more completely by a model testing the impact of government actors.\(^8\)

Table 4.1 indicates that the presence of a large corporation as a party or a large law firm representing a party has significant influence on the publication decision. The coefficients for both variables are significant and positively signed. Table 4.2 indicates

\(^8\) The Basic Model cannot include variables measuring the presence of a government as a party, as they are highly correlated with the "umbrella variable."
that when an opinion features a large corporation as a party, this raises the probability that an opinion will be published by 22%, when all other variables are held at their means. When an opinion features a large law firm representing a party, this raises the probability that an opinion will be published by 15%. The presence of a union as a party, on the other hand, has no impact on the district judge's publication decision.

Large corporations and law firms represent the economic upper class, and their mere presence as a party or a party's representative influences publication. Is the same true for governments, another type of powerful, well-placed litigant? The impact of the presence of the U.S. government as a litigant before the U.S. Supreme Court has been well-documented in the literature, but the run-of-the mill nature of government cases in the federal district courts may result in a different impact. Table 4.8, displaying the results of a model testing the effect on publication of government parties in civil cases, reveals that no level of government influences the publication decision.

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9 This government actors model analyzes non-prisoner civil cases only, as a government is always a party to a criminal, habeas corpus, or prisoner civil rights case.
| Variable                                                                 | Coefficient | Std. Error | z    | P>|z|  |
|-------------------------------------------------------------------------|-------------|------------|------|-------|
| Official Publication Guidelines                                         | .65         | .30        | 2.14 | .033  |
| Ideological Direction of Decision                                       | -.41        | .33        | -1.24| .217  |
| Ideological Congruence of Decision and Judge's Party*                   | .24         | .30        | .79  | .430  |
| Judge has Degree from Elite Law School                                  | .16         | .29        | .56  | .573  |
| Judge has Experience as Law Professor                                   | .43         | .32        | 1.34 | .179  |
| Years Judge Served as District Judge                                    | .02         | .02        | 1.12 | .263  |
| Judge has Prior Experience as Judge                                    | -.14        | .41        | -0.35| .724  |
| Top Company as Party                                                    | .64         | .40        | 1.59 | .111  |
| Top Law Firm for Party                                                  | .26         | .33        | .79  | .431  |
| Union as Party                                                          | -.05        | .60        | -.08 | .936  |
| U.S. Government as Party                                                | -.25        | .41        | -.61 | .543  |
| State Government as Party                                               | .02         | .48        | .05  | .960  |
| Local Government as Party                                               | .12         | .40        | .30  | .765  |
| Constant                                                                | -.90        | .74        | -1.21| .225  |
| Model Chi-square                                                        | 18.41       |            |      | p<.143|

a See note a to Table 4.1.
Note: Includes civil cases only (N=239).

Table 4.8: The Influence of Government Actors as Parties: Logistic Regression Model of Publication by Federal District Judges. (Supplementary Test of Hypothesis #10)
Perhaps I can get a better sense of the nature of the impact of powerful and well-placed actors if I examine the effect of their wins and losses on the publication decision. Tables 4.9 and 4.10 set forth the results of models testing Hypothesis #10A: Judges will disproportionately publish opinions wherein the parties or attorneys are powerful and well-placed when the direction of the decision favors these actors; conversely, judges will disproportionately fail to publish opinions wherein the parties or attorneys are powerful and well-placed when the direction of the decision goes against these actors. Table 4.9 displays the results of a model testing all cases featuring important actors; the results of a model testing a subset of the important actors model— all cases featuring government actors— is displayed in Table 4.10.

Table 4.9 indicates that important actors as a group, by their winning or losing, do not influence the publication decision. When the focus is turned in Table 4.10 to government actors in particular, however, a government loss has a positive effect on publication. Table 4.2 indicates that government losing the case raises the probability by 10% that an opinion will be published, when all of the other variables are held to their means. We have already learned that this impulse to publish government losses is particularly prevalent among judges with government employment experience (see Table 4.7). Table 4.9 additionally demonstrates that a government loss has a statistically significant effect on the publication decision of all judges. As discussed above in section 4.4.2, this is probably due to the interesting nature of cases wherein the perennially successful litigant, the government, is defeated.

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10Hypothesis #10A could not be tested by the Basic Model because variables needed to test it are highly correlated with several variables in the Basic Model.
Why do the results vary between Tables 4.9 and 4.10? The types of issues featuring losing government parties, may be more inherently interesting than cases wherein economic "upper dogs" (large corporations and the clients of large law firms) lose.

In any event, Hypothesis #10A is clearly not borne out by the data. Judges are not engaged in a strategy of assisting important actors of any type by suppressing the publication of their losses or publicizing their wins. Examining the support for Hypotheses #10 and #10A together, a judge's decision to publish is influenced by the presence of a large corporation or large law firm, and by a government loss. It is not influenced, however, by the mere presence of a government as a party, or by the loss or win of a large corporation or large law firm. This indicates that the mechanism at work is probably not deliberate strategy on behalf of career goals, but more likely a less conscious response to a "cue."
| Variable                                      | Coefficient | Std. Error | z     | P>|z|   |
|-----------------------------------------------|-------------|------------|-------|-------|
| Official Publication Guidelines               | 1.09        | .29        | 3.76  | .000  |
| Ideological Congruence of Decision and Judge's Party* | -.16        | .28        | -.56  | .575  |
| Judge has Degree from Elite Law School        | .53         | .27        | 1.95  | .052  |
| Judge has Experience as Law Professor         | .58         | .29        | 2.02  | .044  |
| Years Judge Served as District Judge           | -.01        | .02        | -.30  | .768  |
| Judge has Prior Experience as Judge           | -.40        | .42        | -.96  | .340  |
| Judge has Background Links to Case (Umbrella Variable)* | -.20        | .28        | -.70  | .484  |
| Important Actor is a Party and Won or Lost    | -.41        | .38        | -1.07 | .283  |
| Constant                                      | -1.96       | .53        | -3.71 | .000  |

Model Chi-square 27.08
p<.001

a See note a to Table 4.1.
b See note b to Table 4.1.
Note: Includes cases featuring important actors only (N=479). Important actors include any level of government, large law firms, large corporations, and unions.

Table 4.9: The Influence of Important Actors as Parties: Logistic Regression Model of Publication by Federal District Judges. (Test of Hypothesis #10A)
| Variable                                                                 | Coefficient | Std. Error | z      | P>|z| (two-tailed test) |
|-------------------------------------------------------------------------|-------------|------------|--------|--------------------|
| Official Publication Guidelines                                         | 1.02        | .32        | 3.17   | .002               |
| Ideological Congruence of Decision and Judge's Party<sup>*</sup>         | -.17        | .32        | -.54   | .592               |
| Judge has Degree from Elite Law School                                 | .56         | .30        | 1.85   | .064               |
| Judge has Experience as Law Professor                                  | .59         | .31        | 1.89   | .059               |
| Years Judge Served as District Judge                                   | .02         | .02        | 1.04   | .298               |
| Judge has Prior Experience as Judge                                    | -.20        | .45        | -.44   | .657               |
| Judge has Background Links to Case (Umbrella Variable)<sup>b</sup>     | .26         | .30        | .87    | .385               |
| Government Actor is a Party and Won or Lost                            | -.79        | .38        | -2.07  | .038               |
| Constant                                                               | -2.32       | .59        | -3.96  | .000               |
| Model Chi-square                                                        | 25.80       |            |        | p<.001             |

a See note a to Table 4.1.  
b See note b to Table 4.1.  
Note: Includes cases featuring government actors only (N=449).

Table 4.10: The Influence of Government Wins and Losses: Logistic Regression Model of Publication by Federal District Judges. (Test of Hypothesis #10A)

4.6 DIFFERENCES BETWEEN DEMOCRATIC AND REPUBLICAN DISTRICT JUDGES IN THE PUBLICATION DECISION

Differences in the behavior of judges of different political party backgrounds are of widespread interest to the public and scholars alike. It is well-established that federal judges appointed by Democratic presidents behave differently from judges appointed by Republican presidents in the ideological direction of their decisions. Counter to my
hypothesis, ideology is not directly at play in the publication decision: Democratic and Republican judges do not vary notably in the ideological direction of the decisions they choose to publish. More subtle party differences, however, such as differences in the influences on the publication decisions of Democratic and Republican judges, are worth exploring. Though not related explicitly to testing the hypotheses posed in Chapter 2, a brief exploration of the differences in the publication behavior of judges of different political backgrounds is worthwhile.

Tables 4.11 and 4.12 set forth the results of the Basic Model as applied to Democratic and Republican district judges, respectively. Democratic and Republican judges do indeed behave differently when it comes to publishing opinions. Different variables are significant predictors of publication for Democrats and not for Republicans, and vice versa. As a caveat in comparing the findings, note that the sample of Republicans is nearly twice the size as the sample of Democrats; thus the findings for Republicans are more likely to reach statistical significance.

Table 4.11 shows that receipt of a law degree from an elite law school influences the publication decision of Democratic judges; it is not a significant predictor publication for Republican judges (see Table 4.12). Table 4.12 shows that Republican judges are influenced by the official publication guidelines, and the presence of a top law firm or top corporation. These factors do not appear to influence Democrats. As expected, Democratic judges more so than Republicans are prone to publish liberal opinions.
Some of these party differences reinforce traditional stereotypes. It is not surprising that Republicans should be more beholden than are Democrats to the presence of economic "upper dogs:" large corporations and law firms. And, Republicans are the party most often touting the "strict constructionist" model of constitutional interpretation, which accords with Republican judges' special deference to the official publication guidelines. The constituencies of Republican judges moreso than Democrats are apt to be impressed by the presence of these influences on publication, and to assist judges in attaining their goals. I have no explanation for the party differential in elite law graduates.
| Variable                                      | Coefficient | Std. Error | z      | P>|z|=  |
|-----------------------------------------------|-------------|------------|--------|--------|
| **Variable Coefficient Std. Error**           |             |            |        |        |
| Official Publication Guidelines               | .59         | .41        | 1.43   | .153   |
| Ideological Direction of Decision             | -1.23       | .44        | -2.81  | .005   |
| Judge has Degree from Elite Law School        | .80         | .38        | 2.09   | .036   |
| Judge has Experience as Law Professor         | .09         | .39        | .24    | .810   |
| Years Judge Served as District Judge           | .00         | .02        | .14    | .888   |
| Judge has Prior Experience as Judge           | .48         | .62        | .77    | .441   |
| Top Company as Party                          | .86         | .57        | 1.51   | .132   |
| Top Law Firm for Party                        | .54         | .46        | 1.17   | .242   |
| Union as Party                                | -.67        | .91        | -.74   | .460   |
| Judge has Background Links to Case (Umbrella Variable)* | -.18        | .41        | -.45   | .655   |
| Constant                                      | .09         | .94        | .10    | .922   |

Model Chi-square 28.94 p<.001

a See note b to Table 4.1.
Note: Includes cases decided by Democratic presidential appointees only (N=192).

Table 4.11: The Basic Model: Logistic Regression Model of Publication by Federal District Judges Appointed by Democratic Presidents.
| Variable                                           | Coefficient | Std. Error | z   | P>|z|  |
|----------------------------------------------------|-------------|------------|-----|------|
|                                                    |             |            |     | (two-tailed test) |
| Official Publication Guidelines                    | .82         | .35        | 2.34| .019 |
| Ideological Direction of Decision                  | -.39        | .46        | -.84| .399 |
| Judge has Degree from Elite Law School             | -.20        | .36        | -.56| .577 |
| Judge has Experience as Law Professor              | .62         | .35        | 1.77| .077 |
| Years Judge Served as District Judge               | .03         | .03        | .97 | .332 |
| Judge has Prior Experience as Judge                | -.30        | .43        | -.71| .480 |
| Top Company as Party                               | 1.46        | .51        | 2.89| .004 |
| Top Law Firm for Party                             | 1.10        | .39        | 2.80| .005 |
| Union as Party                                     | 1.20        | .95        | 1.27| .205 |
| Judge has Background Links to Case (Umbrella Variable)* | .24        | .34        | .69 | .490 |
| Constant                                           | -2.18       | 1.00       | -2.18| .029 |
| Model Chi-square                                    | 48.24       | p<.000     |

a See note b to Table 4.1.  
Note: Includes cases decided by Republican presidential appointees only (N=376).

Table 4.12: The Basic Model: Logistic Regression Model of Publication by Federal District Judges Appointed by Republican Presidents.

4.7 SUMMARY OF THE ANALYSES

I have presented the results of tests of twelve hypotheses using data about published and unpublished opinions decided by federal district court judges in 1996. As explained in Chapter 3, my actual data source is a sample of circuit court of appeals opinions, from which I made inferences about the district court opinions. The data were
tested using several multivariate models of the district court publication decision, supplemented at times with bivariate analyses and insight gained from personal contacts with district judges. Although not all hypotheses were supported, the data provide support for an overarching theory of publication grounded in judicial pursuit of certain goals.

The findings provide evidence consistent with several of my predictions. Most importantly, support was found for the proposition that judges are guided by the official publication guidelines. This is counter to the findings of some previous studies by social scientists, but I submit that this project offers some meaningful improvements on those studies. First of all, my measure of whether an opinion complies with the official publication guidelines is more useful. It directly goes to the substance of that inquiry, not substituting a more primitive proxy for an opinion's complexity. Secondly, I use multivariate analysis which allows me to control for alternative factors that may be confounded with complexity. Isolating the influence of the official guidelines from other independent variables allows for a more accurate assessment of the importance of the guidelines. In Chapter 2, I explained the concerns that scholars have expressed that studies might confound the effects of legal factors influencing publication with extra-legal factors. I have taken those concerns seriously in designing the methodology for this study, and hopefully produced findings that need not be questioned on this basis. (This self-promotion is not meant to imply that my project is immune from criticism; Chapter 5 addresses criticisms.)
Support for other hypotheses indicates that the publication decision is a function of additional influences as well. In particular, the data support the proposition that the presence in a lawsuit of a large corporation or law firm, quintessential powerful, well-placed actors in the economic arena, influences judges to publish the opinion. There is also a tendency of judges with particular career backgrounds to exhibit the influence of this background in deciding to publish an opinion. The data demonstrate that judges with backgrounds as criminal prosecutors will be more apt to publish criminal cases. And, judges formerly employed as attorneys for a state, local or the federal government will be more apt to publish a case when the former employer is a losing party.

Several of the hypotheses are not supported by these findings, which may also provide worthwhile insight into the publication decision. Of particular interest is the indication from the data that judges do not use publication as a means of promoting the ideology of their appointing president. This corroborates the findings of previous studies, and provides an interesting counterpoint to the abundant research documenting the effect of ideology on decisions on the merits. Instead, the data support the proposition that judges of both parties favor the publication of liberal decisions. This feeds into the research demonstrating that judges are attracted to innovative opinions.

In the next chapter, I will offer some concluding comments on this project. First I will discuss the implications stemming from the findings for theories of judicial decision making. Next I will offer criticisms of the project and suggestions for future research.
CHAPTER 5

CONCLUSION

In Chapter I, I set forth several reasons why the publication decision of the federal district judge was a worthwhile topic of study. The most important reason supporting this project was that the publication decision could afford an excellent (and little studied) perspective on judicial decision making. The literature on judicial behavior provided the foundation for the formulation of hypotheses about publication put forth in Chapter 2. In this concluding chapter, it is now time to again consider theories of decisional behavior in view of what I have learned from this project. I submit that the findings of this project detailed in Chapter 4 do provide evidence with which to further evaluate the traditional models of judicial decision making, as well as the multiple-goal-based framework.

In addition to the above mission, this chapter will set forth this project's contribution to the literature on judicial publication decisions. I will also discuss some of the implications of this project other than those for judicial decisional behavior. Lastly, I will provide criticisms of this project and suggestions for future research.
5.1 IMPLICATIONS OF THE PROJECT

5.1.1 THE PUBLICATION DECISION AND MODELS OF JUDICIAL BEHAVIOR

First I will assess the three traditional models of judicial behavior in light of this project's findings. Then I will discuss the multiple-goal-based framework. To summarize Chapter 2, the attitudinal model posits that judges are unconstrained policy advocates who generally act with the goal of asserting their personal policy preferences. Though a judge's attitudes are chiefly thought to manifest themselves through deliberate policy-asserting actions (as some might characterize the Justices' votes in Bush v. Gore), some scholars, namely Rowland and Carp (1996) and followers, find it more accurate to characterize attitudes as functioning as "cognitive shortcuts" that assist in decision making especially when evidence is ambiguous or complex. The attitudinal model is in sharp contrast to the legal model, which holds that good interpretation of the law is the foundation of judicial decision making. The third model to gain currency, the strategic model, assumes that judges are policy oriented, that they act strategically to further their goals, and that their interactions are structured by institutions.

A central finding of Chapter 4 is that meeting the official publication guidelines significantly increases the probability that an opinion will be published. This is unambiguous evidence supporting the validity of the legal model of judicial decisional behavior. Though the official guidelines are just that, and not as constraining on the outcome of a judge's decision as the dictates of statutes and constitutions, the guidelines
are the only source of formal law structuring the publication decision. Thus judges, trained to apply the law to the facts and make a decision, look to the guidelines to determine whether to publish an opinion or not.

But, if the legal model explained everything about the publication decision, the correlation between publication status and adherence to the official guidelines would be close to perfect. The data set forth in Chapter 4 demonstrate that this is not the case. Moreover, the data support other hypotheses as well, which maintain that extra-legal factors influence the publication decision. The presence in a lawsuit of a large corporation or law firm influences judges to publish the opinion; indeed, their forces are more powerful than that of the official publication guidelines. And judges with particular career backgrounds exhibit the influence of this background in deciding which opinions to publish. Judges with backgrounds as criminal prosecutors are swayed by this background to publish criminal cases; in contrast, judges formerly employed by the government are influenced by this background to publish a case when that government loses.

Do these findings provide support for any particular model of judicial decision making? The tendency of judges, especially judges appointed by Republican presidents, to publish opinions featuring powerful, well-placed economic actors could be viewed as evidence of the assertion of policy preferences. However, the hypothesis concerning the effect of judges' ideology on the publication decision is not supported by the data; the test of this hypothesis, more than the others, directly examines the assertion of judges' policy preferences. Moreover, the model testing the hypothesis concerning the influence of the
presence of powerful, well-placed economic actors controlled for the ideological
direction of decision (which should have effectively teased out the separate influences of
these variables). Instead, the findings that emerged concerning ideology demonstrate
that judges of all backgrounds have a tendency to publish liberal opinions. This indicates
that judges publish with a view towards what is novel or innovative, concepts
overlapping substantially with the instructions of the official publication guidelines.2

The tendency to publish opinions featuring powerful, well-placed economic
actors cannot plausibly be viewed as an exercise of strategy on behalf of policy goals
either. If it were, the publication decision would reflect more influence when powerful
economic actors won a case than when they lost, but the findings do not support this
hypothesis. The evidence concerning the disparate effect of only certain career
backgrounds on the publication decision cannot be argued as supporting any model but
the legal model (if that), as will be discussed below.

In short, it is surprising that study of the publication decision does not yield
evidence on behalf of the attitudinal or strategic models of decision making. I had
thought that it would, in that the publication decision, given its relative lack of
constraints, seems a prime opportunity for district judges to give sway to their policy
preferences. Perhaps the publication decision is simply not viewed as important in the
same way that decisions on the merits are, and is not seen as an opportunity for policy
making. My interview data and personal experience do not support this suggestion,

1 Nor can this tendency be viewed as the operation of a "cognitive shortcut" in judges' decision to publish
complex or ambiguous cases, because the complexity factor is controlled for by the variable measuring the
adherence to the official publication guidelines.

2 Of course, these two factors should have been measured independently of each other due to the controls of
the multivariate model.
however. Moreover, according to Rowland and Carp's (1996) suppositions about the psychological mechanics of judges' attitudes, attitudes should operate even unconsciously when the judge is struggling to resolve an ambiguous case. If attitudes are this ingrained, they should present themselves whenever a decision of a political nature is being made. In sum, though the legal model is the most successful of the three traditional judicial decision-making models at describing publication decision making by federal district court judges, it is less than satisfactory. The failures of these models have some probative value in evaluating the models. The models are not flexible enough to allow for judicial behavior as the expression of a variety of goals, which the publication decision undoubtedly must be. This criticism is, of course, similar to many scholars' criticisms of the models' function in describing or explaining judges' decision making on the merits.

Perhaps the implications of the various findings can rest more comfortably together under the umbrella of the multiple-goal-based framework. It is not easy to defend absolutist positions that judges are single-mindedly in pursuit of one objective or another; the multiple-goal-based framework offers an alternative, which at the same time adopts aspects of the three traditional models. The multiple-goal-based framework posits that judicial behavior is a product of efforts to achieve various goals or priorities central to judges; accordingly, political behavior such as that of the district judge when choosing to publish an opinion can be explained as designed to achieve certain of the judge's goals. This model has been useful in describing and explaining the district judge's publication decision, and the findings of this project offer evidence concerning which goals are operative for the federal district judge.
The finding that meeting the official publication guidelines significantly increases the probability that an opinion will be published is evidence for the proposition that judges use publication as a means of pursuing a goal meaningful to many judges, namely achieving legal accuracy and clarity. Baum (1997) treats concern with achieving the goal of legal accuracy and clarity as a subset of judges' broader goal of concern with the content of legal policy. The importance of the goal of affecting the content of legal policy is well-established for the Supreme Court; this project helps demonstrate, not surprisingly, that this goal is of fundamental importance to federal trial court judges as well. District judges' primary focus on affecting legal policy predominantly to achieve legal goals (accuracy and clarity) rather than policy goals may be of greater contrast to goals sometimes ascribed to the justices.

Identifying the goals achieved by publishing opinions featuring large corporations or law firms, but not particularly when they win or lose, is more ambiguous. This is especially so since the presence of that other variety of "repeat player," a government, does not influence the publication decision unless the government loses the case, particularly for judges formerly employed by that government. Add to the mix the evidence that former prosecutors tend to publish criminal cases, but judges with other backgrounds do not tend to publish cases concerning their issue areas of expertise. And, though judges do not tend to publish in a manner promoting the policy preferences of their appointing presidents, judges generally have a tendency to publish liberal opinions. These are not patterns clearly consistent with attainment of obvious goals a district judge might have, namely promotion to the court of appeals, improving the day-to-day work
environment, or propounding his or her policy preferences. If anything, these publication patterns are consistent with efforts to publish cases that are particularly interesting or important. Publication of interesting and important opinions may be a shortcut effort to publish opinions meeting the official publication guidelines, or may be an effort to raise the judge's profile in the legal community. Many judges desire to exercise high quality legal craftsmanship, but they also desire recognition for doing so. Publication is the most direct means of meeting the latter goal. This may, in turn, work towards achievement of the loftier goals of promotion or a more general enhancement of the judge's prestige. Though specifying these goals is challenging, the findings support the conclusion that judges are, in fact, motivated by several goals in making their publication decisions. This suggests a positive evaluation of the multiple-goal-based model relative to the traditional models.

5.1.2 THE PROJECT'S ADDITION TO EXISTING STUDIES OF PUBLICATION DECISIONS

Most studies influencing this project did not seek to examine the judicial publication decision *per se*, but set out to explore the nature of unpublished opinions in comparison to published opinions. Social scientists (chiefly but not exclusively political scientists) who study publication by district court judges are principally scholars of judicial behavior who seek to understand decision making by federal judges more fully by studying unpublished as well as published opinions. Several important studies offer potent critiques of the previously common practice of studying federal district court
decisions based on published output only. (See, e.g., Songer (1988); Siegelman and
Donohue (1990); and Olson (1992)). Other studies go further and offer models of federal
district judge decision making that take account of unpublished as well as published
opinions. (The most prominent example is Rowland and Carp's 1996 book Politics and
Judgment in Federal District Courts. See also Ashenfelter et al. (1995); and Ringquist
and Emmert (1999)). Though these studies do not purport to examine the publication
decision per se, they contain findings that are useful to this project's effort to seek insight
into judges' decisions to publish.

Legal scholars studying publication do so typically to critique the institutional
practice of leaving many important opinions unpublished (see, e.g., Martineau (1994);
Reynolds and Richman (1989); and Robel (1981)). (The bulk of the studies examine the
U.S. courts of appeal, which abide by the same publication guidelines as do the U.S.
district courts.) One study by law professors Merritt and Brudney (2001) seeks to do this
(the article is titled "Stalking Secret Law") but much more as well. Merritt and Brudney
conducted the only study I could locate explicitly setting out to examine why judges
decide to publish opinions in some cases but not others.

This section discusses these studies in the context of the light they shed on judges'
decision to publish, and addresses how this project adds to the findings of these studies. I
will proceed approximately in the order of my hypotheses.

The impact of the official publication criteria on the judge's decision to publish is
of central concern to this project, and several existing studies mentioned above have
findings bearing on this inquiry. Social science research evaluating the importance of the
publication guidelines in distinguishing published from unpublished district court opinions all use a proxy assessing the decision's complexity or importance. Songer (1988) and Olson (1992) did not find significant differences between published and unpublished cases, whereas Siegelman and Donohue (1990) and Ringquist and Emmert (1999) document that published opinions are more important and complex than those unpublished. This project supports the findings of the latter studies with a measure directly assessing the impact of the publication guidelines. My measure, which involves examining the text of the opinion for its compliance with the publication guidelines, is similar to that used by legal scholars but more systematic. The conclusions of the research conducted by law professors Robel (1989) and Reynolds and Richman (1981) support my findings that the official criteria explain some but not all of the judicial publication decision.

On a related note, the findings of this project also add to the theoretically important argument about district judges' publication behavior advanced by Carp and Rowland (1996) (and by others, such as Ashenfelter et al. (1995)). Carp and Rowland's data demonstrate that appointment effects, i.e., the tendency of judges to decide cases consistently with the ideological preferences of their appointing president, are significant for published cases but not for unpublished cases. These authors theorize that differential complexity explains the discrepancy: cases with factual complexity or legal ambiguity are more likely to be submitted for publication, and are more likely to provide opportunity for the influence of political variables. This leads to the concern that studies such as this project interested in making inferences about why judges choose to publish
some cases but not others might confound the effects of legal factors influencing publication with extra-legal factors. For example, a judge with a pattern of publishing cases that do comply with the official publication guidelines (and a pattern of not publishing cases that do not) might be assumed to be motivated by a desire to promote legal accuracy. This could be illusory, however, as this publication pattern might be consistent with the behavior of a judge motivated by other goals, such as those goals served by strategizing on behalf of ideology. By creating a multivariate model of the publication decision that controls for complexity (in the form of compliance with the official publication guidelines) as well as appointment effects, this project answers the confoundment concern and enriches Carp and Rowland's theoretical speculation. The findings of this project suggest that opinions decided by judges under the influence of political variables, i.e., opinions decided consistently with the ideological preferences of the judges' appointing president are not more likely to be submitted for publication. Instead, opinions that are more complex are more likely to comply with the official publication guidelines, and are more likely to be published. I cannot explain why appointment effects are more prevalent for published opinions than for unpublished opinions in Carp and Rowland's data, but my findings suggest that differential complexity is not the reason.

The Merritt and Brudney (2001) study has findings relevant to several hypotheses made in this project concerning judges' decisions to publish. As discussed above, my hypothesis that judges will disproportionately publish opinions which are ideologically

---

3 This is true for my data whether or not one controls for other variables. Simple bivariate analysis set forth in Table 3.5 shows that appointment effects are a bit more prevalent for unpublished opinions than for published opinions.
congruent with their ideological background (as determined by the party of the judge's appointing president), essentially in a strategic effort to promote this ideology, was not supported by the data. Similarly, Merritt and Brudney found no support for their hypothesis that court of appeals judges appointed by Democratic presidents would be more apt to publish liberal court decisions, i.e., decisions favoring unions in labor cases. The findings of both studies thus imply that in general, the party of a judge's appointing president has little impact on the judge's publication decision.

Merritt and Brudney (2001) also report that judges with law degrees from elite law schools are more apt to publish than those with more ordinary law degrees, inspiring the hypothesis for this project. Once again, their findings concerning the behavior of federal appellate court judges are supported at least to some extent by the findings of this study of federal district court judges. This suggests that the expertise in the law and the confidence in one's abilities that come with a prestigious legal education are influential on a judge's choice to publish. (This project found limited support for the hypothesis that judges with experience as law professors would be more apt to publish, however, whereas Merritt and Brudney found no support for it.) Another factor related to a judge's career background, the length of tenure as a judge, was found to have no bearing on the publication decision in the Merritt and Brudney study and in this project.

The Merritt and Brudney study has interesting findings concerning the effect of the nature of a judge's law practice on the publication decision. Counter to the authors' hypotheses, judges with career experience in labor law (representing management) are significantly less likely to publish labor law cases than are other judges. There is no
evidence that judges use publication strategically, however, to suppress or promote
decisions disfavoring or favoring their former clients. Similarly, this project did not find
support for the general theory that judges are more inclined to publish opinions in areas
where they have greater expertise and interest thanks to career experience. An exception
to this is in the area of criminal law, where judges formerly serving as prosecutors have a
tendency to publish criminal cases. Merritt and Brudney's theory that judges use
publication strategically to promote the wins (or suppress the losses) of former employers
is not supported by this project's findings. Indeed, my findings are significant counter to
the hypothesized direction for judges formerly employed by the government; these judges
are apt to publish cases where that government loses.

The finding of this project that judges favor the publication of cases that are
decided in a liberal direction is supported by existing studies of district court judges,
though there is a dearth of theoretical explanation for this phenomenon. (See Siegelman
and Donohue (1990); Rowland and Carp (1996); and Ringquist and Emmert (1999)).
Thus there is some consensus at this stage in the research that the impact of the
ideological direction of the opinion on the judge's decision to publish is not a product of
the effects of the appointing president, but of the particular nature of liberal opinions.

Previous studies measuring the impact of powerful, well-placed actors on
publication are meager, but are supported by this project. Siegelman and Donohue (1990)
report that federal judges' publication of employment discrimination cases is significantly
affected by the presence of parties with high-wage or high-prestige job classifications.
This project’s findings that large law firms and large corporations enhance the likelihood of publication add to this theory that judges are influenced by the prestige of parties to a case when deciding to publish.

All said, the primary contribution of this project to the existing literature is its treatment of the district judge's decision to publish or not publish any given opinion he or she writes as an active choice. Investigating what factors influence this choice give the political scientist a fine opportunity to analyze the behavior of district judges. Thus this study adds to the scholarship on decision making by federal district court judges generally, and especially adds to recent studies which highlight the differences between published and unpublished opinions. This project also adds to the important contribution by Merritt and Brudney, which directly examines the influences on federal court of appeals judges' publication decisions in the area of labor law. This project, while studying district judges and numerous policy areas, has several findings that are parallel with Merritt and Brudney's. The similarities may be surprising, considering the different settings in which trial and appellate judges make their publication decisions; the appellate judge votes to publish as part of a panel, whereas the district judge acts alone in his or her decision. Consistency of the findings strengthens the generalizability of both studies, and offers important insight into judges' publication decisions.

5.1.3 OTHER IMPLICATIONS OF THE PROJECT

For those interested in the topic of publication for reasons other than the implications for judicial decisional behavior, the findings of this project are also useful.
These findings reinforce the notion that studying the published output alone of the federal district courts is not representative of the courts' work. The published output is more liberal, involves more lawsuits featuring large corporations or large law firms, and may be more the product of judges with particular backgrounds, especially judges with degrees from elite law schools or with law teaching experience. The pools of published and unpublished cases vary in other ways barely explored by this project; one particularly striking fact is that cases involving certain issues or types of litigants, e.g., criminal prosecutions and prisoner civil rights lawsuits, are published at remarkably lower rates than others (see Table 3.12).

There are also lessons for those who wish to evaluate the legal institution of publication. The official publication guidelines seem to have the desired effect, but not strongly enough. The pool of published opinions is biased in the manner specified above, which has some implications for the operation of the publication process. Though the process dwells more on the interests of the economic elite than on the powerless in terms of the subject matter of published cases, publication is not an outright tool of the elite as it might be if the wins of powerful, well-placed actors were overpublished. Finally, this project could serve to banish fears of other more sinister potential abuses of the publication process. If judges were using publication as a tool for promotion of an ideological agenda, this would be distasteful and further erode public confidence in the courts as a political institution. Instead, this project offers evidence that judges tend to publish opinions that make a new rule of law, or are otherwise interesting or important.
5.2 SUGGESTIONS FOR FUTURE RESEARCH

Perhaps the area of most vulnerability in this project that could be improved upon in future projects is the nature of the sample. Clearly, it could be larger, especially since many useful analyses break down the sample by issue type or party of the judge's appointing president. Interesting areas that this project could not explore due to limited sample size include differences between judges appointed by particular presidents, differences between men and women judges, and differences between cases of specific issue areas (beyond differences between civil and criminal cases generally.)

In addition, because the sample was limited to one year, it may not be safe to generalize about the findings. For one thing, publication practices are changing by becoming more open. The Internet and CD-ROM technology have promoted competitors to LEXIS and WESTLAW in the private and public arenas. For example, in the past few years most circuit courts of appeal have established their own websites, many featuring unpublished as well as published opinions. The same could be true of district courts some day, rendering meaningless any distinctions between what is or is not published on LEXIS.

The feature of the sample most compromising its generalizability is, as discussed extensively in Chapter 3, the fact that all cases have been appealed. This skews the nature of the sample, and also limits the quality of the information available about the district court opinion. At the same time, any study subject to limited resources must make
choices involving various tradeoffs, and I still defend my choice. At the very least, the
cases-appealed sample offers a valuable addition to studies relying on samples selecting
limited geographic areas or issue areas.

On a broader level, a true understanding of the district judge's publication
decision and the goals served by publication requires qualitative as well as more
quantitative research. My efforts above to interpret the results of my findings by drawing
conclusions about the goals of district judges may seem far-reaching to the discerning
reader. As Baum (1997) notes, it is difficult to divine judicial goals from patterns in
empirical data; data are often consistent with several interpretations. I learned a great
deal from my handful of interviews with district judges about how judges decide what to
publish, and more principally, what is important to judges. Many interviews with a wide
variety of district judges is certainly advised as a direction for future research in this area
of increasing interest to scholars.
INTRODUCTION

For my dissertation research, I have proposed studying federal district court decisions by examining court of appeals opinions, i.e., district court decisions that have been appealed to the court of appeals. This unorthodox sampling method is not without concerns, and they are addressed in this memo. The first concern is that a cases-appealed sample of district court decisions is not representative. To satisfy this concern, this report will explore how profiles of those district court cases that are appealed and those that are not differ from each other. Other researchers, such as Eisenberg and Schwab (1989), warn of warped view of district court filings when observed through the lens of appellate opinions, on the grounds that parties do not randomly decide which cases to appeal. This issue will be examined by comparing pools of appealed and non-appealed cases by issue type and by litigant type.
A second concern regarding my proposed sampling method is that district court cases that are appealed and cases that are published are one and the same, so that selecting a sample of district court cases from those that are appealed constitutes the statistical transgression of "selecting on the dependent variable." This report will examine the relationship between appealed and published cases next.

DATA SET

C.K. Rowland's database "Federal District Court Civil Decisions, 1981-1987; Detroit, Houston and Kansas City" is coded for a number of variables relevant to my dissertation project, and is a useful resource for exploring and assessing the potential bias in drawing a sample of district court decisions from those that have been appealed. I used this database to prepare this report.

My first task was to limit this data set by isolating the subset of cases in which a potentially dispositive decision was made by the judge. We know that generally, most cases are settled prior to trial. I thus eliminated those cases that were settled prior to the judge issuing a potentially dispositive decision in the case. Unfortunately, I was also forced to exclude cases from Detroit and Houston, as a large percentage of them were coded as "missing information" in categories of interest.

Accordingly, this report is an analysis of cases decided by federal district court judges in Kansas City from 1981-1987 (N=1,427). The variables analyzed for this report are Appealed (whether or not a case was appealed to the Court of Appeals); Litigant Type (whether the case is between private parties, or whether one litigant is a federal, state or
local government); Issue Type (whether case is Prisoner, Civil Rights, Labor, Contracts, Property Rights [copyright, patent and trademark], Forfeiture, Personal Injury/Product Liability, or Other); and Published (whether or not a case was published in the *Federal Supplement* or other casebook.)

**COMPARISON OF APPEALED AND NON-APPEALED CASES BY ISSUE TYPE AND LITIGANT TYPE**

**ISSUE TYPE (See Table A.1)**

The average rate of appeal for all cases in this data set is 10%. The big culprit in excessive rates of appeal are Prisoner cases, which are appealed 14% of the time. As Prisoner cases make up 49% of the total, this amounts to a significant discrepancy between the pools of appealed an non-appealed cases.

Many of the broad case issue types coded here have rates of appeal that are similar to the average appeal rate of 10%. For example, Property Rights cases are appealed 9% of the time as are Personal Injury/Product Liability cases and cases coded as Other. Civil Rights cases are appealed 8% of the time. Some are appealed at a substantially lower rate than the average: Labor cases are appealed 4% of the time, and Contracts cases are appealed 5% of the time. No Forfeiture cases are appealed.

---

1 The data is not coded for type of private litigant.
The Chi-square tests of independence indicate that we must reject the hypothesis that the Appealed variable is independent of Issue Type. However, directional measures indicate that the strength of association between the variables is very low. The Lambda statistic is 0 for the Appealed x Case Type Cross-tab; knowing a case's issue type is of very little help in predicting whether a case is appealed or not.

<table>
<thead>
<tr>
<th></th>
<th>Not Appealed</th>
<th>Appealed</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prisoner</td>
<td>87% (607)</td>
<td>14% (95)</td>
<td>100% (702)</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>92% (280)</td>
<td>8% (25)</td>
<td>100% (305)</td>
</tr>
<tr>
<td>Labor</td>
<td>96% (124)</td>
<td>4% (5)</td>
<td>100% (129)</td>
</tr>
<tr>
<td>Contracts</td>
<td>95% (146)</td>
<td>5% (8)</td>
<td>100% (154)</td>
</tr>
<tr>
<td>Property Rights</td>
<td>91% (20)</td>
<td>9% (2)</td>
<td>100% (22)</td>
</tr>
<tr>
<td>Forfeiture</td>
<td>100% (16)</td>
<td>0% (0)</td>
<td>100% (16)</td>
</tr>
<tr>
<td>Personal Injury/Product Liability</td>
<td>91% (31)</td>
<td>9% (3)</td>
<td>100% (34)</td>
</tr>
<tr>
<td>Other</td>
<td>91% (59)</td>
<td>9% (6)</td>
<td>100% (65)</td>
</tr>
<tr>
<td>Totals</td>
<td>90% (1283)</td>
<td>10% (144)</td>
<td>100% (1427)</td>
</tr>
</tbody>
</table>

Chi-square=21.866***
Lambda=0
Tau=.015***
Phi=.124***
Cramer's V=.124***
*p<.1, **p<.05, ***p<.01 (one-tailed test where available).

Table A.1: Crosstabulation: Case Issue Type by Appealed Status (in percentages) (numbers in parentheses)

LITIGANT TYPE (See Table A.2)

Cases between private litigants (without a government as a party) are appealed 6% of the time (slightly less than the average rate of appeal of 10%), whereas cases with at least one government as a party are appealed 14% of the time. The sample is close to equally divided among cases between private litigants and those with a government party.
Breaking the government-party cases down by type of government shows that cases involving all types of government except for county governments are appealed at a rate higher than the 10% average. City government cases are appealed 16% of the time, state government cases are appealed 15% of the time, and cases with the federal government as a party are appealed 14% of the time. County government cases are appealed 9% of the time.

The Chi-square tests of independence indicate that we must reject the hypothesis that the Appealed variable is independent of Litigant type. However, directional measures indicate that the strength of association between the variables is low. A modest Lambda statistic (.20) resulted from the Appealed x Litigant Type Cross-tab; thus we can say that if we want to use information regarding whether a case is appealed to predict the type of litigant, this will reduce 20% of the errors of prediction. When a case's appealed status is the dependent variable, however, type of litigant is of no predictive value.

<table>
<thead>
<tr>
<th>No Government Litigant</th>
<th>Not Appealed</th>
<th>Appealed</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Plaintiff</td>
<td>100% (41)</td>
<td>100% (41)</td>
<td></td>
</tr>
<tr>
<td>Federal Defendant</td>
<td>83% (107)</td>
<td>17% (22)</td>
<td>100% (129)</td>
</tr>
<tr>
<td>State Defendant</td>
<td>85% (339)</td>
<td>15% (58)</td>
<td>100% (397)</td>
</tr>
<tr>
<td>County Defendant</td>
<td>91% (84)</td>
<td>9% (8)</td>
<td>100% (92)</td>
</tr>
<tr>
<td>City Defendant</td>
<td>85% (60)</td>
<td>16% (11)</td>
<td>100% (71)</td>
</tr>
<tr>
<td>Other</td>
<td>87% (13)</td>
<td>13% (2)</td>
<td>100% (15)</td>
</tr>
<tr>
<td>Totals</td>
<td>90% (1283)</td>
<td>10% (144)</td>
<td>100% (1427)</td>
</tr>
</tbody>
</table>

Chi-square=33.859***
Lambda=0
Tau=.024***
Phi=.154***
Cramer's V=.154***
*p<.1, **p<.05, ***p<.01 (one-tailed test where available).

Table A.2: Crosstabulation: Case Litigant Type by Appealed Status (in percentages) (numbers in parentheses)
PRISONERS

The observation that partied do not randomly decide which cases to appeal is borne out by examining the Rowland data. As observed above, the pool of appealed district court cases differs from the pool of those not appealed in that appealed cases contain a disproportionately greater number of Prisoner cases, and those with governments as litigants. The latter fact is due to the reality that when prisoners sue, they sue their jailers, who are almost always employees and political subunits of state, local or federal governments or the governments themselves.

Prisoners have a unique lack of disincentive to appeal: Because they are usually granted *in forma pauperis* status, they do not pay filing fees at the trial or appellate level; and because they proceed *pro se*, they do not pay burdensome attorneys' fees. Furthermore, prisoners often have little else to do with their time. Indeed, engaging in litigation, including all research and drafting of pleadings, is a constitutionally protected activity. Some prisoners clearly find litigation to be a rich source of satisfaction and entertainment, wins and losses aside. Prisoners as a general matter have nothing to lose and much to gain by appealing their losses in the district court.

Aside from the prisoner phenomenon, my assessment is that the pools of appealed and non-appealed cases don't differ in consistent and predictable ways when one examines issue type and litigant type. Understanding this may make my proposed sampling method less problematic. Before passing final judgment, however, the publication-appealed relationship deserves a more detailed look.
GENERAL ASSESSMENT OF THE PUBLICATION-APPEALED RELATIONSHIP

(See Table A.3)

Whether a case is published or not is the dependent variable in my dissertation project; if there is a large overlap between cases that are published and those that are appealed, the project could be accused of the sin of "selecting on the dependent variable."

Indeed, there is disproportionate overlap between cases that are appealed and cases that are published. Of the total sample of 1,427 cases, only 10% were appealed. Only 4% of the total sample were published. However, 10% of the appealed cases were published, compared to 4% of those not appealed.

The Chi-square tests of independence indicate that it is very unlikely that the Appealed and Published variables are independent. However, directional measures indicate that the strength of associate between the variables is very low. The Lambda statistic is 0 for the Appealed x Published Cross-tab. In other words, whether a case is appealed or not is of no help in predicting if it is published (and vice versa).

Other research has also noted the lack of relationship between published and appealed district court cases. Songer (1988) noted that for two recent years, 81% of published court of appeals decisions were appeals from district court decisions without published opinions. (As my sampling method involves examining unpublished as well as published court of appeals opinions, I will get at a larger slice of district court cases than did Songer.)
Perhaps the association between cases that are appealed and those that are published can be better explored by breaking the data down by Issue Type and by Litigant Type.

<table>
<thead>
<tr>
<th></th>
<th>Not Appealed</th>
<th>Appealed</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Published</td>
<td>91% (1234)</td>
<td>10% (130)</td>
<td>100% (1364)</td>
</tr>
<tr>
<td>Published</td>
<td>78% (49)</td>
<td>22% (14)</td>
<td>100% (63)</td>
</tr>
<tr>
<td>Totals</td>
<td>90% (1283)</td>
<td>10% (144)</td>
<td>100% (1427)</td>
</tr>
</tbody>
</table>

Chi-square=10.691***  
Lambda=0  
Tau=.007***  
*p<.1, **p<.05, ***p<.01 (one-tailed test where available).

Table A.3: Crosstabulation: Publication Status by Appealed Status (in percentages) (numbers in parentheses)

Publication-Appealed Relationship by Issue Type (See Table A.4)

Breaking the data down by broad issue type reveals categories of cases where appealed cases were somewhat more likely than non-appealed cases to be published. For Contracts cases, 25% of those appealed are published compared with 6% of those not appealed; for Labor cases, 20% of those appealed are published compared with 6% of those not appealed; for Prisoner cases, 10% of those appealed are published compared with 1% of those not appealed; for cases coded as Other, 17% of those appealed are published compared with 14% of those not appealed.
For some categories of cases, those not appealed were somewhat *more likely* than appealed cases to be published. For Property Rights cases, 0% of those appealed are published compared with 5% of those not appealed; for Civil Rights cases, 4% of those appealed are published compared with 6% of those not appealed.

0% of either type are published within Personal Injury/Product Liability and within Forfeiture.

<table>
<thead>
<tr>
<th>Category</th>
<th>Not Appealed</th>
<th>Appealed</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not Published</td>
<td>Published</td>
<td></td>
</tr>
<tr>
<td>Prisoner</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Appealed</td>
<td>99% (599)</td>
<td>1% (8)</td>
<td>100% (607)</td>
</tr>
<tr>
<td>Appeled</td>
<td>91% (86)</td>
<td>10% (9)</td>
<td>100% (95)</td>
</tr>
<tr>
<td>Civil Rights</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Appealed</td>
<td>94% (263)</td>
<td>6% (17)</td>
<td>100% (280)</td>
</tr>
<tr>
<td>Appeled</td>
<td>96% (24)</td>
<td>4% (1)</td>
<td>100% (25)</td>
</tr>
<tr>
<td>Labor</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Appealed</td>
<td>94% (117)</td>
<td>6% (7)</td>
<td>100% (124)</td>
</tr>
<tr>
<td>Appeled</td>
<td>80% (4)</td>
<td>20% (1)</td>
<td>100% (5)</td>
</tr>
<tr>
<td>Contracts</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Appealed</td>
<td>95% (138)</td>
<td>6% (8)</td>
<td>100% (146)</td>
</tr>
<tr>
<td>Appeled</td>
<td>75% (6)</td>
<td>25% (2)</td>
<td>100% (8)</td>
</tr>
<tr>
<td>Property Rights</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Appealed</td>
<td>95% (19)</td>
<td>5% (1)</td>
<td>100% (20)</td>
</tr>
<tr>
<td>Appeled</td>
<td>100% (2)</td>
<td>0% (0)</td>
<td>100% (2)</td>
</tr>
<tr>
<td>Forfeiture</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Appealed</td>
<td>100% (16)</td>
<td>0% (0)</td>
<td>100% (16)</td>
</tr>
<tr>
<td>Personal Injury/</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Product Liability</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Appealed</td>
<td>100% (31)</td>
<td>0% (0)</td>
<td>100% (31)</td>
</tr>
<tr>
<td>Appeled</td>
<td>100% (3)</td>
<td>0% (0)</td>
<td>100% (3)</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Appealed</td>
<td>86% (51)</td>
<td>14% (8)</td>
<td>100% (59)</td>
</tr>
<tr>
<td>Appeled</td>
<td>83% (5)</td>
<td>17% (1)</td>
<td>100% (6)</td>
</tr>
</tbody>
</table>

Table A.4: Crosstabulation: Case Issue Type by Appealed Status by Publication Status (% within Appealed in percentages) (numbers in parentheses)

**PUBLICATION-APPEALED RELATIONSHIP BY LITIGANT TYPE (See Table A.5)**

If the case is one without a government as a party, appealed cases are more likely than non-appealed cases to be published (12% of those appealed are published, compared to only 4% of those not appealed.) A similar differential is found for cases with state or
county governments as defendants. (For cases with state government defendants, 14% of those appealed are published compared with 2% of those not appealed; for county government defendants, 13% of those appealed are published compared with 2% of those not appealed.)

When the federal government or a city government is a defendant, however, non-appealed decisions are somewhat more likely than appealed decisions to be published. (For cases with the federal government as a defendant, 0% of those appealed are published compared with 7% of those not appealed; for city government defendants, 0% of those appealed are published compared with 5% of those not appealed.)

<table>
<thead>
<tr>
<th>Case Litigant Type</th>
<th>Not Appealed</th>
<th>Appealed</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Government Litigant</td>
<td>Not Appealed</td>
<td>96% (613)</td>
<td>4% (26)</td>
</tr>
<tr>
<td></td>
<td>Appeled</td>
<td>88% (38)</td>
<td>12% (5)</td>
</tr>
<tr>
<td>Federal Plaintiff</td>
<td>Not Appealed</td>
<td>95% (39)</td>
<td>5% (2)</td>
</tr>
<tr>
<td></td>
<td>Appeled</td>
<td>100% (22)</td>
<td>0% (0)</td>
</tr>
<tr>
<td>Federal Defendant</td>
<td>Not Appealed</td>
<td>94% (100)</td>
<td>7% (7)</td>
</tr>
<tr>
<td></td>
<td>Appeled</td>
<td>100% (22)</td>
<td>0% (0)</td>
</tr>
<tr>
<td>State Defendant</td>
<td>Not Appealed</td>
<td>98% (331)</td>
<td>2% (8)</td>
</tr>
<tr>
<td></td>
<td>Appeled</td>
<td>86% (50)</td>
<td>14% (8)</td>
</tr>
<tr>
<td>County Defendant</td>
<td>Not Appealed</td>
<td>98% (82)</td>
<td>2% (2)</td>
</tr>
<tr>
<td></td>
<td>Appeled</td>
<td>88% (7)</td>
<td>13% (1)</td>
</tr>
<tr>
<td>City Defendant</td>
<td>Not Appealed</td>
<td>95% (57)</td>
<td>5% (3)</td>
</tr>
<tr>
<td></td>
<td>Appeled</td>
<td>100% (11)</td>
<td>0% (0)</td>
</tr>
<tr>
<td>Other</td>
<td>Not Appealed</td>
<td>92% (12)</td>
<td>8% (1)</td>
</tr>
<tr>
<td></td>
<td>Appeled</td>
<td>100% (2)</td>
<td>0% (0)</td>
</tr>
</tbody>
</table>

Table A.5: Crosstabulation: Case Litigant Type by Appealed Status by Publication Status (% within Appealed in percentages) (numbers in parentheses)
CONCLUSION

Overall, I'm impressed that appealed and non-appealed cases don't differ dramatically in party type and issue type, or in likelihood of publication. The Chi-square tests of independence indicate that we must reject the hypothesis that the Appealed variable is independent of the other variables of interest. However, directional measures indicate that the strength of association between the variables is very low.

The identifiable difference between the pool of appealed and non-appealed cases in terms of issue type and litigant type is attributable to the reality that Prisoners are prone to appeal. Of relevance to my dissertation project, this sampling method will produce an overrepresentation of Prisoner case types (such as habeas corpus and civil rights violations in prisons), and cases involving governments as defendants.

Assessment of the relationship between appeal and publication is difficult. The two factors are not statistically independent. Yet they do not have a consistent relationship across party types and issue types. If the two factors are related in a meaningful way, it is perplexing as to why the relationship is observable for some categories of decisions and not others.

It is important to note that there is no direct relationship between publication and appeal; the judge's decision to publish should be made before the judge knows if the decision is appealed. It is possible, though, that similar third variables not measurable here (such as the complexity of the case) could influence both the judge's decision to publish and the losing litigant's decision to appeal.
The concern about "selecting on the dependent variable" is probably overstated. My hunch is that the overlap between appealed and published cases is not large enough to condemn this sampling method. Given its advantages in allowing a large geographic scope of sample (among other things), it may even be the preferred method.
APPENDIX B

CODING SCHEME FOR OPINION COMPLIANCE WITH OFFICIAL PUBLICATION GUIDELINES

I. Does court of appeals use language telling the reader that it is establishing a new rule of law?

Examples include but are not be limited to:

A. The legal question "has yet to be determined in this Circuit."

B. "With this holding, we join the other circuits to have considered the issue, . . . "

C. "This appeal raises a question of first impression in this Circuit: . . . ."

D. "Although we have not squarely faced this issue some courts read [this statute] to require . . . ."

E. "Prior to this case, we have not allowed review of [this legal issue], thus we must first consider . . . ."

F. "We previously recognized but did not resolve the conflict in [a prior case from our circuit] . . . ."

G. "We have not previously addressed this precise issue; . . . ."
H. "We respectfully part company with the courts that have utilized this rationale."

I. "In the absence of controlling Guam case law, we must construe the Guam speedy trial statute under California law."

J. Our holding in [a previous case] was premised in part on . . . but was prior to [an intervening Supreme Court case's] explicit directive. Until [the court of appeals case at hand], this court had yet to revisit our holding . . ."

K. "During the pendency of this appeal, Congress again amended the immigration laws by enacting . . ." (I think that interpretation of a brand new statute results in establishing a new rule of law.)

L. Court of appeals reverses one of its own prior opinions.

If so, code as 1.

II. If not, does opinion do one of the following?

A. In discussing a given legal issue, court cites opinions from other circuits or district courts other than the district from which the case was appealed, but none from its own circuit or the district from which the case was appealed.
1. The reverse scenario is citation of own circuit opinions as well as from other circuits; this is not "1."

2. Citation of U.S. Supreme Court cases as well: Citation of own circuit opinions as well as Supreme Court opinions is not "1." Citation of Supreme Court opinions as well as opinions from other circuits or district courts other than the district from which the case was appealed is a "1."

   B. If issue is one of state law, court cites no opinions from state or states from which lawsuit arose (this occurred only once in my 150 case sample).

   C. Citation of U.S. Supreme Court opinions only. Must use judgment. Usually this means that the issue is so routine that there are Supreme Court cases directly on-point that clearly settle the case at hand, and there is no need to look to any lower court cases. Occasionally, something very different is true. There are no lower court cases available for guidance. The court of appeals interprets available Supreme Court case or cases in view of the facts of the case at hand, and establishes a new rule of law.

   If so, code as 1.
APPENDIX C

SPAETH CODING SCHEME FOR IDEOLOGICAL DIRECTION OF DECISION

In the context of issues pertaining to criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys:

\[ l = \text{pro-person accused or convicted of crime, or denied a jury trial} \]

\[ \text{pro-civil liberties or civil rights claimant} \]

\[ \text{pro-indigent} \]

\[ \text{pro-Indian} \]

\[ \text{pro-affirmative action} \]

\[ \text{pro-female in abortion} \]

\[ \text{pro-underdog} \]

\[ \text{anti-government in the context of due process, except for takings clause} \]
cases where a pro-government, anti-owner vote is considered liberal

pro-attorney

pro-disclosure in Freedom of Information Act (and related statutes) issues

except for employment and student records

2 = reverse of above

In the context of issues pertaining to unions and economic activity:

1 = pro-union except in union antitrust where 1 = pro-competition

anti-business

anti-employer

pro-competition

pro-liability

pro-injured person

pro-indigent

pro-small business vis-a-vis large business

pro-debtor

pro-bankrupt

pro-Indian

pro-environmental protection

pro-economic underdog

pro-consumer

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pro-accountability in governmental corruption
anti-union member or employee vis-a-vis union
anti-union in union antitrust
pro-trial in arbitration

2 = reverse of above

In the context of issues pertaining to judicial power
1 = pro-exercise of judicial power
pro-judicial "activism"
pro-judicial review of administrative action

2 = reverse of above

In the context of issues pertaining to federalism
1 = pro-federal power
anti-state

2 = reverse of above

In the context of issues pertaining to federal taxation [except criminal cases]
1 = pro-united States

2 = pro-taxpayer
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