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## Wilderness, the Courts and the Effect of Politics on Judicial Decisionmaking

Peter A. Appel

University of Georgia, [appel@uga.edu](mailto:appel@uga.edu)



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# WILDERNESS, THE COURTS, AND THE EFFECT OF POLITICS ON JUDICIAL DECISIONMAKING

Peter A. Appel\*

*Empirical analyses of cases from federal courts have attempted to determine the effect of judges' political ideology on their decisions. This question holds interest for scholars from many disciplines. Investigating judicial review of the actions of administrative agencies should provide strong evidence on the question of political influence because applicable rules of judicial deference to administrative decisions ought to lead judges to reach politically neutral results. Yet several studies have found a strong correlation between results in these cases and proxies for political ideology. Cases involving the interpretation of environmental law have been of particular interest as a subset of this research because political ideology is also thought to predict views on environmental regulation. Nevertheless, an earlier work offered initial evidence that this phenomenon may not hold in cases involving review of agency decisions administering the Wilderness Act of 1964. Indeed, the cases showed a pro-wilderness tilt in the outcomes, rather than a pro-agency tilt. This Article builds on that earlier evidence. It first provides an overview of empirical studies of environmental decisions in federal courts and then reviews the Wilderness Act and current problems arising in the administrative application of it. The Article then analyzes whether ideological proxies employed in earlier studies strongly correlate with the outcome of the Wilderness Act cases using standard statistical analysis. The analysis shows a lack of correlation between politics and the aggregate outcome of wilderness decisions, namely a tilt in a pro-wilderness direction.*

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## INTRODUCTION

Although politics in government is a fact of life, the role that politics plays in actual governmental outcomes often meets with disdain. People at both ends of the political spectrum will hurl the criticism that a particular policy announcement or new rulemaking with which they disagree simply reflects politics (as opposed to the wise, disinterested policy judgment that they would support). Judges in particular are supposed to rise above politics and partisanship in their decisionmaking. Thus, an idealistic (if naïve) view of the decisions of executive branch agencies is that their decisions reflect their expertise on policy; neutral judges then review these decisions only to ensure that the agency has applied the law correctly but not to weigh the merits and demerits of the policy determinations themselves.<sup>1</sup>

This simplistic view has received much criticism in the literature, and scholars who study the courts empirically have added much grist to the mill. They have created statistical analyses demonstrating that, in many instances, the political ideology of judges makes a measurable difference in the outcome of cases. This work emerged prominently in analyses of the Supreme Court, especially of its constitutional decisions. Other scholars have then employed a similar methodology of analysis to other supposedly less political courts and to other supposedly less political areas of the law, namely judicial review of administrative decisions. These contexts potentially offer more telling results. Unlike the Supreme Court, lower courts are bound not only by their own precedent but also by decisions of courts above them in the hierarchy.<sup>2</sup> Unlike the constitutional context, the administrative review

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<sup>1</sup> See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (holding that judges should not review administrative determinations “on the basis of the judges’ personal policy preferences.”); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (holding that, under the Administrative Procedure Act, “the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”).

<sup>2</sup> Many of the studies in this area have focused on the courts of appeals. See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS 2* (2007) (“The circuit courts play by far the greatest legal policymaking role in the United States judicial system.”); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 4* (2006) (arguing that results in courts of appeals “provide an exceedingly illuminating test of the role of politics in judicial judgments” as opposed to results in Supreme Court or district courts). There have been some studies of the district courts, although these studies also

context has stated rules of deference to executive agencies that should be more neutral in application.<sup>3</sup> If political influences are statistically determinable in these contexts, then the prediction that judges are political creatures gains more support.

The context of environmental decisions has provided one substantive area for this type of analysis.<sup>4</sup> The attractiveness of environmental decisions is that environmental issues are thought to divide political conservatives from political liberals, with liberals favoring greater environmental protection through regulation and conservatives opposing it.<sup>5</sup> If the votes of judges reviewing administrative decisions — such as rulemakings by the U.S. Environmental Protection Agency (“EPA”) — tend to follow those predictions, that pattern would support the argument that judges act in a political way, i.e., that their decisions track partisan beliefs or individual political attitudes rather than neutral principles of law.

This Article examines the pattern of judicial decisions reviewing agency interpretations of the Wilderness Act of 1964.<sup>6</sup> Building on earlier research,<sup>7</sup> it finds that the judicial decisions show a pattern of having a pro-wilderness bent that would not be predicted by hypotheses of how cases should come out based on applicable legal rules. The predictions based on

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examine other potential influences on judicial behavior such as the desire for a promotion to the court of appeals. See, e.g., Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

<sup>3</sup> See, e.g., Martha Anne Humphries & Donald R. Songer, *Law and Politics in Judicial Oversight of Federal Administrative Agencies*, 61 J. POL. 207, 209 (1999) (deference doctrines “should lead to comparable levels of support among all the agencies, regardless of the agency’s political orientation”); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 827–28 (2006) (hypothesizing that deference under *Chevron* should eliminate political tendencies among judges’ decisions).

<sup>4</sup> See, e.g., JAY E. AUSTIN ET AL., *JUDGING NEPA: A “HARD LOOK” AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 1* (2004) [hereinafter AUSTIN ET AL., *JUDGING NEPA*]; Jason J. Czarnecki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 768 (2008); Miles & Sunstein, *supra* note 3, at 848 (noting focus on cases involving the Environmental Protection Agency because of its tendency to “produc[e] politically contentious decisions”); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717–18 (1997); see also Stefanie A. Lindquist & Susan B. Haire, *Decision Making by an Agent With Multiple Principals: Environmental Policy in the U.S. Courts of Appeals*, in *INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT* 230 (James R. Rogers, Roy B. Flemming & Jon R. Bond eds., 2006) (applying principal-agent model to courts of appeals in environmental context).

<sup>5</sup> See, e.g., Christopher J. Bosso, *Environmental Groups and the New Political Landscape*, in *ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY* 55, 59–62 (Norman J. Vig & Michael E. Kraft eds., 4th ed. 2000) (discussing “[c]onservative antipathy to environmentalism”). This characterization of environmental issues is in tension with the history of environmental regulation which, at its beginning at least, enjoyed strong bipartisan support in Congress. See, e.g., Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 623–26 (2006); Christopher H. Schroeder, *Global Warming and the Problem of Policy Innovation: Lessons from the Early Environmental Movement*, 39 ENVTL. L. 285, 306 (2009).

<sup>6</sup> 16 U.S.C. §§ 1131–1136 (2006 & Supp. II 2008).

<sup>7</sup> Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62 (2010).

proxies for judicial ideology also do not hold when analyzed using standard statistical tools. These findings lend support to the hypothesis that wilderness protection taps into a deep-seated cultural love of wilderness that transcends party politics and simple ideology.

This Article employs basic statistical analysis of case decisions to bolster the overall conclusion. Although its contribution to the overall literature of empirical measures of judicial decisions may be modest, it provides further nuance to statistical analyses of environmental decisions, which themselves have become a testing ground for hypotheses about judicial decisionmaking more broadly. In addition, this Article offers further examination of an underappreciated area of environmental law, namely the Wilderness Act, and continues the argument that the Wilderness Act may represent an exception among environmental statutes and a standout that deserves more scrutiny than it has received in the legal literature to date.

This Article will proceed first with an overview of judicial decisionmaking in the administrative context. It will briefly explore the stated rules that judges apply when examining the decisions of administrative agencies and then summarize the empirical research evaluating whether judges stick to those rules or adhere more to their political philosophy. Because of their relevance here, the studies of environmental cases receive particular attention. Part II then provides an overview of the 1964 Wilderness Act, its background, and the political alignment of supporters and detractors. Part III lays out detailed analysis of the cases interpreting the Wilderness Act. The methodology roughly follows other studies of environmental cases, but a detailed description of the methodology is provided so that comparisons among studies can be easily made. Unlike other studies of environmental decisions, however, the analysis shows that, statistically, political attitudes of judges do not have a determinable effect on case outcomes.

## I. A BRIEF INTRODUCTION TO JUDICIAL DECISIONMAKING IN ADMINISTRATIVE CONTEXT

Because this Article examines how federal courts review the decisions of executive branch agencies in litigation before them, some background in general principles of administrative law and how analysts have attempted to describe these cases is useful. Basically, the question boils down to what factors — including precedent and political ideology — influence the end results in these cases. The analysis has proven to be a two-way street, since it reflects both on the decisionmakers and on the outcomes they generate.

### A. *Models of Judicial Review Generally*

Federal courts decide a variety of cases involving everything from civil rights to employment discrimination to criminal cases. Because federal judges are appointed (rather than elected) and enjoy life tenure, they enjoy a

superficial image of being able to rise above politics. Indeed, federal judges often refer to Congress and the executive as the “political branches”<sup>8</sup> to contrast them with the apolitical judiciary. Nevertheless, critics often assail federal judges for making decisions that merely reflect politics or some other aspect of the judges’ background and not transcendent principles of law that a judge should apply; this occurs especially frequently in popular discourse when the observer disagrees with the outcome of a particular case. Except in rare instances, however, courts claim to follow rules of neutral application to the cases in front of them and eschew relying on their political preferences to decide cases. This section thus reviews two chief models of judicial decisionmaking, the legal model and the attitudinal model, as a background to judicial review in the more specific context of environmental decisionmaking.

### 1. *The Legal Model*

The process of judicial decisionmaking requires judges to rely on authoritative sources — e.g., the Constitution, the text of applicable statutes and regulations, and relevant precedent — to reach their decisions. It would not be satisfactory for a judge to state that she simply prefers one outcome to another; she must have reasons to do so that are grounded in sources of law. As a nominee to the Supreme Court, Chief Justice Roberts compared this ideal view of the role of the judge to the role of a baseball umpire, simply calling balls and strikes but not participating in the game itself or altering the rules of the game.<sup>9</sup>

Even within this model, the rules that judges apply range widely depending on context — e.g. whether a court is interpreting the Constitution, a statute, or a regulation issued by an administrative agency. Of particular relevance here are the rules that judges follow when they assess the decisions of an administrative agency. These rules have their foundations in the statutes authorizing judicial review of agency decisions<sup>10</sup> and in separation of powers principles, namely the view that the judiciary espouses that the legislative and executive branches should make policy decisions.<sup>11</sup>

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<sup>8</sup> See, e.g., *14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456, 1472 (2009); *Boumediene v. Bush*, 553 U.S. 723, 753 (2008); *Munaf v. Geren*, 553 U.S. 674, 700 (2008).

<sup>9</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr.). Judge Posner has called this statement “ridiculous.” Richard A. Posner, *Some Realism about Judges: A Reply to Edwards and Livermore*, 59 *DUKE L.J.* 1177, 1181 (2010).

<sup>10</sup> For example, the Administrative Procedure Act allows a court to reverse an agency decision that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (2006).

<sup>11</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences.”).

Earlier in the last century, courts applied general rules of deference to agency decisionmaking under cases such as *Skidmore v. Swift & Co.*<sup>12</sup> In that case, the Court held that

the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade.<sup>13</sup>

*Skidmore* painted administrative rulings as a persuasive body of law even when not binding, but not ones to which judges were required to adhere in lockstep.

As the administrative state expanded dramatically, judicial review of agency actions increased also as a part of the docket of the federal courts, and deference under *Skidmore* remained the basic rule. In the 1980s, the Supreme Court arguably reformulated its rules concerning deference to some types of administrative actions in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>14</sup> There, the Court held:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>15</sup>

The *Chevron* decision appeared to represent a break with earlier decisions such as *Skidmore* in that it formalized when a court would defer to an agency's statutory interpretation (i.e., in the case of statutory ambiguity), and how much deference would apply (i.e., whether the agency's construction is "permissible"). Although the case itself involved a regulation issued after

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<sup>12</sup> 323 U.S. 134 (1944).

<sup>13</sup> *Id.* at 140.

<sup>14</sup> 467 U.S. 837 (1984).

<sup>15</sup> *Id.* at 842-43 (footnotes omitted).

notice and comment rulemaking, courts quickly applied *Chevron* to a range of agency decisions that did not involve such legislative rules.<sup>16</sup> They also adopted a vocabulary describing how they would apply this precedent, dubbing as a “*Chevron* step one” case one in which Congress had spoken clearly, and a “*Chevron* step two” case one in which a statute evinced ambiguity and the court would defer to any “permissible” statutory interpretation or application.<sup>17</sup> Commentators follow this nomenclature.<sup>18</sup>

Since *Chevron*, observers have debated both its overall legitimacy<sup>19</sup> and the extent to which the case applies to all agency determinations.<sup>20</sup> The Court has subsequently cut back on those cases to which *Chevron* applies, most clearly first in the case of *United States v. Mead Co.*,<sup>21</sup> which involved the extent to which a Customs tariff regulation applied to a particular product. The decision that a higher tariff applied to Mead’s product was laid out in a “carefully reasoned but never published” letter written by Customs headquarters.<sup>22</sup> The Court held that the deference described in *Chevron* applied “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that

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<sup>16</sup> See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (applying *Chevron* to agency adjudication); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 978–80 (1986) (applying *Chevron* to no-action decision of the Food and Drug Administration); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 849–52 (2001) (reviewing different instances in which courts have applied *Chevron* and discussing circuit conflicts and tensions in the cases).

<sup>17</sup> See, e.g., *Catawba Cnty. v. EPA*, 571 F.3d 20, 32–33 (D.C. Cir. 2009); *N.Y. ex rel. N.Y. State Office of Children & Family Servs.*, 556 F.3d 90, 97 (2d Cir. 2009); *Terrell v. United States*, 564 F.3d 442, 450 (6th Cir. 2009); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 920 n.2 (9th Cir. 2009) (en banc). The first judicial use of the expression “*Chevron* step one” appears to be in Judge Starr’s opinion in *Ass’n of Maximum Serv. Telecasters v. FCC*, 853 F.2d 973, 975–76 (D.C. Cir. 1988).

<sup>18</sup> See, e.g., Czarnecki, *supra* note 4, at 772–76; Note, “*How Clear Is Clear*” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687 (2005).

<sup>19</sup> See, e.g., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 562 (2009); John E. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189–211 (1998).

<sup>20</sup> See, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Merrill & Hickman, *supra* note 16, at 858–63 (explaining why two deference doctrines are better than one); Peter A. Appel, Note, *Administrative Procedure and the Internal Revenue Service: Delimiting the Substantial Understatement Penalty*, 98 YALE L.J. 1435, 1442–52 (1989) (questioning the level of deference for interpretative rules).

<sup>21</sup> 533 U.S. 218 (2001). The Court’s decision in *Christensen v. Harris County*, 529 U.S. 576 (2000), made clear that *Chevron* did not apply to all agency decisions but only those with the force of law. *Id.* at 587 (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”). *Mead* provided more explanation of when *Chevron* applies to agency actions and when it does not. Professor Bressman has criticized *Mead* for creating more confusion than clarity in administrative law. Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

<sup>22</sup> *Mead*, 533 U.S. at 225.



authority.”<sup>23</sup> In other instances, the agency’s interpretation of law may merit deference under the principles announced in *Skidmore*.<sup>24</sup> Since then, the Court has held that an agency interpretive memo deserves deference based on the formality of the procedures leading to it, the fact that it came from headquarters, and its persuasive power as an account of the applicable statutes and regulations.<sup>25</sup> Following a suggestion pre-dating *Mead*, scholars have now dubbed this question of whether *Chevron* even applies to an agency action “*Chevron* step zero.”<sup>26</sup> The range of questions that courts ask in reviewing administrative decisions — e.g., whether the *Chevron* rule of deference applies; if so, whether the statute is ambiguous; and if so, whether the agency’s interpretation of that statute is permissible — leaves a great deal of room for judicial crafting of their decisions. Indeed, it may result in enough room that courts could impose their ideological spin on cases in answering these questions.

## 2. *The Attitudinal Model*

Since the growth of legal realism in the 1920s, many observers have expressed the view that judges apply their own views to decide cases rather than relying on predictable rules of law to govern their decisions. A simplistic way of posing the problem is to ask whether judges apply law or make law.<sup>27</sup> More recently, scholars have tried to measure judicial decisions empirically and determine whether (and under what circumstances) judges apply their own views to the cases before them. Much of the earlier work in this field focused on the Supreme Court and its decisions interpreting the Constitution. One model — the attitudinal model — “holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes

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<sup>23</sup> *Id.* at 226–27.

<sup>24</sup> *Id.* at 234–35.

<sup>25</sup> *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2473 (2009); see also J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 84 (2010) (describing deference rule for interpretive memoranda after *Coeur Alaska*).

<sup>26</sup> Merrill & Hickman, *supra* note 16, at 836; Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 987 (2006).

<sup>27</sup> Of course, judges engage in some of both when they exercise their functions. As Eugene Rostow observed:

In deciding constitutional cases the judges must not only interpret the law and find the law but make law too, as surely as they make law when they decide cases of tort, contract, or corporations. In a passage often quoted, Holmes once said, “I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.” And one recalls Jeremiah Smith’s pungent remark, after he left the Supreme Court of New Hampshire for the Harvard Law faculty: “Do judges make law? Of course they do. Made some myself.”

EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 116 (1962).

the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.”<sup>28</sup> Empirical analysis of decisions supported this view of the Court’s decisionmaking.<sup>29</sup>

The attitudinal model contrasts with several other models of the judicial process. The first is the legal model discussed above, which depicts judges as bound by a series of authoritative sources — statutes, regulations, prior case law, rules of statutory interpretation and construction — that would lead them to decide cases as contrary to their political preferences.<sup>30</sup> The second is the rational choice model, which accepts that judges are political animals but holds that judges will respond to the desires of those who influence the judges by controlling their docket, jurisdiction, and salary. Each of these models has its supporters and detractors, but the attitudinal model attracts particular attention in the discussion of judicial decisionmaking.

The attitudinal model may have particular force in describing the decisions of the Supreme Court, but it may not describe the vast majority of federal court decisions for at least three reasons.<sup>31</sup> First, the Supreme Court controls the majority of its docket through the decision of whether to take a case on certiorari.<sup>32</sup> Thus, the cases in which it issues full decisions are not a random distribution of cases presented for consideration but rather a hand-picked selection of all cases worthy of review by the highest court.<sup>33</sup> Second, the Supreme Court does not directly answer to a superior authority in the form of a higher tribunal. It can overrule its own precedents and is thus

<sup>28</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002).

<sup>29</sup> *Id.* at 312–26; see also Miles & Sunstein, *supra* note 3, at 831–36.

<sup>30</sup> *Id.* at 49–85; see also Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255 (1997).

<sup>31</sup> Segal and Spaeth acknowledged that the special conditions under which Supreme Court justices operate allow the attitudinal model to have particular force:

Attitudinalists argue that because legal rules governing decision making (e.g., precedent, plain meaning) in the cases that come to the Court do not limit discretion; because the justices need not respond to public opinion, Congress, or the President; and because the Supreme Court is the court of last resort, the justices, unlike their lower court colleagues, may freely implement their personal policy preferences as the attitudinal model specifies.

SEGAL & SPAETH, *supra* note 28, at 111.

<sup>32</sup> By statute, appeals as of right to the Supreme Court are limited to cases “required by any Act of Congress to be heard and determined by a district court of three judges.” 28 U.S.C. § 1253 (2006). The largest category of such cases are those involving challenges to legislative redistricting decisions. 28 U.S.C. § 2284 (2006); see Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 148 (2008); see also JAMES C. DUFF, ADMIN. OFF. U.S. CTS., *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR*, tbl. S-18 (2010) (containing five years of statistics on three-judge district courts).

<sup>33</sup> Many have criticized the Court’s shrinking docket or called for reform. See, e.g., Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439 (2009); Kenneth W. Start, *The Supreme Court and its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2006); see also Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 51–53 (2009) (arguing that the Court’s decisions should be maximalist because of shrinking docket).

less bound by prior cases. Its decisions interpreting the Constitution are essentially final (absent the rare constitutional amendment), and, although Congress can reverse the Court's decisions interpreting statutes by amending the statute, that check does not appear to infiltrate the Court's decisions to a large degree.<sup>34</sup> Third, to the extent that the Supreme Court's decisions involve interpretation of the Constitution, politics may enter into the realm of decisions more than in the case of statutory interpretation or review of administrative decisions.<sup>35</sup>

In response to the strong statement of the attitudinal model, two cohorts of cases present themselves as attractive bodies of data for comparative empirical analysis. The first is decisions from the federal courts of appeals.<sup>36</sup> In these cases, the courts have much less ability to select the cases that they decide. For that matter, the federal district courts present an even more attractive set of data to scrutinize. The district courts are courts of original jurisdiction in matters involving interpretation of the Constitution or a federal statute.<sup>37</sup> Appeals as of right from the district courts are heard in the courts of appeals.<sup>38</sup> The district courts have nevertheless received less attention because the impact of their decisions as precedent (and therefore the policymaking aspect of their decisions) is limited. By contrast, once a panel of a court of appeals speaks, its decision binds the courts of that circuit including future panels of that court of appeals. The courts of appeals can

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<sup>34</sup> In a noteworthy recent example, Congress reacted to the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), by enacting the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. The *Ledbetter* decision interpreted employment laws as imposing a statute of limitations on claims alleging unequal pay for equal work; the Ledbetter Fair Pay Act provides for a longer period in which to file such suits. Examples such as this are noteworthy because they are infrequent. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 377 (1991) (finding that Congress overrides only about five percent of Supreme Court statutory decisions); Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612-13 (2007) (finding that Congress overrode Supreme Court preemption decisions twice in 127 cases over a twenty-year period).

<sup>35</sup> Of course, the attitudinal model does not predict outcomes with one hundred percent accuracy. Professors Edelman, Klein, and Lindquist have offered a conceptual framework to analyze departures from votes predicted by the attitudinal model. Paul H. Edelman et al., *Measuring Deviations from Expected Voting Patterns of Collegial Courts*, 5 J. EMPIRICAL LEGAL STUD. 819 (2008). They postulate that disordered voting (e.g., a coalition of liberal and conservative justices in the majority against dissenting moderates) can be explained by the justices using a case to further other ideological objectives, a disagreement about what vote ideology demands in a particular case, or other facts. *Id.* at 833.

<sup>36</sup> On this subject, see generally Cross, *supra* note 2, at 1-2.

<sup>37</sup> 28 U.S.C. § 1331 (2006). This statement is subject to some important exceptions. Of particular relevance here, several of the environmental statutes vest the courts of appeals — or, in particular, the U.S. Court of Appeals for the District of Columbia Circuit — with original jurisdiction over cases challenging administrative decisions (e.g., the issuance of a regulation or a permit). See, e.g., 15 U.S.C. § 2618(a) (2006); 33 U.S.C. § 1369(b)(1) (2006); 42 U.S.C. § 6976(a)-(b) (2006); 42 U.S.C. § 7607(b) (2006); 42 U.S.C. § 9613(a) (2006).

<sup>38</sup> 28 U.S.C. §§ 1291, 1292, 1295 (2006).

overrule their prior decisions through the procedure of convening en banc,<sup>39</sup> but that happens only rarely.<sup>40</sup> The district courts are bound by the precedent of their respective circuits, and district court judges face reversal by those bodies should they err in the application of that corpus of law or applicable precedent from the Supreme Court.

Another important category of cases which could counter or confirm the predictions of the attitudinal model are those in which federal courts review the decisions of federal administrative agencies. As described in more detail above, courts employ rules of deference to the decisions of agencies. If judges are bound by legal rules, the applicability of rules of deference should minimize the role that judicial attitudes play in case outcomes. Of course, if outcomes in the administrative context track results predicted from political affiliation, such a finding would provide strong support for the attitudinal model.

The past fifteen years has seen a wealth of such studies of judicial attitudes as reflected in case outcomes on the courts of appeals and in the administrative review context.<sup>41</sup> These studies have examined, inter alia: whether gender matters in gender discrimination and sexual harassment cases;<sup>42</sup> whether judicial ideology matters in religious freedom cases;<sup>43</sup> the impact of ideology and background on sentencing;<sup>44</sup> the impact of ideology on which prior decisions judges cite;<sup>45</sup> and the impact of ideology on the mode of legal interpretation that judges use.<sup>46</sup> Several studies have also tried to capture the effect of the *Chevron* and *Mead* cases on administrative review decisions.<sup>47</sup> Some of these studies have also shed light on other models

<sup>39</sup> See FED. R. APP. P. 35. Professor George has made an empirical study of one court's en banc decisions, namely the U.S. Court of Appeals for the Fourth Circuit. Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998). She concluded that appellate judges in these cases tended to vote consistently with their ideological preferences tempered by strategic calculations of what would prevail in the court. See *id.* at 1695.

<sup>40</sup> See DUFF, *supra* note 32, at tbl. S-1 (showing that out of 30,914 cases terminated in courts of appeals in the year ending September 30, 2010, only 44 were from *en banc* hearings).

<sup>41</sup> See generally CROSS, *supra* note 2; SUNSTEIN ET AL., *supra* note 2; Miles & Sunstein, *supra* note 3, at 847-65. Of course, there is also a burgeoning literature criticizing this method of analyzing court decisions. See, e.g., Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009). In addition, there are more specific methodological criticisms of different aspects of this empirical work. For the most comprehensive, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

<sup>42</sup> Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005).

<sup>43</sup> Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004).

<sup>44</sup> Sisk et al., *supra* note 2.

<sup>45</sup> Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEG. STUD. 87 (2008).

<sup>46</sup> Sara C. Benesh & Jason J. Czarnezki, *The Ideology of Legal Interpretation*, 29 WASH. U. J.L. & POL'Y 113 (2009).

<sup>47</sup> See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (examining Supreme Court cases involving agency interpretations of

of judicial decisionmaking not directly discussed here, namely the strategic theory and the litigant-driven theory.<sup>48</sup> The studies have also employed a variety of statistical techniques to measure the significance (or not) of the hypotheses tested in reaching their conclusions. Of these studies, those focusing on environmental cases have the most relevance to the subject of this Article and are discussed more fully in the next section.

### B. Federal Environmental Law and the Federal Judiciary

Federal statutory law has addressed environmental issues for many years, but one relatively short period saw an outpouring of legislation that now defines the field of modern environmental law as we know it.<sup>49</sup> Congress drastically expanded the scope of federal protections for the environment beginning in 1969 with the enactment of the National Environmental Policy Act (“NEPA”).<sup>50</sup> In the fifteen years following NEPA, Congress added many landmark laws, including the Clean Air Act,<sup>51</sup> the Clean Water Act,<sup>52</sup> the Resource Conservation and Recovery Act (the major federal statute governing the treatment, storage, and disposal of hazardous waste),<sup>53</sup> the Comprehensive Environmental Response, Compensation, and Liability Act (providing a means for cleaning up areas contaminated with hazardous substances),<sup>54</sup> the Toxic Substances Control Act,<sup>55</sup> and the Emergency Planning and Community Right-To-Know Act.<sup>56</sup> These statutes have led to many types of litigation that implicate the interpretation of these laws. The types of litigation include enforcement actions (brought by EPA and citizen plaintiffs) against regulated interests and actions challenging rules promulgated by the relevant administrative agency (typically EPA). The rulemaking chal-

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statutes); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1271–80 (2007) (examining empirically the effect of *Mead* in federal courts of appeals); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Miles & Sunstein, *supra* note 3, at 847–65; Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (examining empirically the effect of *Chevron* on federal circuit court decisions).

<sup>48</sup> The strategic theory (or rational choice model) postulates that judges wish to maximize their policy preferences, but realize that they operate under constraints such as higher courts that can reverse their decisions or other branches of government that can affect their working conditions or pay (by not raising it). See CROSS, *supra* note 2, at 95–96; SEGAL & SPAETH, *supra* note 28, at 96–110; George, *supra* note 39, at 1655–57. The litigant-driven theory postulates that judges only react to the cases put before them by the litigants and that the litigants’ choices of cases to bring or ways of participating (e.g. as an *amicus curiae*) drive outcomes. See CROSS, *supra* note 2, at 123–32.

<sup>49</sup> For an excellent history of federal environmental law, see RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 43–165 (2004).

<sup>50</sup> 42 U.S.C. §§ 4321–4347 (2006).

<sup>51</sup> 42 U.S.C. §§ 7401–7671q (2006).

<sup>52</sup> 33 U.S.C. §§ 1251–1387 (2006).

<sup>53</sup> 42 U.S.C. §§ 6901–6992k (2006).

<sup>54</sup> 42 U.S.C. §§ 9601–9675 (2006).

<sup>55</sup> 15 U.S.C.A. §§ 2601–2697 (West 2010).

<sup>56</sup> 42 U.S.C. §§ 11001–11050 (2006).

lenges have been brought by both environmental organizations and members of the regulated community, with the former arguing that the regulations are too lenient and the latter arguing that they are too stringent.

Several studies have tried to capture the influence of politics in the context of judicial decisions on environmental issues. Within the political science literature, Wenner and collaborators have made several general studies of politics, environmental cases, and the judiciary.<sup>57</sup> Wenner and Dutter analyzed environmental decisions and the political tendencies of geographic regions, finding a correlation between judicial outcomes and the political leanings of the geography of the judicial circuits.<sup>58</sup> Wenner and Ostberg reviewed decisions of the Ninth Circuit from 1970 to 1990 and the D.C. Circuit from 1970 to 1988.<sup>59</sup> Their conclusions were mixed. They found some evidence supporting an argument that Reagan and Bush appointees mostly deferred to the executive agencies in challenges, whether brought by business interests or environmental organizations.<sup>60</sup> This finding contrasted with the political impression that President Reagan's administration was decidedly anti-environmental.<sup>61</sup>

Within the legal literature, Richard Revesz analyzed years of environmental decisions of the District of Columbia Circuit.<sup>62</sup> Revesz's decision to focus on that circuit had several bases in the underlying law of judicial review of these decisions. First, many federal statutes vest that court with exclusive jurisdiction to review EPA rulemaking decisions.<sup>63</sup> These exclusive review provisions reduce potential geographic variances in ideology and thus on decisions (one factor studied by Wenner). The exclusive review provisions also reduce the chance that lower courts will conflict over the validity of a regulation, which in turn reduces the chance that the Supreme Court will wish to take a case on certiorari because of a conflict in the lower courts. This practicality limits the potential that judges on the D.C. Circuit will change their purely ideological stance in light of strategic voting behavior (e.g., not wishing to be reversed).<sup>64</sup> Second, the D.C. Circuit is arguably

<sup>57</sup> See, e.g., LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* (1982).

<sup>58</sup> Lettie McSpadden Wenner & Lee E. Dutter, *Contextual Influences on Court Outcomes*, 41 W. POL. Q. 115 (1988).

<sup>59</sup> Lettie M. Wenner & Cynthia Ostberg, *Restraint in Environmental Cases by Reagan-Bush Judicial Appointees*, 77 JUDICATURE 217 (1994).

<sup>60</sup> *Id.* at 220.

<sup>61</sup> See, e.g., Norman J. Vig, *Presidential Leadership and the Environment: From Reagan to Clinton*, in ENVIRONMENTAL POLICY IN THE 1990S: REFORM OR REACTION? 95, 98–101 (Norman J. Vig & Michael E. Kraft eds., 3d ed. 1997).

<sup>62</sup> Revesz, *supra* note 4. Revesz's study was not the first of its kind in the legal literature to undertake an analysis of judicial decisions in the environmental area. See William E. Kovacic, *The Reagan Judiciary and Environmental Policy: The Impact of Appointments to the Federal Courts of Appeals*, 18 B.C. ENVTL. AFF. L. REV. 669 (1991). Nevertheless, Revesz's study set a standard for other studies because it is so thorough and comprehensive.

<sup>63</sup> Revesz, *supra* note 4, at 1717 & n.1. Czarnezki found that only a plurality of the environmental statutory interpretation cases he reviewed arose in the D.C. Circuit. Czarnezki, *supra* note 4, at 790.

<sup>64</sup> Cf. Revesz, *supra* note 4, at 1766–69 (explaining how D.C. Circuit judges vote in a strategically ideological fashion rather than a naively ideological or nonideological fashion).

more political than other circuits in its behavior, meaning that any political effect found in his study may have been greater than the political effects in the other circuits.<sup>65</sup> Using this circuit, Revesz compared rates of success by environmental organizations and industry representatives with the political affiliation of the judges on the panels deciding the cases. He found a statistically significant relationship between the results of the cases and the political affiliation of the judges; specifically he found that judges appointed by Democratic presidents held in favor of environmental plaintiffs and against industry positions more than judges appointed by Republican presidents.<sup>66</sup> The effect of politics was magnified depending on the composition of the appellate panel: Democratic judges on panels with other Democratic judges tended to vote for environmental positions more often than Democrats on panels with Republican judges, and vice versa.<sup>67</sup> Revesz found this panel composition effect more pronounced in cases involving procedural issues than cases involving the merits of a regulation.<sup>68</sup>

Others have followed the Revesz study as a model to determine whether political affiliation and panel composition makes a significant difference in case outcomes. These studies have largely confirmed Revesz's basic claims. The Environmental Law Institute issued a report reviewing 325 cases from the courts of appeals and the district courts involving NEPA.<sup>69</sup> It found a strong relationship between voting patterns and political ideology (measured by the judge's party of appointment).<sup>70</sup> It also found support in the court of appeals decisions for the panel composition hypothesis Revesz observed.<sup>71</sup> Sunstein and collaborators built on Revesz's data set of D.C. Circuit decisions to broaden its reach and update it to 2002; their examination basically confirmed Revesz's earlier observations.<sup>72</sup> Miles and Sunstein examined several years of data from the courts of appeals and spe-

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Revesz argued that his finding of more ideological difference in procedural cases had its roots in this strategic behavior, hypothesizing that a procedural case would be less likely to get to the Supreme Court. *Id.* at 1729–30.

<sup>65</sup> Revesz, *supra* note 4, at 1720–21; *see also* Kovacic, *supra* note 62, at 700–01.

<sup>66</sup> Revesz, *supra* note 4, at 1738–43.

<sup>67</sup> *Id.* at 1751–56. Revesz makes clear that his findings are “tentative” given that they are statistically significant only for one period. *Id.* at 1756. At roughly the same time that Revesz published his work, Cross and Tiller published an article finding a similar phenomenon in courts of appeals votes generally. 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). They hypothesized that the presence of a judge from a different political party would check other judges' decisions by acting as a potential (or actual) whistleblower by threatening to write or actually writing a dissenting opinion to “expose the majority's manipulation or disregard of the applicable legal doctrine (if such manipulation or disregard were needed to reach the majority's preferred outcome).” *Id.* at 2156.

<sup>68</sup> Revesz, *supra* note 4, at 1761–63.

<sup>69</sup> AUSTIN ET AL., *JUDGING NEPA*, *supra* note 4, at 7.

<sup>70</sup> *Id.* at 8–9.

<sup>71</sup> *Id.* at 9.

<sup>72</sup> Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 *VA. L. REV.* 301, 322–23 (2004). Their rules for including environmental cases are laid out in the article. *Id.* at 313 n.33. The results of this preliminary study are also reported in SUNSTEIN ET AL., *supra* note 2, at 34.

cifically focused on cases in which the courts applied the *Chevron* standard of deference.<sup>73</sup> They confirmed the ideological pattern of voting and the panel composition effects noted by Revesz.<sup>74</sup> Czarnezki examined three years of data from the federal courts of appeals. Specifically, he looked at the application of *Chevron* deference in the context of environmental cases from 2003 to 2005.<sup>75</sup> Although this involved a shorter time period than Revesz's study, Czarnezki's data included circuits other than the D.C. Circuit.<sup>76</sup> Using a means of measuring judicial ideology other than the party of the president appointing the judge, Czarnezki found that "judges tend to vote in their perceived ideological direction."<sup>77</sup> Czarnezki also found that *Chevron* deference tended to dampen ideological effects and thus "work[ed] as expected."<sup>78</sup>

To date, only one study has examined the group of cases under analysis here, namely cases dealing with the Wilderness Act and agency interpretations of it.<sup>79</sup> A theory underlying this examination is that the Wilderness Act cases form a different kind of environmental case altogether. To understand the basis for this hypothesis, some background in the Wilderness Act and wilderness values will aid the reader.

## II. WILDERNESS VALUES AND THE WILDERNESS ACT

In standard accounts of the history of federal environmental law, the Wilderness Act of 1964<sup>80</sup> often falls between the cracks of an earlier era, when federal environmental and natural resources law mostly governed the use of federal lands and extraction of resources from them, and the modern era, when a spate of federal legislation aimed at ending the despoliation of the natural environment.<sup>81</sup> The Wilderness Act and subsequent statutes that

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<sup>73</sup> Miles & Sunstein, *supra* note 3, at 848. Miles and Sunstein treated cases involving EPA together with cases involving the National Labor Relations Board ("NLRB"). They had originally intended to include cases involving the Federal Communications Commission but dropped that from further consideration. *Id.* at 848 n.32. Except for providing overall rates at which courts affirmed the agencies' decisions, *id.* at 852, Miles and Sunstein generally commingled EPA decisions with NLRB decisions as generally providing liberal or conservative results and did not distinguish the two types of cases in their article.

<sup>74</sup> *Id.* at 854–56.

<sup>75</sup> Czarnezki, *supra* note 4, at 790.

<sup>76</sup> *See id.* at 784 (describing data and inclusion rules).

<sup>77</sup> *Id.* at 793.

<sup>78</sup> *Id.* at 795.

<sup>79</sup> *See Appel, supra* note 7.

<sup>80</sup> 16 U.S.C. §§ 1131–1136 (2006 & Supp. II 2008).

<sup>81</sup> Professor Purdy makes the same point. Jedidiah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 *YALE L.J.* 1122, 1160 (2010) ("[T]he wilderness movement formed an essential and underappreciated bridge between the two eras."). For examples of the standard treatment of the Wilderness Act as more of an afterthought or transitory moment in the telling of the history of federal environmental law, see RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY 195–96* (1999); KARL BOYD BROOKS, *BEFORE EARTH DAY: THE ORIGINS OF AMERICAN ENVIRONMENTAL LAW, 1945–1970* 99 (2009); LAZARUS, *supra* note 49, at 49–50.



add lands to the National Wilderness Preservation System (“NWPS”) tap into deeply-held views about the environment, and the project of expanding the wilderness system enjoys broad bipartisan support, which reflects widespread popular support for wilderness generally.

A. *Wilderness Values in American Thought*

The concept of wilderness occupies a unique place in American history, and such notable thinkers as Henry David Thoreau and John Muir were instrumental in the development of the American wilderness ideal.<sup>82</sup> The effort to protect wilderness reached an apex in its statutory protection with the federal Wilderness Act of 1964. That statute originally protected over 9 million acres of federally-owned lands as the NWPS, and subsequent acts of Congress have added over 100 million acres to that total. Although some legislative proposals have become mired in the usual political squabbles, the overall record of legislation to protect wilderness has had remarkable success and bipartisan support. The original congressional support for the Wilderness Bill in Congress was spearheaded by Democrat Hubert Humphrey in the Senate and Republican John Saylor in the House.<sup>83</sup> Every president since Lyndon Johnson has signed legislation adding acreage to the system; Ronald Reagan signed the most individual bills protecting wilderness, and President Obama signed a law protecting millions of acres as wilderness within his first few months in office.<sup>84</sup>

That record of superficial agreement has nevertheless engendered its share of controversy along the way within the wilderness management agencies. Four separate federal agencies manage the NWPS: the United States Forest Service (“USFS”), the National Park Service (“NPS”), the United States Fish and Wildlife Service (“FWS”), and the Bureau of Land Management (“BLM”). These agencies face the day-to-day questions about what activities may take place in wilderness areas and under what conditions. The agencies decide a panoply of management questions such as whether and under what circumstances they will use motorized equipment for their own activities. They also apply these rules to those who claim private rights within wilderness (e.g., mineral interests and access rights).<sup>85</sup> The agencies’ land management decisions on non-wilderness lands often involve questions about motorized uses and land preservation as well. The fights over the

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<sup>82</sup> See RODERICK FRAZIER NASH, *WILDERNESS AND THE AMERICAN MIND* (4th ed. 2001); see also CRAIG W. ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION* 5–15 (2d ed. 2008); DENNIS M. ROTH, *THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS* (1988); DOUG SCOTT, *THE ENDURING WILDERNESS* (2004); PAUL SUTTER, *DRIVEN WILD: HOW THE FIGHT AGAINST AUTOMOBILES LAUNCHED THE MODERN WILDERNESS MOVEMENT* (2002).

<sup>83</sup> See SCOTT, *supra* note 82, at 49; THOMAS G. SMITH, *GREEN REPUBLICAN: JOHN SAYLOR AND THE PRESERVATION OF AMERICA’S WILDERNESS* 96 (2006).

<sup>84</sup> See Appel, *supra* note 7, at 65 & n.10, 85.

<sup>85</sup> See 16 U.S.C. § 1133(d)(3) (2006); see also *Clouser v. Espy*, 42 F.3d 1522, 1539 (9th Cir. 1994); *McMaster v. United States*, No. 2:10-cv-881-GEB-EFB, 2010 WL 3582555, at 5 (E.D. Cal. Sept. 10, 2010).

nonimpairment standard for wilderness study areas,<sup>86</sup> on the one hand, and the Clinton Administration's roadless area rule<sup>87</sup> and the subsequent amendments of that rule under the Bush Administration,<sup>88</sup> on the other, all have their origin in the debate over wilderness itself and preserving areas short of the full panoply of restrictions of the 1964 Wilderness Act. Once Congress decides to add an area to the NWPS, however, the statutory limitations that apply to the area are uniform and restrictive.

### *B. Key Provisions of the Wilderness Act and Subsequent Enactments*

The Wilderness Act contains two types of provisions of particular relevance here. The first is the definition of wilderness and the procedures for the inclusion of more areas of land into the NWPS. The Wilderness Act declares that a wilderness is "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain."<sup>89</sup> More specifically, the Act provides:

"wilderness" is further defined . . . as an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.<sup>90</sup>

To determine whether Congress should add more federal lands to the wilderness system, the Wilderness Act establishes a review process undertaken by the agencies who manage wilderness.<sup>91</sup> The agencies are to assess the lands under their management to determine the suitability of those lands for inclusion in the NWPS. They then recommend suitable lands to the President, who in turn makes a recommendation to Congress. The Wilderness Act makes clear that Congress has the final word about what lands are subject to the restrictions of the Act.<sup>92</sup>

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<sup>86</sup> See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004).

<sup>87</sup> Roadless Area Conservation Rule, 66 Fed. Reg. 3244 (Jan. 12, 2001).

<sup>88</sup> State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005).

<sup>89</sup> 16 U.S.C. § 1131(c) (Supp. II 2008).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* § 1132.

<sup>92</sup> *Id.* § 1131(a) (providing that "no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act").

Those restrictions make up the second category of important provisions of the Wilderness Act, namely the prohibitions and exceptions for activities within wilderness. These bans and allowances define the general look and feel of wilderness on the ground. Section 4(c) of the Act provides the blanket prohibitions of certain activities within wilderness. It provides:

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.<sup>93</sup>

Section 4(c) itself contains some exceptions to its prohibitions, namely the exception for "existing private rights" and for those uses "necessary to meet minimum requirements for the administration of the area." Section 4(d) of the Act then lists a number of activities that can take place within wilderness notwithstanding the limitations of section 4(c). These include the continuation of preexisting motorboat and aircraft uses,<sup>94</sup> steps to control "fire, insects, and diseases,"<sup>95</sup> prospecting for minerals and conducting some mining operations,<sup>96</sup> and the permitting of commercial guide services.<sup>97</sup> Thus, subject to limited exceptions, a wilderness area is one where a visitor can escape roads, motors, mechanical transport, and many of the trappings of civilization in the quest for solitude and unity with nature.

### C. *Administrative Interpretations of the Wilderness Act and Judicial Review of Those Decisions*

The seemingly unambiguous provisions of the Wilderness Act nevertheless leave open questions of what exactly falls within the prohibited activities and what exactly the land management agencies may permit. Some cases considered by the courts are easy. Motorcycling in a wilderness area clearly violates the section 4(c) ban on motor vehicles.<sup>98</sup> Bicycling in a wil-

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<sup>93</sup> *Id.* § 1133(c).

<sup>94</sup> *Id.* § 1133(d)(1).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* § 1133(d)(2), (3).

<sup>97</sup> *Id.* § 1133(d)(5).

<sup>98</sup> See *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965). This case involved a criminal prosecution for violating Forest Service regulations governing primitive areas; the court cited the ban on motor vehicles in the Wilderness Act to support congressional acceptance of the Forest Service regulation. *Id.* at 285. A similarly straightforward case is *United States v. Gregg*, 290 F. Supp. 706 (W.D. Wash. 1968). There, the defendant landed an airplane in a wilderness area. Although the area had aircraft landings before the wilderness designa-

derness area is also unlawful, but only because the agencies have uniformly interpreted the section 4(c) ban on “mechanical transport” to encompass bicycles, a wholly reasonable interpretation of the Act.<sup>99</sup>

Other cases present closer questions of interpreting the Wilderness Act. A difficult question is the presence of commercial activities within a wilderness area. The Act prohibits “commercial enterprise”<sup>100</sup> but permits “[c]ommercial services [to] be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.”<sup>101</sup> This exception is generally thought to include guide services. One agency permitted a volunteer organization to conduct fish restocking activities within a wilderness, ostensibly to aid the wilderness but also to augment a commercial fishery that was located outside of the wilderness boundary.<sup>102</sup> Another agency has allowed guide services to bring pack animals into wilderness areas. In some instances, the pack animals can cause environmental damage akin to that which might be caused by mountain bikes,<sup>103</sup> and a legitimate question is whether these activities are “necessary” for the “proper” realization of the recreational purposes of the wilderness areas.<sup>104</sup> Other difficult questions are the extent to which the agencies can use motor vehicles within a wilderness area, which turns on whether the use is the “minimum requirement[ ] for the administration of the area,”<sup>105</sup> and whether an agency can allow a visitor to ride in an otherwise authorized motor vehicle.<sup>106</sup> A third difficult question facing the agencies is how to treat arguably conflicting statutes, such as the Wilderness Act and the National Historic Preservation Act, or the Wilderness Act and specific legislation for a national forest or national wildlife refuge.<sup>107</sup>

In each of these cases, the courts found against the agencies’ interpretation of the Wilderness Act and in favor (roughly speaking) of a purer vision of wilderness. Earlier work collected the decisions reviewing agency inter-

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tion, the Forest Service had not expressly grandfathered the use after designation under the Wilderness Act. The court easily found that the Wilderness Act permits private aircraft landings only where the agency has created an exception “by positive regulation.” *Id.* at 708. These applications of the bans on motor vehicles and aircraft are unambiguous.

<sup>99</sup> See Appel, *supra* note 7, at 87 & n.85.

<sup>100</sup> 16 U.S.C. § 1133(c) (Supp. II 2008).

<sup>101</sup> *Id.* § 1131(d)(5).

<sup>102</sup> See *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1058 (9th Cir. 2003) (en banc), *amended by* 360 F.3d 1374, 1374 (9th Cir. 2004) (en banc).

<sup>103</sup> An advocate of allowing mountain bike use in wilderness areas makes this point. See Theodore J. Stroll, *Congress’s Intent in Banning Mechanical Transport in the Wilderness Act of 1964*, 12 PENN ST. ENVTL. L. REV. 459, 481 & n.116 (2004).

<sup>104</sup> See *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 636 (9th Cir. 2004).

<sup>105</sup> 16 U.S.C. § 1133(c).

<sup>106</sup> See *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1087 (11th Cir. 2004).

<sup>107</sup> See, e.g., *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1039 (9th Cir. 2010) (holding that the Wilderness Act restricts management discretion in national wildlife refuge for protection of bighorn sheep by imposing minimum requirements analysis of structures to provide water to sheep); *Olympic Park Assocs. v. Mainella*, 2005 WL 1871114, at 8 (W.D. Wash. Aug. 1, 2005) (holding that the Wilderness Act governs over commands of National Historic Preservation Act).

pretations and applications of the Wilderness Act. That work found that the court decisions had a distinct “pro-wilderness” tilt in terms of outcome. Specifically, it found a sharp divide in the cases challenging the agencies’ application of the Wilderness Act between those in which environmental organizations challenged the agencies’ decisions and those in which extractive or private property interests did so.<sup>108</sup> Against environmental interests, the agencies prevailed less than half of the time (48%); in litigation against private property or extractive interests, the agencies prevailed almost 87% of the time.<sup>109</sup> The pro-wilderness bent of the cases did not appear to be affected by the political affiliation of the judges involved, although only raw numbers were presented.<sup>110</sup> Further analysis will determine whether this effect holds under deeper statistical scrutiny.

### III. ANALYSIS OF THE WILDERNESS CASE DECISIONS

This section provides the central analytical portion of the Article. It shows that the effect of political ideology on the judicial decisions is not statistically significant for the overall outcome in the cases as measured on a pro-wilderness/anti-wilderness outcome measure. Political ideology appears to have a stronger correlation with outcomes within the subgroups of cases. One of these groups — namely where a plaintiff seeks less protection for wilderness and the agency loses in court — appears to have a significant connection with ideology. Upon further consideration, however, this group constitutes an outlier in the overall data because there are so few data points within it and because it may reflect the effect of case distribution. Ideology is examined both along the party of the President appointing the judge and using common space scores. Interestingly, there is less correlation between the common space scores and the results than simple party of appointment.

#### A. *Overview of the Data, Hypotheses, and Statistical Methodology*

To measure whether political ideology has a significant effect on case outcomes, a group of cases was first assembled for analysis. The cases analyzed consist of all federal judicial decisions from the set of all cases using the term “wilderness act,” as gathered from the electronic databases of Westlaw and LexisNexis. Many of these cases simply refer to the Wilderness Act in passing and were excluded from further study.<sup>111</sup> Of the 317 cases (Westlaw) or 331 cases (LexisNexis) (as of March 2011), 153 cases actually involve an interpretation of the Wilderness Act. There are several types of cases involving interpretation of the Wilderness Act, including chal-

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<sup>108</sup> Appel, *supra* note 7, at 113.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 117–18.

<sup>111</sup> A list of the cases and whether or not each was included in the study is available online at [http://www.law.harvard.edu/students/orgs/elr/vol35\\_2/online.pdf](http://www.law.harvard.edu/students/orgs/elr/vol35_2/online.pdf).

lenges to agency action implementing the restrictions of the Wilderness Act;<sup>112</sup> challenges to agency action that arguably violates the Wilderness Act;<sup>113</sup> determination of whether an area is protected by the Wilderness Act;<sup>114</sup> cases in which application of the Wilderness Act arguably resulted in a taking of private property;<sup>115</sup> enforcement actions against violators of the Wilderness Act or regulations that the agencies have promulgated to implement it;<sup>116</sup> and procedural rulings (e.g., a motion to intervene or a decision on mootness) in which a claim concerning the Wilderness Act forms at least one of the issues in the overall case.<sup>117</sup> Although this list is not exhaustive, it captures the vast majority of the cases under study.

Two underlying assumptions informed the design of the data. First, the study assumed that cases were assigned to the judges randomly by the appropriate clerks' offices. Other studies have proceeded on this assumption.<sup>118</sup> Second, it was assumed that the availability of cases in Westlaw or Lexis-Nexis is also unaffected by political orientation of the judges. The online availability of officially unpublished opinions (especially for the courts of appeals) has reduced the effect of the determination that a decision will be officially published, but the data may still be incomplete because other decisions involving wilderness areas or interpretations of the Wilderness Act may have escaped notice given the methodology of collecting cases.

### 1. Coding Rules

Of the 153 decisions that actually involve a claim arising under the Wilderness Act, several consist of reported or available decisions that are one in a series in a case. The study further distills the case outcomes into a

<sup>112</sup> *E.g.*, *Stupak-Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996) (en banc); *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994).

<sup>113</sup> *E.g.*, *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004); *Wilderness Watch v. Mainella*, 375 F.3d 1085 (11th Cir. 2004); *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003) (en banc), *amended by* 360 F.3d 1374 (9th Cir. 2004) (en banc).

<sup>114</sup> *See, e.g.*, *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751 (8th Cir. 2009); *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971). This category does not include areas that are protected as wilderness study areas or roadless areas that are potential additions to the NWPS. Some of the cases involving those questions use the term "wilderness act" because the lands under dispute may or may not qualify one day as wilderness. *See, e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004). These cases have been excluded from this study. Although *Parker* involved lands not included in the NWPS, it is included because the court interpreted the reach of the Wilderness Act itself in reaching its conclusion. *See* Appel, *supra* note 7, at 98–102.

<sup>115</sup> *E.g.*, *Fixel v. United States*, 26 Cl. Ct. 353 (1992); *Stone Forest Indus., Inc. v. United States*, 22 Cl. Ct. 489 (1991); *Clawson v. United States*, 24 Cl. Ct. 366 (1991).

<sup>116</sup> *See, e.g.*, *United States v. Gotchnik*, 222 F.3d 506 (8th Cir. 2000); *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965); *United States v. Gregg*, 290 F. Supp. 706 (W.D. Wash. 1968).

<sup>117</sup> *E.g.*, *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683 (9th Cir. 2005) (dismissed on res judicata grounds); *Kerr-McGee Corp. v. Hodel*, 840 F.2d 68 (D.C. Cir. 1988) (per curiam) (vacated as moot with instructions to dismiss).

<sup>118</sup> *Revesz, supra* note 4, at 1722–23; *SUNSTEIN ET AL., supra* note 2, at 303.

list of principal cases.<sup>119</sup> The principal cases consist of the final decision of a tribunal in a particular litigation event. A litigation event is one lawsuit challenging a particular agency interpretation, and the opinion of the highest tribunal issuing an opinion is included as the principal case. Further decisions in the case — for example, a district court opinion on remand deciding an issue not originally presented to a court of appeals — are also included as principal cases. Distilling the cases to the principal cases avoids the problem of double-counting. A prolific panel or a verbose district court judge could issue a series of opinions each of which would otherwise be counted as a decision, but these decisions would not necessarily have additional practical impact either on the parties directly or in the form of precedential impact. Some decisions from the same overall case were nevertheless accorded status as principal decisions because they decided separate issues. Some examples will illustrate the rules for narrowing the list of all cases involving an interpretation or application of the Wilderness Act to the list of principal cases.

*High Sierra Hikers Ass'n v. Blackwell* involves a challenge to the USFS permitting pack animals for recreation in the John Muir and Ansel Adams wilderness areas.<sup>120</sup> The Wilderness Act permits commercial guide operations like those at issue in *Blackwell* “to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.”<sup>121</sup> The case has produced several opinions. The district court (actually a United States Magistrate Judge) issued a published opinion holding that the program did not violate the terms of the Wilderness Act.<sup>122</sup> Reversing the lower court on that point, the Ninth Circuit issued one opinion originally,<sup>123</sup> and upon petition for rehearing modified its opinion slightly;<sup>124</sup> it held that the district court had misinterpreted the term “necessary” in section 4(d)(5) of the Wilderness Act and remanded for further determination under the proper standard.<sup>125</sup> On remand, the district court found both a violation of the Wilderness Act and that the USFS’s visitor surveys to determine the necessity of the program were skewed and flawed.<sup>126</sup> For purposes

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<sup>119</sup> A list showing how each case is designated is available online at [http://www.law.harvard.edu/students/orgs/elr/vol35\\_2/online.pdf](http://www.law.harvard.edu/students/orgs/elr/vol35_2/online.pdf).

<sup>120</sup> 390 F.3d 630, 637 (9th Cir. 2004).

<sup>121</sup> 16 U.S.C. § 1133(d)(5) (2006).

<sup>122</sup> *High Sierra Hikers Ass'n v. Powell*, 150 F. Supp. 2d 1023, 1029–30, 1046 (N.D. Cal. 2001).

<sup>123</sup> *High Sierra Hikers Ass'n v. Blackwell*, 381 F.3d 886 (9th Cir. 2004), *withdrawn and amended*, 390 F.3d 630 (9th Cir. 2004).

<sup>124</sup> 390 F.3d 630 (9th Cir. 2004).

<sup>125</sup> *Id.* at 646–49.

<sup>126</sup> *High Sierra Hikers Ass'n v. Weingardt*, 521 F. Supp. 2d 1065, 1073–76 (N.D. Cal. 2007). This decision is bundled with the magistrate’s subsequent decision to enter an injunction governing pack animals in the wilderness area. *High Sierra Hikers Ass'n v. Moore*, 561 F. Supp. 2d 1107 (N.D. Cal. 2008).

of the study here, the Ninth Circuit decision and the district court's decision on remand were included as principal cases.<sup>127</sup>

The dispute over a road between Gasquet and Orleans, California, in the Six Rivers National Forest (the "G-O Road") yielded several opinions that reference the Wilderness Act.<sup>128</sup> The plaintiffs' primary argument was that construction of the G-O Road would unduly impact the free exercise of their religion. Plaintiffs also challenged construction of the G-O Road as violating many statutes, including the review provisions of section 3(b) of the Wilderness Act. After finding that the plaintiff did not have likely success on the merits of this claim in the context of ruling on a motion for a preliminary injunction,<sup>129</sup> the district court subsequently agreed with their argument concerning the Wilderness Act.<sup>130</sup> The Ninth Circuit found the Wilderness Act claim moot because of the passage of the California Wilderness Act of 1984 and directed the district court to vacate its decision on that point.<sup>131</sup> Ultimately, the Supreme Court held against the plaintiffs on their religious freedom claim.<sup>132</sup> Thus, none of the decisions in this string of litigation on the merits were included as principal cases. A decision concerning plaintiffs' motion for attorneys' fees<sup>133</sup> is included as a principal case for reasons explained more fully below.

One ongoing controversy between an individual and the USFS involving a general dispute about property rights has nevertheless yielded several separately coded litigation events. Kathy Stupak-Thrall owns littoral<sup>134</sup> land on Crooked Lake in the Upper Peninsula of Michigan. Much of Crooked Lake lies within the Sylvania Wilderness Area, which is managed by the USFS. After the original designation of the Sylvania area as wilderness, the USFS issued regulations regarding management of the area including bans on houseboats, sailboats, disposal containers, and the like. Ms. Stupak-Thrall's primary interest in Crooked Lake was her right to navigate the surface of the lake using a motorboat, which this first regulation did not ad-

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<sup>127</sup> Because the lower court's decision on remand is the decision of a United States Magistrate Judge, however, this decision is not included in the tally of votes according to political ideology for reasons discussed below. See *infra* text accompanying notes 157–58.

<sup>128</sup> *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442 (1988).

<sup>129</sup> *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 552 F. Supp. 951, 956–57 (N.D. Cal. 1982).

<sup>130</sup> *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 602–04 (N.D. Cal. 1983), *aff'd in part and vacated in part*, 764 F.2d 581 (9th Cir. 1985), *on reh'g*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom. Lyng*, 485 U.S. at 439.

<sup>131</sup> *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 589 (9th Cir. 1985), *on reh'g*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom. Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). The Ninth Circuit's rehearing decision did not affect the decision to vacate the Wilderness Act holding. 795 F.2d at 697–98.

<sup>132</sup> *Lyng*, 485 U.S. at 439.

<sup>133</sup> *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 589 F. Supp. 921, 923 (N.D. Cal. 1983) (denying fees for Wilderness Act claim because the government's position was substantially justified).

<sup>134</sup> Littoral land is land that borders a lake or the ocean; in many of the opinions her land is referred to as "riparian," which technically means bordering a river. See *Stupak-Thrall v. United States*, 89 F.3d 1269, 1273 n.3 (6th Cir. 1996) (en banc) (Boggs, J., dissenting).



dress; she nevertheless challenged it (unsuccessfully) in a case that eventually reached the Court of Appeals for the Sixth Circuit sitting en banc.<sup>135</sup> That decision was treated as a principal case, but the published opinions of the district court<sup>136</sup> and the Sixth Circuit panel<sup>137</sup> were not because they are ultimately subsumed in the en banc decision. When the USFS issued motorboat regulations, Stupak-Thrall challenged those rules successfully in district court (an appeal by the government was subsequently dismissed voluntarily); that case is also included as a principal decision.<sup>138</sup> Finally, Stupak-Thrall challenged the USFS's decision to treat Crooked Lake as part of the Sylvania Wilderness Area, arguing that the lake was not part of the wilderness area. The Sixth Circuit affirmed the district court's determination that the applicable statute of limitations barred this action, and that case is treated as a principal case as well.<sup>139</sup> An earlier, unsuccessful attempt by environmental organizations to intervene in the litigation over the boundary is subsumed within this decision because the side that the environmental organizations supported (the USFS) ultimately prevailed.<sup>140</sup>

As noted above in the discussion of the *Northwest Indian Cemetery* cases, decisions involving applications for attorneys' fees under the Equal Access to Justice Act ("EAJA")<sup>141</sup> were treated separately and could count as principal decisions. EAJA authorizes a court to award prevailing private parties their fees in litigation against the government unless the government's position in the litigation was "substantially justified."<sup>142</sup> Because EAJA provides a second opportunity for a court to determine whether it accepts or rejects the government's interpretation or application of law, it provides another data point in the overall study of how courts treat agency interpretation of law. The set of principal cases includes four cases applying EAJA to Wilderness Act claims.

Compared to other empirical analyses of environmental judicial decisions, the data set under analysis here is deeper and broader, and differs from other studies in four key ways. First, the data involves a deeper set of cases because it involves decisions from both the courts of appeals and the district courts as well as one specialized federal court, namely the United States Court of Claims and its successors. This allows for consideration of political influence at different levels. It also creates a data set of more analytical

<sup>135</sup> *Stupak-Thrall*, 89 F.3d 1269.

<sup>136</sup> *Stupak-Thrall v. United States*, 843 F. Supp. 327 (W.D. Mich. 1994), *aff'd*, 70 F.3d 881 (6th Cir. 1995), *vacated*, 81 F.3d 651 (6th Cir. 1996), *aff'd by an equally divided court*, 89 F.3d 1269 (6th Cir. 1996) (en banc).

<sup>137</sup> *Stupak-Thrall v. United States*, 70 F.3d 881 (6th Cir. 1995), *vacated*, 81 F.3d 651 (6th Cir. 1996), *aff'd by an equally divided court*, 89 F.3d 1269 (6th Cir. 1996) (en banc).

<sup>138</sup> *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997), *appeal dismissed*, No. 98-1153 (6th Cir. Aug. 3, 2005).

<sup>139</sup> *Stupak-Thrall v. Glickman*, 346 F.3d 579, 584-85 (6th Cir. 2003).

<sup>140</sup> *Stupak-Thrall v. Glickman*, 226 F.3d 467 (6th Cir. 2000).

<sup>141</sup> 28 U.S.C. § 2412(d) (2006).

<sup>142</sup> 28 U.S.C. § 2412(d)(1)(A) (2006). A court may also decline to enter a fee award if "special circumstances make an award unjust." *Id.* None of the cases involving fee awards that are included in this study discuss whether an award of fees would be unjust.

interest, since only thirty-five of the principal decisions are from the courts of appeals.

The data are also broader because the study includes cases that involve more than interpretations of the Wilderness Act in a rulemaking or rulemaking-like context.<sup>143</sup> Although including such decisions dilutes the potential effect of stated rules of deference (such as under the *Chevron* decision or its progeny),<sup>144</sup> the election to include these decisions rests on two observations. First, a judge with strong political convictions could attempt to influence the outcome in a case on the merits whether or not a particular rule of deference applies. For example, critics often maintain that conservative judges are less generous in granting standing to sue to environmental interests than liberal judges.<sup>145</sup> If a conservative judge wished to decide a case according to her political attitude, she could dismiss the case for want of standing to sue without needing to tackle the question of deference to an agency. The ultimate outcome would be the same for all practical purposes — the agency would win — but the case would not count in a study focused exclusively on the application of rules of deference to administrative agencies.<sup>146</sup> Second, the principal cases extend from 1965 until the present. Until *Chevron* was decided in 1984, courts may have been less exact in the standard of deference they employed.<sup>147</sup> Even in cases post-dating *Chevron* or *Mead*, the courts often do not discuss which standard of review applies to the administrative decision, and in some instances leave it up in the air exactly what standard of review or principle of deference applies to the given controversy.<sup>148</sup>

Related to this point, the data set under evaluation is also wider than those examined in other studies because it extends beyond the strict rulemaking context. All of the types of cases present some type of agency interpretation of the Wilderness Act, either through a rulemaking decision

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<sup>143</sup> Wenner and Ostberg characterized environmental cases as falling into one of three types: “(1) government enforcement actions against industry, (2) business complaints about overly restrictive government actions, and (3) environmental interest groups’ arguments that the agency has not fully carried out laws designed to protect the environment.” Wenner & Ostberg, *supra* note 59, at 218. The study presented in this Article includes one more type of case, namely claims that government action has effectuated a taking of private property.

<sup>144</sup> For examples of empirical studies focusing on the narrower question of decisions made under *Chevron*, see Czarnetzki, *supra* note 4; Miles & Sunstein, *supra* note 3; Schuck & Elliott, *supra* note 47.

<sup>145</sup> See, e.g., Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591 (2010); Erin B. Kaheny, *The Nature of Circuit Court Gatekeeping Decisions*, 44 LAW & SOC’Y REV. 129, 142–43 (2010); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

<sup>146</sup> Indeed, Revesz found the effect of political ideology more pronounced in procedural cases than cases addressing the merits of the rulemakings in his study. See Revesz, *supra* note 4, at 1749–50. Revesz limited the definition of “procedural” in his study to procedural defects in rulemaking, not larger procedural questions such as ripeness, standing, or decisions on intervention. *Id.* at 1729 n.33.

<sup>147</sup> See Schuck & Elliott, *supra* note 47, at 1023–24.

<sup>148</sup> See, e.g., *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059–60 (9th Cir. 2003) (en banc) (applying hybrid of *Chevron* and *Mead* deference).

(or one like one) or the decision to pursue enforcement against an alleged violator of a rule. Thus, in *United States v. Gotchnik*,<sup>149</sup> the government indicted defendants for using motorized transportation and motorized equipment within a wilderness area. Defendants, who were Native American, countered that a treaty protected their hunting and fishing activities, which included their means of transportation and, for one defendant, the equipment to facilitate those activities (i.e. a motorized ice auger). The lower court dismissed the charge against one defendant involving the possession of the ice auger; the government did not appeal that dismissal, conceding on appeal that the defendants' treaty rights to hunt allowed them to use modern implements and means of hunting but not motorized means of transportation.<sup>150</sup> The government's decision not to appeal the dismissal will escape judicial review, but its decision to defend the convictions obtained represents the executive branch's interpretation of the Wilderness Act presented for evaluation to the courts and thus subject to whatever political influence there might be in the courts' decisions.

Third, the inclusion of decisions of the United States Court of Claims and its successors allows for the potential measure of ideological influence in voting patterns when government action has allegedly taken private property. The United States Court of Claims had jurisdiction over cases arising under the so-called Big Tucker Act (i.e. claims against the United States for over \$10,000 arising under a theory other than tort).<sup>151</sup> As relevant here (i.e. actions post-1964), the Court of Claims included both a trial and an appellate tribunal. In 1982, Congress transferred the appellate functions of the Court of Claims to the United States Court of Appeals for the Federal Circuit and the trial functions to United States Claims Court, which in turn was later renamed the United States Court of Federal Claims ("CFC"). Although judges on both the Federal Circuit and CFC are nominated by the President and confirmed by the Senate, there is a difference: judges on the Federal Circuit are Article III judges (i.e. they have life tenure and cannot have their pay reduced); judges on the CFC are Article I judges and serve for a fifteen year term.<sup>152</sup> Although Sunstein and co-authors found no significant difference between Democratic and Republican appointees on the issue of takings of private property,<sup>153</sup> some authors have suggested that the Federal Circuit and the CFC have politically biased decisions in favor of private property owners.<sup>154</sup> Thus, including those decisions within the group of decisions is appropriate to measure the potential impact of politics in that context.

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<sup>149</sup> 222 F.3d 506, 508 (8th Cir. 2000).

<sup>150</sup> *Id.* at 510.

<sup>151</sup> 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2006).

<sup>152</sup> 28 U.S.C. §§ 171, 172 (2006).

<sup>153</sup> SUNSTEIN ET AL., *supra* note 2, at 51–52.

<sup>154</sup> See generally Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998); see also David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 829–30 (1999) (discussing outcomes of takings claims in context of wetlands regulation).

Fourth, including decisions that are unpublished in the official reporters but are available in the Westlaw and LexisNexis electronic databases captures a more accurate view of what the courts are doing. Sunstein and co-authors limited their study of judicial ideology to published opinions of the courts of appeals, arguing that because “unpublished opinions are widely believed to be simple and straightforward and not to involve difficult or complex issues of law . . . it is harmless to ignore unpublished opinions, simply because they are easy.”<sup>155</sup> This choice nevertheless could distort the effect of ideology in the remaining, more difficult cases where the effect of ideology may be more pronounced to begin with. If judges of any political stripe agree on the vast majority of cases, but ideology influences their decisions in the subset of more difficult cases, then ideology does not have the decisive outcome in judicial decisionmaking asserted by attitudinalists.<sup>156</sup> The decision to include unpublished opinions also reflects the nature of the data, namely that many of the decisions are from the federal district courts. The choice whether to publish a district court decision often rests as much with the editors of the reporters as with the judge herself.

One cohort of decisions that is not included in the measure of potential political influence is the decisions of United States magistrate judges involving wilderness. This study includes several such opinions in the initial overall list of principal cases because those represent a final published resolution of the controversy (i.e., there is no further decision on review of the case in the district court or appeal to the court of appeals). Nevertheless, the selection process for United States magistrate judges renders determination of the political background of the judges using the proxies employed in the next sections difficult if not impossible. Magistrate judges are appointed for an eight-year term by majority vote of the district court judges in a particular judicial district.<sup>157</sup> Vacancies in magistrate judgeships are publicly noticed, and merit selection panels “composed of residents of the individual judicial districts . . . assist the courts in identifying and recommending persons who are best qualified to fill such positions.”<sup>158</sup> The conditions of their nomination and appointment differ so much from the political back-and-forth of Article III judicial appointments that no available proxy for magistrate judge ideology currently exists. Thus, even though the decisions of magistrate judges are included in the list of principal decisions for comparison’s sake, these decisions are omitted from analysis of the potential effects of politics on the results of the wilderness cases.

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<sup>155</sup> SUNSTEIN ET AL. *supra* note 2, at 18.

<sup>156</sup> This argument is analyzed in more detail in Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213 (2009).

<sup>157</sup> 28 U.S.C. § 631(a), (e) (2006).

<sup>158</sup> 28 U.S.C. § 631(b)(5) (2006).

## 2. Initial Results

As originally presented, the cases were organized into four groups according to the type of challenge brought (more protection, Group 1, versus less protection, Group 2) and according to the outcome (agency win versus agency loss). Thus, Group 1A was cases in which environmentalists sought more protection and the agency prevailed; Group 1B was cases seeking more protection in which the agency lost; Group 2A was comprised of cases seeking less protection for wilderness in which the agency won; and Group 2B was challenges seeking less protection for wilderness in which the agency lost. Because other studies have examined the results of cases in terms of whether the agency prevailed or not,<sup>159</sup> the cases were originally arrayed according to that outcome.

To analyze the cases according to aggregate outcome in the decisions, they were then arrayed along a pro-wilderness/anti-wilderness organization, which looks as follows:<sup>160</sup>

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<sup>159</sup> See, e.g., Czarneski, *supra* note 4, at 787 (describing “whether the judges voted to reverse or affirm the government agency’s decision” as one factor that was coded for); Miles & Sunstein, *supra* note 3, at 825–26 (summarizing correlation between judicial ideology and rates at which the judges validate agency action); Revesz, *supra* note 4, at 1727. Some cases pose difficulties in determining whether the agency won or lost the decision. Ultimately, the decision to code them as a win or loss for the agency was measured against whether the agency could have appealed the decision (if final or otherwise appealable) to a court of appeals or the Supreme Court. For example, in *American Whitewater v. Tidwell*, 2010 WL 5019879 (D.S.C. Dec. 2, 2010), the district court denied government motions to dismiss on the grounds of mootness and failure of the plaintiffs to exhaust available administrative remedies. The court nevertheless denied a preliminary injunction to the plaintiffs, who sought the ability to raft on portions of the Chattooga River closed to boating. (Plaintiffs claimed that this closure violated the Wilderness Act.) This case was therefore coded as one seeking less protection that the agency won (Group 2A). By contrast, in *Oregon Natural Desert Ass’n v. McDaniel*, 751 F. Supp.2d 1145 (D. Or. 2010) (2010 WL 4624004), the magistrate judge held that a decision of the Department of the Interior’s Interior Board of Land Appeals was a final agency action on which judicial review was available. Although the decision was not one on the merits, the government could eventually challenge that adverse decision on appeal. This case was therefore coded as one seeking more protection that the agency lost (Group 1B).

<sup>160</sup> Appel, *supra* note 7, at 117 tbl.2. It should be noted that the original article contains a typographical error in the cell for the total of the case numbers. It indicates that there are 90 cases; the correct number of total cases is 94. All of the other numbers in that table are correct, including the percentages calculated above the mistaken total.

TABLE 1: AGGREGATE WILDERNESS DECISIONS (SPRING 2010)

	More protection sought	Less protection sought	Totals
“Pro-wilderness” outcome	26 (Group 1B)	38 (Group 2A)	64 (68.1%)
“Anti-wilderness” outcome	24 (Group 1A)	6 (Group 2B)	30 (31.9%)
Totals (for case numbers only)	50	44	94

The aggregate results in the initial study showed a pro-wilderness tilt in the outcome of the cases as indicated by the 68% to 32% win rate for pro-wilderness outcomes versus anti-wilderness outcomes. This effect stems from the combination of the relatively low win percentage (46%) of the agencies when facing a challenge brought by environmentalists and a very high rate of prevailing in cases brought by private interests (88%).

Updating the numbers to Spring 2011 yields similar results. Including more recent cases and using the coding and bundling rules described above, the cases break down as follows:

TABLE 2: AGGREGATE WILDERNESS DECISIONS (SPRING 2011)

	More protection sought	Less protection sought	Totals
“Pro-wilderness” outcome	27 (Group 1B)	40 (Group 2A)	67 (68.4%)
“Anti-wilderness” outcome	25 (Group 1A)	6 (Group 2B)	31 (31.6%)
Totals (for case numbers only)	52	46	98

These updated numbers reflect basically the same patterns. The ratio of pro-wilderness to anti-wilderness cases is approximately the same. The percentage of cases that the agencies have won in challenges brought by environmentalists has risen slightly to approximately 48.1% (25 out of 52 cases) but is still well below the usual win rate of agencies in federal court litigation.

The hypothesis tested in this Article is straightforward: political influence of judicial voters makes a difference in the outcomes of the cases. The null hypothesis is that political ideology makes no difference in the outcomes of the cases. The following subsections examine the hypothesis according to two different commonly used measures of judicial ideology.

*B. The Effect of Party of Appointment on the Wilderness Cases*

The pro-wilderness tilt of the case outcomes represents a potential victory for environmental interests. Other studies have found an outcome orientation that corresponds to perceived political ideology — i.e. liberal judges vote in a pro-environment way and conservative judges vote in an anti-environment/pro-business direction. Obviously, each of these labels (liberal, conservative, pro-environment, anti-environment/pro-business) presents problems of categorization. Nevertheless, following these studies, it remains to be seen whether the principal cases interpreting the Wilderness Act follow the same pattern. In other words, is the pro-wilderness tilt of the case outcomes a result of one political preference or another prevailing in the cases?

Determining the political ideology of a federal judge can prove difficult. Unless a federal judge reveals her ideology through statements pre- or post-appointment,<sup>161</sup> the researcher must use a proxy or proxies of the judge's ideology to determine whether the judge's decisions or votes track ideological leanings.<sup>162</sup> Obviously, the measure of judicial ideology cannot be the judge's votes themselves, since that measure would beg the question of whether ideology influenced the outcome in a line of cases.

One commonly used proxy for judicial ideology is the political party of the President who appointed the federal judge. The underlying assumption is that Republican presidents will tend to appoint conservative judges and Democratic presidents will tend to appoint liberal judges. Thus, the thinking goes, if Republican appointees vote in a stereotypically conservative way on an issue and Democratic appointees vote in a stereotypically liberal way on the same issue, a researcher can point to solid evidence that political ideology has made the difference in the outcome of the votes.<sup>163</sup>

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<sup>161</sup> Sometimes, a judge will openly identify herself or himself as a conservative or liberal. *See, e.g.*, DAVID B. SENTELLE, *JUDGE DAVE AND THE RAINBOW PEOPLE 2* (2002) (identifying supporters of Judge Robert Bork's unsuccessful nomination to the Supreme Court as "my fellow conservatives").

<sup>162</sup> Another related problem is determining whether a particular outcome is a conservative or liberal one. Most studies have assumed that decisions in favor of environmental organizations or interests are liberal and decisions in favor of industry are conservative. *See, e.g.*, Czarnecki, *supra* note 4, at 786 & n.108; Revesz, *supra* note 4, at 1728.

<sup>163</sup> *See* SUNSTEIN ET AL., *supra* note 2, at 6 (explaining and defending use of party of appointment as a proxy for judicial ideology); Revesz, *supra* note 4, at 1718 & n.11-13 (explaining why party is a particularly good predictor in the D.C. Circuit); *see also* AUSTIN ET AL., *JUDGING NEPA, supra* note 4, at 8.

The initial breakdown of the data coded by presidential party of appointment was presented in earlier work. The following tables present the votes of Democratic and Republican appointees in the principal cases. The tables are organized according to the description of the cases provided above and also omits the principal decisions decided by magistrate judges (for the reasons discussed above).

TABLE 3: VOTES OF DEMOCRATIC APPOINTEES (SPRING 2010)

	More protection sought	Less protection sought	Totals
“Pro-wilderness” outcome	32	28	60 (69.8%)
“Anti-wilderness” outcome	24	2	26 (30.2%)
Totals (for case numbers only)	56	30	86

TABLE 4: VOTES OF REPUBLICAN APPOINTEES (SPRING 2010)

	More protection sought	Less protection sought	Totals
“Pro-wilderness” outcome	22	36	58 (64.4%)
“Anti-wilderness” outcome	22	10	32 (35.6%)
Totals (for case numbers only)	44	46	90

Updated to Spring 2011, the figures look roughly the same.<sup>164</sup> The votes for Democratic appointees look as follows:

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<sup>164</sup> The number of “Pro-wilderness” outcome cases where less protection was sought is lower than the figure used in the earlier chart because of the bundling rules. Specifically, a new decision in the same litigation event took the place of an earlier one.



TABLE 5: VOTES OF DEMOCRATIC APPOINTEES (SPRING 2011)

	More protection sought	Less protection sought	Totals
“Pro-wilderness” outcome	34	26	60 (68.2%)
“Anti-wilderness” outcome	26	2	28 (31.8%)
Totals (for case numbers only)	60	28	88

The votes of Republican appointees look as follows:

TABLE 6: VOTES OF REPUBLICAN APPOINTEES (SPRING 2011)

	More protection sought	Less protection sought	Totals
“Pro-wilderness” outcome	22	34	56 (59.6%)
“Anti-wilderness” outcome	29	9	38 (40.4%)
Totals (for case numbers only)	51	43	94

Testing for statistical significance using a chi-square calculation,<sup>165</sup> the aggregate outcome (pro-wilderness vs. anti-wilderness) reveals no statistical significance. Specifically, a chi-square calculation of aggregate outcome in the earlier data shows that the relationship between party of appointment and aggregate outcome is significant only at a 58% confidence level ( $p$  value = 0.4119). (See Appendix, Figure 1A).<sup>166</sup> Using the Spring 2011 data, a chi-square calculation of aggregate outcome shows that the relationship between party of appointment and aggregate outcome is significant only at a 77% confidence level ( $p$  value = 0.2268). (See Appendix, Figure 1B).

<sup>165</sup> The use of the chi-square statistics in legal settings is discussed in ROBERT M. LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* 248–61 (2010).

<sup>166</sup> The Appendix is available online at [http://www.law.harvard.edu/students/orgs/elr/vol35\\_2/online.pdf](http://www.law.harvard.edu/students/orgs/elr/vol35_2/online.pdf).

A chi-square calculation of the more differentiated outcomes (more protection vs. less protection, agency wins vs. agency loses) shows more of a statistically significant relationship between the party of appointment of the judges and the outcomes of the cases. Specifically, the chi-square for this set of outcomes shows a statistically significant relationship between party of appointment and outcome at a 90% (almost 95%) confidence level ( $p$  value = 0.0556). (See Appendix, Figure 2A). The confidence level grows with the Spring 2011 data, yielding a confidence level of over 95% ( $p$  value = 0.0377). (See Appendix, Figure 2B). A confidence level of 95% is used frequently as an indication of statistical significance. The relationship between party of appointment of the judges and outcome superficially parallels other studies finding a significant relationship between the two.<sup>167</sup>

Nevertheless, two interrelated aspects of this correlation suggest that the significance of the relationship between party of appointment and the more differentiated case categories may still not support the hypothesis that political ideology likely has an impact on outcome. First, a chi-square analysis of the distribution of cases between the more protection sought and less protection sought categories without regard to outcome (i.e., Groups 1A and 1B vs. 2A and 2B) shows a strong correlation between party of appointment and the type of case assigned. A chi-square calculation yields a  $p$  value of 0.0431 for the 2010 data (see Appendix, Figure 3A) and 0.0536 for the 2011 updated data (see Appendix, Figure 3B) — i.e., close to or over a 95% confidence in both datasets.<sup>168</sup> Yet the assignment of cases based on the type of case is almost entirely random. Although some cases are assigned to the same judges (e.g., a related case or an appeal after remand), the system of distilling all cases to principal cases should greatly reduce or even eliminate any such effect. Unless some completely unaccounted for process is happening in the wilderness cases that is not occurring elsewhere, this random pattern of assignment accounts for some of the apparent significance of the initial relationship between party of appointment and outcome.

Second, once the less protection sought/agency loses category (Group 2B) is removed from consideration, the confidence level between party of appointment and case result drops dramatically. Eliminating this cohort from consideration drops the confidence level of the relationship between outcome and party of judicial appointment to only a 76% confidence level ( $p$

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<sup>167</sup> See Czarnezki, *supra* note 4, at 793–95; Miles & Sunstein, *supra* note 3, at 832–33; Revesz, *supra* note 4, at 1728–29.

<sup>168</sup> This figure was calculated after omitting the votes in two cases decided en banc, namely *Stupak-Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996) (en banc), and *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976) (en banc). The reason for omitting these votes is that the court of appeals exercises discretion in deciding what cases to take en banc and, because all judges in active service on the court hear the case, the assignment of the panel is not random. Because of the special rules governing en banc proceedings in the Ninth Circuit, the chi square calculation includes the votes from *Wilderness Society v. United States Fish & Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003) (en banc), amended by 360 F.3d 1374 (9th Cir. 2004) (en banc). See 9TH CIR. R. 35-5 (providing that en banc court consists of the chief judge of the circuit plus ten other judges determined by lot).

= 0.2371) in the 2010 data (see Appendix, Figure 4A) and 85% in the 2011 data ( $p = 0.1481$ ). (See Appendix, Figure 4B). The impact of eliminating this category of cases on aggregate outcome is even more noteworthy. Without the Group 2B cases, the probability of the relationship between aggregate outcome and party of appointment drops to a mere 8% ( $p = 0.9165$ ) in the 2010 data set (see Appendix, Figure 5A) and to 41% in the 2011 update ( $p = 0.5865$ ). (See Appendix, Figure 5B). This drop in significance strongly indicates that the Group 2B cases are outliers in the overall data set.

Interestingly, the Group 2B cases represent instances in which individuals assert private property interests against wilderness values and prevail against the agencies.<sup>169</sup> Republican appointees strongly favor these rights compared to Democratic appointees. This apparent relationship between party of appointment and the results in this particular group of cases gives support to the impression that Republican appointees care more about private property rights than Democratic appointees. That observation would conflict with the data analysis of Sunstein and his collaborators, who found no statistical significance between the party of appointment and the outcomes of cases in which private property rights were at issue in takings cases.<sup>170</sup>

Initial analysis of the data also shows no statistically significant relationship between panel composition and outcome. Even with all cases, the relationship was significant at less than a 50% confidence level. Of course, the sample size of appellate decisions (125 total votes in 36 cases) is rather small compared to other studies that have examined panel effects.

### C. Using Common Space Scores to Measure Political Ideology of Judges

The use of presidential party of appointment as a proxy for judicial ideology has received intense scrutiny and criticism.<sup>171</sup> With judges below the level of a Justice on the United States Supreme Court, presidents often defer to the preferences of the senators from the states from which the judge is appointed, especially if the senator is from the same political party as the

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<sup>169</sup> See, e.g., *Nelson v. United States*, 64 F. Supp. 2d 1318 (N.D. Ga. 1999) (access rights); *Stone Forest Indus., Inc. v. United States*, 22 Cl. Ct. 489 (1991) (logging claim). The cases in this set also include four dissenting votes in *Stupak-Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996) (en banc). The fourteen-member court divided evenly in affirming the decision, but we only know the votes of some of the judges, namely those who signed the opinions. Only seven judges (three who agreed with the lower court and four who did not) recorded their votes, so there are only four dissenting votes instead of seven. As described *supra* note 168, the votes in *Stupak-Thrall* were omitted from calculating the chi square for the relationship between party of appointment for the judges and the types of cases they heard. The votes from *Stupak-Thrall* are included here because they reflect the views of the judges (and they all happen to be Republican appointees). The relationship between those votes and party of appointment of the judges is the hypothesis under examination here.

<sup>170</sup> See SUNSTEIN ET AL., *supra* note 2, at 51–52.

<sup>171</sup> See Epstein & King, *supra* note 41, at 88–89.

appointing President.<sup>172</sup> This is especially true if the President is engaged in horse-trading with members of the Senate on important points of the president's domestic or international policy agenda.<sup>173</sup> With district court appointments, the influence of a President may be minimal at best. Concerning his study of environmental decisions of the D.C. Circuit, Revesz subsequently justified the use of party of appointment because the District of Columbia has no senators and is therefore not subject to senatorial courtesy.<sup>174</sup>

To overcome the potential shortcomings of using the party of the appointing President as a proxy for the political leanings of a judge, political scientists have devised a system that attempts to approximate the political leanings of judges by factoring in the influence that senators have on the appointment process. This system, developed by Keith Poole and others, attempts to place all of the relevant actors in the same common policy space. It assembles a member of Congress's votes on many issues and places them within a common policy space of ideology for numeric assessment.<sup>175</sup> Thus, liberal votes and conservative votes on different issues can be amalgamated and scores can be assigned to individual legislators indicating their relative conservativeness or liberalism.

Giles, Hettinger, and Peppers ("GHP") then applied this methodology to the judicial selection process to evaluate the political leaning of judges based on the politics of selection.<sup>176</sup> By finding a means of incorporating the influence of senatorial courtesy and presidential political alignment, researchers have been able to employ this arguably more sensitive approximation of the ideology of the actors in judicial appointments to measure judicial ideology. As summarized by Czarnecki,

For each . . . judge, GHP assign him or her one of two common space scores. For judges nominated to sit in a state represented by a senator (or senators) of the president's party, the senator's common space score is used (or an average if both senators are of the president's party), reflecting the tradition of senatorial courtesy. If neither senator in office at the time of the appointment is of the same party as the appointing president, then GHP assign the judge the appointing president's score. Scores for both senators and presidents are on the same scale as those used for judges, ranging from most liberal at -1.0 to most conservative at +1.0.<sup>177</sup>

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<sup>172</sup> Micheal W. Giles, Virginia A. Hettinger, & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 628–29 (2001).

<sup>173</sup> *Id.*

<sup>174</sup> Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 181 (2002).

<sup>175</sup> See KEITH T. POOLE & HOWARD ROSENTHAL, *IDEOLOGY AND CONGRESS* 12–30 (2007); KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* 11–16 (1997); see also *Voteview.com*, <http://voteview.com/> (last visited April 22, 2011) (on file with the Harvard Law School Library) (containing links for data on congressional political leanings).

<sup>176</sup> Giles, Hettinger & Peppers, *supra* note 172, at 631.

<sup>177</sup> Czarnecki, *supra* note 4, at 785–86.

Like using the party of the President who appointed a particular judge, the common space or GHP score is nevertheless still a proxy for ideology, not survey data that might reveal a judge's actual thinking or a revelatory memoir explaining an individual judge's philosophy generally or a vote in a specific case. Also like party of appointment as a proxy, the GHP approach is subject to criticisms.<sup>178</sup> Nevertheless, several analyses of the influence of politics on judicial decisions have used the GHP score as their proxy for the judge's ideology.<sup>179</sup>

For purposes of the Wilderness Act analysis, judges were further divided into three categories based on their GHP scores: -1.0 to -0.33 (strongly liberal); -0.33 to 0.33 (moderate); and 0.33 to 1.0 (strongly conservative). Judges on courts without a home state (i.e., the D.C. Circuit, the Court of International Trade,<sup>180</sup> the Claims Court and its successors) were assigned the President's common space score, since no senatorial courtesy would be at issue.

Applying the chi-square calculation to the cases analyzed this way revealed no significant correlation between the categories of GHP scores and aggregate outcome. In this categorization using a chi-square calculation, the

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<sup>178</sup> See Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 Nw. U. L. REV. 743, 784–85 (2005). For example, when this paper was presented as a work in progress at Florida State University College of Law, Judge Susan Black of the 11th Circuit was in the audience. Judge Black originally served on the United States District Court for the Middle District of Florida, having been nominated by Democratic President Carter in May 1979. At that time, Florida's two senators were Lawton Chiles (Democrat, first dimension common space score = -0.189) and Richard Stone (Democrat, first dimension common space score = -0.119). These numbers were derived from the data on Poole's website at [ftp://voteview.com/junkord/SL01111E21\\_BSSE.XLSX](http://voteview.com/junkord/SL01111E21_BSSE.XLSX)(follow the "DW-NOMINATE scores" hyperlink) (last visited April 5, 2011). Following the GHP methodology, Judge Black's GHP score as a district court judge would be -0.154 (mean of Chiles's and Stone's common space scores). Republican President George H.W. Bush then nominated Judge Black to the Eleventh Circuit on March 10, 1992. At that time, Florida's two senators were Connie Mack III (Republican, common space score = 0.421) and Bob Graham (Democrat, common space score = -0.238). Following the methodology this time would yield a score of 0.421, namely following Senator Mack's. Judge Black has heard no cases involving the interpretation of the Wilderness Act. One publicly available set of databases examining judicial ideology against common space score lists Judge Black's common space score as -0.034032717 in the appeals court and district court databases, indicating a slightly liberal outlook. See David C. Nixon, Political Ideology Measurement Project, <http://www2.hawaii.edu/~dnixon/PIMP/> (last visited April 22, 2011) (on file with the Harvard Law School Library) (navigate to district court database in Excel format). This coding is presumably based on Nixon's working hypothesis that individual political ideology of judges is relatively stable over time.

<sup>179</sup> See, e.g., Benesh & Czarnetzki, *supra* note 46, at 129 & n.67; Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735 (2008); Czarnetzki, *supra* note 4.

<sup>180</sup> The Court of International Trade ("CIT") poses a coding problem. The court's judges are Article III judges (i.e. they are appointed by the President, confirmed by the Senate, and serve with life tenure), so they may sit by designation on other courts. 28 U.S.C. §§ 251(a), 293(a) (2006). Nevertheless, the statute constituting the CIT provides that "[n]ot more than five of [the nine] judges shall be from the same political party." 28 U.S.C. § 251(a) (2006). Only one principal decision involved one vote by a judge on the CIT sitting by designation. See *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999).

relationship between judicial ideology as measured by GHP score category and aggregate outcome was as weak if not weaker than the relationship between party of appointment and aggregate outcome (confident at less than 50%,  $p$  value = 0.7293) for the original data (see Appendix, Figure 6A) and just over 60% confidence level for the Spring 2011 update ( $p$  = 0.3992) (see Appendix, Figure 6B). An initial analysis of the cases sorted by outcome shows a relationship between GHP category and outcome (confident at over 90%,  $p$  value = 0.0574) (see Appendix, Figure 7A) and an even more significant relationship in the 2011 updated data (confident at over 95%,  $p$  value = 0.0230) (see Appendix, Figure 7B), but once the Group 2B cases are removed from the analysis, the relationship drops to only a 73% confidence level ( $p$  value = 0.2655) in the original data (see Appendix, Figure 8A) and to an 85% confidence level ( $p$  value = 0.1183) in the Spring 2011 data (see Appendix, Figure 8B). In this instance, the outcome of the analysis does not appear to vary significantly whether one uses party of appointment as a proxy for ideology or the more refined method of GHP scores.

#### D. Analyzing the Results

Overall, this study finds no significant relationship between aggregate outcome (pro-wilderness versus anti-wilderness) and political ideology. Several reasons may explain this result, many of which were outlined in my original article.<sup>181</sup> Some of the possibilities inhere in this study; others can be measured empirically and await further work on the subject; and still others may defy empirical measurement. As a preliminary matter, the coding rules and the rules regarding which cases to include (e.g., the decision to include unpublished cases) may have dampened the apparent effect of politics.<sup>182</sup> Many other studies have focused on the courts of appeals and particular types of cases. Although the reasons for including the cases in this study are provided above, the inclusion rules limit the ability to make a complete apples-to-apples comparison. Further refinement of the data might produce different results, although it would likely reduce the number of cases involved and therefore the power of the study.

As for other factors that may influence the outcome, some can be measured empirically. More detailed information about the cases — including the agencies involved in the litigation, the experience level and resources of the attorneys involved, or characteristics of the wilderness areas themselves (e.g., proximity to an urban area or number of visitors per year) — may provide an explanation of the outcome of the cases that also meshes with political ideology. Examination of those factors awaits further study. The small numbers of cases likely involved in each category means that this proposed study may shed little light on the wilderness management regime.

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<sup>181</sup> See Appel, *supra* note 7, at 119–25.

<sup>182</sup> See Keele et al., *supra* note 156, at 233.

I have suggested other factors that would be more difficult or impossible to measure empirically. First, judges may vote the way they do because they largely share the high value that Americans place on wilderness.<sup>183</sup> Short of conducting an opinion poll of judges — which presents its own problems — one can only draw an inference about this factor from the apparent lack of influence from political ideology. Political ideology may play only a secondary role because wilderness protection enjoys broad bipartisan support. Even a politically-motivated judge may act like a politician and use a pro-wilderness decision in litigation to cover an anti-environmental attitude overall. Second, judges may simply be interpreting the Wilderness Act properly and correcting an anti-wilderness bias in the management agencies.<sup>184</sup> This argument does not directly respond to the pro-wilderness bias of the actual case results, however.

### CONCLUSION

Scholars have debated the extent to which environmental law constitutes a coherent field of legal study, the way that torts or civil procedure might.<sup>185</sup> For empirical legal scholars, environmental decisions have become a fruitful testing ground for theories about the influence of political ideology on outcomes. To that extent, the field of environmental law may hang together, if not doctrinally then ideologically. This Article contributes to both parts of the discussion. It suggests that the field of environmental law may contain a subfield that does not exhibit one of the salient characteristics of other areas of environmental law. It also raises a challenge to empirical legal scholars about their overall data sets, to see whether they have comprehensively included all cases involving the environment.

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<sup>183</sup> See Appel, *supra* note 7, at 92 (discussing public polling data on wilderness), 120–21 (speculating on influence on judicial behavior).

<sup>184</sup> A version of this criticism was initially offered to me by Joseph Feller. He postulated that the Wilderness Act cases may come out the way they do because the wilderness advocacy organizations have more decisions from which to choose to bring their challenges than the extractive/private property interests. Thus, suppose that wilderness management decisions are ranged on a scale from 1 to 10, in which 1 represents a decision by the agency that all judges (regardless of ideology) would agree comports with the Wilderness Act and 10 represents a decision that all judges (regardless of ideology) would agree violates the Wilderness Act. Because agencies make many more decisions that adversely affect wilderness values than private property interests, the argument goes, wilderness advocates have a more target-rich environment from which to select their cases. Thus, wilderness advocates have the luxury of selecting cases scoring 7, 8, 9, and 10; whereas private property advocates would have to dig deeper in their smaller pool of cases and choose cases scoring 2, 3, and 4 and higher. Although Feller might be correct, an empirical study such as this one cannot measure how strong the claims of the parties are; rather it can only measure how the courts react to the claims brought before them.

<sup>185</sup> Richard J. Lazarus, *Human Nature, the Laws of Nature, and the Nature of Environmental Law*, 24 VA. ENVTL. L. REV. 231 (2005); Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703 (2000); Purdy, *supra* note 81; Jay D. Wexler, *The (Non)Uniqueness of Environmental Law*, 74 GEO. WASH. L. REV. 260 (2006).