Anatomy of a Norm: How Ideology and Issue Area Shape Publication Decisions in the U.S. Courts of Appeals

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BACKGROUND

Unlike the US Supreme Court, US Circuit Courts do not have control over the cases that they must decide. In order to deal with this large caseload, circuit court judges have developed the practice of designating some opinions as unpublished. Published decisions are legally binding precedent for future cases in a circuit; however, unpublished decisions are not (Hazelton et al. 2016). Since these opinions do not create law, judges do not have to dedicate as much time to writing them (Szmer et al. 2012). Judges have considerable latitude in their decision whether or not to publish an opinion. Since publishing a decision requires more work, we expect judges to act strategically in their decision to publish. Circuit courts hear cases in three judge panels (Hazelton et al. 2016). Once the panel makes a decision, litigants can ask the entire circuit to rehear the case en banc, where all judges on the circuit vote on the case. This acts as a form of oversight for the panel (Giles et al. 2006). An en banc panel has the authority to overrule the decision of the three judge panel. Unpublished decisions, however, are far less likely to be review en banc (Hazelton et al. 2016). Judges can use publication, or the lack thereof, to avoid review when they anticipate the circuit as a whole will reacting negatively to their decision. Furthermore, judges may care about some issue areas more than others (Wasby 2001). Publishing a decision takes time and judges may be more likely to do so in issue areas they care more about.

HYPOTHESES

- As the ideological distance between the panel median and circuit median increases, a panel will be less likely to publish an opinion
- As circuit extremity increases, a panel will be more likely to publish an opinion
- Opinions in more salient issue areas will be more likely to be published than opinions in less salient issue areas
- Both ideology and circuit will have a larger impact in issue areas where publication is more likely

METHOD

In order to test our theories, we rely on a new dataset of all Circuit Court of Appeals opinions from 2002-2012. We utilize a Probit regression in our analysis. Our outcome variable is the panel's decision whether or not to publish an opinion. Our primary explanatory variables are ideological distance, circuit extremity, and issue area.
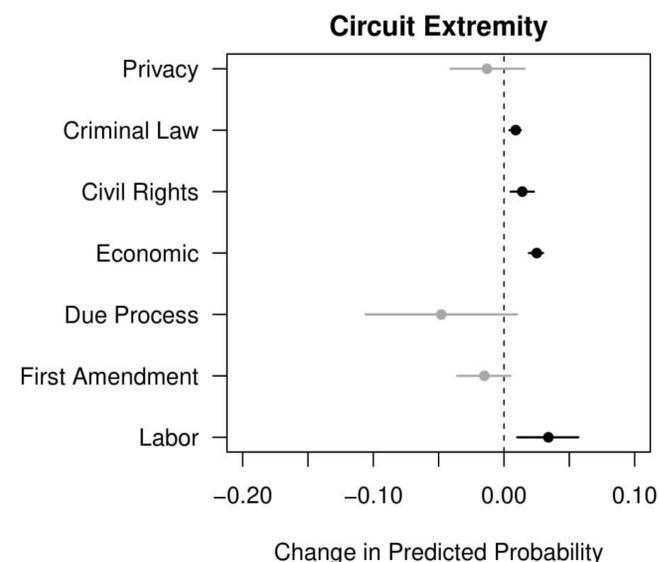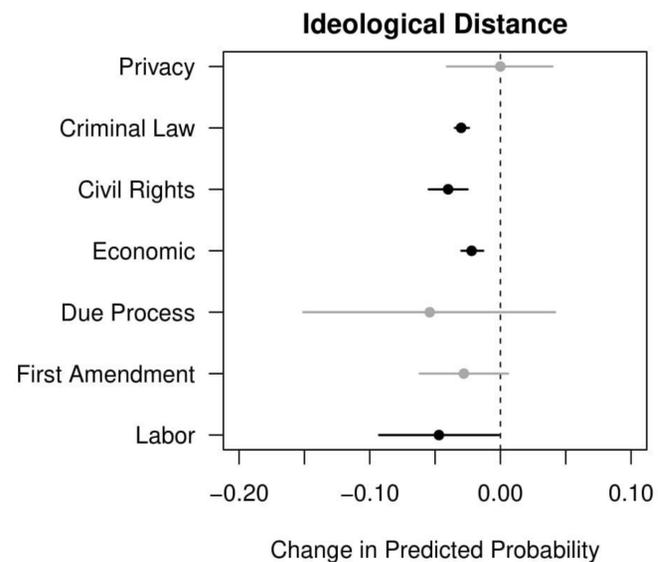
In addition to our primary explanatory variables, we also include a series of control variables in our model. We control for whether or not a circuit consists of primarily Republican judges, the caseload of a circuit, the criminal caseload of a circuit, whether an opinion is a per curiam decision, and the publishing rate of a circuit.
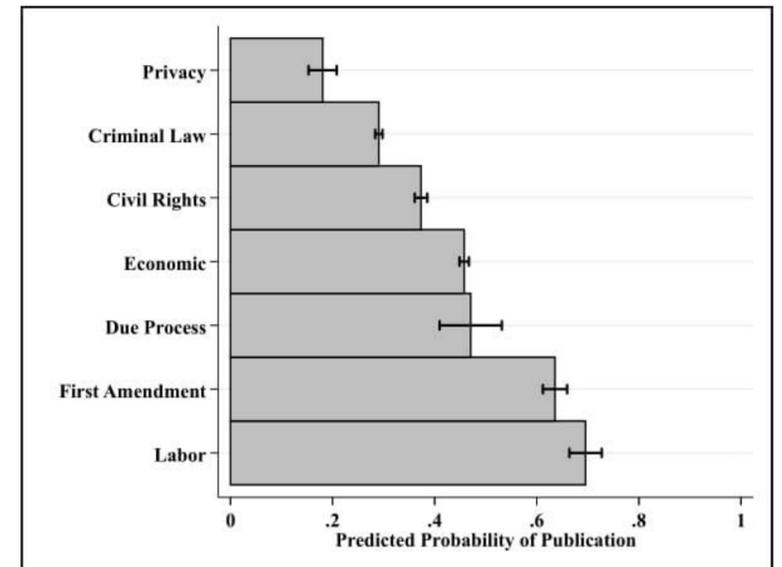
ISSUE CLASSIFICATION

- We needed to code the issue area of the opinions ourselves. Coding all 186,737 opinions by hand is not feasible, so we developed a supervised classifier using the Songer Court of Appeals Database. Our classifier consists of three separate classifiers relying on words, citations, and bigrams respectively. The prediction accuracies of our classifier and its three component classifiers are presented below. We then compared the accuracy of our classifier to that of NLTK's Naïve Bayes and Maximum Entropy classifiers..

Classifier Type	Prediction Accuracy
Our Classifier	**87.8%**
Word Classifier	60.6 %
Citation Classifier	62.3 %
Bigram Classifier	80.5 %
Naive Bayes Classifier	2.4 %
Maximum Entropy Classifier	51.5 %

RESULTS

Ideological Distance

Change in Predicted Probability

Circuit Extremity

Change in Predicted Probability

RESULTS

Probability of Publication in each issue area. Other variables are held at their median values/

CONCLUSIONS

- Judges' publication decisions are strategic
- Circuit extremity and ideological distance both affect publication
- These effects are dependent on the issue area of the decision

ACKNOWLEDGEMENTS

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