

## How Should We Study District Judge Decision-Making?

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### INTRODUCTION

Understanding judicial decision-making requires attention to the specific institutional settings in which judges operate. The choices available to judges are determined not only by the law and facts of the case but also by procedural context. The incentives and constraints shaping judges' decision-making will vary depending on, for example, whether they have a life-appointment or are elected; whether they hear cases alone or with colleagues; and whether and under what circumstances their decisions might be altered, overturned, or undone by the actions of others. The basic insight that the institutional context matters has led to increasingly sophisticated studies of how strategic interactions among Supreme Court justices,<sup>1</sup>

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1. See, e.g., TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT (2004); FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000); Gregory A. Caldeira, John R. Wright & Christopher J. W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999) (empirically testing whether

among branches of government,<sup>2</sup> and within a judicial hierarchy<sup>3</sup> shape judicial decision-making. But studies of federal district judges—the nearly one thousand judges who compose 78% of the federal judiciary<sup>4</sup> and superintend 79% of its cases<sup>5</sup>—have not matched this sophistication. Instead, much of the existing empirical work on federal district courts has failed to take account of the institutional setting in which those judges operate.

Too often, studies of the district courts rely on an implicit assumption that judging at the trial court level is fundamentally the

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Supreme Court Justices engage in strategic voting in certiorari decisions); Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581 (1996) (empirically testing whether Supreme Court Justices act strategically in changing their votes between initial conference and final vote); Paul J. Wahlbeck, James F. Spriggs II & Forrest Maltzman, *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294 (1998) (examining Supreme Court draft opinions to test empirically whether they are written strategically).

2. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (arguing that justices make decisions based not only on their political preferences but also institutional constraints); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991) (theorizing that decision-making among the three branches is a product of the dynamic interactions of the three branches). But see Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (finding that justices deciding statutory cases largely vote sincerely).

3. See, e.g., VIRGINIA A. HETTINGER, STEPHANIE LINQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* (2006); Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534 (2002); Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000) (using principal-agent model of upper and lower courts to explore conflicts over policy); Susan B. Haire, Stephanie A. Linquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143 (2003); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995) (modeling judicial decision-making as product of strategic interactions between upper and lower courts); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994) (examining the interactions between courts of appeals and the Supreme Court and finding that the circuit courts are largely responsive to the Supreme Court's preferences).

4. These figures include both active and senior judges, on the district courts and the courts of appeals. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR* 42, tbl. 11.

5. *Id.* at 19, tbl. 1; *id.* at 22, tbl. 3.

same as judging at the appellate level. These studies therefore employ models and methods developed to study the Supreme Court or the federal courts of appeals. We argue below that this approach is misguided, because the nature of district judges' work is substantially different from that of appellate judges. For example, unlike in the typical appellate case, a district judge may rule in a single case on multiple occasions and on different types of questions, only a few of which could be dispositive but all of which affect the case's progress and ultimate outcome. Moreover, because many of the judge's actions are taken in response to motions by the parties, there is no determinate sequence in which pretrial litigation events occur. Rather, how a case proceeds depends on the choices made by the parties—what motions are filed by whom and how discovery unfolds.

The work of the district judge is also more varied than that of an appeals judge. In addition to the law-applying and law-interpreting functions familiar to observers of the appellate courts, the district judge undertakes other tasks such as finding facts, resolving disputes about the scope of litigation, setting deadlines, facilitating settlement, and supervising trial before a jury.<sup>6</sup> Of course, as in the courts of appeals, many cases in the district courts are resolved by agreement or abandonment rather than adjudication.<sup>7</sup> But in the district courts far more than in the courts of appeals, even in these settled or withdrawn cases, a judge has often made some or even many decisions that may well have influenced the likelihood and the terms of the non-adjudicated outcome.

In this Essay, we argue for a new and more suitable approach to studying decision-making in the federal district courts—one that takes into account the trial level litigation process and the varied nature of the tasks judging in a trial court entails. We begin in Part I by describing in detail the institutional setting in which district judges function and how their role differs substantially from that of appellate judges. In Part II we critique the existing empirical literature's predominant method for studying district courts—analysis of district court opinions, usually published opinions—and discuss the

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6. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

7. See, e.g., Mori Irvine, *Better Late than Never: Settlement at the Federal Court of Appeals*, 1 J. APP. PRAC. & PROCESS 341 (1999); see also *infra* notes 50–51.

limitations and biases inherent in this approach. Part III then proposes our new approach to studying decision-making by district judges.

By taking advantage of the electronic docketing system now operating in all federal district courts, researchers can use dockets, orders, and other case documents, as well as opinions, as data sources, thereby incorporating into their analysis the relevant institutional features of district courts. In particular, expanding the focus beyond opinions allows researchers to capture both the procedural context and the iterative nature of district judge decision-making. In addition, examining dockets permits direct study of the incidence and timing of party settlements and their resulting effects on case selection. Conversely, docket information can be used to test whether judicial decisions in turn influence litigants' settlement behavior. Finally, in Part IV, we describe an ongoing project focused on the litigation activities of the Equal Employment Opportunity Commission, in which we implement this new approach to studying the work of the district courts.

#### I. THE INSTITUTIONAL CONTEXT

Much of the quantitative work on judicial decision-making focuses on appellate judging and therefore relies on models that assume features typical of appellate courts. For example, the considerable literature on the United States Supreme Court builds on observations about that Court's unique position as a collegial court situated at the top of the judicial hierarchy, with a discretionary docket.<sup>8</sup> Similarly, scholars who study the federal courts of appeals take into account their location in the judicial hierarchy, modeling their compliance with Supreme Court precedent,<sup>9</sup> the interaction among judges on appellate panels,<sup>10</sup> and the determinants of en banc

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8. See, e.g., H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991); Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy*, 15 J. THEORETICAL POL. 61 (2003); Cameron et al., *supra* note 3.

9. See, e.g., Benesh & Reddick, *supra* note 3; McNollgast, *supra* note 3; Songer et al., *supra* note 3.

10. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299 (2004); Cass R.

review and en banc decisions.<sup>11</sup> But in the relatively scant empirical literature on district courts, little attention has been paid to how their institutional features shape judges' decision-making. Empirical studies of district courts have tended unreflectively to borrow models developed to study the appellate courts, without considering the systematic ways in which trial and appellate courts differ. As we argue below, the work of district judges differs in significant ways from that of appellate judges, and these differences must be taken into account in order to build appropriate models for studying district judge decision-making.

#### A. Federal Courts of Appeals

Empirical scholars often begin with the assumption that federal court of appeals judges have policy preferences that they seek to advance through their decisions.<sup>12</sup> Although federal judges are technically non-partisan, they are appointed through a political process involving presidential nomination and Senate confirmation—a process during which ideological concerns are often raised. On the other hand, as Article III judges, they have life tenure and their salary cannot be diminished, affording them a degree of insulation from direct political pressure once appointed. Given this institutional structure, a number of studies have sought to determine whether and to what extent court of appeals decisions are influenced by judges' policy goals or constrained by legal precedent.<sup>13</sup>

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Sunstein, David Schkade & Lisa M. Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, U. PA. L. REV. 1319 (2009).

11. See, e.g., Tracey George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999); Tracey George & Michael E. Solimine, *Supreme Court Monitoring of Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171 (2001).

12. See, e.g., HETTINGER ET AL., *supra* note 3; Benesh & Reddick, *supra* note 3; Cameron et al., *supra* note 3; Cross & Tiller, *supra* note 10; Farhang & Wawro, *supra* note 3; Songer et al., *supra* note 3.

13. See, e.g., THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* (2006); Benesh & Reddick, *supra* note 3; Cross & Tiller, *supra* note 10; Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002); Songer et al., *supra* note 3; Paul J. Wahlbeck, *The Life of the Law: Judicial Politics and Legal Change*, 59 J. POL. 778 (1997).

As intermediate level courts, the courts of appeals review decisions of the federal trial courts. Their cases follow a well-defined trajectory through the appellate process to resolution. The process is initiated when a litigant, unhappy with a decision below, files a timely notice of appeal.<sup>14</sup> That notice triggers a fairly predictable set of events: the record is prepared and transmitted to the appellate court;<sup>15</sup> briefs are filed in turn by the parties (appellant's opening brief, appellee's brief, appellant's reply brief);<sup>16</sup> the case is calendared for oral argument unless the court decides argument is unnecessary;<sup>17</sup> a three-judge panel convenes to decide the case;<sup>18</sup> and, ultimately, those judges issue some kind of written decision, which may or may not be designated for publication.

Settlement,<sup>19</sup> abandonment, or a procedural defect in the appeal may halt the process in its tracks,<sup>20</sup> but otherwise cases proceed in a fairly predictable way. Minor variations in this procedural account may occur—for example, there may be motions to extend time deadlines, permit the participation of amici, or stay a case pending some other event. However, in the vast majority of federal appellate cases that are adjudicated, the basic process leading to final resolution does not deviate significantly from the one just described. Not only is the appellate process largely standardized, but the nature of the appellate judge's role is similarly well defined. The basic task facing the appellate judge is quite straightforward, if not always simple to carry out. She must consider the record from the court

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14. FED. R. APP. P. 3(a).

15. *E.g.*, ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 133–34 (2d ed. 1989).

16. STEVEN WISOTSKY, PROFESSIONAL JUDGMENT ON APPEAL: BRINGING AND OPPOSING APPEALS 130–31 (2002).

17. *Id.*

18. *Id.*

19. Appellate court mediation programs have become increasingly popular in recent years. In the Eleventh Circuit, for example, cases can be directed to formal mediation by “[a]n active or senior judge of the court of appeals, a panel of judges (either before or after oral argument), or the Kinnard Mediation Center, by appointment of the court.” 11TH CIR. R. 33(c). According to the Eleventh Circuit, “[t]he purposes of the mediation are to explore the possibility of settlement of the dispute, to prevent unnecessary motions or delay by attempting to resolve any procedural problems in the appeal, and to identify and clarify issues presented in the appeal.” *Id.*; *see also* Irvine, *supra* note 7.

20. WISOTSKY, *supra* note 16, at 241–60.

below, the relevant legal authorities and the arguments of the parties and, together with her panel colleagues, pass judgment on the decision of the district court that is being appealed—either affirming it, reversing it, or remanding the case to the district court for further consideration. Thus, her primary role is one of law application and law interpretation.

### *B. Federal District Courts*

Federal district judges, like federal court of appeals judges, are appointed through a process of presidential nomination and Senate confirmation to positions of life tenure. And, as in the case of appellate judges, scholars have posited that district judges are political actors—that is, that they have policy goals and preferences that influence how they decide cases.<sup>21</sup> District judges, however, work in a very different environment than court of appeals judges do. Even assuming that they have policy goals, their position as trial judges—the first responders in a judicial system open to a growing number of claimants—suggests that concerns about case management and docket control are also significant, if not dominant, motivations.

Moreover, district judges interact with their colleagues in quite different ways. While the court of appeals judge hears cases as a member of a three-judge panel that is usually composed of her circuit colleagues, a single district judge is usually assigned to a case at any given time. However, the district judge does not necessarily determine the outcomes of cases alone. Magistrate judges, appointed by the judges in a district for eight-year terms, play an increasingly important role in managing federal litigation. Both a magistrate and a district court judge may make decisions on different issues in the same case. And because district court litigation can stretch over long periods of time, recusals, retirements, and the like may mean that more than one district judge or more than one magistrate judge will make decisions in a given case over its lifetime. Unlike in the courts of appeals, it is nearly impossible to identify a standard way in which cases proceed through the district courts. Although district court

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21. See, e.g., C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* (1996).

cases, like appellate cases, are frequently settled or abandoned before judgment,<sup>22</sup> far more variation exists than at the appellate level in the procedure followed and in the role of the judge prior to the non-adjudicated resolution. At one extreme, the parties to a dispute may invoke the power of the court only to facilitate judicial enforcement of an agreement they have reached out of court. In such a case, the judge may do nothing to resolve the dispute other than entering a jointly proposed consent decree, the terms of which are determined—possibly even prior to filing—by the parties. At the other extreme, a case may remain active in the district court for years, even decades, involving multiple parties, multiple judges, teams of lawyers, complex procedural maneuvering and extensive discovery, a trial before a jury, and post-trial skirmishing before a final judgment is entered. In such a case, the district judge will be required to make case-specific decisions at multiple points throughout the litigation, deciding numerous pre-trial motions, resolving discovery disputes, setting schedules and discovery limits, presiding over the trial proceedings, and ruling on post-trial motions.<sup>23</sup> Between these two extremes, in the more typical case, a district judge, perhaps assisted by a magistrate judge, will preside over a status and/or settlement conference or two, issue a handful of orders regarding scheduling and other administrative matters, and perhaps decide a few pre-trial motions before the case is resolved by a settlement between the parties.

This description of the work of the district courts highlights a number of important differences from the appellate courts. First, district judges often make multiple decisions at different times before a case is finally resolved, while appellate court judges typically act in a case at a single point in time—when rendering a decision on the appeal. Thus, when making a decision, the district judge is aware that she may have other opportunities to shape the outcome of the case. For example, the district judge knows that if she grants a motion to dismiss with prejudice, the case will be removed from her docket;

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22. See *infra* notes 52–53.

23. See David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681 (2007) (reporting considerable variance in number of docket entries in district court cases studied).



however, if she denies the motion, she will make other decisions later in the case, unless it is settled or abandoned first. Another difference from appellate cases is that litigation events in district courts do not inevitably occur in a fixed sequence. It is true that certain events *typically* precede other events; however, all possible events do not inevitably occur, and if they occur, they will not necessarily happen in any particular order. For example, a defendant may bring a motion to dismiss before answering the complaint; choose to answer without bringing such a motion at all; or move to dismiss the case for failure to state a claim at a much later time, even at trial. As a result of these litigant choices, district court cases, in contrast to appellate cases, may involve any of a nearly infinite number of combinations of pre-trial, trial, and post-trial decisions by the judge.

In addition to differences in the number and timing of judicial decisions, the types of decisions judges make are quite different in district courts and courts of appeals. Some of the district judge's decisions—for example, whether or not to dismiss a case for failure to state a claim, whether or not to grant summary judgment, or whether a plaintiff has proven liability at trial—look a great deal like prototypical appellate decisions. They are clearly “on the merits” in the sense that the judge is adjudicating the relative strengths of the legal or factual claims made by the parties. They involve assessing the evidence offered by the parties and/or applying the law to the facts presented by the case. In some instances, where a case raises a novel issue, a judge may interpret ambiguous legal authority. Depending on who wins, many of these “on the merits” decisions are final judgments and therefore directly appealable.<sup>24</sup>

However, unique to the work of district judges is their role in establishing a factual record. The district judge must decide what evidence is relevant and admissible for what purposes, and how certain facts will be entered in the record. If a jury sits as the ultimate fact-finder, the judge must instruct them about the evidence and frame the factual issues for them to decide. In the case of a bench

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24. “The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .” 28 U.S.C. § 1291 (2006). A final decision is “one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233 (1945).

trial, the district judge must sift through the evidence herself, weighing its probativeness, drawing inferences, and ultimately determining matters of historical fact. While subject to appeal, these factual determinations by a district court are reviewed under an extremely deferential standard of review.<sup>25</sup>

Unlike appellate judges, moreover, district judges make many other types of decisions that neither resolve the parties' dispute nor directly address the merits of the parties' existing claims. Although characterized as "procedural," these decisions can have an enormous impact on the scope of the subsequent litigation and thus the likelihood that a given litigant will ultimately prevail. For example, a district judge may decide whether to grant a motion to allow the plaintiff to amend her complaint to add new theories of liability, whether to permit the defendant to bring counterclaims against the plaintiff, whether to compel a party to produce certain materials in discovery, or whether to bifurcate the liability and damages phases of a trial. In each of these situations, the decision of the district judge does not resolve or even directly address the merits of the claims or defenses. Nevertheless, the influence on the subsequent course and outcome of the litigation can be profound. The plaintiff unable to add a new theory of liability or discover information critical to her case will face lower odds of ultimately prevailing in the case. Similarly, the defendant's prospects diminish if it cannot pursue a counterclaim or if it must respond to evidence of catastrophic harm suffered by a plaintiff at the same time that it tries to deny liability. By changing the odds facing each party, these "procedural" decisions also affect the relative strengths of the parties' negotiating positions and therefore the terms on which they will be willing to settle. Although these types of decisions constitute a substantial proportion of the district judge's work, they are usually not final decisions and therefore are only rarely reviewed by courts of appeals.<sup>26</sup>

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25. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985).

26. Although in theory interlocutory appeal is possible pursuant to 28 U.S.C. § 1292(b) (2006), a district court must first state in writing that an otherwise unappealable order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," and the court of appeals must agree to hear the appeal. 28 U.S.C. § 1292(b) (2006). In fact, few interlocutory orders are ever reviewed pursuant to § 1292(b). *See Michael*

Finally, in addition to making decisions “on the merits” and on procedural matters affecting the scope of litigation, district judges increasingly act in a “managerial” role, diverging even further from court of appeals judges. A quarter century ago, Judith Resnick described the emergence of “managerial judging,” in which district judges do not simply adjudicate disputes brought to them by the parties, but instead assume an active role in supervising cases and take on the responsibility of shepherding them to a final resolution.<sup>27</sup> This shift in the nature of the district judge’s role has only become more pronounced in the time since Resnick wrote. Today, district judges are required under Federal Rule of Civil Procedure 16 to enter a scheduling order in every case soon after its initiation.<sup>28</sup> The scheduling order must set time limits for joining parties, amending the pleadings, filing motions, and completing discovery, and may also include directions regarding required disclosures and electronic discovery, address issues of privilege or work product protection, and set dates for conferences and trial. In addition, the district judge is empowered under Rule 16 to address such matters as “formulating and simplifying the issues,” the possibility of settlement, the use of procedural devices for promoting dispute resolution, and “adopting special procedures for managing potentially difficult or protracted actions.”<sup>29</sup>

The shift to managerial judging substantially affects the nature of the district judge’s role. Under the traditional model of adjudication—largely still applicable in the appellate courts—judges are detached from the process by which evidence and arguments are brought before the court.<sup>30</sup> The litigants, outside the view of the court, develop their strategies and theories and then present the factual record, relevant authorities, and legal arguments through

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E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1174 (1990) (reporting that in the 1980s about 35% of § 1292(b) appeals were accepted, representing only about 0.3% of appeals).

27. Resnick, *supra* note 6.

28. FED. R. CIV. P. 16(b)(2) says that “[t]he judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.”

29. FED. R. CIV. P. 16(c).

30. Resnick, *supra* note 6.

written submissions or highly structured public testimony by witnesses or legal argument by lawyers. Communications between the attorneys and the court are formal, public, and limited in scope. In contrast, federal district judges today interact with the parties—or at least their attorneys—in a variety of ways both formal and informal and on a broad scope of issues. In order to create a scheduling order, judges must discuss with the attorneys their views about the complexity of a case, the central issues it raises and the evidentiary or management challenges it presents. Resolving discovery disputes requires judges to “immerse themselves in the factual details of the case” at an early stage of the litigation and to “consider the parties’ litigation strategies.”<sup>31</sup> Moreover, heavy caseloads incentivize judges to actively encourage settlement by discussing likely trial outcomes with the litigants or referring cases for alternative dispute resolution procedures.

In short, judging on the federal district courts is fundamentally different from appellate judging.

## II. EXISTING STUDIES OF DISTRICT JUDGE DECISION-MAKING

Despite the significant differences between judging on the district and appellate courts, most quantitative studies of judicial decision-making have treated them largely the same. (There are, however, a few notable exceptions,<sup>32</sup> along with qualitative studies that have more frequently taken full account of trial court contexts.)<sup>33</sup> Following methods developed to study Supreme Court and court of appeals decision-making, a number of scholars have collected data on the outcomes of district court cases using officially published reports or, more recently, electronically available opinions as the source of data. Coding these outcomes as liberal or conservative, or according

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31. *Id.* at 393.

32. Malcolm Feeley’s classic exploration of trial-level criminal court proceedings is a source of insight here, though he finds quantitative analysis fairly unhelpful, and moves quickly on to the qualitative analysis that is the core of his book. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 123–53 (1979).

33. *See id.* at 154–297; KENNETH M. DOLBEARE, *TRIAL COURTS IN URBAN POLITICS: STATE COURT POLICY IMPACT AND FUNCTIONS IN A LOCAL POLITICAL SYSTEM* (1967); BARBARA YNGVESSON, *VIRTUOUS CITIZENS DISRUPTIVE SUBJECTS: ORDER AND COMPLAINT IN A NEW ENGLAND COURT* (1993).

to the success or failure of certain arguments or parties, scholars have sought to answer such questions as whether judges are political policy-makers, whether their decisions are influenced by social background characteristics or prior experiences, or whether they tend to favor certain types of litigants or legal theories.<sup>34</sup>

Work by C. K. Rowland and Robert A. Carp is typical of the approach taken by many political scientists studying the federal district courts. In perhaps the most comprehensive study of district court decision-making, Rowland and Carp analyzed nearly 46,000 opinions published in the Federal Supplement over a 44-year period.<sup>35</sup> They divided the cases according to issue area and coded the outcome of each as “liberal” or “conservative.”<sup>36</sup> Analyzing this

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34. See, e.g., John R. Allison & Mark A. Lemley, *The (Unnoticed) Demise of the Doctrine of Equivalents*, 59 STAN. L. REV. 955 (2007); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008); Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298 (1993); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991); Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 NW. U. L. REV. 773 (2004); Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998); Sean M. McEldowney, *New Insights on the “Death” of Obviousness: An Empirical Study of District Court Obviousness Opinions*, 2006 STAN. TECH. L. REV. 4; Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623 (2003); C. K. Rowland, Robert A. Carp & Ronald A. Stidham, *Judges’ Policy Choices and the Value Basis of Judicial Appointments: A Comparison of Support for Criminal Defendants Among Nixon, Johnson, and Kennedy Appointees to the Federal District Courts*, 46 J. POL. 886 (1984); C. K. Rowland, Donald Songer & Robert A. Carp, *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 LAW & SOC’Y REV. 191 (1988); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992); Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton’s District Court Appointees*, 53 POL. RES. Q. 137 (2000); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004); Ronald Stidham, Robert A. Carp & Donald R. Songer, *The Voting Behavior of President Clinton’s Judicial Appointees*, 80 JUDICATURE 16 (1996); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985); Thomas G. Walker, *A Note Concerning Partisan Influences on Trial-Judge Decision Making*, 6 LAW & SOC’Y REV. 645 (1972); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

35. ROWLAND & CARP, *supra* note 21, at 18.

36. *Id.* at 22–23.

outcome data, they concluded that Democratic judges are more likely to vote liberally than Republican judges, although the degree of partisan difference varies depending upon the issue.<sup>37</sup> They further examined this outcome data for correlations with the composition of the Supreme Court, time trends, the party of the appointing President, and geographic influences.<sup>38</sup> Other studies by judicial politics scholars have followed a similar strategy of coding the outcomes of district court opinions as liberal or conservative in order to test theories about judicial decision-making.<sup>39</sup>

Empirically minded legal scholars have asked different questions, but have also largely relied on opinions—usually published ones—for analysis. Some have examined federal district court opinions in order to determine whether social background or prior professional experience influences judicial decision-making. For example, Gregory C. Sisk, Michael Heise, and Andrew P. Morriss studied published federal district court and appellate opinions in religious freedom cases and concluded that the religious background of judges, as well as the religious affiliation of claimants, significantly influenced judicial votes in these cases.<sup>40</sup> Other scholars have explored how various legal doctrines affect who wins certain types of cases, again relying on published district court opinions for their data.<sup>41</sup> For example, Vicki Schultz and Stephen Petterson examined published Title VII opinions to determine how plaintiffs fared when resisting a “lack of interest” defense in races and sex discrimination cases.<sup>42</sup>

Focusing only on published opinions may make sense when asking, for example, how formal legal doctrine has evolved. However, when research aims to understand what factors influence case outcomes or how judges make decisions, an analysis based

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37. *Id.* at 24.

38. *Id.* at 25–38, 39–44, 45–57, 58–86.

39. *See, e.g.*, Carp et al., *supra* note 34; Rowland, Carp & Stidham, *supra* note 34; Rowland, Songer & Carp, *supra* note 34; Stidham et al., *supra* note 34; Walker & Barrow, *supra* note 34; Walker, *supra* note 34.

40. Sisk, Heise & Morriss, *supra* note 34, at 613–14.

41. *E.g.*, Eisenberg & Johnson, *supra* note 34; Schultz & Petterson, *supra* note 34; Winkler, *supra* note 34.

42. Schultz & Petterson, *supra* note 34, at 1089.

solely on published opinions is problematic. In particular, such an approach risks producing biased or misleading results because published opinions are not representative of all opinions; opinions are not representative of all district court decisions; and adjudicated cases are not representative of all filed cases. To begin, *published* opinions—at both the district court and appellate levels—constitute only a small portion of opinions,<sup>43</sup> and that portion is decidedly unrepresentative. Opinions are not randomly selected for publication; rather, authoring judges decide whether to designate a particular opinion for publication, and their decision to do so may depend upon formal rules, court culture, personal predilections, or strategic considerations. Numerous studies have found that published and unpublished opinions differ in systematic ways.<sup>44</sup> For example, Rowland and Carp found that published district court opinions are generally more “liberal” than unpublished ones, and that ideological influences appear to be greater in the former compared with the latter.<sup>45</sup> Some scholars have justified their focus on published

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43. Of the 41% of cases that are briefed and submitted, only one-quarter have published opinions. Data derived from Federal Judicial Center, Federal Court Cases: Integrated Data Base, 2006, Study No. 4685 (Oct. 9, 2007), <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/09422.xml>.

44. See, e.g., ROWLAND & CARP, *supra* note 21, at 123–28; David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817 (2005); Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782 (1992); Evan J. Ringquist & Craig E. Emmert, *Judicial Policymaking in Published and Unpublished Decisions: The Case of Environmental Civil Litigation*, 52 POL. RES. Q. 7 (1999); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC’Y REV. 1133 (1990); Donald R. Songer, *Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review*, 50 J. POL. 206 (1988).

45. ROWLAND & CARP, *supra* note 21, at 123–28. As Evan J. Ringquist and Craig E. Emmert summarized in 1999:

The most thorough comparison of political influences on published and unpublished district court decisions, that of Rowland and Carp (1996), reaches three general conclusions regarding this comparison. First, in almost all instances, court decisions in published cases were more “liberal” than court decisions in unpublished cases. . . . Second, more often than not, appointment effects were greater in published case decisions than in unpublished case decisions. . . . Finally, while Ducat and Dudley (1989) found that the published decisions of federal judges were much more likely to support the policy and legal positions of the presidents who appointed them, Rowland and Carp (1996) find no such cohort effect for unpublished decisions.

opinions by arguing that published opinions likely include the important, policy-making cases.<sup>46</sup> However, it is not true that only unimportant or easy cases in the district courts are decided without published opinions.<sup>47</sup> Donald Songer found that more than half of the court of appeals cases sampled that involved reversals or nonunanimous decisions (presumed to be more difficult cases) were reviewing unpublished district court decisions, and *half* of the portion of the Supreme Court's caseload in the 1980 term that originated in federal trial courts had unpublished district court opinions.<sup>48</sup> Thus, published district court opinions can neither be taken as representative of all district court opinions nor assumed to capture all of the important policy-making decisions.

Although publication bias plagues both district court and court of appeals studies, another form of bias—introduced by the focus on *opinions*, whether or not published—particularly affects the study of district courts. As discussed above, a district judge may make many decisions of varying types at different points in time in a single case. Most are not accompanied by written reasons and therefore are recorded on the docket sheet or in a brief order as simply a decision to “grant” or “deny” a particular motion. For example, a judge will frequently decide motions to compel discovery without offering written reasons. Even decisions “on the merits”—a denial of a motion to dismiss, for example—may be issued without written explanation. Whether on the merits or not, these decisions can have a significant impact on the potential outcome and may reflect a judge's attitude

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Ringquist & Emmert, *supra* note 44, at 15 (discussing ROWLAND & CARP, *supra* note 21, and Craig R. Ducat & Robert L. Dudley, *Federal District Judges and Presidential Power During the Postwar Era*, 51 J. POL. 98 (1989)).

46. ROBERT CARP & C. K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 18 (1983); ROWLAND & CARP *supra* note 21, at 20–21; Philip Shuchman & Alan Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of “No Precedent Value”?*, 29 EMORY L.J. 195 (1980).

47. Pamela Foa, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeal*, 78 COLUM. L. REV. 1167 (1978); cf. Donald Songer, Donna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963 (1989); Allan Vestal, *Reported Federal District Court Opinions: Fiscal 1962*, 4 HOUS. L. REV. 185 (1966).

48. Songer, *supra* note 44, at 211, 213.



toward the case or the litigants. However, without an accompanying written statement of reasons, the decision is not an “opinion” but an “order,” and, as such, it will not appear in Westlaw or Lexis, even as “unpublished.” Although such orders are also components of court decision-making worthy of study, they are largely inaccessible from traditional data sources. Using a sample from 2003—well after Westlaw and Lexis began systematically including unpublished opinions—David A. Hoffman, Alan J. Izenman, and Jeffrey R. Lidicker found that only 3% of judicial actions were accompanied by opinions.<sup>49</sup> Even excluding purely ministerial orders, they were able to access written opinions for less than 20% of judicial orders in the cases they examined.<sup>50</sup> Thus, unlike in the courts of appeals, many district court decisions are not captured at all in opinions, published or not, making opinions even more unrepresentative of district judge decision-making. Indeed, it seems plausible that judges are more likely to write opinions to accompany appealable orders—grants but not denials of motions to dismiss or of summary judgment, for example.<sup>51</sup>

Litigant choices produce yet another type of selection effect that can bias studies of judicial decision-making that focus only on court opinions or even court decisions. As in the appellate courts,<sup>52</sup> *decided* cases constitute only a fraction of disputes that are filed in the district courts. In 2006, for example, less than half of the cases disposed of by the district courts were resolved by some sort of adjudication. About the same proportion were either abandoned or settled.<sup>53</sup>

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49. Hoffman et al., *supra* note 23, at 682.

50. *Id.*

51. *Id.* at 719–20 n.161, 720–21.

52. Not every appealable order is in fact appealed, and even among appealed cases, many are settled or abandoned by the parties prior to the issuance of an appellate decision. In 2006, for example, only about 40% of cases with noticed appeals in the federal courts of appeals proceeded to briefed submission and judicial decision. Federal Judicial Center, *supra* note 43. The set of such cases is defined by its exclusions: an additional 30% of the noticed cases were settled and withdrawn under FED. R. APP. P. 42 or defaulted by one party or the other, 26% were disposed of for non-merits reasons (jurisdictional defects, or denials of a certificate of appealability), and for the remainder the relevant fields do not specify the reason for the non-merits disposition.

53. In 2006 (the last year for which data are available), of the cases disposed of by district courts (rather than transferred and the like), 47% were abandoned or settled, another 47% were

Because there is no reason to expect that cases settle randomly, litigated cases will be unrepresentative of filed cases.<sup>54</sup> Moreover, given that district court cases unfold dynamically over time, the decisions observed at any particular stage of the litigation will be drawn from a different pool than those observed at another stage. For example, cases that are tried likely differ in important ways from those in which a summary judgment decision is reached; those cases in turn likely differ from those in which some discovery occurs. Thus, the litigants' choices regarding whether and when to settle or abandon a case have the effect of selecting which cases survive long enough to evoke different types of court decisions.

Because of these various selection effects, studying only district court opinions—particularly only published opinions—creates significant risks of misleading results. Consider, for example, Rowland and Carp's classic study of district judge decision-making, which asks whether district judges' decisions are influenced by their ideology. As they acknowledge, by looking only at published opinions, they may well over- or under-estimate the role of ideology.<sup>55</sup> It may be the case, as their own preliminary look at unpublished opinions suggests, that decisions not memorialized in a written opinion are less subject to political influences and that therefore the effects of ideology will be less significant across the whole range of district judge decisions than appears from an analysis of published opinions.<sup>56</sup> Alternatively, district judges may be *more* inclined to allow their policy preferences to hold sway when their decisions are subject to the least scrutiny—because they are

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adjudicated in some way (a mere 1% by trial), and 6% do not have available data on the disposition type. *Id.*

54. See Siegelman & Donohue, *supra* note 44. Of course, it is also true that filed cases are unrepresentative of all disputes, because potential litigants must first recognize their injuries as grievances and decide to pursue litigation, and their decisions to do so will not be random. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980). More specifically, as Ahmed Taha has suggested, litigant choices to file a case or not may be influenced by the composition or perceived preferences of the trial bench. Ahmed E. Taha, *Judges' Political Orientations and the Selection of Disputes for Litigation* (Wake Forest University Legal Studies Paper No. 963468, 2007), available at <http://ssrn.com/abstract=963468>.

55. ROWLAND & CARP, *supra* note 21, at 121–23.

56. *Id.*

expressed in the form of a summary order and are unlikely to be reviewed by an appellate court.<sup>57</sup> Another possibility, not explicitly explored by Rowland and Carp is that the role of ideology may vary depending upon the stage of litigation at which a judge decides. Similarly, Sisk et al.'s conclusion, based on a study of published opinions, that the religious background of judges influences their decisions in religious freedom cases<sup>58</sup> may also hold true of their decisions in summary orders or on procedural matters. But without examining all district judge decisions and controlling for the procedural context in which they are made, there is simply no way to know.

### III. STUDYING DISTRICT COURT DECISION-MAKING

Given the significant problems introduced by relying on opinions—particularly only published opinions—we argue for a different approach for studying district judge decision-making, one that takes into account the institutional role of district courts and the nature of judging at the trial court level. In brief, we believe that the study of district judge decision-making should focus on decisions, not opinions. That is, it should encompass *all* decisions—whether or not published and whether or not accompanied by written reasons—and, in doing so, should take into account the specific procedural context in which those decisions are made.

One of the principal justifications in the past for relying on published opinions was purely practical. In 1969, for example, Dolbeare defended his use of opinions by pointing out the absence of a practicable alternative:

For what it may be worth in exculpatory terms, we may note that there appears to be no more rigorous way to gather data on the outcomes of cases [other than relying on opinions in F. Supp.], short of a review of transcripts in each court's file—a

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57. Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEG. STUD. 257, 264 (1995) (arguing that judicial decision-making is more likely to be constrained when a judge must articulate reasons for a decision).

58. Sisk, Heise & Morriss, *supra* note 34.

task whose dimensions foreclose the prospect of more than case study or sampling, rather than comparative terms.<sup>59</sup>

Technological advances have obviated this justification. Over time, Lexis and Westlaw have included an increasing number of unpublished opinions in their databases, making these opinions as easy to access as officially “published” opinions. More importantly, however, with the advent of electronic docketing systems, researchers can access information on *all* court activity, not just opinions, in a given case. Each of the ninety-four U.S. district courts now uses a system, entitled “Public Access to Court Electronic Records” (“PACER”), that makes this information available on the internet.<sup>60</sup> Complete electronic docket sheets are available in most districts for cases filed from the mid-1990s on. In each subsequent year, coverage has increased, and it is essentially universal for current cases. PACER docket sheets offer a wealth of readily accessible information permitting study of how cases proceed through the district courts and what role judges play. They identify the district judge and any magistrate judges connected to the case, as well as the parties and their lawyers. They also contain brief descriptions and the dates of every litigation event before the court—such as the filing of pleadings and motions, court orders, hearings, conferences, and verdicts.<sup>61</sup> Thus, with internet access, dockets can now be retrieved for federal cases nationwide at a small fraction of the cost and effort once required to obtain that information.

In addition to the docket sheets, PACER makes other case documents available electronically. Under the Case Management/Electronic Case Files system (“CM/ECF”), the parties file case

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59. Kenneth M. Dolbeare, *The Federal District Courts and Urban Public Policy: An Exploratory Study*, in *FRONTIERS OF JUDICIAL RESEARCH* 378 (Joel B. Grossman & Joseph Tanenhaus eds., 1969).

60. Electronic Public Access Fee Schedule (Issued in accordance with 28 U.S.C. §§ 1913, 1914, 1926, 1930, 1932) (Mar. 11, 2008), [http://pacer.psc.uscourts.gov/documents/epa\\_feesched.pdf](http://pacer.psc.uscourts.gov/documents/epa_feesched.pdf).

61. These entries are done free-form by clerk’s office staff, within hours of the events’ occurrence. Because maintenance of dockets is a core function of court clerk’s office personnel, PACER dockets are extraordinarily accurate. For a proposal that dockets include mark-up coding, to allow their easier batch analysis, see Lynn Lopucki, *Court System Transparency*, (Wash. Univ. Sch. of Law, Working Paper No. 07-10-01, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1013380](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013380).

documents such as pleadings and motions papers electronically in portable document format (“pdf”). The court then links these electronic documents to the relevant docket entries recording their filing. Since about 2005, pdf versions of case documents have been available through PACER for nearly every case in nearly every district, and in some districts they are available for documents dating back as many as ten years. These documents can be downloaded for a fee of 8¢ per page (with a maximum of \$2.40 per document).<sup>62</sup> Written opinions filed after mid-2005 are available for free.<sup>63</sup> Thus, PACER offers a significant data source for more accurately capturing and understanding the activity of the district courts.<sup>64</sup>

We propose that, rather than relying on opinions, scholars use dockets and the other case documents available on PACER as data sources for studying district judge decision-making. By looking at dockets, researchers can capture all of the critical decisions in a case, thereby avoiding the problems of selection bias introduced by relying only on opinions or published opinions.

Only a handful of prior studies, some pre-dating the advent of PACER,<sup>65</sup> have made use of dockets to understand district court litigation, and none has fully exploited the advantages of doing so for studying district judge decision-making.<sup>66</sup> For example, the Civil

62. Electronic Public Access Fee Schedule, *supra* note 60.

63. E-Government Act of 2002, Pub. L. No. 107-347, § 204-05, 116 Stat. 2899, 2913-14 (codified in notes of 44 U.S.C. § 3501) (2006).

64. See Peter Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns* (Cornell Legal Studies Research Paper No. 08-003, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1107412](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107412) (detailing PACER’s advancements and drawbacks).

65. In addition to the studies discussed below in notes 66-70, examples of other studies using non-internet methods to obtain dockets include Christian Wollschläger, *Civil Litigation and Modernization: The Work of the Municipal Courts of Bremen, Germany, in Five Centuries, 1549-1984*, 24 LAW & SOC’Y REV. 261, 262-64 (1990); F. Van Loon & E. Langerwerf, *Socioeconomic Development and the Evolution of Litigation Rates of Civil Courts in Belgium, 1835-1980*, 24 LAW & SOC’Y REV. 283 (1990); Ross E. Cheit & Jacob E. Gersen, *When Businesses Sue Each Other: An Empirical Study of State Court Litigation*, 25 LAW & SOC. INQUIRY 789 (2000). For a critique of these sorts of studies, see Richard Lempert, *Docket Data and “Local Knowledge”: Studying the Court and Society Link Over Time*, 24 LAW & SOC’Y REV. 321 (1990).

66. A number of scholars have used docket research as a way of understanding the makeup of particular court caseloads (for example, to assess time trends relating to which disputes get litigated or litigation rates, or to describe litigation activity and its participants or intensity). Other studies have used dockets to assess case outcomes (for example, Burbank’s

Litigation Research Project (“CLRP”) collected docket, case file, and interview data on over 1600 civil lawsuits terminated in 1978 in 5 federal and 5 state trial courts. That project, however, focused on the cost, pace, frequency, and stakes of mid-range civil disputes<sup>67</sup> and on the settlement dynamics between parties<sup>68</sup> rather than on judicial decision-making. To the extent that the CLRP examined the role of the judge in promoting settlement, it did so not by examining docket activity in individual cases, but by aggregating survey data on judicial case management practices within each district studied.<sup>69</sup>

Eisenberg and Schwab also collected data from dockets in order to assess the nature and extent of civil rights and prisoner litigation in three federal district courts during 1980-81.<sup>70</sup> Together with Ashenfelter, they used this data source to test whether judicial background influences settlement and win rates in these types of cases.<sup>71</sup> Specifically, they used measures such as the mean settlement rate or the mean plaintiff win rate for each district judge in their study to capture case outcomes. Comparing these outcomes measures across judges, they found little evidence that individual judge characteristics explain variation in outcomes.<sup>72</sup> By using dockets to

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study of the use of summary judgment). Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMP. LEGAL STUD. 591 (2004). For other examples of use of digitized dockets as a datasource on case outcomes more than case dynamics, see, for example, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) (using dockets along with other data); Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573 (2001) (using dockets to analyze preliminary relief in patent cases). Although these types of studies inform us about litigation trends and the nature of disputing, they have not taken advantage of dockets to study judicial decision-making.

67. For information on the Civil Litigation Research Project, see, for example, David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer, & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

68. See, e.g., HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* (1991).

69. See, e.g., Herbert M. Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 28 (1982).

70. See Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988).

71. Ashenfelter et al., *supra* note 57.

72. *Id.* at 281.

collect data on all filed civil rights cases, they avoided many of the selection problems plaguing other studies of judicial decision-making. However, their method for testing for judge effects—comparing mean outcomes across individual judges—requires aggregating results, thus treating all settlements alike and all court judgments for plaintiffs alike. It matters, though, not only whether, but when, settlement occurs. Similarly, a court outcome for the plaintiff that results from a summary judgment ruling differs from one that is the result of a jury verdict. Each result suggests something different about judicial decision-making.

More recently, Hoffman et al. have argued, as we do here, for the intensive study of trial court dockets available through PACER and against reliance on opinions.<sup>73</sup> In particular, they were focused on the particular question of *when* district judges choose to write opinions—that is, to provide written reasons to accompany their decisions—rather than relying on summary orders. Examining *decisions*, rather than *opinions*, they found that each case typically involves multiple judicial decisions and that the distribution of court activity across cases is highly skewed, with many cases having only a handful of docket entries, while a few cases had hundreds.<sup>74</sup> After categorizing court decisions by procedural type—management orders, intermediate orders and final action orders—they found that the likelihood that a given order would result in a written opinion varied substantially with the type of order and concluded that the decision to write an opinion is significantly affected by the procedural context.<sup>75</sup>

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73. Hoffman et al., *supra* note 23. They propose a methodological approach they call “docketology”—that is, “the intensive study of trial court dockets” and contrast it with the standard approach of “opinionology”—gathering a sample of court opinions and subjecting them to analysis. *Id.* at 684–85, 694.

74. *Id.* at 709.

75. “Management orders” in Hoffman et al.’s classification scheme are orders, such as discovery orders, that “are rarely immediately appealable.” *Id.* at 715. They also refer to “intermediate orders,” such as motions to dismiss, that are only sometimes appealed and “final actions orders,” like summary judgment, that are “almost always conclusive and appealable.” *Id.* at 715. To the extent that this classification is intended to capture the likelihood of an appeal, the categories are imprecise because the actual outcome of the motion—i.e., whether a summary judgment motion is granted or denied—will affect the likelihood that it will be appealed. The authors recognize this issue and take it into account in their later analysis. *See id.* at 719–20. Regardless of the inexactness of their classification scheme, Hoffman and his colleagues make an important contribution by demonstrating that the likelihood that a district

Their work demonstrates the risks of studying only opinions, as well as the possibilities of using dockets as a source of data. However, their research focused narrowly on the question of when judges write opinions rather than using the wealth of data available in dockets to examine why judges make the substantive decisions that they do.

Although each of these prior studies relying on dockets for information has contributed insights not available from a limited focus on opinions, they failed to fully exploit the possibilities for using docket information to study district judge decision-making. In particular, studying dockets offers several distinct advantages. First, dockets allow researchers to take into account the stage of litigation in which a particular judicial decision occurs and to control for the effects of procedural context. Second, by examining what types of cases settle at what stages of the litigation, researchers can directly study the selection process that shapes the pool of cases that are resolved by adjudication. And finally, the reverse question can be explored as well: Does judicial decision-making affect the parties' settlement decisions?

The first advantage is that studying dockets permits a comparison of decisions which are truly comparable—i.e., those made in the same procedural context—rather than simply comparing whatever decisions are available. In traditional outcome studies of court opinions, researchers tend to lump together all “liberal” decisions—for example, votes in favor of a civil rights plaintiff—without paying attention to the type of decision being made. However, a decision to deny a motion to dismiss that favors a civil rights plaintiff has a very different consequence than a decision entering a verdict in favor of that same plaintiff. Moreover, the same judge who denied a defendant's motion to dismiss early in a case may subsequently *grant* its motion for summary judgment. Thus, ignoring the type of decision being made creates not so much a problem of comparing apples to oranges, but one of comparing tadpoles to frogs: differences among observations may be attributable to the stage of the litigation at which the decision is made.

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judge's decision will be accompanied by a written opinion varies significantly depending upon the type of decision.



This problem is best illustrated with some examples. Suppose a study undertakes to examine whether political affiliation or social background factors influence the likelihood that a judge will vote in favor of plaintiffs in certain types of cases. Consider four hypothetical cases with the following event histories:

|         | Case A          | Case B          | Case C          | Case D          |
|---------|-----------------|-----------------|-----------------|-----------------|
| Event 1 | Complaint filed | Complaint filed | Complaint filed | Complaint filed |
| Event 2 | Settled         | Answer filed    | Answer filed    | Answer filed    |
| Event 3 |                 | D. moves for SJ | D. moves for SJ | D. moves for SJ |
| Event 4 |                 | SJ denied       | SJ denied       | SJ granted      |
| Event 5 |                 | Settled         | Trial           |                 |
| Event 6 |                 |                 | D. verdict      |                 |
| OUTCOME | Settled         | Settled         | Judgment for D. | Judgment for D. |

A study that focused only on case outcomes might view cases A and B as similar and C and D as similar. However, the outcomes in each pair of cases are not identical. From the perspective of judicial decision-making, cases B and C are more similar than A and B, or C and D. After all, in cases B and C, the judge denied defendants' motion for summary judgment. If the goal is to understand judicial decision-making, it is important to recognize that the judge's summary judgment decision in C (at event 4) was the *opposite* of the analogous decision in D (also at event 4). To state the point more generally, because district court litigation occurs in sequence, the stage or procedural posture of a decision is crucial. Looking only at the end result or comparing judgments made at different points in the litigation that happen to be observable misapprehends the role of district judges and risks mischaracterizing their work.

Procedural context also matters because different district court decisions face different risks of appellate reversal. Depending upon the type of decision, the probability that appellate review will occur at all can vary drastically, and the standard of review that will be applied may differ as well. Many district court decisions, such as rulings on discovery or procedural matters, are effectively unreviewable because they are not final judgments that are

immediately appealable.<sup>76</sup> While interlocutory appeal is theoretically possible, an extremely small proportion of non-final decisions are ever subject to such appeal;<sup>77</sup> without the right to immediate review an aggrieved party has little recourse. Any errors by the district court may become moot if the case is settled or ultimately resolved in that party's favor. Even if the objection is preserved and raised on appeal after a final judgment, the appellate court will be reluctant to void a judgment reached after a case was fully litigated on the basis of erroneous rulings early in the proceedings.<sup>78</sup> Thus, procedural decisions regarding matters such as party joinder or discovery are effectively insulated from review. Even some significant substantive rulings, such as a partial grant of summary judgment, may be difficult to reverse after a case is finally concluded.<sup>79</sup> For those decisions that are appealed, the degree of scrutiny given the district court's decision will vary depending upon the type of decision. Questions of law are closely re-examined under an exacting *de novo* standard,<sup>80</sup> while appellate courts are far more deferential to district court findings of fact or decisions relating to the management of the lawsuit.<sup>81</sup> Because dockets provide information about all types of district court decisions, researchers can take into account the procedural context when studying district judges' decisions.

A second advantage to utilizing dockets as a data source is that it allows direct study of selection effects. Filed cases reach discovery only if they survive the pleadings stage. Summary judgment is considered only if a case was not dismissed at the pleadings stage and no settlement has occurred. Cases are tried only if any summary judgment motion was denied. And so on. Thus, selection effects will progressively limit the pool of cases actually adjudicated at various stages of the litigation, and these pools of cases surviving at each

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76. 28 U.S.C. § 1291 (2006).

77. See Solimine, *supra* note 26, at 1174.

78. Appellate courts should not reverse for "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (2006).

79. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 660–66 (explaining how expanded pretrial activity and rules of appeal have created a significant set of lower court rulings that are effectively unreviewable).

80. 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 206.04[1] (3d ed. 2008).

81. *Id.* at §§ 206.03 [1]–[6], 206.05[1].

stage may differ in systematic ways from all filed cases and from each other. Information from dockets allows the researcher to track the entire progress of cases over time and therefore to model these selection effects. Which cases with what characteristics survive to each stage of the litigation process? And how do the cases subject to adjudication at each stage differ from filed cases and from one another?

Finally, dockets permit exploration of a closely related question: Does judicial decision-making influence the parties' settlement decisions? To the extent that scholars have paid attention to selection effects, they have assumed that their importance lies in limiting the pool of cases that remain to be adjudicated.<sup>82</sup> While this effect is important, the possibility that judicial decision-making in turn influences settlement behavior has been largely ignored in empirical studies of district court litigation.<sup>83</sup> Theory instructs that litigants' willingness to settle turns on their expectations regarding the ultimate outcome of the case. Although the parties may begin the litigation with an estimate of the likely outcome, they will have repeated opportunities for updating their predictions as they glean additional information about the strengths and weaknesses of their cases during the litigation process. The district judge, by ruling on procedural matters, commenting informally on the evidence, and even by setting schedules, can dramatically impact the parties' estimates of their chances of success before, during, and after trial, thereby encouraging settlement and influencing its terms.<sup>84</sup> In fact, one of the premises of

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82. See, e.g., Ashenfelter et al., *supra* note 57, at 259 (observing that because litigants can decide to settle a case or present it to the court for judgment, cases actually adjudicated are unlikely to be a random sample of filed cases); Siegelman & Donohue, *supra* note 44 (arguing that because of litigant selection effects and judge publication decisions, published district court decisions are not representative of cases filed).

83. Some scholars have noted this possibility. For example, Rowland and Carp suggest that pretrial rulings "can change dramatically the balance of probable trial outcomes and, therefore, of each side's incentives to settle a case." ROWLAND & CARP *supra* note 21, at 122; see also KRITZER, *supra* note 68. This theory, however, has not been subjected to much empirical testing. While Ashenfelter et al. tested for judge effects on case outcomes including settlements, they aggregate these outcomes by judge, comparing, for example, mean settlement rates per judge, rather than testing whether specific judicial decisions influenced the likelihood of settlement. Ashenfelter et al., *supra* note 57, at 270–77.

84. The situation in appellate courts is not exactly analogous. Because oral argument is typically the only pre-decisional contact that the parties have with the appellate judges deciding

the shift to managerial judging is that the actively involved trial judge can more quickly move cases towards resolution. By collecting data on district judge interventions in a case and the timing of settlement, researchers can test whether the decisions of the district judge influence litigant settlement decisions.

#### IV. OUR EEOC PROJECT

In an ongoing project, we seek to exploit these advantages of using dockets as a data source. Currently, we are collecting and analyzing data on federal court litigation brought between October 1, 1996, and September 30, 2006, by the Equal Employment Opportunity Commission (“EEOC”), the federal agency charged with enforcing the laws forbidding race, color, national origin, religion, sex, age, and disability discrimination by employers. We began with a list of the nearly 4000 employment discrimination cases filed in all district courts by the EEOC on behalf of individual complainants during this time period. We stratified our initial, comprehensive list of cases into two groups. Group 1 consisted of all cases in which a trial or appeal took place, cases resolved by a judicial decision, and cases involving more than one “benefited party.”<sup>85</sup> The nearly 1700 cases in this group were all included in our sample. Group 2 consisted of the remaining 2220-plus cases; of these, we randomly selected 1000 for inclusion in our study. From this initial sample, a handful were dropped because they did not in fact fit the criteria for inclusion or the relevant data was missing or difficult to code,<sup>86</sup>

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their case, party expectations of what the judges will likely do are probably very stable, with few opportunities for updating. Of course, if the parties are notified of the judges on their assigned panel in advance, it might influence their expectations of the outcome and, hence, the likelihood of settlement. In that case, however, it is not anything that the judges *do*, but simply who they *are* that influences the likelihood of settlement. However, interactions at oral argument can give the parties a direct sense of how the judges view the particular case, just as the many pre-trial rulings of a district court judge entail contacts that give the parties information about their litigation prospects. *See, e.g.*, JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* 55–63 (2002).

85. Note that some of the cases in Group 1 had more than one of these features.

86. Cases were dropped from the sample for the following types of reasons: cases could not be found because the docket number in our initial list was missing or, apparently, incorrect; the case involved enforcement of an administrative subpoena rather than an antidiscrimination

resulting in a final sample of about 2500 cases for analysis. For each, we are using the district court docket number provided by the EEOC to search PACER for additional data. We have located docket sheets in all the cases, as well as pleadings and settlement documents in a substantial portion of them.

From the case docket, we collect information about the judge, the defendants, any intervening private parties, the motions filed in the case, the timing and disposition of those motions, and whether and when the case settled. In cases resolved by a judicial decision, we collect information on the type of decision (e.g., dismissal, summary judgment granted, trial, etc.), the prevailing party, the amount of monetary relief, whether injunctive relief was granted, and whether the losing party appealed.

The database we are constructing is very comprehensive but fairly ordinary for the most part (except that it is web-based, to facilitate multiple users' access, and provides links to the relevant documents, to facilitate both data entry and review). But it does have one unusual feature. Most research databases are "flat"—that is, they array the data in a two-dimensional grid with rows and columns. But a flat database could not accommodate the enormous variation in the number, type, and sequence of party motions, court orders, and other litigation events in the district courts. We have therefore built the database to incorporate multiple tables, to allow us to enter information on as many case events as occur. Each case in the database is an observation in the main table. Additional tables record information about each litigation event in a case as a separate observation with its own row of data, which is then linked to the main table. Thus, for each case, we are able to capture any number of case events, from zero to thousands.<sup>87</sup>

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lawsuit; the case involved preliminary injunctive enforcement of a settlement reached and memorialized outside of litigation; the case was a lawsuit against a governmental defendant; the case turned out to have been filed prior to our study period; or the case was consolidated with other litigation in a way that was too complex to be captured by our coding protocol.

87. For each motion, we collect: Date; Docket Entry #; Type; Filing Party; Consent Status; Written Opposition Filed; Date of Outcome; Outcome Docket Entry #; Identity of Decision-maker; and Outcome. For each non-motion event, we collect: Date; Docket Entry #, and Event Type.

These data will allow us to conduct tests and analyses of district court litigation and judicial decision-making that would be impossible with traditional sources of outcome data. For example, we plan to test theories of judicial decision-making using *all* district court decisions in EEOC litigated cases—published and unpublished, final and non-final—while taking into account the procedural context of each decision. The data will allow us to model different types of decisions separately and to consider how the different risks of appellate review might affect those decisions. In addition, we plan to use a hazard model to predict the distribution of settlements over time, examining not only the effect of case characteristics potentially relevant to the settlement decision but also the timing and nature of judicial interventions.

#### CONCLUSION

Empirical study of district judge decision-making has long been limited by both inadequate theoretical models and inaccessible data. However, the development of the electronic filing system in federal courts and the current availability of dockets and litigation documents through PACER have significantly reduced the obstacles to obtaining detailed information about the work of the district courts. In order to fully exploit the wealth of data now coming on line, researchers need to develop better models of district court decision-making. Given the significant differences between appellate and trial court decision-making, traditional models that analyze only opinions, treat all district judges alike, and ignore the impact of settlement are simply inadequate. Instead, we argue for a new approach—one that uses dockets to study district judge *decisions* (not just opinions), takes into account the procedural context of these decisions, and directly studies how the settlement behavior of litigants may both influence and be influenced by district judge decision-making. Only after developing models that incorporate the unique institutional setting of district courts in these ways can empirical research bring greater understanding of district judge decision-making.