PUBLIC OPINION AND THE POLICY CHOICES OF STATE HIGH COURTS

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ABSTRACT

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This project addresses the question of whether the judiciary is a representative part of state government. I will examine whether state high court justices, as other political actors, are influenced by constituency opinion in their decision-making process. I contend that popular elections provide an incentive to hold the justices more accountable to the electorate and comparing the impact of public opinion on the votes of state supreme court justices from a diverse set of electoral arrangements will help to understand the democratic nature of the judiciary. This dissertation will contribute to the literature on the role of public opinion in the policy process, the effect of institutional design on elite behavior, and the impact of judicial selection and retention reforms.

Dedicated to Charles, Donna, Samantha, Daisy, and Abigail Wood

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Chapter 1 Introduction

Shortly after midnight on May 17th 2004, Marcia Kadish and Tanya McCloskey became the first same-sex couple to obtain a valid marriage license and by 9:10 a.m. they became the first same-sex couple to legally marry in the United States. They and hundreds of other gay & lesbian couples were able to do so because of a Massachusetts state high court decision that held the state's constitution did not allow for the disparate treatment of same-sex couples seeking the protections, benefits, and obligations emanating from marriage (*Goodridge vs. Department of Public Health* 2003). This decision not only rekindled the debate about how government policy should treat same-sex relationships, it also highlights the important role that state high courts can have on the lives of individuals and within the policy-making process.

The *Goodridge* decision also presents the question as to why the Massachusetts Supreme Judicial Court found a right to marriage for gays and lesbians after other courts had explicitly refused to do so for decades.[1] The *Goodridge* decision was not unanimous and in the conversation between the majority, concurring, and dissenting opinions the justices provided a hint that external considerations played a significant role in deciding the case. Justice Cordy, in a dissenting opinion, believed that the majority had altered its approach in applying a legal test due to a "perfect storm" of external pressures.[2] Among

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[1] See Baker v. Nelson (1971), Baker v. State (1999), De Santo v. Barnsley (1984), Dean v. District of Columbia (1995), Jones v. Hallahan (1973), and Singer v. Hara (1974).

[2] "I fully appreciate the strength of the temptation to find this particular law unconstitutional - there is much to be said for the argument that excluding gay and lesbian couples from the benefits of civil marriage is cruelly unfair and hopelessly outdated; the inability to marry has a profound impact on the personal lives of committed gay and lesbian couples (and their children) to whom we are personally close (our friends, neighbors, family members, classmates, and co-workers); and our resolution of

the reasons for the court to change the marriage laws of the state was that society now had "a more fully developed understanding of the invidious quality of the discrimination" (at 328). In a concurring opinion, Justice Greaney described the change in more direct terms:

"We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do" (at 349-350).

Justice Greaney continued by elaborating on his larger judicial philosophy that allows judges to be influenced by external forces:

"The provisions of our Constitution are, and must be, adaptable to changing circumstances and new societal phenomena, and, unless and until the people speak again on a specific subject, conformable in their concepts of liberty and equality to what is fair, right, and just" (at 350).

This description of how the court arrived at its decision raises the question of whether justices always decide cases in this manner. Courts are often thought of as separate from the democratic process. The republican design of the national and state government with government power divided among separate institutions has contributed to differing expectations for the behavior of policy makers. The legislative and executive branches were designed with the expectation that they would represent or reflect the views of the citizenry to varying degrees. However, in this three branch design, the

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this issue takes place under the intense glare of national and international publicity. Speaking metaphorically, these factors have combined to turn the case before us into a "perfect storm" of a constitutional question. In my view, however, such factors make it all the more imperative that we adhere precisely and scrupulously to the established guideposts of our constitutional jurisprudence, a jurisprudence that makes the rational basis test an extremely deferential one that focuses on the rationality, not the persuasiveness, of the potential justifications for the classifications in the legislative scheme. I trust that, once this particular "storm" clears, we will return to the rational basis test as it has always been understood and applied." at 363.

judiciary was expected to be removed from popular politics and instead established as the umpire of the political process. The task of the courts was to ensure that the laws were created in the appropriate manner within the bounds of government authority and enforced without violating the rights of the people. In the course of performing this role, courts have had to maintain their independence from the political branches and assert a judicial power to abate the decisions of the same political branches (McCloskey 1960). To maintain the power of judicial review, judges have attested that the source and justification for this power is not political in nature, but rather grounded in reason and logic. If the decisions of a court were to appear to be based on political concerns, like public opinion, rather than the logical extension of the requirements of the law, then a court's exercise of judicial review would appear to encroach on the charge of the other branches. This encroachment could negatively affect their legitimacy with the public and those with the ability to enforce their decisions. Judges and courts who stray outside of the bounds of what the public wants are risking diminishing their influence over policy.

Ignoring the fact that this policy change originated from a judicial body, scholars of state politics could point to a number of factors to explain why Massachusetts had changed its policy instead of the other states. One of the primary explanations would be that compared to other states, Massachusetts has a number of liberal policies in place and same-sex marriage is just an extension of the liberal citizen and elite opinion. Alternatively, by focusing on the judicial source of the policy change, judicial decision-making scholars could offer contradictory explanations that focused internally on the personnel on the court or the institutional features of the Supreme Judicial Court and the contextual factors relied upon by state politics scholars would be mostly ignored. It is the

goal of this study to reconcile these two approaches and determine whether the external forces that are often used to explain state policy influence judicial decision-making.

Democratic theory posits that a government composed of representatives elected by the people will be faithful to the policy wants of the people and therefore enact policies that pursue these wants. As a result, there should be evidence of congruence between public opinion and policy. For decades, political scientists have found a link between the public's preferences and when policy is created or altered for institutions other than judicial bodies (Achen 1978, Bartels 1991, Burstein 2003, Erikson 1978, Hill et al. 1995, Lascher et al. 1996, Miller and Stokes 1963, Page and Shapiro 1983, Weber and Shaffer 1972). Previous research focused on state governments has found that a state's overall policy priorities and the ideological direction of its policies are influenced by public opinion (Erikson et al. 1993, Jacoby and Schneider 2001). Despite the introductory illustration and numerous other instances, the public policy literature has largely excluded the courts as policy-makers (Barlcay and Birkland 1998, but see Roch and Howard 2008).

Because of the tendency to exclude courts in studies of policy formation, the expectation of popular control has not been extended to the rulings of state high courts, even though their decisions can have a profound effect on the availability of policy alternatives to state governments and in many states, the public elects the justices. In spite of calls from prominent scholars (Brace et al. 2000a, Caldeira 1991), to date there has been little study of the impact of public opinion on the decision-making process of state supreme court justices. In this dissertation, I propose to address this omission by

conceptualizing state high courts as policy-makers to evaluate the influence that public opinion has on the decision-making process of individual justices.

Courts as Policy Actors

The common assumption is that courts are solely legal and not political institutions and they only act to limit the actions of other actors or settle disputes between actors. Judges are typically thought of as speaking in the language of the law and using policy neutral legal principals derived from a philosophy of justice to arrive at their decisions. These decisions are a result of simply applying the facts of a case to the established law. This “Myth of Legality" is reinforced by the judges themselves with various symbolic acts such as the wearing of robes, the elevation of their benches, and the deference that is required when in a courtroom. The resulting “cult of the robe" has become part of our American political culture (Scheb and Lyons 2000). Another feature that discourages the inclusion of the judiciary in the policy making process is the reactive nature of the judiciary. Judges can only act when a controversy is brought before the court and the case meets the legal requirements of standing, jurisdiction, and an available remedy.

State high courts can use the power of judicial review to participate in the policy process and act as policy-makers themselves (Langer 2002). The judiciary can act as a constraint on the policy process by restricting the alternatives available to policy implementers. As an example, in *Printz v. United States*, the U.S. Supreme Court held that the Brady Handgun Violence Prevention Act could not require local law enforcement officials to perform background checks on handgun purchasers (*Printz v. United States* 1997). The national government cannot impose upon the sovereignty of a state and

compel it to perform those duties that it is not willing or able to do. Courts can also pre-approve or suggest policy alternatives that would be constitutional to undertake. In *Swann v. Charlotte-Mecklenburg Board of Education*, the U.S. Supreme Court outlined which policies school districts could constitutionally employ to desegregate their student population (*Swann v. Charlotte-Mecklenburg Board of Education* 1971).

Courts not only resolve policy disputes, they also act as agenda-setters and their decisions can define the availability of policy alternatives (Dahl 1957, McCann 1994). A court can use its rulings to redirect the attention of policy makers towards a specific policy area or preapprove policy alternatives by pronouncing those that would be constitutional to undertake. Courts may also alter the agenda setting process by allowing groups who have been excluded by other institutions into the policy process (Cobb and Elder 1983). Like most agenda-setters, the courts are limited in the frequency in which they can define the policy agenda. Still, a court decision can spark a wide range of reactions by the public and government, from minor clarifications in the law to the proposal of constitutional amendments or ballot initiatives.

The judiciary participates in a wide array of policies. As an institution, courts are probably most recognized for their involvement in the creation and implementation of policy concerning criminal and civil justice procedures (Wasby 1993). Creating rules like the Miranda rule and the exclusionary rule, the courts have regulated how members of law enforcement agencies treat individuals suspected of committing criminal offences.

The reach of courts extends beyond the issues that they do not directly implement. For example, state high courts in Vermont (*Brigham v. State of Vermont* 1997) and New York (*Campaign for Fiscal Equity v. State of New York* 2003) have ruled that their state's

scheme for financing public schools is unconstitutional and requires reform to make them more equitable. Additionally, other policy makers can enlist the judiciary when implementing a policy. When the Environmental Protection Agency decided to combat pollution with the Superfund program, the agency resorted to litigation as a strategy of regulatory enforcement (Church and Nakamura 1993).

Importance of State Courts

The state judiciary is important to study as a policy-making institution due to the volume and types of cases that it decides. One estimate places almost 98% of the nation's litigation in state court systems (Hall 2008). State high courts decide more than ten thousand cases a year (Devins 2010). Not only are state high courts responsible for interpreting state constitutions, but they also decide much of the civil litigation that takes place in the United States (Kritzer et al. 2007). The diversity of the types of cases that come before state court systems is vast (Meeker 1986).[3]

State high courts can use their judicial review powers to initiate policy change and their judicial authority to ensure the implementation of the law. State courts have increasingly become a source of constitutional rights for American citizens. In a famous essay, Justice William Brennan called for state high courts to "be the guardians of our liberties" when the Supreme Court was unwilling to do so (Brennan 1977 at 491). The

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[3] "the number of inmates in state prisons, where children go to school, whether land can be used for highways, whether and when abortions may be performed, the protection of various species, the need for motorcycle helmets and thousands of other issues " (Thomas and Hrebenar 1994 at 3 cited in Corbally, Sarah F. 2004. Filing of Amicus Curiae Briefs in State Courts of Last Resort: 1960-2000 *Justice System Journal*)

"the final decision makers on most issues of commercial, property, family, inheritance, tort and criminal law, as well as state constitutional issues and local governmental powers and procedural issues" (Meeker, 1986, at 3)

Supreme Court itself subsequently proclaimed in a decision that "a state court is entirely free to read its own State's constitution more broadly that this Court reads the Federal Constitution" (City of Mesquite v. Aladdin's Castle, Inc. 1982). Observers noted that the number of cases in which state high courts considered constitutional questions had increased dramatically between 1977 and 1986 and quickly doubled in the following teo years (Hershkoff 1993). While the rights granted by state courts are not initially national in their effect, they contribute to the rights environment that exists in the law and decisions in one state can be used by courts as justification for expanding rights in other states (Caldeira 1985). Additionally, compared to the United States Supreme Court, the state courts have an added ability to influence constitutional law because it is free from limitations on the types of cases that it hears (Hershkoff 2001). Another important difference between state high courts and the federal Supreme Court is that state high courts play a large role in shaping the common law that is used for civil torts (Sager 1978). Finally, state high courts are more integrated into the policy making process of state governments than their federal counterpart. A number of state high courts are able to intervene in cases before there is a formal appeal, some have a mandatory docket when it comes to hearing constitutional challenges, others have the ability to offer advisory opinions before a law is passed, and state courts have been more willing to hear disputes between government officials (Linde 2005).

Even though state high courts are a policy making institution, previous research on the effect of public opinion on judicial decision-making has focused on the United States Supreme Court. Unfortunately, given the purposeful isolation of the Supreme Court, it is difficult to conclude that their behavior is representative of the great number

of judges in the United States' legal system. This analysis is needed because unlike studies of the federal courts, there is a sufficient amount of variation in the selection method of state supreme court justices to determine whether the form of retention provides a linkage between the court and the public or if the nature of a court's power requires the courts to act in this manner to protect its efficacy. Given the diversity contained within the states of their institutional design and mass attitudes, a comparative analysis of judicial voting behavior will contribute to both the state policy and judicial-decision making literatures. This study will test one of the key findings of the state policy literature within a new institutional setting, the state judiciary, to determine whether the policy-making process employed by the courts is similar to that of the elected institutions. This would allow state policy researchers to consider the judiciary in their policy-making explanations. The study would contribute to the judicial literature by incorporating political context into decision-making models.

This study will continue, in Chapter 2, with a survey of previous research on state policy making and judicial decision-making, further demonstrating a need for this study. The design of the study is motivated by the previous findings of state policy research. Chapter 3 will discuss where the data used in this study comes from and how it will be analyzed. Chapters 4 and 5 will provide an in-depth discussion and analysis of the legal issues that courts are addressing that are relevant to gays and lesbians (Chapter 4) and gender discrimination (Chapter 5). This study will conclude with Chapter 6, which will discuss the findings, its implications, and directions for future research.

Chapter 2 Literature Review

An oft-used metaphor to describe the role of states in the federal system is as laboratories of democracy.[4] This expression is attractive because it provides a simple reason as to why there is ample variation in the institutions and policies among the states. Political scientists have focused on the study of the American states due to their rich variation on institutional, socio-economic, and political characteristics (Dawson and Robinson 1963).[5] Under the rubric of federalism and a national government of limited powers, state governments initially had great latitude to exert their police powers over the general areas of health, safety, welfare, and morals. However, over time, the federal government centralized many of the functions previously performed by the states. Following the expansion of the federal government's authority during the New Deal and the Great Society, a period of devolution has returned some discretion to state governments to address their policy problems (Conlan 1998). However, in some policy areas such as homeland security, there are significant constraints placed upon state governments. A review of policy subject to devolution concluded that devolution may have been more political rhetoric than reality (Bowman 2002).

As some autonomy returned to state governments in the 1980's, they were once again able to serve as policy innovators. A number of reforms to state government, such

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[4] Justice Brandeis wrote "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." (*New State Ice Co. v. Liebmann* 1932 at 311)

[5] "The fifty states share a common institutional framework and general cultural background, but they differ in certain aspects of economic and social structure, political activity, and public policy. Therefore, they provide a large number of political and social units in which some important variables can be held constant while others are varied." (Dawson and Robinson 1963, 265)

as amending constitutions, professionalizing legislatures and bureaucracies, increasing gubernatorial authority, and the diversification of state revenues, have aided state governments in their transition back to playing a more substantial role in governing (Reeves 1990). As a result of these changes, states have been able to experiment with their own solutions to policy problems in diverse areas such as economic development, education policy, environmental regulation, and welfare reform (Bowman and Kearney 1986, Osborne 1988).

Scholars of state politics have for decades attempted to develop an explanation as to why states have taken divergent paths to solving social problems. Broadly speaking, the literature has found that social, economic, and political factors influence the content of state policy (Gray 2008). The social and economic properties of the state that affect policy include the size and composition of the state's population[6], the geographic features of the state, the economic makeup and conditions, and the presence of natural resources. The political factors that influence the policies of the states include the political party in control of the government, the level of electoral competition between the two parties in general elections, the effectiveness of interest groups, the amount of professionalization present in government, and the power of the governor within the state.

Early scholarship on state policy making focused on the socio-economic differences among the states. Differing from the case study approach that political scientists employed, economists such as Fabricant (1952) and Fisher (1961) utilized

[6] Hero (1998) looks towards the differences in terms of social diversity and how the ethnic and racial composition of a state influences the political processes, institutions, and polices of a state. However, a later study by Barrilleaux (2006) concludes that racial diversity is not as important of a factor to explain state policy liberalism as various forms of party competition within the state and public opinion are.

government reports detailing the expenditures of state and local governments to determine why expenditures varied by state. Fisher found that per capita income, population density, and degree of urbanization explained "a considerable amount" of the differences among states levels of expenditures (Fisher 1961 at 355). However, Fisher did not attempt to include variables that represent the political differences of the states; he excludes them because they are not easily quantified.

Political scientists responded to this literature by including economic variables in their studies of the state political process (Peters 1972). For example, in their study of state welfare policy Dawson and Robinson (1963) found that economic factors, such as per capita income, had higher correlations with welfare policy outcomes than political party competition. In a study of the effect of legislative apportionment on state policy, Hofferbert writes that "structural characteristics…do not seem to go very far toward explaining the kind of policies produced in the states" (Hofferbert 1996, at 82). These are but two examples of a line of research in the 1960's that produced similar conclusions (Dye 1968, Sharkansky 1968).

Questions were raised about this body of work in respect to how the authors utilize systems theory for their underlying theoretical framework and how the system inputs and outputs are operationalized (Jacob and Lipsky 1968, Rakoff and Schaefer 1970). After changing the dependent variable analyzed to the redistributive impact of revenues and expenditures, Fry and Winters (1970) found that political variables are more powerful than socio-economic variables in explaining policy variation among the states.

Wright, Erikson, and McIver (1987) address this contest between socioeconomic and political explanations when attempting to determine the role of public opinion on state policy. After describing how some literature interprets the significance of socioeconomic variables as reflecting the demands of the public on inputs, Wright et al. suggest that these variables are actually proxies for an underlying public opinion. If this interpretation of why socioeconomic variables have such explanatory power in predicting state policy outcomes is correct, then including a measure of public opinion should reveal that public opinion is the actual determinant. An alternative explanation for the statistical significance of socioeconomic variables is that they reflect nonpolitical economic development (Dye 1968). State policy is the result of a predictable sequence; as a state develops, it is then able to provide services to its citizens. If this explanation is correct, then public opinion as a political variable should have little to no explanatory power. Their analysis found that public opinion was a strong predictor of state policy and state political processes and institutions matter.

Another source of variation among the states is the amount of policy experimentation or innovation that they undertake. The success of states in fixing their problems is what is meant by the metaphor of states as laboratories and can lead to other states adopting the same policy. States experience problems to varying degrees and when a problem is severe it provides a political opportunity for policy change (Berry and Berry 1994). Also states may have policy entrepreneurs, political actors that promote policy ideas, which raise the probability of a state adopting a policy (Mintrom 1997). Policy innovation is also influenced by the available resources within the state (Hill and Leighley 1992). States with greater resources are able to take risks and afford policy

failures. The state's political culture may also influence a state's proclivity towards innovation (Miller 1991).

In addition to the political context within a state, the relationships between the states can influence their policies. States that share a border may also share common problems that are better solved by cooperation. Interstate compacts, such as the Driver License Compact, allow states to enter into agreements with each other (Zimmerman 2002). States may also adopt policies that have been adopted by nearby states. One example of a policy that appears to spread by regional diffusion is the establishment of a lottery within a state (Berry and Berry 1990). To avoid the losses that a state may incur from its citizens participating in the lotteries of neighboring states, a state may choose to create its own lottery. For other types of policies neighboring states may serve as innovators that create knowledge and policy change is the result of social learning (Mooney 2001a). For example, the economic development approach adopted by a state is influenced by those employed by its neighbors (Saiz 2001).

A comparative focus on the variation of the state governments has uncovered some marked differences in the effect of institutional contexts on the choices of policy actors and the outcomes that follow. For example, in regards to fiscal policy, the presence of ballot initiatives has been found to lower levels of spending by state governments (Matsusaka 1995) and states with governors who possess greater power over the state budget process are more likely to distribute benefits statewide (Barrilleaux and Berkman 2003). These differences in institutional design have significant effects on the content and effectiveness of government policy.

Common to each state is a democratic form of government. However, the exact form of the government can vary in many ways. Another source of variation is whether states have direct democracy measures in place to allow citizens to influence policy. The initiative process allows citizens to write and enact legislation or amend the state's constitution (Bowler and Donovan 2008). Other states have an indirect initiative process that allows the state legislature to become involved in the drafting process to varying degrees. Through the initiative process citizens are able to enact government reforms and address subjects like taxes, social issues, and environmental policy (Tolbert et al. 2001). The initiative allows for interest groups that otherwise would not get access to the political process to have an effect on policy-making (Boehmke 2005). Aside from the immediate effect of an initiative, some scholars have found that the use of initiatives increases voter turnout (Smith 2001, Tolbert et al. 2001) and levels of citizens' political knowledge (Smith 2002). The open nature of the initiative process has led some to question whether direct democracy has a negative effect on minority groups (Haider-Markel et al. 2007). Another potential effect of direct democracy is to alter the behavior of elected officials depending on the policy under consideration (Gerber 1996, Lascher et al. 1996).

A less direct method of citizen participation, but common to every state, is through the electoral process. One of the reasons for states to have different policies is that the composition of the citizenry is different. In an early study of southern state policy towards blacks, V. O. Key (1949) found differences within what was previously thought of as a single culture. Subsequent work extended the concept of culture to describe the policy choices of states. Daniel Elazar (1966) created typologies of political

subcultures in the states along lines of moralistic, individualistic, and traditionalistic cultures. Moralistic states prefer policies that seek to improve the general welfare. Individualistic states prefer policies that emphasize a limited role of government. Traditionalistic states prefer government to maintain the existing conditions within a state. However, the utility of this measure as a proxy for public preferences is limited. Schiltz and Rainey (1978, 414), in comparing Elazar's political culture classifications with survey data, conclude that a scale of political culture should not be considered "accurate representations of reality."

Survey data would be the direct manner to measure the policy preferences of a state's citizenry; however the cost to do so for 50 states has proven prohibitive. In an attempt to create measures of public preferences, scholars have used census data and national surveys to simulate public opinion for the states (Poole et al. 1965, Weber 1971). The studies that used simulations found a strong link between policy and public opinion (Weber and Shaffer 1972), but concerns were raised about the assumptions that were required in computing the measures of opinion (Seidman 1975). Erikson (1976) was able to use survey data from the 1930's on the death penalty, child labor prohibitions, and the right of women to serve on juries, to correlate the opinion of the states with the policy that existed in those states, reaffirming the belief that public opinion can influence policy.

In an attempt to better study state politics, Wright, Erikson, and McIver (1985) created a measure of opinion and partisanship. Previous studies on the opinion and policy linkage required policy area specific measures of policy. The new approach would seek to create overall measures of a state's preferences. These measures would allow researchers to compare all 50 states and the policy outputs studied would no longer be

limited to the subject area that was asked in a single survey question. In order to get a representative sample, poll questions from many policy areas were coded to generate a value on a liberal or conservative ideological dimension. The conceptualization of public preferences would allow a researcher to examine the policy and opinion linkage as long as it could be reasonably assumed that the policy outputs were part of the liberal-conservative ideological dimension.

Using their aggregate public liberalism measure, Wright, Erikson, and McIver (1987) examine its influence on an index of state policy liberalism. They used eight policy issues to create an index based on a liberal-conservative ideological scale. They concluded that state public opinion was the major determinant of the ideological direction of state policy. This relationship was tested again in their text *Statehouse Democracy* (Erikson et al. 1993) with similar result. In a review essay, Burstein (2003) concludes that most scholars accept the conclusion that public opinion influences public policy. This conclusion comes after decades of research into the question by numerous scholars since the work of Erikson, Wright, and McIver (Erikson et al. 1993, Wright et al. 1987). Scholars have continued the study of state policy in two manners. On the one hand, the linkage between policy and opinion could be examined at the macro level by comparing a measure of a state's overall policy liberalism to a state's overall opinion liberalism (Barrilleaux 1997, Erikson et al. 1993, Gray et al. 2004, Wright et al. 1987). On the other hand, one could examine a specific policy area to determine whether the linkage between opinion and policy survives the aggregation of numerous policies. Studies of a state's abortion policy have repeatedly shown that conservative states are more likely to enact restrictions on obtaining abortions (Camobreco and Barnello 2008, Norrander and

Wilcox 1999). The opinion and policy linkage has been found in diverse set of policies such as the presence of environmental regulations (Hays et al. 1996), the level of welfare benefits distributed by a state (Fording 1997, Volden 2002), and the strictness of campaign finance regulations (Pippen et al. 2002). Haider-Markel and Kaufman (2006) conclude that public opinion was significant for the adoption of hate crime laws including sexual orientation as a protected group. The timing of passage of any hate crime law was found to be influenced by public opinion by Grattet et al. (1998). In their study of same sex marriage bans, Lewis and Oh (2008) found that the link between public opinion and policy strengthened over time.

The state policy literature has repeatedly demonstrated that among the various influences on state policy there is a link between public opinion and the policy outputs of a state. However, this literature does not consider how the judiciaries of the states have shaped policy. For example, the dependent variable in *Statehouse Democracy*, policy liberalism, is an index composed of primarily legislative activities like spending and regulation. The explanation offered for the linkage revolve around the state legislature as the policy making actor and the two party system for keeping the elected government in line with public opinion. According to Barclay and Birkland (1998), because policy scholars view the judiciary in the traditionally legal sense of solving individual disputes using agreed upon principles policymaking is outside of the court's function. This description of the judiciary limits the court's importance only in areas of constitutional decision-making, in cases where individuals go to the court as a last resort, or as participants in implementing but not initiating policy change. However, public law

scholars have taken a different approach to the role of courts and treat the judiciary as a political institution.

Judicial Decision-Making

Like other political actors, a wide range of theories have been applied to explain how and why justices decide cases in the manner they do (Baum 2006, Gibson 1983). Much of our understanding of the judicial making process stems from the exemplar of the Supreme Court of the United States. While campaigning for the ratification of the Constitution, Alexander Hamilton wrote in Federalist #78 that the future U. S. Supreme Court would regard the document as the fundamental law of the United States. In those instances when the Constitution did not speak directly to the controversy in question, justices would be constrained from imposing their own will on the people by the law itself.[7] The need for a legal education to understand the controversy relative to the large number of precedents and principles would also teach jurists a respect for the law and the need for stability.

The judiciary, like any other institution, needs to have the support of the citizenry and be viewed by them as a legitimate authority to be an effective governing body. As Justice Frankfurter noted in *Baker v. Carr*: "The Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction" (*Baker v. Carr* 1962 at 296). The Constitution does not provide the judicial

[7] Hamilton Federalist #78 states: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them."

branch with any formal mechanism to enforce its orders. The only authority the judiciary holds is as the voice of the law.[8] As a result, the judicial process was designed to proceed in a manner that would foster trust and derive its power from its perceived legitimacy. Judges have described their role in this system as ensuring that decisions are the result of the application of the relevant facts of a controversy to the plain meaning of a statute, precedent, or constitution. Written and published opinions of a court often follow a pattern of reciting the facts of the case with the application of a legal standard to the case at hand.

In the early twentieth century a number of legal commentators began to offer a new perspective on the judicial process. Individuals such as Oliver Wendell Holmes, Jr., Jerome Frank, and Roscoe Pound spoke of the law as a temporary phenomenon. They believed the outcomes of cases depended more on who was participating as the arbiter than the controlling law. These scholars thought the application of social science research and theory to studies of judicial decision-making would enhance the effort to use litigation as an instrument for positive social change.

Jerome Frank (1930) wrote one of the first examinations into the decision-making processes of judges. Frank concluded that when judges first examine a case, they identify their desired outcome and then they publicly present the legal reasoning that justifies

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[8] Al Gore's concession speech on December 13th 2000 provides an excellent example of the Court's success in being considered the voice of the law: "Over the library of one of our great law schools is inscribed the motto, "Not under man but under God and law." That's the ruling principle of American freedom, the source of our democratic liberties. I've tried to make it my guide throughout this contest as it has guided America's deliberations of all the complex issues of the past five weeks. Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court's decision, I accept it. I accept the finality of this outcome which will be ratified next Monday in the Electoral College. And tonight, for the sake of our unity of the people and the strength of our democracy, I offer my concession."

their preferred result. It is not difficult for a judge to support his or her chosen decision given the large body of precedent. Frank describes the root of a judge's decision as a hunch. To explain the composition or source of these hunches, Frank (1949) later utilizes Gestalt psychology, which posits that human responses are not an aggregation of smaller distinct thoughts, but rather a single complete thought. The completeness of a thought is the reason that individuals often find it difficult to explain their decision-making process. The published opinion announcing the court's decision is necessary to preempt the critics of the decision and to justify the judge's own actions. This public explanation reinforces the apparent existence of the traditional legal model. The introduction of psychological theories to this question was as far as Frank would go. Frank thought a lifetime of experiences combined to form the personality of a justice. Frank believed that looking at the judge's background and personal characteristics, such as education, family history, political affiliations, and their personality traits both temperament and intellectual, would prove to be a useless exercise.

One of the earliest political science attempts at understanding the voting behavior of justices was completed by C. Herman Pritchett (1948). His tome, *The Roosevelt Court,* examined the changes to the law made by President Franklin Roosevelt's appointments to the Supreme Court. The first part of Pritchett's analysis found that justices routinely dissented in blocs. In examining these blocs, Pritchett found a clear distinction between the justices. While this work mainly examined the patterns in which justices joined the written opinions of their colleagues, it demonstrated that the product of the Court depended upon its composition. In the second part, Pritchett analyzed the direction of the votes of justices on cases involving claims of personal liberty. Pritchett

found that the separation of justices into blocs could be summarized on a liberal – conservative dichotomy depending on the composition of the court for each term. Examining judicial voting behavior in the backdrop of the New Deal made the effect more visible. As new justices were elevated to the bench, many recent precedents were overturned and the expansion of the federal government was allowed to continue.

Pritchett did not investigate the source of the differences between the two primary blocs on the Court because of the influence that the composition of the Court has on the positioning of a justice within a bloc. For example, Justice Black may have originally been viewed as a liberal justice when he was the only Roosevelt appointee among the larger number of conservative justices on the court. Yet, ten years later, when Roosevelt had made eight other appointments to the Court, Justice Black may no longer be a part of the liberal bloc relative to the new members. Pritchett's work did not attempt to solve the question of why justices vote the way they do, but it did set a number of scholars down the path of investigating why justices vote in ideologically consistent patterns.

Inspired by the unanswered questions left by the work of Pritchett, Glendon Schubert wrote his text *The Judicial Mind* (1965). Schubert framed his work as an attempt to answer the question of what role a public official's personal beliefs play in their public acts. Methodologically, Schubert utilized scaling and dimensional analysis to construct scores for the justice's personal values and the case facts. From the combination of values and case facts, Schubert was able to construct what he termed ideal points. These ideal points would place a justice within an attitudinal space. The ideal points work more along the lines of a pivot or tipping point. When the facts of a case change and go beyond what a justice believes is allowable, the justice would be

expected to change his vote in the other direction. While Schubert went into greater depth in arranging the votes of justices on an ideological scale, there was little investigation into why the justices vote in the direction that they do. Schubert's analysis went beyond the blocs identified by Pritchett, but the scales offered did not present a causal theory.

Some of the first research to examine the reasons behind an individual justice's vote utilized attitude theory (Spaeth 1972, Spaeth and Parker 1969). In their work, *Supreme Court Decision Making,* Rohde and Spaeth (1976) combine attitude theory with a rational choice framework to develop their explanation of how the justices of the U.S. Supreme Court decide to vote. As with many other rational choice frameworks, Rohde and Spaeth make a number of assumptions some of which were originally outlined in an earlier work by Spaeth (1972). The first assumption is that the justices of a court are goal oriented and they make decisions with the achievement of these goals as the primary concern. The resulting vote should be the alternative that is closest to achieving that goal. A second assumption is that the justices recognize the institutional structures within which they operate. This assumes that the justices understand that there is the possibility that their decision could potentially be either ignored by those charged with implementing the policy contained in the decision, be circumvented by additional legislation, overruled by the passage of a constitutional amendment, or impeached and removed by Congress. The third and final assumption is that decisions are dependent on the particulars of the cases before them. Put simply, a justice cannot vote to overturn the death penalty in a case that does not raise it as an issue.

Rohde and Spaeth argue that preferences are composed of an individual's beliefs, attitudes, and values. These factors are constructs and as such cannot be observed. Their function is to aid in the explanation of a justice's personal policy preferences. The beliefs of an individual combine to form an attitude. Rohde and Spaeth assert that attitudes can be measured by the use of scaling techniques on the votes of the justices in similar cases. Values are similar to attitudes, but are more general in nature. To measure values, Rohde and Spaeth propose to examine the interrelatedness among attitudes to define values. In doing so, they identified three major values, civil liberties, equality, and economic activity, to account for 85% of the cases in their sample. Using the major values in combination with two additional minor values, privacy and taxation, Rohde and Spaeth were able to classify the justices according to an overall value system. To test their theory they classified cases to identify the most likely basis for the Court's decision and then applied the scaling scores for the justices on that value. After using their theory to predict cases, the authors conclude that justices base their decisions more on the situation than the characteristics of the litigants.

The broader theory of attitudes rather than the law forming the basis of judicial decision making was further developed in Spaeth's later work with Jeffrey Segal (Segal and Spaeth 1993, 2002). In this work, the authors provide evidence to assert that the attitudinal model can explain the voting behavior of U.S. Supreme Court justices. Their theory is explained succinctly in the following quote:

> "[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 the way he does because he is extremely

conservative; Marshall voted the way he did because he was extremely liberal."[9] In their text, Segal and Spaeth provide a number of tables, graphs, and examples to demonstrate that the votes of the justices fit on the liberal – conservative dimension. These voting patterns are also demonstrated to be highly correlated with the views of public commentators in four of the nation's leading newspapers at the time of their confirmation (Segal and Cover 1989) and again their previous votes on similar cases. While some scholars were critical of the empirical evidence for the model (see Baum 1994), others confirmed the central premise with courts other than the United States Supreme Court. Scholars have reported evidence of the attitudinal model operating on the United States Court of Appeals (Songer et al. 1994), state supreme courts (Brace et al. 2000b) and the Supreme Court of Canada (Ostberg et al. 2002).

To protect their authority it is believed that the judiciary has fostered "the myth of legality" (Scheb and Lyons 2000). According to the myth of legality, judges base their decisions on the plain meaning of the statute, original intentions of the drafters of the law, and previous legal decisions. When two laws or decisions are in conflict, judges are to balance the concerns of both in their decisions. The use of legal symbols such as black robes, a high bench, and a secretive decision-making process were designed to bolster the perception that justices use objective legal reasoning and not their own personal preferences when reaching a decision.

In an effort to examine whether justices live up to the myth of legality, Spaeth and Segal examined the voting behavior of United States Supreme Court justices in both landmark and non-landmark cases and their progeny to determine whether the principle

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[9] Segal, Jeffrey A. and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited.* Cambridge, UK: Cambridge UP, 2002 at 86.

of *stare decisis* was followed later by members of the Supreme Court (Segal and Spaeth 1996, Spaeth and Segal 1999). When justices disagree with the outcome in a case, they rarely change their voting preferences on subsequent cases and vote to uphold the precedent that they originally dissented from. According to their analysis, only two justices, Stewart and Powell, could be viewed as being influenced by precedent and this is at a level of 33% of the votes in their analysis. Critics of this work have correctly pointed out that there are numerous aspects to a law-based model of judicial decision making and these factors may also be in conflict with stare decisis (Brisbin 1996).

Another empirical examination of the effect of the law on the decisions of justices can be found in Richards and Kritzer's (2002) identification of jurisprudential regimes. According to the authors, a jurisprudential regime is created when a case determines the factors that future cases will be decided upon and the amount of scrutiny that the court will apply to a case. This concept appears to be simply just a focusing on precedent under a different label.

For courts other than the United States Supreme Court, a concept that is consistent with the ideal of the legal model is the issue of compliance. According to the legal model, all lower courts should not only be bound by their precedents but also those of a higher court. Compliance with higher courts is often assumed because the lower courts follow the practice of citing precedents in their written opinions. To examine the validity of this expectation Songer and Sheehan (1990) study the impact that two U.S. Supreme Court decisions *Miranda v. Arizona* and *New York Times v. Sullivan* had on the areas of criminal procedure and libel respectively. The authors find high levels of compliance with both decisions, yet the impact of the decisions varied. Following *Miranda*, the

percentage of decisions supporting the criminal defendant remained virtually the same, while support for libel defendants increased following the *New York Times* decision. The limitations of this study are recognized by the authors themselves and the impact of the personal preferences of the justices was not considered in their analysis.

This line of work demonstrates that the decision-making process of justices should be treated similarly to other political actors. While justices frame their decisions relative to legal principles or precedents, arriving at that decision is mostly an individual and personal enterprise that has the potential to be influenced by external conditions. As Gibson (1983) notes: "Comprehensive theory can best be developed through models that incorporate influences stemming from various levels (e.g., group, institution, environment) but that are ultimately focused on the individual. (pg. 8)"

Public Opinion and the Courts

Given the democratic nature of governance in the United States, political scientists often explore the link between the positions of the citizenry and the actions of public officials and institutions. The literature examining the relationship between public opinion and judicial decision-making has produced conflicting results. Those who suspect there is a relationship between the courts and the public point to the fact that the decisions of the courts are often in line with the government or public opinion. In his analysis, Barnum (1985) concluded that the U.S. Supreme Court is not as countermajoritarian as it had been previously thought. In a number of policy areas, such as school desegregation, access to contraception, interracial marriage, abortion, and women's rights, a decision of the U.S. Supreme Court was supported by a majority, or near majority, of the citizenry. However, there was also some evidence that the U.S.

Supreme Court ruled contrary to public opinion in cases involving school prayer and the implementation of the death penalty. Barnum does not conclude that the Court is following the wishes of the public when deciding these cases, as he only attempted to answer the question of whether the Court has acted in the countermajoritarian fashion. Marshall (1988) also found that in situations where a clear majority supports the issue before the Supreme Court, approximately 60% of the time the Court's decision agrees with the public's preference. Research in this vein does not assert nor find a causal link between the results of a case and the public's opinion on an issue. Furthermore, the anecdotal nature of these analyses find as many instances of the U.S. Supreme Court almost equally going against public opinion as they do with it. Finally, these studies do not examine the votes of individual justices and accordingly do not aid in understanding the decision making process.

In an effort to find a causal relationship between public opinion and the outputs of the Supreme Court, Mishler and Sheehan (1993) used Stimson's (1991) Mood Indicator in finding that the overall policy liberalism of the U.S. Supreme Court corresponds to changes in the public mood and the effect was strongest after a 5-year lag. While being careful to not assert too strong of a relationship between the public and the decisions of the Court, Mishler and Sheehan assert that the Court does respond to changes in the public mood and the relationship may be reciprocal in that the Court's decisions legitimize changes in public opinion towards policy. Further analysis has also shown that the Court's responsiveness depends on the policy area under consideration (Link 1995). In their critique, Norpoth and Segal (1994) reanalyze the data used by Mishler and Sheehan and contend that any effect of public opinion is likely a result of changes to the

composition of the Court. As the membership of the court is changed, the views of the public are incorporated into this updated court. Norpoth and Segal also find fault with the methodological approach taken by Mishler and Sheehan and suggest that introducing a variable capturing the realignment of the U.S. Supreme Court due to Nixon's appointees renders the effect of public mood insignificant. Utilizing an alternative model specification Stimson, MacKuen, and Erikson (1995) find the Court responding to changes in public opinion sooner than Mishler and Sheehan, but believe it is not strong enough to make a definitive claim. McGuire and Stimson (2004) employed an alternative measure of the individual justices' liberalism to reexamine the relationship between public preferences and judicial decision-making. Their study concludes that there are both the indirect effects described by Norpoth and Segal and that the direct relationship between the public and the U.S. Supreme Court is stronger than was previously reported by Mishler and Sheehan.

Flemming and Wood (1997) examine the individual justice's response to changes in the public mood. They concluded that individual justices were similar to each other in their response to changes in the public mood across and between all issue areas. However, similar to the findings of Stimson, MacKuen, and Erikson, Flemming and Wood conclude that the reaction of the Court to changes in the public mood is quicker than Mishler and Sheehan had originally speculated, but also that the impact is rather small. Also, Flemming and Wood demonstrate that the responsiveness of the Court varies among the justices and across issue areas. Given the relative isolation of the federal judiciary from the electorate, it is not at all surprising that the effect of public opinion on judicial decision-making is not substantial, if at all. The weak findings of a

small link between public opinion and the decisions of the U.S. Supreme Court are likely due to changes of the personnel to the Court and not a conscious decision to keep the Court in touch with the populace.

The Importance of Context

There is conflicting evidence for public opinion having an impact on U.S. Supreme Court justices, but there have been a number of studies supporting this linkage at lower court levels. The literature on judicial decision-making has primarily focused on explaining the internal and ideological behavior of the voting decision, rather than the influence of exogenous conditions and broader context.[10] Seeking out a new institutional approach that explains "behavior taking the cultural contexts that gives it shape, direction, and meaning" into consideration, Clayton and Gillman conclude that research on judicial actors needs to acknowledge that "different contexts make it more or less possible for individuals to act on different sets of beliefs" (1999, 3). The uncommon nature of the United States Supreme Court's institutional design makes generalization to other judges untenable (Tate 1981). To avoid this problem, increased attention has been given to judiciaries with different institutional designs operating within a variety of social environments. The examination of multiple high courts alleviates the concerns that generalizing beyond a single institution can create.

Kuklinski and Stanga (1979) examined the sentencing practices of California trial courts following an initiative that proposed to decriminalize the personal use of marijuana. Employing the vote supporting the initiative at the county level as an

[10] According to McCann: "[g]iven that mobilization of the law in practice is highly context dependant, it again stands to reason that adequate analysis of legal tactics should identify those contextual variables most and least favorable to movement success" (1994 p. 11).

independent variable, the authors found that after the election the sentencing practices of justices changed to become more attune to the desires of the county electorate. Gibson's (1980) examination of criminal trial courts in Iowa concluded that judges were perceptive to the electoral environment at the county level. The trial judges in Iowa rode circuit by traveling from county to county, and the sentencing behavior of a judge would vary depending on their perception of the environment. Both of these articles stress the electoral connection between the judges and the electorate.

Among the small number of studies on state high courts, Ragland (1995) concluded that the decisions of the Texas Supreme Court were largely consistent with public opinion. By matching statewide public opinion polls taken between 1978 and 1994 with decisions of the court, Ragland found that 76% percent of the court's outcomes corresponded with the position of the public. However, Ragland's study does not focus on the decision-making process, it instead attempts to determine whether the final decision is in line with public preferences.

Brace and Boyea (2007) examine the vote of individual justices to reverse a death sentence. Using a series of comparisons between elected and appointed justices, the authors conclude that elected justices are less likely to overturn a death sentence than appointed judges are. However, there is no evidence presented to the reader that the differences in percentages meet conventional levels of statistical significance and the study does not conduct a multivariate analysis.

In another study, Brace and Boyea (2008) conclude that public opinion only has a direct effect in those states with popular elections. Their empirical analysis found that public opinion towards the death penalty, as measured by Brace et al. (2002), had a

statistically significant effect on the vote of whether to overturn a death sentence for those justices who were subject to regular elective formats, defined as partisan, nonpartisan, or retention elections. However, the authors note that this finding stems from a highly salient issue. Furthermore, courts are often asked in death penalty cases to evaluate whether the trial court has followed the proper procedure rather than establish policy that will affect future cases.

As Devins (2010) notes that there are multiple mechanisms in place that suggest state high courts need to be concerned about the consequences of their decisions. In regards to the public, in many states citizens have the ability to remove individual justices in a future election or are able to reverse a decision through a direct democracy mechanism. Fortunately, the justices of state high courts are in a unique position to predict whether their decisions will incite a backlash (Sager 1985). One simple reason that state justices are able to do so is that they have been exposed to how the state operates. An analysis of the personal characteristics of justices serving on state high courts in 1994 and 2000 revealed that over 60% of justices were either born or attended law school in-state (Bonneau 2001).

Conclusion

Scholars studying policy change at the state level have identified numerous influences on the overall direction of policy. Differences in the composition of the citizenry, institutional design, the political environment have all been used to explain the policy making process of state governments. However, most of this research does not include the judiciary as an agent of policy change. As a result, it is unknown whether the

explanations offered to explain state policy change have an influence on the state judiciaries.

As Devins (2010) notes that there are multiple mechanisms in place that suggest state high courts need to be concerned about the consequences of their decisions. In regards to the public, in many states citizens have the ability to remove individual justices in a future election or are able to reverse a decision through a direct democracy mechanism. Fortunately, the justices of state high courts are in a unique position to predict whether their decisions will incite a backlash (Sager 1985). One simple reason that state justices are able to do so is that they have been exposed to how the state operates. An analysis of the personal characteristics of justices serving on state high courts in 1994 and 2000 revealed that over 60% of justices were either born or attended law school in-state (Bonneau 2001).

The previous research on the judicial decision-making process of the United States Supreme Court demonstrates that justices do not make decisions based solely on the law and judges are able to pursue their own policy preferences. However, at the same time, judges can also be influenced by institutional and environmental factors. Public opinion has been found to be one of these environmental factors. Early research on state supreme courts, which are institutionally more diverse than the Unites States Supreme Court, has found that public opinion may have an influence on the decision-making process. Yet thus far, the only study has been on the individual appeals of those convicted of the death penalty and not on cases that have public policy implications. This dissertation will apply what Erikson, Wright, and McIver have called "the dominant influence on policymaking in the American states" to the state judiciary (1993at 244).

Chapter 3 Data and Methods

In this chapter, I outline how previous research on the judicial decision-making process of state high court justices informs the design of the empirical models. Then, I describe how these concepts are measured and quantified in this analysis. Finally, I discuss the factors that influence the design of the estimation strategy employed.

Previous research has validated the need for a comparative approach to the study of the judiciary (Epp 1998). Research on the judicial decision-making process of state supreme court justices has revealed that among the factors affecting a justice's vote are the institutional and contextual conditions in which they operate (Brace and Hall 1997). As part of the laboratory of democracy, states have instituted an assortment of institutional arrangements to balance accountability and legitimacy in the judicial branch (Brace et al. 2001). From partisan elections to a life term, the full range of public participation in the selection and retention of state high court justices exists. Along with other differences, interested scholars have sufficient institutional variety to determine the influence of public opinion on judicial decision-making and the resulting policy outputs.

The lack of debate over the responsiveness of state supreme court justices to public opinion has been primarily due to the assumption that justices who face popular elections must be, to some degree, responsive to the electorate in order to be re-elected. However, this assumption has been largely untested. Previous studies of judicial voting behavior have shown that justices subject to popular elections are more conservative in their voting behavior (e.g. Brace and Hall 1993, 1997, Hall 1987, 1992, Hall and Brace 1992). It should be noted that these studies were performed on votes involving death penalty appeals and built into an examination of a state's implementation of the death

penalty is the reality that a majority of the electorate in that state supports the policy (Norrander 2000). I believe that examining a policy other than the death penalty, where there are varying levels of support, will enhance our understanding of the influence of public opinion on judicial decision-making and the policies that follow.

It is important to consider multiple policy areas when examining state policy making (Gray 1974) and judicial decision-making (Epstein and Mershon 1996, Link 1995). As a result, I examine two broad policy areas where the judicial branch has played a role in shaping state policy. Each policy area will receive its own empirical analysis. I have chosen policy areas that would be salient to the public at large. The policy areas were chosen to ensure that there would be a diverse number of cases across time and space. These cases were selected because there is no national consensus on the issues that are presented and the treatment of the groups is different across the United States. Furthermore, these are two policy areas where the judiciary must work with the other branches to create policy. Finally, I selected these two policy areas because there are valid and sustained legal arguments on both sides of the issue that would allow the justices to be open to considerations other than the law. In other words, there is an opportunity for justices to engage in policy making instead of norm enforcement as with death penalty appeals. If external and non-legal factors influence the judicial decision-making process, the two policy areas I have selected will allow for that influence to be displayed.

Dependent Variable

The first analysis pertains to cases involving the treatment of gays and lesbians. In Chapter 4, I discuss in more detail the types of policy questions that courts are asked to

answer. I expect that in states where the public is either more tolerant of homosexuality, as measured by Brace et al., or more liberal generally, justices will be more likely to vote to overturn a distinction based upon sexual orientation. The second analysis includes the litigation of claims of gender discrimination. Specific cases are discussed in Chapter 5. I expect that in states where the public is either more feminist, as measured by Brace et al., or more liberal generally, justices will be more likely to vote to overturn a distinction based upon gender. After examining each case opinion, the votes of the individual justices were classified according to whether he or she voted to extend equal treatment to the group claiming discrimination or to remove the legal distinction that denied equal treatment. When the case syllabus did not explicitly list each individual justice participating, a reference list of justices serving on a court was consulted (Langer National Science Foundation CAREER Grant, SES-0092187).

The list of gay rights cases come from Daniel Pinello's text *Gay Rights and American Law* (2003). Pinello identifies cases concerning the rights of gays and lesbians from 1981 – 2000 by searching the Westlaw database of published court opinions using a series of keywords. The main search terms were "gay," "homosexual," "lesbian," "same sex," "sexual orientation," and "sexual preference." After consulting with numerous gay and lesbian rights interest groups about the results of his search, Pinello concluded that "the odds for courts' never referring to any of the six search keywords are negligible" (Pinello 2003 at 165). I used the same procedure as Pinello to augment his list to the year 2004 by using the same search terms with the Lexis-Nexis database. A one-year overlap between Pinello's list and the Lexis-Nexis search was used to confirm the reliability of the process. All six of the cases identified by Pinello for state supreme courts in 2000

were also identified in the additional case collection. There were 94 cases identified for the years 1980 - 2004.

The gender discrimination cases were obtained from a dataset provided by Baldez, Epstein, and Walker (2006) from their article "Does the U.S. Constitution Need an ERA?" The authors identified sex discrimination cases decided by state high courts from 1950 – 2001 using a similar keyword search as Pinello. Baldez et al. also "shepardized" their case list to look for previously unidentified cases that were cited by a court in an already identified case. This process resulted in identifying 651 cases. Not all of the cases will be included in the analysis as not all of the independent variables have been measured back to 1950.

The 94 gay rights cases and 651 sex discrimination cases were coded using a scheme similar to the State Supreme Court Data Project. Among the information collected was the voting behavior of the individual justices. The dependent variable in this analysis is a dichotomous indicator of the direction of a justice's vote in cases where discrimination was alleged. All of the votes were coded in a binary fashion to indicate whether a justice voted in agreement with those seeking equal treatment. The observations are pooled from a number of cases and individual justices may appear in the dataset multiple times.

Measuring Public Opinion in the States

The primary independent variable for these analyses is an indicator of state-level public opinion. However, developing measures of public preferences at the state level has been a difficult enterprise, both generally and for specific policy issues. When the high cost of a representative survey is multiplied by the 50 states, it becomes cost

prohibitive to generate a dataset similar to the American National Election Study or the General Social Survey. Instead, scholars have had to develop alternative methods to create measures of public preference at the state level.

One approach has been to perform computer simulations that combine information from the national decennial Census and multiple national surveys to create estimates of state-level public preferences (i.e. Weber 1971). This method is comprised of multiple stages. First, national survey data is used to define the preferences of predetermined voter types based upon demographic characteristics. Second, the Census data is used to determine the number of individuals that appeared in each voter-type residing in a state. Finally, the frequency of voter types and survey data are combined to create an estimate that reflects the composition of the state and what the preferences of those citizens are. The strategy behind this approach has recently been adapted to incorporate Bayesian methods of parameter estimation (Park et al. 2006) and multilevel modeling (Lax and Phillips 2009b).

Others have sought to acquire a sufficiently large random sample by aggregating the responses from multiple surveys. This approach avoids the strong assumptions that are required to simulate measures of public preferences (Seidman 1975). Wright, Erikson, and McIver (1985), and later Erikson, Wright, and McIver (1993), pooled a series of CBS/New York Times polls to estimate the self-reported political ideology of a state's citizenry. Although the polls were different, they used similar question wording and random sampling within states. A benefit of this approach is that the aggregation of these polls can be done for specific periods. For the models in this study, the measure was computed by taking the average ideological identification over the period of the

sample. For sexual orientation cases, the years 1977 - 2003 were used and for gender discrimination cases the years 1976 – 2001 were used to compute the ideological average. The resulting variable has a range of values between -1 to 1, with increasing values indicating a more liberal public opinion. This variable is static for the period of this study.

Berry, Ringquist, Fording, and Hanson (1998) developed an alternative method to creating state level estimates of public preferences because they believed that previous attempts had ignored the potential for opinion to change over time. Berry et al. created measures of citizen ideology by combining election returns with interest group ratings of members of Congress in addition to the partisan composition of state government. The use of interest group ratings allow for their measure to be comparable across states and the inclusion of voting returns aids in creating a measure that reflects changes within the citizenry. To create a similar measure for government ideology, Berry et al. focus on ideology scores for the governor and major party delegations in the state's legislative bodies. These variables have a range of values from 0 to 100, with increasing values indicating a more liberal populace or government. It should be noted that Berry et al. use the term ideology in naming their measure and in an effort to distinguish among the public opinion measures I will continue to employ their terminology when discussing results of statistical analyses that include their measure. I am not using the term to refer to how attitudes may be structured in an individual.

Norrander (2001) used the National Election Survey of the Senate (Miller et al. 1993) to generate state level estimates of public opinion. These surveys included a full sample for each state that had a U.S. Senate election in 1988, 1990, or 1992. Another

advantage from using this data source is that the questions were identically worded. These characteristics allow Norrander to create measures of state level public opinion for various issues and the overall opinion of the state's citizenry. The scale of values ranges from 1 to 5, with higher numbers indicating a more conservative citizenry. I have recoded the measure to be consistent with the other measures of public opinion by reversing the direction to indicate a more liberal public as the measure increases.

Brace, Sims-Butler, Arceneaux, and Johnson (2002) extended the procedure of pooling survey responses from many years with the goal of creating public opinion measures for specific public attitudes. Brace et al. pooled the General Social Survey from 1974-1998 and then disaggregated the responses at the state level. The resulting indices capture the differences in opinion on specific policy issues such as abortion, sexual orientation, and capital punishment, support for government spending on welfare and the environment, and broader concepts such as tolerance, feminism, and religiosity. Some of the indices were computed from a single question, while others were the result of multiple questions. The Brace et al. measure for public preferences towards homosexuals was derived from a respondent's reaction to the question of when "sexual relations between two adults of the same sex" is wrong. The resulting index ranges from a 0 to 1 with higher numbers indicating more tolerance towards homosexuals. Their index of public feminism was calculated from two questions. The first asked respondents to evaluate the statement "Women should take care of running their homes and leave running the country to men." The second question asked the respondent to evaluate the position that "most men are better suited emotionally for politics then women." This

index has a range of 0 to 2, with increasing values indicating a higher amount of public feminism.

There have been a number of articles debating the advantages and disadvantages of the different measures. Berry et al. (Berry et al. 1998, 2006) argue that any measure of public preferences should be temporally dynamic.[11] This assertion calls into question the conclusion of others that intrastate public opinion is stable over time. Erikson, Wright, and McIver (1993, 32) found "near-perfect stability" of state opinion and evidence of change is mostly due to measurement error and subsequent study reaffirmed this conclusion (McIver et al. 2001). Brace et al. (2004) reinforce this conclusion and argue that the Berry et al. measure demonstrates movement because it is not based on surveys but elite behavior that is more susceptible to change.

Erikson et al. (2007) and Brace et al. (2006) suggest that using the Berry et al. measure to predict state policy would lead to misleading results due to validity problems in the measure. In their study of interest group scores, Groseclose, Levitt, and Snyder (1999) conclude that because interest groups use different bills on many issues, the scale that is developed can include considerable measurement error and any use of these scores need to adjust for movement in the underlying scale.

Another reason to include multiple measures of public preferences is that there is disagreement concerning what the measures are truly capturing. Berry et al. originally considered their measure to be state citizen ideology but they have subsequently found that the measure is also highly correlated with a measure of policy mood or operational

[11] "Nothing in the revised results…alters our conviction that citizen ideology varies across states and over time, in ways that are relevant to our understanding of policy choices made at the subnational level" (Berry et al. 2006 at 495).

ideology (Berry et al. 2007a). Berry et al. also argue that "scholars seeking to test hypotheses about the impact of public opinion on public policy…should use a measure of policy mood, not ideological self-identification" such as the Erikson et al. and Brace et al. measures (Berry et al. 2007a at 127). However, Erikson et al. have argued that instead of a state's public mood, Berry et al. are actually capturing the state's congressional delegation's roll call ideology (Erikson et al. 2007). Others also contend that the Berry et al. measure reflects a concept other than public preferences and might be a measure of elite opinion due to its non-survey source (Brace et al. 2004, 2006, Norrander 2001).

There is no consensus in the field about which measure is best (Berry et al. 2007a, b, Brace et al. 2007, Erikson et al. 2007, Norrander 2007) and new measures continue to be developed (Lax and Phillips 2009b, Park et al. 2006). Berry et al. (2007a, 127) have gone as far to state that "no single measure adequately captures the concept of state political ideology." As a result, this dissertation will include both the specific issue measure, from Brace et al., and the general measures of opinion, from Erikson et al., Berry et al., and Norrander. By estimating a separate model for each measure of public attitudes, I will reduce the sensitivity of my analysis to the concerns of the validity of any one specific public opinion measure when estimating their effect on judicial decision-making and any differences among the models may allow for greater explanation of how the linkage works. Measures of public preferences that are computed from either Bayesian or multilevel modeling will not be included due to their relatively recent introduction and a lack of study commensurate with the measures discussed above.

Control Variables

The review of literature on judicial decision-making in chapter 2 above has demonstrated that it is primarily an individual process. To control for the effect that individual-level preferences have on the decision-making process, I have obtained ideology scores for each justice sitting on state supreme courts from 1970 to 2004. Traditionally, partisan identification was used to differentiate liberal and conservative justices. Recognizing that the Democratic and Republican party labels have different meanings across the United States led to the creation of an alternative measure of state supreme court justice's ideology. These are available in the form of Party-Adjusted Judge's Ideology (PAJID) scores (Brace et al. 2000b, Langer n.d.). Discrimination based upon sexual orientation or gender are issues that can be identified as liberal and conservative. I expect that justices who are more liberal in their ideology should be more likely to vote to overturn a distinction based on sexual orientation or gender.

The differences in how justices are selected and retained in office have frequently been found to influence judicial decision making behavior in a variety of situations including death penalty appeals (Brace and Boyea 2008, Brace and Hall 1997), challenges to abortion (Brace et al. 1999), campaign and election laws (Langer 2002), workers' compensation laws (Langer 2002), unemployment compensation laws (Langer 2002), and welfare benefits laws (Langer 2002). State governments have always been free from federal influence when designing their judicial branch. Currently, only a small number of states have followed the federal method and given justices a virtually life term

in office.[12] The most frequently used method of selection and retention is what is referred to as the "Missouri Plan" or merit selection.[13] Under this system, typically nominees are recommended to the political branches by a nonpartisan commission. The commission is tasked with evaluating and recommending acceptable candidates to the political branches for selection. Typically, a number of qualified candidates are presented to the governor for selection. Depending on the specifics of the process, the governor's selection may be appointed to the court without the consent of the legislative branch. If a justice seeks to remain on the court, then they run for retention in the form of a plebiscitary election. With the approval of the public, the justice then remains on the court for another term of office until he or she will face the electorate again.

Open elections are also used by the states to compose its judiciary. These elections can be partisan, nonpartisan, or a combination of both. The purely partisan states allow candidates for judicial offices to contest party primaries and if successful, the nominees are placed on the general election ballot with partisan labels. The purely nonpartisan states follow the usual primary and general election process, but candidates appear on a nonpartisan section of the ballot. Two states, Ohio and Michigan, allow

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[12] For example, in Massachusetts the justices of the Supreme Judicial Court are appointed by the governor and serve until they reach a mandatory retirement age of 70. Similar methods are used in New Hampshire, where justices nominated by the governor and approved by the executive council serve until they reach age 70, and in Rhode Island where the justices nominated by the governor and confirmed by both the state house and senate serve a life term.

[13] Missouri was the first state to adopt this selection method in 1940, which was endorsed by the American Bar Association in 1937. One commentator noted that this adoption "deserves inclusion in any chronology of major events in the history of what has been done to improve our courts." (Elliott 1957)

political parties to hold a primary election to determine their candidates, but do not allow the partisan label to be attached to the candidates on the general election ballot.

Table 1: Methods of Retention for State High Courts

Alabama	Partisan Election	Montana	Nonpartisan Election
Alaska	Retention Election	Nebraska	Retention Election
Arizona	Retention Election	Nevada	Nonpartisan Election
Arkansas	Nonpartisan Election	New Hampshire	Life-Like Term
California	Retention Election	New Jersey	Elite Reappointment
Colorado	Retention Election	New Mexico	Partisan Election
Connecticut	Elite Reappointment	New York	Elite Reappointment
Delaware	Elite Reappointment	North Carolina	Nonpartisan Election
Florida	Retention Election	North Dakota	Nonpartisan Election
Georgia	Nonpartisan Election	Ohio	Nonpartisan Election
Hawaii	Elite Reappointment	Oklahoma	Retention Election
Idaho	Nonpartisan Election	Oregon	Nonpartisan Election
Illinois	Partisan Election	Pennsylvania	Partisan Election
Indiana	Retention Election	Rhode Island	Life-Like Term
Iowa	Retention Election	South Carolina	Elite Reappointment
Kansas	Retention Election	South Dakota	Retention Election
Kentucky	Nonpartisan Election	Tennessee	Retention Election
Louisiana	Partisan Election	Texas	Partisan Election
Maine	Elite Reappointment	Utah	Retention Election
Maryland	Retention Election	Vermont	Elite Reappointment
Massachusetts	Life-Like Term	Virginia	Elite Reappointment
Michigan	Nonpartisan Election	Washington	Nonpartisan Election
Minnesota	Nonpartisan Election	West Virginia	Partisan Election
Mississippi	Nonpartisan Election	Wisconsin	Nonpartisan Election
Missouri	Retention Election	Wyoming	Retention Election

For some, the use of popular elections of judges has long been a controversial method of judicial selection and an effort promoting reform continues today.[14] The American Bar Association's Commission on the 21st Century Judiciary espoused the position that the popular selection of judges to state courts politicizes the judiciary and reduces its legitimacy with the public (ABA 2003). Among the evidence the ABA relies on is a 2001 survey commissioned by the Justice at Stake Campaign.[15] When asked "[h]ow much influence do you think campaign contributions made to judges have on their decisions," only 5 percent of the respondents stated that they thought there was "no influence at all." Furthermore, 67 percent of respondents agreed with the statement: "[i]ndividuals or groups who give money to judicial candidates often get favorable treatment." These figures led the commission to declare "[t]he time has come to inoculate America's courts against the toxic effects of money, partisanship, and narrow interests" (ABA 2003). By removing judges from popular selection, the ABA believes the public's confidence and trust will be restored in the judiciary. The absence of elections will remove the need for candidates to raise campaign funds, respond to the questionnaires of interest groups, and participate in public debates and should result in higher levels of public support for the judiciary. Merit selection has also gained the endorsement of a number of other interest groups: the American Judicature Society, the Brennan Center for Justice and the Constitution Project.

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[14] "Putting courts into politics and compelling judges to become politicians in many jurisdictions has almost destroyed the traditional respect for the bench." (Pound 1962)

[15] Survey results are available at http://faircourts.org/files/JASNationalSurveyResults.pdf.

Recent reforms have been enacted with the desire to make judicial elections less political. For example, in 2004 North Carolina held its first judicial election with a number of new reforms in place. The selection and retention method used in North Carolina changed from partisan to nonpartisan elections, added the option of public financing for candidates, lowered limits on campaign contributions, and mandates the publication of a voter guide to provide information about the candidates in appellate court elections. Recently, other states have reformed the selection and retention methods by removing partisan labels from the ballot or adopting the Merit Plan.[16]

In this analysis, each state high court was coded for the type of retention method that was used at the time the decision was made. The states that use a reappointment system that incorporates elected officials rather than members of the public were placed in a single category of elite reappointment.[17] In three states, Massachusettes, New Hampshire, and Rhode Island, justices serve until they reach a mandatory retirement age or die. These states have been classified as having a life-like term and are the baseline category for the models below. Generally, justices who face popular elections to keep their seats decide cases in a more conservative direction.

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[16] In addition to North Carolina, Alabama and Arkansas also switched to nonpartisan elections in 2000 and 2001 respectively and South Carolina moved to a merit plan in 1996.

[17] These states are: Connecticut (Gubernatorial reappointment and legislative confirmation), Delaware (Gubernatorial reappointment from referral by judicial nominating commission and Senate confirmation), Hawaii (reappointment by the judicial nomination commission), Maine (Gubernatorial reappointment and Senate confirmation), New Jersey (Gubernatorial reappointment and Senate confirmation), New York (Gubernatorial reappointment from referral by judicial nominating commission and Senate confirmation), South Carolina (legislative reappointment), Vermont (legislative reappointment), and Virginia (legislative reappointment).

Because state high courts are reactive institutions and hear cases that have been appealed to them rather than creating controversies to rule upon, not every case is expected to be as equally significant to the policy making process. To evaluate the expected importance of the case, I include a measure of whether a third party filed an amicus curiae brief. The procedure of filing an amicus curiae brief allows an outside party to provide the court with its position on the legal issues in the case (Comparato 2003). Caldeira and Wright (1988) describe the filing of an amicus brief as an avenue for interest groups to inform the court of the significance of the decision beyond the immediate effect to the litigants. I expect that as the number of amicus curiae briefs increases, a justice will be more likely to vote to remove a distinction in the law due to the significance of the decision to the policy process.

Today, most states have intermediate appellate courts in place to reduce the workload of its high court while preserving the general right of a losing party to appeal an adverse trial court decision. A potential side effect of this organizational feature is the possibility that there is a difference in the cases that reach a high court depending on whether the case was considered by an intermediate appellate court. A high court that does not have an intermediate appellate court acting as a filter will hear cases that are less controversial or routine (Canon and Jaros 1970). A study by Atkins and Glick (1976), concludes that the inclusion of an intermediate appellate court in a state's judicial system alters the distribution of issues which come before the state's high court. Previous research on judicial decision-making behavior has found that dissent rates are higher in those states with intermediate level appellate courts between themselves and trial courts (Canon and Jaros 1970, Hall and Brace 1989). A dichotomous variable indicating the

presence of an intermediate appellate court in the state's judicial system will be included in the analyses. I expect that if statistically significant, the presence of an intermediate appellate court would increase the probability of a justice to vote to overturn a law that discriminates.

The level of political competition in a state will be included using the folded Ranney Index (Ranney 1976). This index is based upon elections for legislative and executive state offices and is composed of the proportion of success of the parties, the duration of that success, and the frequency of divided government. The index has been folded to remove the identification of which party is in control if there is no competition. The folded measure now ranges from 0.5, indicating complete single party dominance, to 1.0, signifying complete competition, and the point at which dominance becomes competition is 0.85. Research on voting in cases involving a death sentence has often found that justices in politically competitive environments were more likely to vote in a conservative manner (Brace and Hall 1997, Hall and Brace 1992). In states where there is greater competition between the two parties, I would expect that a justice would be more likely to vote to uphold the discriminatory regulation so as to not create a potentially controversial vote that would be politicized.

I also include a measure state government ideology in recognition of the interdependence of the judicial branch with the legislative and executive branches (Berry et al. 1998). This variable is included to control for the preferences of the other branches that would be charged with implementing or enforcing judicial decisions. I expect that like public opinion, government ideology would have a positive effect on the vote of a justice. Justices in states with more liberal governments should be more likely to vote to

overturn a discriminatory law because they would not face a state government unlikely to enforce the decision.

The size of the legal community is measured by the Bureau of Economic Analysis as the State Level Gross Domestic Product of Legal services. The BEA defines its Standard Industrial Classification of Legal Services as "those establishments which are headed by members of the bar and are engaged in offering legal advice or legal services." This variable is measured in millions of current U.S. dollars and has been lagged for one year. This variable is included purely as a control to serve as an indication of the availability of legal resources to potential litigants. I would expect that as the size of the legal community increases, there would be a positive effect on the probability of overturning a discriminatory law.

Criminal justice issues are among the most discussed topics in judicial campaigns (Culver and Wold 1993, Goldberg et al. 2005, Goldberg and Sanchez 2004). Hall (1995) found that a justice is more likely to vote to uphold a death sentence as the murder rate increases. Additionally, in a study focusing on the effects of re-election success of justices, Hall (2001) also concludes that the electoral success of incumbent justices in all of the types of election were negatively influenced by increases in the murder rate. The murder rate variable is taken from the Uniform Crime Reports compiled by the Federal Bureau of Investigation and it represented the number of murders and non-negligent manslaughter per 100,000 residents. This variable has been lagged by one year. There are a number of criminal cases included in the sample for both policy areas. If the murder rate has an effect, I expect that it would be in the negative direction.

Modeling Strategy

The parsimonious solution to estimating the influence of the various independent and control variables on the dependent variable would be a single model with fixed effects for each variable. However, the data in this dissertation has a multilevel structure. There are three distinct levels contained within each observation. On the first level are individual justices. These individual justices decide cases as a member of a larger panel composed of all the justices on the court. For example, the Supreme Court of Michigan has seven members that hear oral argument *en banc* and subsequently each justice casts a vote to determine the outcome of the case. The second level of data contains information on the specifics of the case itself. Each justice sitting on a case is presented with the same facts and relevant laws. The third level contains information about the state's institutional structures and social environment. Beyond these levels, other groupings could be established. Proceeding without consideration of the structure of the data potentially ignores or violates assumptions that are necessary for inference. Maximum Likelihood Estimation includes an assumption of how the errors are distributed and the estimated parameters can be affected by residuals that have influence, resulting in sensitivity to the misspecification of the error term.

Previous research on judicial-decision making has often ignored this detail of the data structure and combined the votes of the justices together while disaggregating the characteristics of the upper levels down to the individual level. When this approach is taken the actions of individual justices are directly linked to higher level data and as a result are assigned attributes that they do not possess as individuals (Heck and Thomas 2000). Zorn (2006) provides an example of how hypothesis testing and the conclusions

that follow are negatively affected by ignoring the presence of groups within data. Furthermore, this approach often ignores information about the context in which the decision-making behavior takes place.[18]

As advised by Primo et al. (2007), robust standard errors will be incorporated into the model to correct for the multi-leveled structure of the data. These clustered standard errors will reduce concerns of non-exchangeability and other violations of statistical assumptions associated with MLE (King 2001). Comparing MLE and GEE model results, Zorn (2006) found that the decision of what unit to cluster the observations on had more influence on the consistency of estimates than the estimation strategy used. There are a number of options in determining on what level to cluster the standard errors due to the structure of the dataset. Because the focus of analysis is the individual justice's voting behavior in different contexts, I will use robust standard errors clustered at the individual justice level to improve the validity of hypothesis testing given this data structure. Maximum Likelihood Estimation (MLE) will be used as the strategy to create parameter estimates that predict the change to the probability of observing an outcome.

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[18] To address these concerns, multi-level modeling has been extended to a wide range of political phenomena and there are a number of advantages to using this method (Gelman and Hill 2007). Incorporating the structure of the data into the analysis will result in greater efficiency and less bias while reducing the probability of falsely rejecting the null hypothesis. Ignoring the hierarchical properties of the data leads to the violation of a number of assumptions made when testing hypotheses (Burstein 1980).
While theoretically there are advantages of using a Multi-Level Model, for this dissertation it is not a practical approach (Primo et al. 2007). Like the example in the Primo et al. article, this model does not converge using modern computing software, indicating that parameters cannot be generated. The model attempted in the Primo et al. article had approximately 45,000 observations. In this study, one policy area has almost 700 observations and the second policy area has approximately 2,000. Theoretically, a multi-level model would be the most appropriate estimation strategy, but it is not possible in this study.

Another approach that has been used is the inclusion of a multiplicative interaction term to allow the effect of one independent variable on the dependent variable to vary within groups of other independent variables. Given recent work on the significance testing when using interaction terms, additional attention will be given to whether interaction terms are needed in the model and if so how they should be interpreted (Ai and Norton 2003, Berry 1999, Berry et al. 2008, Berry and Rubin 2007, Brambor et al. 2006, Braumoeller 2004, Kam and Franzese 2006). If there is an interaction between public opinion and retention method, I expect that justices

Research on the appropriateness of interactions has developed some practical suggestions on how to determine whether an interactive relationship exists. Berry and Rubin (2007) use Monte Carlo methods to demonstrate that the practice of examining the statistical significance of the product term's coefficient is not a sufficient test for an interaction between two independent variables. Instead, Berry and Rubin suggest measures of model performance be examined to evaluate the appropriateness of including interaction terms. One such method is to compare the area under the receiver-operator characteristic (ROC) curve between the base model with interaction terms and the model that included interaction terms. Berry and Rubin argue that among three possible fit-based estimators, the ROC-based estimator of the relationship was the most likely to correctly identify that an interactive relationship existed and least likely to indicate an interactive relationship where there was none.

Conclusion

In this chapter, I have described the variables and methods that are going to be used in this analysis. The dependent variable of individual justice's votes was obtained

by coding a list of gay rights and sexual discrimination cases from previous works. Given the difficulty in measuring public preferences at the state level, I will perform the analysis four times, each with a different measure of public opinion. This will ensure that the conclusions made are not dependent on the choice of competing public opinion measures. Two separate policy areas will be analyzed to ensure that the findings are not dependent on the type of cases in the analysis. If the results indicate that there is an opinion-policy linkage, then further analysis concerning whether elections provide that linkage will be performed.

Chapter 4 Discrimination Based on Sexual Orientation

The regulation of private behavior in the consideration of the public good includes a number of highly personal actions. Within the principle of a state's inherent police powers are the ability to regulate health, safety, welfare, and morals of its citizens. State governments use this ability to create laws that prohibit specific physical acts and the possession of obscene objects. Because of this capacity to draw distinctions between acceptable and prohibited behavior, groups are established and future laws can be developed that build upon or extend the original groupings.

Discrimination based upon sexual orientation has been rooted in the consideration of homosexuality as an individual trait, such as a personal moral failing, criminal act, or medical condition, and not a characteristic of a group of people (Slovenko 1985). As a result of this characterization, discrimination against gays and lesbians has taken many forms and is persuasive throughout society. One source for discrimination was the use of religion to construct the criminal laws of governments. Sodomy was considered a sin and a crime against nature to be punished by death.[19] In the United States, the punishment for sodomy has decreased over time and it is no longer a crime. Another basis for discriminating against gays and lesbians was the belief that homosexuality was an illness that could be treated and cured. This perspective of homosexuals as mentally ill gave further reason to exclude gays and lesbians from certain occupations like teaching. Although homosexuality is no longer considered a mental disorder by the American

[19] According to the Bible "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood [shall be] upon them." (Leviticus 20:13, King James Version of 1769)

Psychiatric Association, it is still considered to be a question of morality by many in American society (Fiorina et al. 2011).

A person's sexual orientation is used to publically discriminate directly against individuals in employment, public accommodations, housing, credit, marriage. For example, gays and lesbians are prohibited from serving openly in the national armed forces. Until 1995, gays and lesbians were prohibited from holding positions in the national government that required security clearance. Sexual orientation is not always included among the protected personal characteristics like race, color, national origin, religion, sex, age, or disability often are when prohibiting discrimination. Some institutions like the U.S. Equal Employment Opportunity Commission include sexual orientation as a form of conduct that does not adversely affect employee performance. This has a practical result of not allowing an individual to be fired because of their sexual orientation, but the exclusion of sexual orientation as a class provides less protection than if the class were explicitly mentioned. Attempts to include sexual orientation as a class have been proposed in bills dating back to 1974, and recently as the Employment Non-Discrimination Act (ENDA), but the law has not been passed. At the state level, Wisconsin was the first state to pass an anti-discrimination law that included sexual orientation in 1982. Since 1982, other state and local governments have included sexual orientation in their laws, but the lack of a national law has created conditions that allow varying levels of discrimination against gays and lesbians working in the United States.

I have constructed a dataset of all gay rights decisions made by state supreme courts from 1981 - 2004. The cases for 1981 – 2000 were initially identified by Pinello in his text, *Gay Rights and American Law* (2003). Using identical search terminology,

the case list was augmented to include cases from 1981 to 2004. Cases where the sexual orientation of the parties was not the justification for discrimination or was merely tangential to the claim presented were not included in this analysis. Table 2 displays the distribution of these cases among the states.

Table 2: The number of sexual orientation discrimination cases by state, 1981 - 2004.

Alabama	3	Montana	1
Alaska	2	Nebraska	2
Arizona	1	Nevada	0
Arkansas	2	New Hampshire	1
California	2	New Jersey	2
Colorado	1	New Mexico	0
Connecticut	2	New York	5
Delaware	1	North Carolina	0
Florida	1	North Dakota	2
Georgia	5	Ohio	4
Hawaii	1	Oklahoma	3
Idaho	0	Oregon	0
Illinois	0	Pennsylvania	2
Indiana	0	Rhode Island	3
Iowa	3	South Carolina	0
Kansas	0	South Dakota	3
Kentucky	1	Tennessee	1
Louisiana	3	Texas	2
Maine	1	Utah	1
Maryland	3	Vermont	4
Massachusetts	9	Virginia	2
Michigan	0	Washington	3
Minnesota	0	West Virginia	2
Mississippi	5	Wisconsin	3
Missouri	1	Wyoming	1

Total = 94

The cases were grouped into six broad categories based on the legal and substantive policy issues raised in the case. This will allow me to control for the effect of any jurisprudential regimes, the set of related legal precedents in an area of the law

(Kritzer and Richards 2003). For example, it is expected that every legal challenge to the constitutionality of a criminal prohibitions of sodomy will be a discussion of the individual's right to privacy. Table 3 displays the percentage that each case type composes of the sample for each model.

There were 94 cases in the dataset resulting in approximately 700 individual votes. Long (1997) suggests that this is a more than adequate number of observations for maximum likelihood models.

Table 3: Percentage of observations by case type in sexual orientation models.

	Marriage	Benefits	Child Custody	Sodomy	Discrimination	Other
Berry et al.	1.88	11.54	49.93	12.12	20.20	4.33
Brace et al.	1.78	11.89	50.52	12.48	18.87	4.46
Erikson et al.	1.77	10.47	50.29	12.39	20.65	4.42
Norrander	1.88	11.54	49.93	12.12	20.20	4.33
Average	1.83	11.36	50.17	12.28	19.98	4.39

Marriage Cases

According to reports by the General Accounting Office, marital status is a determinant in receiving benefits, rights, or privileges in 1,138 federal statutory provisions (GAO 1997, 2004). Many of the same benefits conferred by state and local governments and private entities are similarly determined by marital status. States discriminate against gays and lesbians by only allowing opposite sex partnerships to obtain marriage licenses. Without a license, gay or lesbian commitment ceremonies have no legal credibility and confer no additional rights onto the couple as a legally recognized family.

The current debate over gay marriage was sparked by a Hawaii Supreme Court decision, which reversed a lower court's finding that discrimination of same-sex couples is allowed under the state constitution's equal protection clause (*Baehr v. Lewin* 1993). The subsequent trial court decision that held there was no compelling state interest in allowing such discrimination (*Baehr v. Miike* 1996) was effectively overturned in 1998 by a state constitutional amendment. This amendment reserved the power to grant same-sex marriages to the legislature before the Hawaii Supreme Court could review the decision.

One of the effects of the Hawaii decision was that it amplified the question of same-sex marriage as part of the gay rights debate and the rights movement in general. After the Hawaii decision, a number of states have ratified amendments to their state constitutions that explicitly banned the recognition of all same-sex marriages. Of these additional states, only Alaska did so in response to a lower state court decision (*Brause v. Bureau of Vital Statistics* 1998). Some states also responded by passing laws stating explicitly that marriage was to be between opposite sex partners. Between 1993 and 2004, 31 states passed legislation prohibiting same-sex marriages within their jurisdiction. During the same period, 33 states passed legislation denying recognition of same-sex marriages performed from outside of the state. These figures may have been higher had a number of states not already explicitly defined marriage as being between a man and a woman or passed legislation prohibiting same-sex marriage before the Hawaii decision.

The first states that allowed for some form of same-sex marriage have done so at the command of their state supreme courts. A 1999 Vermont State Supreme Court

decision ordered the state legislature to provide the equal benefits of marriage to same-sex couples (*Baker v. State* 1999). This decision was followed by the 2003 Massachusetts Supreme Judicial Court decision *Goodridge*, which held that the state's constitution does not allow for the disparate treatment of same-sex couples seeking the protections, benefits, and obligations emanating from marriage. Following a request for clarification from the Massachusetts Senate, the Supreme Judicial Court held that civil unions would not fulfill the constitutional requirements of the *Goodridge* decision. On April 20, 2005, Connecticut legislatively created civil unions for its citizens in same-sex relationships. The legislation also defines marriage as being between opposite sex partners. The passage of this law preempted a court challenge filed in the Connecticut judicial system (*Kerrigan & Mock v. Connecticut Dept. Of Public Health* 2008). Whether the threat of a negative court decision played a role in the passage of this legislation is unknown at this time. In December 2006, New Jersey passed a law creating civil unions to comply with a state high court decision (*Lewis et al. v. Harris* 2006). On May 15, 2008, California ruled that the state's statutory scheme, which limits the designation of the legal term "marriage" to opposite sex couples, violated the equal protection principles in the state constitution (*In Re Marriage Cases* 2008). A subsequent public proposition overturned the California decision and the state high court affirmed the proposition's effect (*Strauss v. Horton* 2009). The Iowa Supreme Court also legalized same sex marriage because of a high court decision (*Varnum v. Brien* 2009).

Child Custody Cases

In addition to regulating the entrance into a marriage, states also have control over the aftereffects of a terminated marriage. Child custody disputes that arise from the

dissolution of a state sanctioned marriage are typically resolved in the family courts of the states. Gay and lesbian parents that were previously part of a heterosexual marriage have sought to ensure that their sexual orientation is not a negative influence when determining child custody. For example, if a state had a statute against sodomy, then gay and lesbian parents were assumed to be potentially subjecting their children to criminal activity and therefore it was in the best interest of the child to grant custody to the heterosexual parent. Additionally, this rationale was used to justify restrictive visitation orders that would exclude the child from visiting a gay or lesbian parent while another individual of the same sex was also in the residence, regardless of whether or not they were in a sexual relationship.

Furthermore, for those gays and lesbians who seek to adopt or serve as foster parents, the state government determines what criteria are to be considered relevant. In the state of Florida, gays and lesbians are excluded from becoming parents by adoption, though they may still serve as foster parents. Sexual orientation has also been a factor when interpreting state law to determine whether a non-biological parent, or the partner of an individual who has previously adopted a child, is eligible to adopt his or her partner's children through what are commonly termed “second parent adoptions”. Adoption laws also have to be interpreted to determine whether gays and lesbians are eligible for other types of adoptions, such as stepparent or joint adoptions.

Sodomy Cases

Among the powers of the state are police powers, which can make the private relations between individuals a crime. The definition of sodomy often criminalized consensual same-sex relations, and the presence of these laws and any subsequent

convictions from these laws could be used to discriminate in other areas of the law like child custody or employment. Constitutional challenges to a state's sodomy prohibitions have been made on both equal protection and privacy claims. For example, in 2002, the Arkansas Supreme Court held that the state's sodomy statute was unconstitutional under the state constitution because it violated the fundamental right to privacy and it discriminated against gays and lesbians (*Jegley v. Picado* 2002). The U. S. Supreme Court invalidated the remaining 13 state sodomy statutes under similar grounds in 2003 (*Lawrence v. Texas* 2003).

Benefits Cases

Many states have instituted programs that allowed gays and lesbians to register as domestic partners in lieu of civil marriage. However, while providing some legal protections and benefits, domestic partnerships do not approach the level of benefits offered to married couples. An example of a case with this type of issue is *Snetsinger v. Montana University System*, where the Montana Supreme Court held that the state must provide the domestic partners of university employees with the same benefits options that it provided married couples (*Snetsinger v. Montana University System* 2004). In addition to mandating the equal treatment of gays and lesbians, state supreme courts also had to resolve challenges from taxpayers who petition the court to stop the extension of benefits to non-married couples (*City of Atlanta v. Mckinney* 1995).

Discrimination Cases

In regards to discrimination, the state supreme courts have had to determine what responsibilities the state government has to protect its gay and lesbian citizens from violations of their civil rights and liberties. The Supreme Court of New Jersey had to

consider whether a private organization could expel one of its members for being gay (*Dale v. Boys Scouts of America* 1999). An example of discrimination in the workplace can be found in *Madsen v. Erwin and Others* where a writer for The Christian Science Monitor was fired because she was a lesbian and had refused to seek treatment for her sexual orientation through the healing of the Christian Science Church (*Madsen v. Erwin and Others* 1985). Other activities where gays and lesbians have encountered disparate treatment in the law include the process of changing a person's legal name (*In Re Bicknell et al.* 2002), receiving student housing (*Levin et al. v. Yeshiva University et al.* 2001), participating in public parades (*Irish-American Gay, Lesbian, and Bisexual Group of Boston v. City of Boston* 1994), recognition of a student group by a public university (*Gay Activists Alliance v. The Board of Regents of the University of Oklahoma* 1981), and admission to a legal bar association (*Florida Board of Bar Examiners: In Re N.R.S.* 1981).

Other Cases

There were a few cases whose subject matter does not fit neatly into one of the categories above and they were placed in a fifth category for analysis. For example, a student group sought an injunction to prevent U.S. military organizations from recruiting on campus because of the military's prohibition against gays and lesbians from serving openly in the military (*Gay and Lesbian Law Students Association v. Board of Trustees* 1995). In *Crooke v. Gilden*, a court had to consider whether a property contract was invalid because the parties who entered into it were lesbians (*Crooke v. Gilden* 1992). In *Collins v. Faith School District*, a court was asked to determine whether a teacher could be fired for answering questions by students about the sexual activities of gays and

lesbians as part of a sex education lesson (*Collins v. Faith School District* 1998). These cases were included in the analysis because they centered on the role of sexual orientation in the law.

Bivariate Model Results

I first ran a set of models where the only independent variable was the measure of public preferences. This will allow for the comparison of the estimated coefficients of the bivariate and fully specified models to ensure that the effect of the public opinion is consistent across models and not the result of an incorrectly specified model. For each of the four models, the measure of public preferences was statistically significant and in the expected direction. The results of each model can be found in Tables 13- 17 located in the appendix to the chapter. The models correctly predicted between 55.91 and 63.13 percent of the observations. To assess how well the models correctly discriminates between possible outcomes, the area under the Receiving Operating Characteristic Curve was computed. The area under the ROC Curve for the four models ranges from 0.576 to 0.630 and none of the models reaches the 0.7 level that indicates an "acceptable" amount of discrimination (Hosmer and Lemeshow 2000 at 162). These low values of the area under the ROC Curve indicate that the models are only slightly better at predicting a justice's vote than flipping a coin. Although statistically significant, a measure of public opinion alone is not sufficient to explain the voting behavior of high court justices.

Multivariate Model Results

Tables 4 – 7 display the estimated coefficients for only the public preferences variable from the multivariable models. The full model results can be found in the appendix. Overall, each of the four models correctly predicted approximately two-thirds

of the cases. Another measure of fit, the area under the receiver-operator characteristic (ROC) curve, indicated that each model produced an "acceptable amount" of discrimination when comparing the observed and predicted votes of the justices (Hosmer and Lemeshow 2000).

Table 4: Estimated coefficient for the Berry et al. measure of public preferences in cases involving claims of discrimination based on sexual orientation.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	0.040	0.011	0.000
Number of Observations	693		
Area Under ROC Curve	0.743		
Percent Correctly Predicted	67.39		

Note: Standard Errors are clustered on the individual justice

As seen in Table 4, the Berry et al. measure of citizen ideology is statistically significant and in the expected positive direction. Justices were more likely to vote to remove a restriction based upon sexual orientation as the citizenry becomes more liberal. As this model is specified, the probability that a justice votes to remove a restriction based on sexual orientation increases by 0.6430 as we move from the minimum observed value to the maximum observed value of public liberalism, holding all other variables constant. Predicted probabilities with 95% confidence intervals were generated using the CLARIFY program for the full range of possible values and can be seen in Figure 1 located in the appendix to this chapter (King et al. 2000).

Table 5 Estimated coefficient for the Brace et al. measure of public preferences in cases involving claims of discrimination based on sexual orientation.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Acceptance of Homosexuality	4.824	2.163	0.026
Number of Observations	673		
Area Under ROC Curve	0.731		
Percent Correctly Predicted	64.49		

Table 5 contains the coefficient from the model utilizing the Brace et al. measure of public preferences. This measure of public opinion, which is specifically the level of tolerance towards homosexuals, is statistically significant and in the expected positive direction. Judges in states that are more tolerant of homosexuals are more likely to vote to remove a law that differentiates based upon sexual orientation. The probability that a justice votes to remove a restriction increases by 0.4277 as we move from the minimum observed value to the maximum observed value of tolerance towards homosexuals. Predicted probabilities with 95% confidence intervals were generated using the CLARIFY program for the full range of values and can be seen in Figure 2 (King et al. 2000).

Table 6: Estimated coefficient for the Erikson et al. measure of public preferences in cases involving claims of discrimination based on sexual orientation.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Public Opinion	7.969	2.038	0.000
Number of Observations	678		
Area Under ROC Curve	0.7433		
Percent Correctly Predicted	67.85		

Table 6, using the measure developed by Erikson et al., also indicates that the justices serving in states that are more liberal are more likely to vote in a manner that would remove a restriction based upon sexual orientation. The probability that a justice votes to remove a restriction increases by 0.5509 as we move from the minimum observed value to the maximum observed value of public opinion. Predicted probabilities with 95% confidence intervals were generated using the CLARIFY program for the full range of values and can be seen in Figure 3 (King et al. 2000).

Table 7: Estimated coefficient for the Norrander measure of public preferences in cases involving claims of discrimination based on sexual orientation.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	1.259	0.626	0.044
Number of Observations	693		
Area Under ROC Curve	0.733		
Percent Correctly Predicted	65.51		

Finally, the estimates presented in Table 7 indicate that as a state's citizens become more liberal, using the Norrander measure of public preferences, the justices in that state are more likely to remove a restriction based upon sexual orientation. The probability that a justice votes to remove a restriction increased by 0.2882 as we move from the most conservative observed value to the most liberal observed value of Norrander's citizen liberalism measure. Predicted probabilities with 95% confidence intervals were generated using the CLARIFY program for the full range of values and can be seen in Figure 4 (King et al. 2000).

The measure of public preferences was statistically significant and in the expected direction in all four models. The results demonstrate that the decisions of state high court justices were influenced by the public's preferences. In states that are more liberal, justices are more likely to change the law to match the preferences of the public. Given that a diverse set of measures of public preferences had a consistent effect on the direction of a justice's vote in gay rights cases, we can conclude that for this issue public opinion can help explain why the laws concerning gays and lesbians are different among the states. The models demonstrate that the rights of gays and lesbians are being expanded in the states that are either more liberal or more tolerant of homosexuals. The justices who vote to expand rights have confidence that the public will not be incline to hold their votes against them in future elections, if elected, and will support the changes in the law.

Control Variables

Table 8 displays the remaining variables for each of the separate models. For ease of interpretation, only those coefficients with a p-value less than 0.10 are presented

in the table. The coefficients whose p-value is between 0.10 and 0.05 are marked with an asterisk. The full results for each separate model are available in the appendix.

Table 8: Coefficient estimates for control variables based on statistical significance.

Control Variable	Berry et al.	Brace et al.	Erikson et al.	Norrander
Partisan Election	---	---	---	---
Nonpartisan Election	1.563	1.751	2.160	1.448
Retention Election	1.491	1.654	1.959	1.389
Elite Reappointment	---	---	0.979	---
Justice Ideology	---	---	---	---
Intermediate Appellate Court	0.921*	---	---	---
Number of Amici Briefs	0.055	0.096	0.058*	0.051*
Same-Sex Marriage	-2.058	-2.541	-1.790*	---
Sodomy Prohibitions	-1.579	-1.186*	-1.303*	-1.356
Discrimination	-1.346	---	-1.082*	---
Benefits	---	---		---
Child Custody	-1.377	-1.046*	-1.286	-1.148*
Same-Sex Marriage Ban	---	---	---	---
Legislative Repeal of Sodomy	---	0.519	---	0.529
Right to Privacy in the Constitution	---	---	---	---
Availability of Direct Democracy	-0.873	-0.835	-0.654	-1.023
Legal Community	---	---	---	---
Murder Rate	---	---	---	---
Government Ideology	---	0.012	---	0.008*
Ranney Competition Index	-6.096	-5.974	-6.422	-6.637

Note: Estimates denoted by * 0.1 > p > 0.05

The first group of control variables indicates the type of retention method that was used by the state where the justice was seated. The excluded group was the indicator for

a life-like tenure. Across the four models, justices who were subject to nonpartisan or retention elections to remain on the bench were more likely to vote to remove a distinction in the law based upon sexual orientation than justices who serve a life-like term. For each of the models, the predicted probability of a positive vote was higher in those situations where a justice was subject to nonpartisan or retention elections than the remaining methods. This is contrary to previous research that has found that justices who face retention by popular elections vote in a more conservative direction. However, some of this previous research does not take into account public preferences as a variable. Once the public's preferences are included, the reason for elections alone to influence judicial behavior is controlled for.

Table 9: Predicted Probabilities of a vote favoring the rights claims of gay & lesbians using the Berry et al. measure of public preferences.

	Berry et al.	Brace et al.	Erikson et al.	Norrander
Partisan Election	0.375	0.435	0.467	0.419
Nonpartisan Election	0.699	0.712	0.504	0.719
Retention Election	0.683	0.691	0.768	0.707
Elite Reappointment	0.471	0.428	0.730	0.552
Life-Like Term	0.327	0.300	0.276	0.375

The variable measuring the ideology of the justice was not statistically significant in any of the four models. Given that during the period of this study there was little difference between Republicans and Democrats on the issue of gay rights, this finding is not surprising. Previous research on judicial decision-making was based on cases involving the death penalty, a partisan issue. Additionally, the rights of gays and lesbians may be considered a morality policy and previous research has shown that public

officials defer to public opinion over their own personal policy preferences (Mooney and Lee 1995).

In only one of the four models was the presence of an intermediate appellate court approach statistical significance. In the model using the Berry et al. measure, the coefficient was indicating that the presence of an intermediate appellate court increased the probability that a justice would vote to reverse a pro-gay law compared to those who had none. Holding all other variables constant in the model using the Berry et al. measure, the predicted probability of a positive vote increases from 0.1929 to 0.3750, for a change in the probability of 0.1821, with the addition of an intermediate appellate court. The presence of an intermediate appellate court changes the composition of the high court's docket and the cases that are frivolous are disposed of before they arrive to the high court.

In all four models, there was a positive and statistically significant estimate for the number of amicus curiae briefs filed in a case. This indicates that as the number of groups outside of the litigation participating in the case increases, a justice is more likely to vote to remove a distinction based upon sexual orientation. By generating predicted probabilities for a pro-gay vote as the number of amicus briefs filed in a case increases from the minimum to the maximum observed value, we can see that there is a substantial effect. The range of increases in the probability of a pro-gay vote was of 0.3141 for the Norrander model up to 0.4674 for the model incorporating the Brace et al. measure. The increased attention that outside briefs bring to a case can alert a justice that there is support for a change in the law. The presence of amicus curiae briefs can also serve as a

measure of interest group involvement in the state as those that are interested in the outcome of the case will file a brief.

The estimate indicating whether the state had banned the recognition of same sex marriages did not reach the level of statistical significance in any of the four models. In two of the model specifications, those using the Norrander and Brace et al. measures, justices were more likely to vote to overturn a distinction based upon sexual orientation if the legislature has previously removed the criminal prohibition against consensual same-sex sodomy. The magnitude of this effect was to increase the probability of a pro-gay vote by 0.1290 in the Brace et al. model and 0.1313 in the Norrander model.

In states where direct democracy mechanisms were in place, justices were less likely to vote to remove a distinction based upon sexual orientation in all four of the models. Given the small number of gays & lesbians in a state and the low levels of tolerance towards homosexuals, this result indicates that justices in states with direct democracy are not as willing to vote in a counter-majoritarian direction and risk having their decision overturned by the people. Additionally, direct democracy mechanisms provide an additional opportunity for a court's decision to be politicized by other political actors in the state. The magnitude of the effect was to decrease the probability of a pro-gay vote by 0.1699 in the model using the Erikson et al. measure to 0.2132 in the model using the Norrander measure.

The estimate for the level of political competition in a state, the Ranney Competition Index, was statistically significant and in the negative direction in all four of the models. As specified in this model, justices are less likely to vote to overturn a legal distinction based upon sexual orientation when they are in states that have higher levels

of political competition between the two major parties. The justices may be reluctant to do so because it would provide the political branches a decision to attack the judicial branch with and politicize the court's activities. The predicted probability of a pro-gay vote decreased by 0.4523 for the Berry et al. model and 0.4965 for the Erikson et al. model as the value of political competition increased from the minimum observed value to the maximum value.

There is also a pattern among the models concerning the subject matter of the case. Table 10 displays the predicted probabilities for each case type. Across the four models, justices are least likely to cast a positive vote in cases that involve a challenge to marriage laws. Justices are also slightly less inclined to vote positively in cases that involve either sexual relations or child custody. Using the terminology from the psychological theory that the Attitudinal Model is based upon, the justices are influenced by the situation that they encounter the object. There was an observed difference between cases that involved the private relationships of the litigants and those that involved public discrimination.

Table 10: Predicted probability of a pro-gay vote by case issue type.

	Berry et al.	Brace et al.	Erikson et al.	Norrander
Marriage	0.0573	0.0470	0.1910	0.1081
Sodomy	0.3224	0.3847	0.2959	0.3250
Discrimination	0.3750	0.4349	0.3729	0.4190
Benefits	0.4467	0.4544	0.4196	0.4434
Child Custody	0.3679	0.4182	0.3310	0.3724
Other	0.6976	0.6717	0.6197	0.6515

Government ideology was statistically significant in two of the four models. In the models using the Brace et al. and Norrander measures, a justice was more likely to vote to remove the distinction in the law as the state's government became more liberal. Generated predicted probabilities show an increase in the likelihood of a pro-gay vote of 0.2635 for the Brace et al. model and 0.1889 for the Norrander model as the value of government ideology moves from the minimum observed value to the maximum.

Justices in states where the right to privacy is in the state's constitution were not more likely to vote to remove a distinction in the law based upon sexual orientation. Although it was hypothesized that a right to privacy present in a state would provide justices with a legal justification to overturn a discriminatory law, there are other legal issues involved in these types of cases. In none of the models did the state's murder rate influence the voting behavior of the justices. While the state's murder rate has an influence on criminal justice appeals, there was no statistical connection with cases involving a discrimination claim by gays and lesbians. The size of the legal community in a state did not have an influence upon the justice's voting behavior. The variation among the states of legal resources available to litigants did not influence how cases were disposed of.

Interactive Effect

The control variables indicating the method of retention that a state employs suggests that in comparison to a life-like term and holding all other variables constant, the justices who face nonpartisan or retention elections are more likely to vote in a pro-gay manner. This finding suggests that the use of interaction terms between the public

opinion measure and the type of retention method employed may provide us with additional insight into how the linkage operates.

Each of the models above indicates that justices are influenced by public preferences when casting their vote in cases about sexual orientation. The next step would be to narrow in on the mechanism that provides this linkage between the two. Those who advocate for a democratically selected judiciary claim that the threat of popular elections will force justices to consider the public's opinion when acting.

To address this question, a second set of models for each of the measures of public opinion were estimated with an interaction term between public opinion and the method of retention the state used. If judicial elections have their intended effect and result in a judiciary that is concerned with the public's preferences, then the influence of public opinion should vary with the retention method in place.

According to Berry and Rubin (2007), when considering whether an interaction term should be included measures of goodness of fit can be examined to evaluate whether there is an interactive effect. Compared to the non-interactive models, those with interactions terms saw improved predictive abilities. However, the size of this improvement is substantively small. Tables 11 and 12 contain the changes in fit – based evaluations for the interactive models compared to the original models.

Table 11: A comparison of the percentage of observations correctly predicted for each measure of public opinion excluding and including interaction terms with retention methods.

Public Opinon Measure	No Interaction	Interaction	Improvement
Berry et al.	67.39	67.39	0.002
Brace et al.	64.49	65.68	1.189
Erikson et al.	67.85	69.03	1.180
Norrander	65.51	68.40	2.886

Table 12: A comparison of the area under the Receiver-Operator Characteristic Curve

Public Opinon Measure	No Interaction	Interaction	Improvement
Berry et al.	0.743	0.752	0.009
Brace et al.	0.731	0.731	0.000
Erikson et al.	0.743	0.751	0.007
Norrander	0.733	0.739	0.005

The goodness of fit measures in Tables 11 and 12 lead me to conclude that there is no interactive effect between public opinion and the judicial selection methods used by a state. There is almost zero improvement in the area under the ROC curve and there is little improvement in the percentage of cases correctly predicted for some of the models.

Conclusion

The analysis presented in this chapter leads me to conclude that justices are influenced by public preferences when voting in cases challenging a distinction in the law based on sexual orientation. A justice becomes more likely to vote to remove a distinction in the law based upon sexual orientation when the state is more liberal in its

policy preferences, holding all other variables constant as specified in the four models. That the finding was consistent across all four models using different measures of public preferences for bivariate and multivariate models suggests that the finding is robust to any measurement errors or bias that may be present.

A comparison of estimates derived from models with and without interaction terms between the measure of public opinion and the method of retention employed by the states does not indicate that there is an interactive relationship. The absence of an interactive effect suggests that justices on state high courts are not forced in line with the public's preferences because of electoral pressures. Justices in gay rights cases are influenced by public preferences regardless of how they are retained on the bench.

The results of the analysis suggest that the decision-making process of state high court justices is similar to the policy making process described in the study of state policy. Justices in this analysis were influenced by a state's public preferences, competition between political parties, the presence of direct democracy measures, and the participation of interest groups in addition to the legal characteristics of the cases. These results suggest that potential litigants should consider the political environment when deciding whether to appeal an adverse decision to a high court.

APPENDIX A

Table 13: Logit estimates for a bivariate model including the Berry et al. measure of public preferences in cases involving discrimination based upon sexual orientation.

	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology (Berry et al.)	0.025	0.005	0.000
Constant	-0.925	0.256	0.000
Number of Observations	723		
Area Under ROC Curve	0.63		
Percent Correctly Predicted	62.66		

NOTE: Standard errors are clustered on the individual justice.

Table 14: Logit estimates for a bivariate model including the Brace et al. measure of public preferences in cases involving discrimination based upon sexual orientation.

	Coefficient Estimate	Standard Error	P-Value
Acceptance of Homosexuality (Brace et al.)	2.884	0.984	0.003
Constant	-0.292	0.218	0.181
Number of Observations	690		
Area Under ROC Curve	0.576		
Percent Correctly Predicted	56.81		

NOTE: Standard errors are clustered on the individual justice.

Table 15: Logit estimates for a bivariate model including the Erikson et al. measure of public preferences in cases involving discrimination based upon sexual orientation.

	Coefficient Estimate	Standard Error	P-Value
Public Opinion	3.356	0.788	0.000
Constant	0.729	0.153	0.000
Number of Observations	689		
Area Under ROC Curve	0.624		
Percent Correctly Predicted	63.13		

NOTE: Standard errors are clustered on the individual justice.

Table 16: Logit estimates for a bivariate model including the Norrander measure of public preferences in cases involving discrimination based upon sexual orientation.

	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	1.023	0.339	0.003
Constant	3.914	1.208	0.001
Number of Observations	728		
Area Under ROC Curve	0.586		
Percent Correctly Predicted	55.91		

NOTE: Standard errors are clustered on the individual justice.

Table 17: Logit estimates including the Berry et al. measure of public preferences in cases involving discrimination based upon sexual orientation.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	0.040	0.011	0.000
Partisan Election	0.211	0.515	0.682
Nonpartisan Election	1.563	0.429	0.000
Retention Election	1.491	0.424	0.000
Elite Reappointment	0.606	0.417	0.146
Justice Ideology	0.003	0.005	0.505
Intermediate Appellate Court	0.921	0.545	0.091
Number of Amici Briefs	0.055	0.028	0.047
Same-Sex Marriage	-2.058	1.045	0.049
Sodomy Prohibitions	-1.579	0.688	0.022
Discrimination	-1.346	0.635	0.034
Benefits	-1.050	0.691	0.129
Child Custody	-1.377	0.618	0.026
Same-Sex Marriage Ban	-0.151	0.204	0.461
Legislative Repeal of Sodomy	0.345	0.240	0.150
Right to Privacy in the Constitution	0.176	0.323	0.587
Availability of Direct Democracy	-0.873	0.250	0.000
Legal Community	0.000	0.000	0.951
Murder Rate	0.011	0.034	0.743
Government Ideology	-0.003	0.005	0.615
Ranney Competition Index	-6.096	1.339	0.000
Constant	3.142	1.636	0.055
Number of Observations	693		
Area Under ROC Curve	0.743		
Percent Correctly Predicted	67.39		

NOTE: Standard errors are clustered on the individual justice.

Table 18: Logit estimates including the Berry et al. measure of public preferences in cases involving discrimination based upon sexual orientation with interactions between retention method and public preferences.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	0.020	0.025	0.417
Citizen Ideology X Partisan Election	0.044	0.033	0.188
Citizen Ideology X Retention Election	0.024	0.028	0.394
Citizen Ideology X Elite Reappointment	0.068	0.027	0.011
Citizen Ideology X Nonpartisan Election	0.009	0.027	0.737
Partisan Election	-2.094	1.944	0.281
Nonpartisan Election	0.553	1.766	0.754
Retention Election	-0.094	1.806	0.959
Elite Reappointment	-3.725	1.777	0.036
Justice Ideology	0.002	0.005	0.660
Intermediate Appellate Court	0.810	0.556	0.145
Number of Amici Briefs	0.069	0.031	0.028
Same-Sex Marriage	-2.350	1.227	0.055
Sodomy Prohibitions	-1.532	0.716	0.032
Discrimination	-1.324	0.657	0.044
Benefits	-0.902	0.716	0.208
Child Custody	-1.329	0.633	0.036
Same-Sex Marriage Ban	-0.146	0.221	0.508
Legislative Repeal of Sodomy	0.262	0.272	0.336
Right to Privacy in the Constitution	0.224	0.332	0.501
Availability of Direct Democracy	-0.828	0.273	0.002
Legal Community	0.000	0.000	0.895
Murder Rate	0.006	0.035	0.870
Government Ideology	-0.004	0.005	0.434
Ranney Competition Index	-5.823	1.382	0.000
Constant	4.526	2.220	0.041
Number of Observations	693		
Area Under ROC Curve	0.752		
Percent Correctly Predicted	67.39		

Note: Standard Errors are clustered on the individual justice

Table 19: Logit estimates including the Brace et al. measure of public preferences in cases involving discrimination based upon sexual orientation.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Acceptance of Homosexuality	4.824	2.163	0.026
Partisan Election	0.586	0.670	0.382
Nonpartisan Election	1.751	0.536	0.001
Retention Election	1.654	0.501	0.001
Elite Reappointment	0.559	0.490	0.254
Justice Ideology	0.005	0.005	0.281
Intermediate Appellate Court	0.483	0.612	0.430
Number of Amici Briefs	0.096	0.033	0.004
Same-Sex Marriage	-2.541	1.125	0.024
Sodomy Prohibitions	-1.186	0.667	0.076
Discrimination	-0.978	0.617	0.113
Benefits	-0.899	0.668	0.178
Child Custody	-1.046	0.596	0.079
Same-Sex Marriage Ban	-0.105	0.213	0.621
Legislative Repeal of Sodomy	0.519	0.256	0.042
Right to Privacy in the Constitution	-0.512	0.418	0.221
Availability of Direct Democracy	-0.835	0.276	0.002
Legal Community	0.000	0.000	0.757
Murder Rate	-0.023	0.032	0.479
Government Ideology	0.012	0.004	0.008
Ranney Competition Index	-5.974	1.449	0.000
Constant	3.252	1.708	0.057
Number of Observations	673		
Area Under ROC Curve	0.731		
Percent Correctly Predicted	64.49		

Note: Standard Errors are clustered on the individual justice

Table 20: Logit estimates including the Brace et al. measure of public preferences in cases involving discrimination based upon sexual orientation with interactions between retention method and public preferences.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Acceptance of Homosexuality	18.605	12.720	0.144
Acceptance of Homosexuality X Partisan Election	-9.881	14.145	0.485
Acceptance of Homosexuality X Nonpartisan Election	-16.365	13.585	0.228
Acceptance of Homosexuality X Retention Election	-12.469	13.482	0.355
Acceptance of Homosexuality X Elite Reappointment	-15.882	12.166	0.192
Partisan Election	4.395	3.528	0.213
Nonpartisan Election	6.273	3.756	0.095
Retention Election	5.545	3.742	0.138
Elite Reappointment	5.297	3.485	0.128
Justice Ideology	0.006	0.005	0.284
Intermediate Appellate Court	0.544	0.619	0.380
Number of Amici Briefs	0.105	0.033	0.001
Same-Sex Marriage	-2.623	1.172	0.025
Sodomy Prohibitions	-1.119	0.669	0.095
Discrimination	-0.907	0.619	0.143
Benefits	-0.850	0.677	0.209
Child Custody	-0.929	0.593	0.117
Same-Sex Marriage Ban	-0.089	0.223	0.690
Legislative Repeal of Sodomy	0.642	0.325	0.048
Right to Privacy in the Constitution	-0.358	0.503	0.477
Availability of Direct Democracy	-0.950	0.326	0.004
Legal Community	0.000	0.000	0.885
Murder Rate	-0.025	0.037	0.501
Government Ideology	0.012	0.004	0.008
Ranney Competition Index	-5.924	1.477	0.000
Constant	-1.080	3.930	0.784
Number of Observations	673		
Area Under ROC Curve	0.731		
Percent Correctly Predicted	65.68		

Note: Standard Errors are clustered on the individual justice

Table 21: Logit estimates including the Erikson et al. measure of public preferences in cases involving discrimination based upon sexual orientation.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Public Opinion	4.263	1.273	0.001
Partisan Election	0.182	0.523	0.728
Nonpartisan Election	1.659	0.448	0.000
Retention Election	1.538	0.442	0.000
Elite Reappointment	0.672	0.429	0.117
Justice Ideology	0.004	0.005	0.374
Intermediate Appellate Court	0.237	0.562	0.673
Number of Amici Briefs	0.074	0.032	0.020
Same-Sex Marriage	-1.932	1.104	0.080
Sodomy Prohibitions	-1.355	0.712	0.057
Discrimination	-1.008	0.641	0.116
Benefits	-0.813	0.714	0.255
Child Custody	-1.192	0.628	0.058
Same-Sex Marriage Ban	-0.114	0.205	0.576
Legislative Repeal of Sodomy	0.472	0.244	0.053
Right to Privacy in the Constitution	-0.298	0.360	0.408
Availability of Direct Democracy	-0.848	0.260	0.001
Legal Community	0.000	0.000	0.722
Murder Rate	-0.035	0.032	0.272
Government Ideology	0.005	0.005	0.312
Ranney Competition Index	-6.797	1.437	0.000
Constant	6.427	1.649	0.000
Number of Observations	678		
Area Under ROC Curve	0.741		
Percent Correctly Predicted	65.49		

Note: Standard Errors are clustered on the individual justice

Table 22: Logit estimates including the Erikson et al. measure of public preferences in cases involving discrimination based upon sexual orientation with interactions between retention method and public preferences.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Public Opinion	2.983	1.310	0.189
Public Opinion X Partisan Election	18.527	2.670	0.008
Public Opinion X Nonpartisan Election	-0.471	-0.160	0.876
Public Opinion X Retention Election	0.143	0.050	0.963
Public Opinion X Elite Reappointment	1.343	0.440	0.658
Partisan Election	3.954	2.710	0.007
Nonpartisan Election	1.393	2.480	0.013
Retention Election	1.475	2.300	0.022
Elite Reappointment	0.200	0.180	0.854
Justice Ideology	0.003	0.530	0.595
Intermediate Appellate Court	0.058	0.090	0.927
Number of Amici Briefs	0.087	2.280	0.023
Same-Sex Marriage	-2.232	-1.740	0.081
Sodomy Prohibitions	-1.252	-1.680	0.092
Discrimination	-0.967	-1.480	0.140
Benefits	-0.768	-1.060	0.287
Child Custody	-1.193	-1.890	0.059
Same-Sex Marriage Ban	-0.126	-0.510	0.613
Legislative Repeal of Sodomy	0.411	1.570	0.116
Right to Privacy in the Constitution	-0.333	-0.890	0.372
Availability of Direct Democracy	-0.746	-2.410	0.016
Legal Community	0.000	0.370	0.709
Murder Rate	-0.042	-1.210	0.225
Government Ideology	0.007	1.490	0.137
Ranney Competition Index	-5.469	-3.810	0.000
Constant	5.303	3.090	0.002
Number of Observations	659		
Area Under ROC Curve	0.743		
Percent Correctly Predicted	65.71		

Note: Standard Errors are clustered on the individual justice

Table 23: Logit estimates including the Norrander measure of public preferences in cases involving discrimination based upon sexual orientation.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	1.259	0.626	0.044
Partisan Election	0.184	0.581	0.752
Nonpartisan Election	1.448	0.455	0.001
Retention Election	1.389	0.449	0.002
Elite Reappointment	0.717	0.446	0.107
Justice Ideology	0.006	0.005	0.200
Intermediate Appellate Court	0.428	0.576	0.457
Number of Amici Briefs	0.051	0.029	0.074
Same-Sex Marriage	-1.379	1.030	0.180
Sodomy Prohibitions	-1.356	0.678	0.046
Discrimination	-0.952	0.627	0.129
Benefits	-0.853	0.670	0.203
Child Custody	-1.148	0.607	0.059
Same-Sex Marriage Ban	-0.136	0.213	0.522
Legislative Repeal of Sodomy	0.529	0.245	0.031
Right to Privacy in the Constitution	-0.005	0.325	0.988
Availability of Direct Democracy	-1.023	0.254	0.000
Legal Community	0.000	0.000	0.835
Murder Rate	-0.016	0.032	0.620
Government Ideology	0.008	0.004	0.054
Ranney Competition Index	-6.637	1.362	0.000
Constant	9.741	2.667	0.000
Number of Observations	693		
Area Under ROC Curve	0.733		
Percent Correctly Predicted	65.51		

Note: Standard Errors are clustered on the individual justice

Table 24: Logit estimates including the Norrander measure of public preferences in cases involving discrimination based upon sexual orientation with interactions between retention method and public preferences.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	4.299	2.144	0.045
Citizen Ideology X Partisan Election	-1.518	3.077	0.622
Citizen Ideology X Nonpartisan Election	-2.765	2.330	0.235
Citizen Ideology X Retention Election	-4.013	2.184	0.066
Citizen Ideology X Elite Reappointment	-2.067	2.254	0.359
Partisan Election	-3.642	11.254	0.746
Nonpartisan Election	-7.183	7.705	0.351
Retention Election	-11.725	7.153	0.101
Elite Reappointment	-5.577	7.443	0.454
Justice Ideology	0.005	0.005	0.328
Intermediate Appellate Court	0.281	0.605	0.642
Number of Amici Briefs	0.067	0.032	0.039
Same-Sex Marriage	-2.012	1.143	0.078
Sodomy Prohibitions	-1.604	0.730	0.028
Discrimination	-1.213	0.680	0.075
Benefits	-1.068	0.721	0.139
Child Custody	-1.346	0.657	0.040
Same-Sex Marriage Ban	-0.019	0.225	0.931
Legislative Repeal of Sodomy	0.625	0.283	0.027
Right to Privacy in the Constitution	0.066	0.352	0.852
Availability of Direct Democracy	-1.220	0.288	0.000
Legal Community	0.000	0.000	0.963
Murder Rate	-0.017	0.036	0.640
Government Ideology	0.009	0.004	0.052
Ranney Competition Index	-7.115	1.376	0.000
Constant	20.183	7.247	0.005
Number of Observations	693		
Area Under ROC Curve	0.739		
Percent Correctly Predicted	68.40		

Note: Standard Errors are clustered on the individual justice

Figure 1

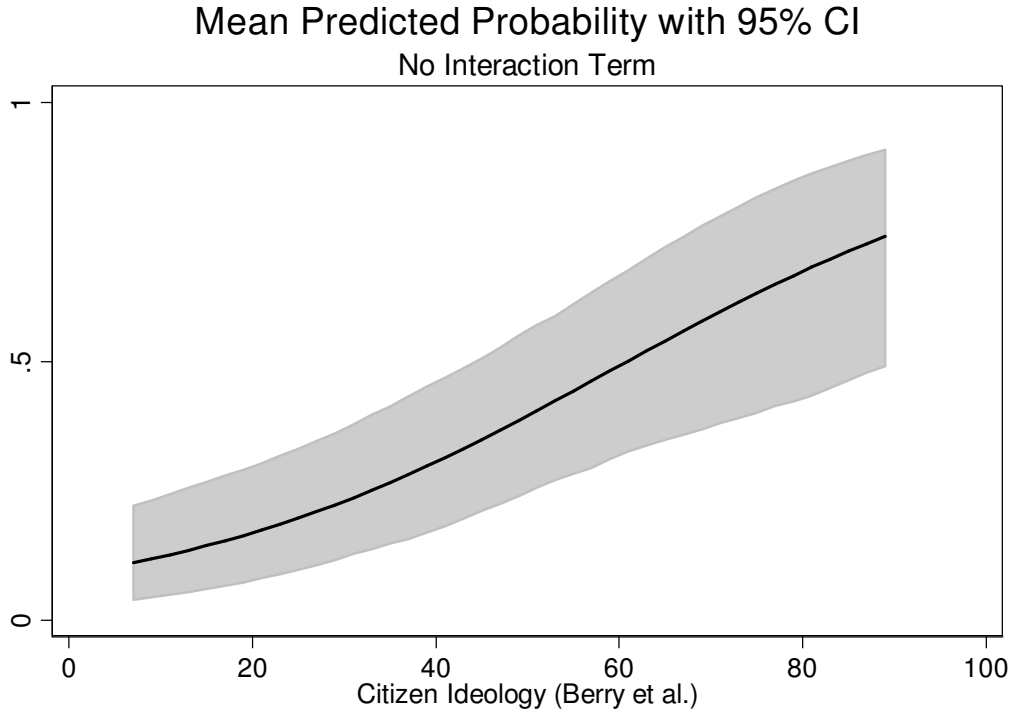


Figure 2

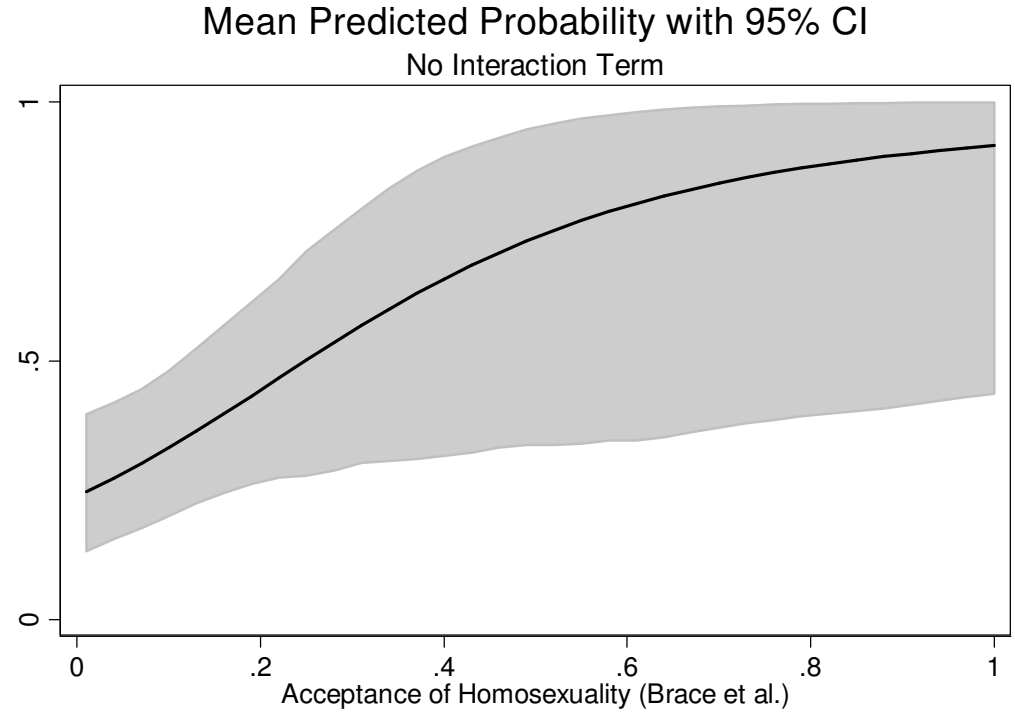


Figure 3

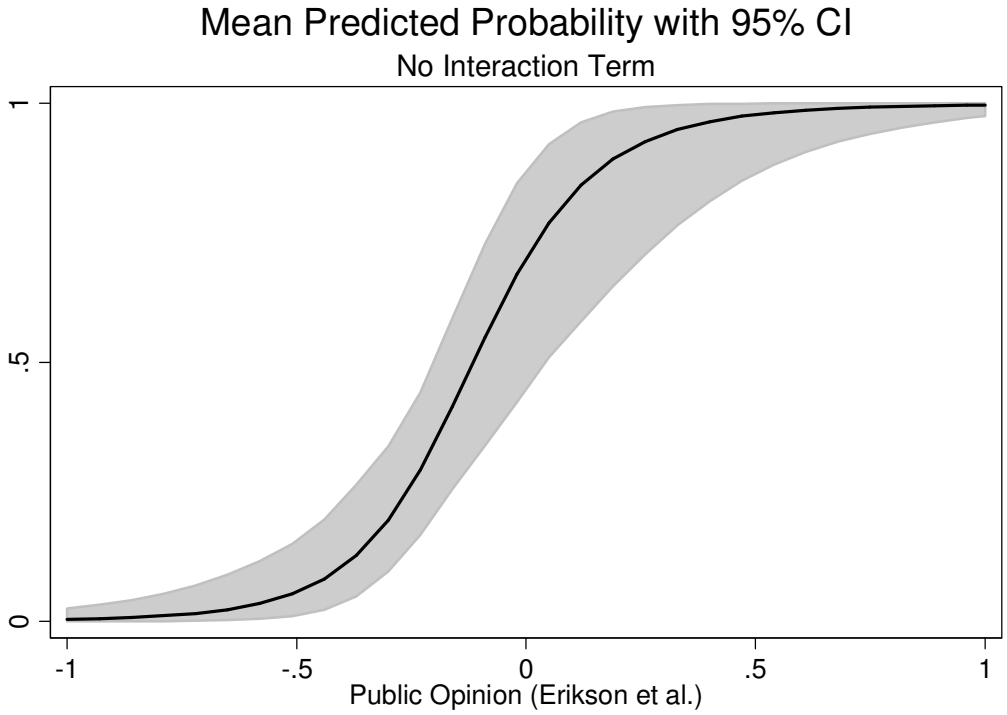
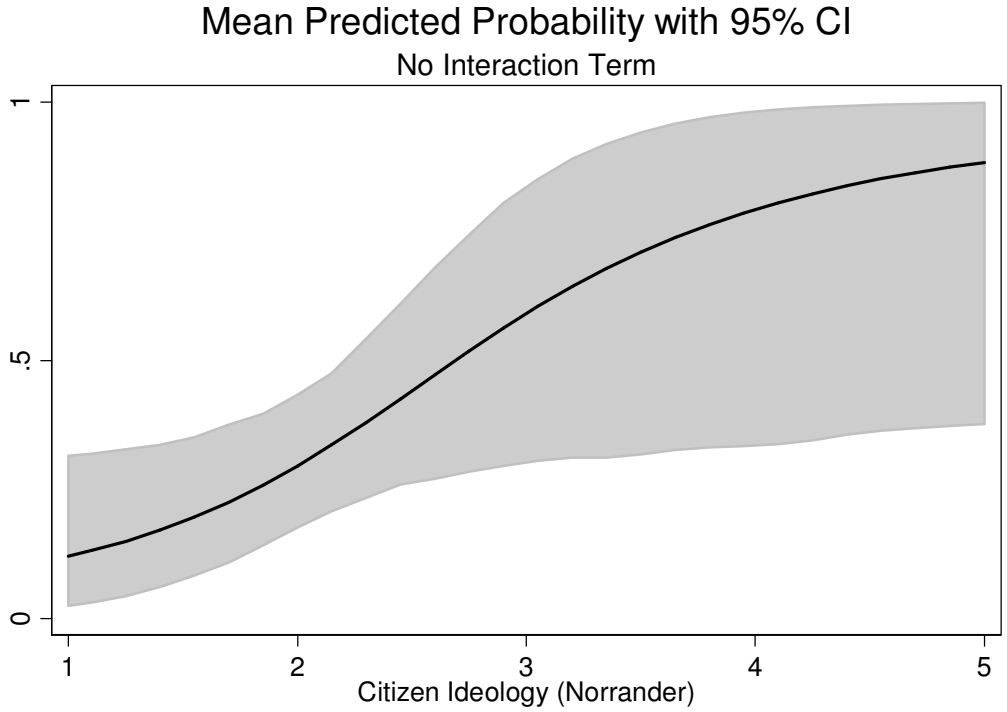


Figure 4



Chapter 5 Gender Discrimination Cases

Both men and women seeking to address disparities in the law that result in differential treatment can file gender discrimination claims. This treatment is often a reflection of social conventions that held women as the center of the domestic, and not public, sphere.[20] Among these conventions was the belief that women were in a constant condition of guardianship by males. Economic survivorship was regulated under the practice of coverture, where the liberty to contract and other property rights of females were subject to the approval of a male head of household. Additionally, differences in biology are frequently used as a justification for the differential treatment of men and women in the law.[21]

In some situations, males assert that the demarcation between the sexes restricts the liberty of men. Biological differences have provided women with a legal advantage in situations involving child custody and at times are used to grant rights to females earlier than males. For example, in many jurisdictions females reached the age of majority before males because it was thought that females tended to mature physically, emotionally, and mentally before males. The analysis in this chapter examines claims

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[20] "Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." Justice Joseph Bradley (*Bradwell v. Illinois* 1873 at 140-142).

[21] The two sexes differ in the structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence." Justice David J. Brewer (*Muller v. Oregon* 1908 at 422).

from both men and women. Before I discuss the results, I will describe the policy areas and legal questions that incorporate claims of gender discrimination.

In a study by Baldez, Epstein, and Martin (2006) they employed a technique similar to Pinello's to create a list of cases addressing claims of gender discrimination. I used their list of cases to create a dataset of votes. The issues in these cases include abortion, family matters, employment discrimination, disparate treatment within the criminal justice system, and benefit eligibility.

In the dataset, the number of votes analyzed ranges from 1,934 votes in the model utilizing the Erikson et al. measure of public opinion to 2,320 votes in the models using the Berry et al. and Norrander measures of public preferences. Table 25 displays the percentage that each case type composes of the sample for each model. Table 26 displays the distribution of cases by state for the period of 1970 - 2001.

Table 25: Percentage of observations by case type in gender discrimination cases.

Model	Abortion	Crime	Discrimination	Family	Benefits
Berry et al.	5.99	33.45	13.92	39.22	7.41
Brace et al.	6.19	32.27	14.34	39.51	7.69
Erikson et al.	6.41	32.37	14.27	39.56	7.39
Norrander	5.99	33.45	13.92	39.22	7.41
Average	6.15	32.88	14.11	39.38	7.48

Table 26: The number of gender discrimination cases by state, 1970 – 2001.

Alabama	21	Montana	14
Alaska	7	Nebraska	5
Arizona	3	Nevada	8
Arkansas	22	New Hampshire	6
California	14	New Jersey	10
Colorado	14	New Mexico	5
Connecticut	13	New York	20
Delaware	6	North Carolina	8
Florida	17	North Dakota	7
Georgia	34	Ohio	0
Hawaii	6	Oklahoma	8
Idaho	7	Oregon	3
Illinois	16	Pennsylvania	19
Indiana	12	Rhode Island	10
Iowa	8	South Carolina	12
Kansas	7	South Dakota	4
Kentucky	2	Tennessee	9
Louisiana	51	Texas	8
Maine	5	Utah	17
Maryland	20	Vermont	7
Massachusetts	25	Virginia	8
Michigan	8	Washington	19
Minnesota	17	West Virginia	10
Mississippi	19	Wisconsin	11
Missouri	17	Wyoming	7

Total = 606

Criminal Cases

A large proportion of the votes in this analysis are on appeals from criminal court trials. Gender differences existed in most aspects of the criminal justice process including the definition of crimes, jury selection, and sentencing. Criminal cases are often appealed because of the large incentive to have a conviction overturned and the ability to combine multiple claims into a single appeal.

The text of criminal statutes defining sexual crimes were frequently written using gendered language and as a result, these statutes were frequently challenged based on denying the equal protection of the law. For example, in *State vs. Meloon* the Supreme Court of New Hampshire was asked to determine whether a law that prohibited a male from having nonconsensual sex with a female was unconstitutional because the same law did not apply to females who forced a male to have nonconsensual sex (*State v. Meloon* 1976). Additionally in some states, prostitution statutes were written to specifically prohibit women from engaging in an action and as a result, women could be charged with a crime that a male could not (*Wilson v. Indiana* 1972).

The exclusion of women in public life included serving on trial court juries. The degree of exclusion varied among the states. In Louisiana, Article 7, Section 41 of the Louisiana Constitution provides: "[N]o woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service." The observed result of this option was that the presence of women on grand and trial juries was virtually nonexistent. In *Hoyt v. Florida* the United States Supreme Court held:

"Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." (*Hoyt v. Florida* 1961 at 61 - 62)

During jury selection, the prosecution and the defense both have the ability to remove a potential juror from the panel by exercising a peremptory challenge. The attorney does not have to provide a reason for excluding the potential juror when a

challenge is used. In a previous ruling the U. S. Supreme Court ruled that the use of peremptory challenges to prevent a group of individuals from serving on a jury subverted the equal protection of the law (*Batson v. Kentucky* 1986). One example of such a case in relation to gender discrimination is *Illinois v. Blackwell*. During jury selection for a murder trial, the prosecution used 15 of its 17 peremptory challenges to remove women from the venire panel. The defendant appealed his conviction on the grounds that the gender bias exhibited by the prosecutor resulted in a jury that was less sympathetic towards the effect that a conviction and a death sentence would have on his mother (*Illinois v. Blackwell* 1996).

Another source of discrimination between men and women were the differences in sentences for criminal convictions. In *Commonwealth v. Daniel*, Daisy Douglas and Richard Johnson were both convicted of aggravated robbery and conspiracy (*Commonwealth v. Daniel* 1968). Without any disparities in their criminal records or circumstances, Mr. Johnson received a sentence of from four to ten years, while Ms. Douglas was given an indeterminate sentence. The trial judge in this case had no discretion in sentencing Ms. Douglas to a specific length of time because of a state law that mandated convicted women to be sentenced to an indeterminate sentence but could specify Mr. Johnson's sentence.

Abortion Cases

Abortion cases often include claims of gender discrimination. Prior to the U.S. Supreme Court decision in *Roe v. Wade*, states were able to determine whether abortion was allowed through its criminal code (*Roe v. Wade* 1973). In this study, there are cases that deal with the question of whether the state can prohibit or regulate the performance

of abortion (*People v. Belous* 1969). Prior to *Roe*, doctors who had performed abortions were either charged with a crime or had their medical licenses revoked (*Kudish v. Board of Registration in Medicine* 1969). In addition to the larger question of the legality of abortion, there were other cases that regulate when the procedure could be performed. The most common case involved challenges to the requirement that a minor obtain parental consent before receiving an abortion (*Ex Parte: Anonymous* 1988). Courts also had to consider when during a pregnancy an abortion could be legally performed (*Simopoulos v. Commonwealth of Virginia* 1981). After abortion had been decriminalized nationally, courts then had to determine whether states were required to pay for abortion as part of their public health programs (*Committee to Defend Reproductive Rights et al. v. Myers* 1981).

Family Cases

Cases in this category focus on the issues surrounding divorce, child custody, and adoption. The standards used in child custody proceedings today have moved away from utilizing an explicitly gendered legal doctrine and instead focus on the outcome of a case being "in the best interests of the child". Prior to this change, it was typical for the law to openly prefer that children be placed with their mothers with all other factors being equal and fathers would frequently challenge this sort of presumption (*J. B. v. A. B.* 1978). Biological fathers who were not married to the mother of the child often had no parental rights. This lack of legal standing would allow the mother of a child to give a child up for adoption without consulting the biological father (*In the Matter of the Adoption of Baby Boy L.* 1982) and prohibit the unwed father from having legal standing to participate in litigation on behalf of the child (*A v. X, Y, & Z* 1982).

Other family questions that involved gender discrimination claims include whether it was permissible to require a parent to pay child support for a female child until she obtained the age of 18 and a male child until he obtained the age of 21 (*Stanton v. Stanton* 1974). Additional aspects of divorce, such as the obligations of alimony, are also included in this category (*Rand v. Rand* 1977).

Benefits Cases

This category of cases involves situations where the law treated men and women differently in respect to how wills were to be settled during the probate process and whether individuals would be eligible for survivors benefits. Some states had laws that required a woman to rewrite her will after she altered her marital status (*Parker v. Hall* 1978). Other aspects of probate law that involved gender included whether widows had an automatic right to a portion of a deceased husband's estate if there was no will (*Ransome v. Ransome* 1981). In addition to the probate process, cases have also considered the acceptability of using gender in the determination of benefits in a variety of programs such as retirement, unemployment, or workman's compensation programs. Frequently when these types of programs are established, it is assumed that the female is not the primary source of support for families and this could affect the eligibility for or level of benefits received (*Da Rosa v. Carol Cable Company* 1979).

Discrimination Cases

Cases classified as focusing on discrimination claims are those cases that challenge laws that explicitly treat males and females differently but not in respect to the other categories of Crime, Abortion, Family, or Benefits. Included in these types of cases are instances where licensing requirements prohibited women from joining a profession.

In *The Maryland State Board of Barber Examiners v. Kuhn*, a statute that prohibited a female cosmetologist from cutting the hair of a male customer, while licensed barbers could cut the hair of both sexes, was ruled unconstitutional (*The Maryland State Board of Barber Examiners v. Kuhn* 1973). Another example of such a law includes ordinance that prohibited females from working as bartenders unless they themselves or their spouse owned the establishment. The New Jersey Supreme Court held that the law was unreasonably discriminatory and found it unconstitutional (*Paterson Tavern & Grill Owners Association v. The Borough of Hawthorne* 1970). In professions where licenses were not required, the state could prohibit a woman from working by making the underlying activity illegal. A Las Vegas, Nevada law prohibited wrestlers from grappling with opponents of the opposite sex. The way the law was written has the effect of prohibiting any wrestling entertainment that would involve a man and a woman physically touching. The Nevada Supreme Court upheld this law because the restriction applied to both genders equally (*Oueilhe v. Lovell* 1977).

Other questions in this category include the participation of females on male sports teams (*Haas v. South Bend Community School Corp., et al.* 1972), the regulation of who could purchase alcoholic beverages (*State of Oklahoma v. County Beverage License #Abl-78-145 of Mcmar General Stores* 1982), and the legality of single sex private clubs (*Burning Tree Club, Inc. v. Bainum* 1985). This category also contains appeals where gender discrimination claims were alleged against an employer (*Peper v. Princeton* 1978).

Bivariate Model Results

I first ran a set of models where the only independent variable was the measure of public preferences. Of the four models, only the measure of public opinion by Berry et al. was statistically significant and in the expected direction. The results for all four models are in Tables 36– 39 located in the appendix to the chapter. The bivariate models correctly predicted between 55.33 and 59.14 percent of the observations correctly. To assess how well the models correctly discriminate between possible outcomes, the area under the Receiving Operating Characteristic Curve was computed. The area under the ROC Curve for the four models ranges from 0.482 to 0.562 and none of the models reaches the 0.7 level that indicates an "acceptable" amount of discrimination (Hosmer and Lemeshow 2000 at 162). These low values of the area under the ROC Curve indicate that the models are only slightly better at predicting a justice's vote than flipping a coin. A measure of public opinion alone is not sufficient to explain the voting behavior of high court justices in cases involving gender discrimination.

Multivariate Model Results

Results for each of the models are presented in Tables 27 – 30. Assessing the overall performance of the models, the range of percentage of cases correctly predicted was from 63.5% to 65.0%. For all four models, the area under the ROC curve was approximately 0.7, which is the lower bound for "acceptable discrimination" comparing the observed and predicted votes of the justices (Hosmer and Lemeshow 2000).

The coefficient for the Berry et al. measure of public preferences was at the margins of statistical significance with a two-tailed p-value of 0.065. The coefficient was in the positive direction, indicating that justices in states that were more liberal were

more likely to vote to remove a distinction based upon gender. However, since the p-value was outside the conventional level of 0.05, I cannot reject the null hypothesis that there is no effect of public preferences on judicial voting behavior in gender discrimination cases as this model was specified.

Table 27: Estimated coefficient for the Berry et al. measure of public preferences in cases involving claims of discrimination based on gender.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	0.009	0.005	0.065
Number of Observations	2320		
Area Under ROC Curve	0.702		
Percent Correctly Predicted	63.75		

In its separate model, the coefficient for the Brace et al. measure of public attitudes towards was statistically significant with a p-value of 0.013 and in the negative direction. This result indicates that justices in states that were more supportive of gender quality were less likely to vote to overturn a distinction based upon gender. The probability that a justice votes to remove a restriction decreases by 0.2462 as we move from the minimum observed value to the maximum observed value of public feminism. Predicted probabilities with 95% confidence intervals were generated using the CLARIFY program for the full range of values and can be seen in Figure 5 (King et al. 2000).

Table 28: Estimated coefficient for the Brace et al. measure of public preferences in cases involving claims of discrimination based on gender.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Public Feminism	-1.333	0.539	0.013
Number of Observations	2197		
Area Under ROC Curve	0.707		
Percent Correctly Predicted	63.77		

In its separate model, the estimate for the Erikson et al. measure of public opinion was not statistically significant with a p-value of 0.374. This result does not allow us to reject the null hypothesis that there is no relationship between public preferences and judicial behavior.

Table 29: Estimated coefficient for the Erikson et al. measure of public preferences in cases involving claims of discrimination based on gender.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Public Opinion	-0.523	0.588	0.374
Number of Observations	1934		
Area Under ROC Curve	0.696		
Percent Correctly Predicted	63.50		

In a fourth model, the coefficient estimate for the Norrander measure of public preferences was statistically significant. However, the coefficient was negative, indicating that justices from states that were more liberal were less likely to vote to

overturn a distinction based upon gender. The probability that a justice votes to remove a restriction decreased by 0.2380 as we move from the most conservative observed value to the most liberal observed value of Norrander's citizen liberalism measure. This result has the same direction as the Brace et al. measure. Predicted probabilities with 95% confidence intervals were generated using the CLARIFY program for the full range of values and can be seen in Figure 6 (King et al. 2000).

Table 30: Estimated coefficient for the Norrander measure of public preferences in cases involving claims of discrimination based on gender.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	-1.346	0.378	0.000
Number of Observations	2320		
Area Under ROC Curve	0.708		
Percent Correctly Predicted	65.00		

Unlike the analysis of gay rights cases in Chapter 4, there is no consistent pattern among the four measures of public preferences in regards to the effect of public opinion on judicial behavior. The two models, Brace et al. and Norrander, with a statistically significant measure have a coefficient that is in opposite direction than hypothesized. These two models indicate that judges are negatively influenced by public opinion and vote contrary to the preferences of the public. However, the Berry et al. and Erikson et al. measures were not statistically significant. The lack of consistency across the four models of gender discrimination cases suggests that there are practical differences among the different measures of public preferences.

Control Variables

Table 31 contains the coefficients for the remaining variables across the four separate models. Only those estimates which could be considered statistically significant are listed. The coefficients whose p-value is between 0.10 and 0.05 are marked with an asterisk. The complete results for the separate models can be found in the appendix to this chapter.

The first set of control variables measure the method of retention that a state utilizes. The results indicate that there are statistically significant differences between justices who face different methods of retention. These indicators are a series of dummy variables and to ease interpretation of the effect of the different methods I have generated predicted probabilities for each measure of public preferences holding the other variables constant. Examining the predicted probabilities across the four models shows that justices who are retained by partisan elections and elite reappointment have a higher probability of voting for gender equality in the law than judges that sit for a life-like term.

Table 31: Coefficient estimates for control variables based on statistical significance.

Control Variable	Berry et al.	Brace et al.	Erikson et al.	Norrander
Partisan Election	0.892	---	0.871	---
Nonpartisan Election	---	---	---	---
Retention Election	0.492*	---	---	---
Elite Reappointment	0.732	0.900	0.883	0.488*
Justice Ideology	0.007	0.008	0.011	0.009
Intermediate Appellate Court	---	0.362*	---	---
Number of Amici Briefs	0.083	0.076	0.096	0.090
Abortion	-1.365	-1.351	-1.808	-1.390
Criminal	-1.480	-1.382	-1.544	-1.470
Discrimination	-0.444	---	-0.829	-0.381*
Family	---	---	-0.474	---
Equal Rights Amendment	---	0.367	0.281*	0.467
Right to Privacy in the Constitution	---	---	---	---
Availability of Direct Democracy	0.275	0.287	---	0.367
Legal Community	---	---	---	---
Murder Rate	---	---	---	---
Government Ideology	-0.006	---	---	---
Ranney Competition Index	---	---	---	---

Note: Estimates denoted by * $0.1 > p > 0.05$

The individual justice's ideology scores were statistically significant and in the expected direction across all four of the models. As a judge's ideology score becomes more liberal the judge is more likely to vote in favor of removing gender discrimination in the law. The size of the effect ranges from an increase of 0.1567 in the Berry et al.

model to 0.2477 for the Erikson et al. model as the value of ideology increases from the minimum to maximum observed value in the models. These results are consistent with the Attitudinal Model of judicial decision-making discussed in Chapter 3. The equal treatment of men and women is a policy issue that is identified with the liberal-conservative split in ideology. As a result, these are cases where the justices would have an opportunity to use their ideology to determine how to vote.

Table 32: Predicted probabilities of a vote favoring the removal of a gender based distinction by retention method.

	Berry et al.	Brace et al.	Erikson et al.	Norrander
Partisan Election	0.565	0.505	0.510	0.487
Nonpartisan Election	0.354	0.356	0.333	0.326
Retention Election	0.465	0.480	0.386	0.450
Elite Reappointment	0.525	0.621	0.513	0.543
Life-Like Term	0.347	0.400	0.304	0.421

The number of amicus curiae briefs filed in an appeal was statistically significant and in the positive direction in all four of the models. This indicates that the more salient a case is to outside participants, a judge is more likely to vote to remove the gender distinction in the law. This is another indication that external forces, such as interest groups, can influence a justice's decision.

A series of dummy variables for the policy issue in the case demonstrated that justices were less likely to vote to reverse gender discrimination in some issues than others. In each of the models, the excluded baseline category were those cases that involved benefits claims. Compared only to benefits cases in all four of the models justices were less likely to vote to overturn cases involving abortion or crimes. In two of

the four models, justices were also less likely to vote to remove a gender distinction in discrimination cases than benefits cases. Finally, in only one of the four models, a justice was less likely to vote to remove a gender distinction in a family case compared to a case involving benefits. In reference to the Attitudinal Model, these results demonstrate how a justice's voting behavior is influenced by the factual situation in which the justice encounters the issue.

Table 33: Predicted probabilities of a vote favoring the removal of a gender based distinction by case type.

	Berry et al.	Brace et al.	Erikson et al.	Norrander
Abortion	0.3305	0.2444	0.2695	0.2477
Crime	0.3055	0.2387	0.3245	0.2332
Discrimination	0.5536	0.4941	0.4955	0.4745
Family	0.6033	0.5124	0.5835	0.5140
Benefits	0.6590	0.5553	0.6924	0.5694

In two of the four models the variable capturing whether a state had ratified the Equal Rights Amendment was statistically significant and in the positive direction. The change in predicted probability was an increase of 0.0919 for the Brace et al. model and 0.1156 for the Norrander model. This indicates that justices were more likely to vote to remove a gender distinction in the law after their state had voted to change the U.S. Constitution. For these two models, the justices were either responding to a signal sent by the public and political institutions or they were attempting to change the case law in anticipation of a shift in constitutional law.

The availability of direct democracy was statistically significant in three of the four models. A justice was more likely to vote to remove a distinction based upon gender

in states with direct democracy. This magnitude of the effect ranges from an increase in the probability to change the law of 0.0666 for the model using the Berry et al. measure to 0.0913 for the model using the Norrander measure. Justices may believe that if the public disagrees with the decision then it would be possible for the public to reverse the decision with a referendum. This threat of an additional institution to check the decisions of the high courts limits the exercise of their powers to change the law.

Government ideology was statistically significant in only one of the four models. In the model using the Berry et al. measure, a justice was less likely to vote to remove the distinction in the law as the state's government became more liberal. There was a decrease in the probability of a vote to remove the gender distinction of 0.1413 as the value of government ideology changed from the minimum observed value to the maximum value as the Berry et al. model was specified. The contrary direction of this finding is similar to the results concerning public preferences. For the other three models, the ideology of the government was not statistically significant and it appears that state high court justices make their decisions independent from the preferences of the elected government.

The inclusion of a right to privacy in a state's constitution was not statistically significant in any of the four models. As with the gay rights models, there are other legal issues that justices may use to decide questions of gender discrimination. Also not statistically significant in any of the four models were the control variables measuring the size of the legal community, murder rate, or the level of political competition in a state. As with the gay rights models, those filing gender discrimination appeals were not affected by the differences in the size of the legal community in the state and were able to

obtain sufficient legal counsel. The murder rate of the states did not influence the justices as the public would not be likely to link the two issues together in evaluating the performance of the court. The lack of statistical significance for political competition indicates that the justices are deciding cases without concern that their decisions in gender discrimination cases would be politicized. The presence of an intermediate appellate court in the state where the case was decided did not have a statistically significant influence on the judge's vote. In one model, utilizing the Brace et al. measure, it was marginally significant ($p = 0.065$) and in the positive direction. This would indicate that a judge in a state with an intermediate appellate court is more likely to agree with a claim of gender discrimination. A judge would be more likely to vote in this manner because the intermediate appellate court would filter out all of the absurd or easily decided cases and leave only the cases that have the most merit to the claim to the highest court.

Interactive Effect

As with the analysis of gay rights cases in the previous chapter, the method of retention that a state employed had a statistically significant influence on the votes of the justices and there was evidence that public opinion was influential in two of the four models. I repeated the process outlined in chapter 4 to determine whether the effect of the public opinion is influenced by retention method. Tables 34 – 35 contain comparisons of fit for the models without and with interaction terms between the measure of public preference and the method a state used to retain its high court justices.

Table 34: A comparison of the percent of observations correctly predicted for each measure of public opinion excluding and including interaction terms with retention methods.

Public Opinon Measure	No Interaction	Interaction	Improvement
Berry et al.	63.750	65.260	1.510
Brace et al.	63.770	65.910	2.140
Erikson et al.	63.500	63.550	0.050
Norrander	65.000	65.860	0.860

Table 35: A comparison of the area under the Receiver-Operator Characteristic Curve for each measure of public opinion excluding and including interaction terms with retention methods.

Public Opinon Measure	No Interaction	Interaction	Improvement
Berry et al.	0.702	0.718	0.016
Brace et al.	0.707	0.715	0.008
Erikson et al.	0.696	0.704	0.007
Norrander	0.708	0.722	0.014

Similar to the models of discrimination based on sexual orientation in Chapter 4, there is no large improvement in the models that include interaction terms for the models of gender discrimination cases. The small amount of improvement may stem from the inclusion of additional variables. I would again conclude that there is no evidence that the influence of public opinion is a result of the method of retention a justice faces.

Conclusion

The analysis presented in this chapter is very different that in the previous chapter. The findings lead me to question whether justices may be influenced by public

preferences when voting in cases challenging a distinction in the law based on gender. There was not consistent evidence for the effect as in the previous chapter. Two of the four models displayed a statistically significant effect on judicial decision-making, but the effect was in the opposite direction as was expected. Instead of judges in liberal states being more likely to vote to remove the distinction in the law based upon gender, the justices were less likely to do so. The inverse direction of the relationship combined with the inconsistent effect among the four measures of public preferences raises questions about the nature of the relationship. A comparison of estimates derived from models with and without interaction terms between the measure of public opinion and the method of retention employed by the states does not indicate that there is an interactive relationship.

The different result among the four measures of public opinion reaffirms the decision that multiple measures of public opinion should be used. The Norrander and Brace measures produced different findings compared to the Berry et al. and Erikson et al. measures indicating that there are differences in what the measures are capturing. This chapter also reaffirms the conclusion that the decision-making process of justices varies by the policy area under consideration.

APPENDIX B

Table 36: Logit estimates for a bivariate model including the Berry et al. measure of public preferences in cases involving discrimination based upon gender.

	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	0.013	0.004	0.001
Constant	-0.915	0.193	0.000
Number of Observations	2942		
Area Under ROC Curve	0.5622		
Percent Correctly Predicted	59.14		

NOTE: Standard errors are clustered on the individual justice.

Table 37: Logit estimates for a bivariate model including the Brace et al. measure of public preferences in cases involving discrimination based upon gender.

	Coefficient Estimate	Standard Error	P-Value
Public Feminism	-0.428	0.352	0.223
Constant	0.253	0.518	0.626
Number of Observations	2824		
Area Under ROC Curve	0.482		
Percent Correctly Predicted	58.64		

NOTE: Standard errors are clustered on the individual justice.

Table 38: Logit estimates for a bivariate model including the Erikson et al. measure of public preferences in cases involving discrimination based upon gender.

	Coefficient Estimate	Standard Error	P-Value
Public Opinion	0.524	0.349	0.134
Constant	-0.153	0.067	0.023
Number of Observations	2158		
Area Under ROC Curve	0.507		
Percent Correctly Predicted	55.33		

NOTE: Standard errors are clustered on the individual justice.

Table 39: Logit estimates for a bivariate model including the Norrander measure of public preferences in cases involving discrimination based upon gender.

	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	-0.054	0.232	0.816
Constant	-0.548	0.812	0.500
Number of Observations	2986		
Area Under ROC Curve	0.503		
Percent Correctly Predicted	58.77		

NOTE: Standard errors are clustered on the individual justice.

Table 40: Logit estimates for the model including the Berry et al. measure of public preferences in cases involving discrimination based upon gender.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	0.009	0.005	0.065
Partisan Election	0.892	0.295	0.002
Nonpartisan Election	0.031	0.275	0.909
Retention Election	0.492	0.281	0.080
Elite Reappointment	0.732	0.289	0.011
Justice Ideology	0.007	0.003	0.008
Intermediate Appellate Court	0.209	0.180	0.247
Number of Amici Briefs	0.083	0.036	0.023
Abortion	-1.365	0.275	0.000
Criminal	-1.480	0.197	0.000
Discrimination	-0.444	0.219	0.043
Family	-0.240	0.167	0.151
Equal Rights Amendment	0.214	0.135	0.112
Right to Privacy in the Constitution	-0.064	0.157	0.684
Availability of Direct Democracy	0.275	0.138	0.046
Legal Community	0.000	0.000	0.651
Murder Rate	0.022	0.018	0.228
Government Ideology	-0.006	0.003	0.033
Ranney Competition Index	-0.049	0.648	0.940
Constant	-0.968	0.620	0.119
Number of Observations	2320		
Area Under ROC Curve	0.702		
Percent Correctly Predicted	63.75		

Note: Standard Errors are clustered on the individual justice

Table 41: Logit estimates for the model including the Berry et al. measure of public preferences in cases involving discrimination based upon gender with interactions between retention method and public preferences.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	0.020	0.012	0.085
Citizen Ideology X Partisan Election	-0.021	0.010	0.035
Citizen Ideology X Nonpartisan Election	0.039	0.011	0.001
Citizen Ideology X Retention Election	0.011	0.012	0.333
Citizen Ideology X Elite Reappointment	0.065	0.012	0.000
Partisan Election	-1.507	0.625	0.016
Nonpartisan Election	-1.292	0.682	0.058
Retention Election	-3.250	0.701	0.000
Elite Reappointment	-0.774	0.700	0.269
Justice Ideology	0.007	0.003	0.008
Intermediate Appellate Court	0.162	0.186	0.386
Number of Amici Briefs	0.080	0.038	0.038
Abortion	-1.405	0.274	0.000
Criminal	-1.630	0.196	0.000
Discrimination	-0.473	0.219	0.031
Family	-0.274	0.165	0.096
Equal Rights Amendment	-0.012	0.142	0.933
Right to Privacy in the Constitution	0.039	0.162	0.810
Availability of Direct Democracy	0.496	0.140	0.000
Legal Community	0.000	0.000	0.742
Murder Rate	0.004	0.019	0.823
Government Ideology	-0.007	0.003	0.024
Ranney Competition Index	-0.311	0.651	0.632
Constant	1.623	0.839	0.053
Number of Observations	2320		
Area Under ROC Curve	0.718		
Percent Correctly Predicted	65.26		

Note: Standard Errors are clustered on the individual justice

Table 42: Logit estimates for the model including the Brace et al. measure of public preferences in cases involving discrimination based upon gender.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Public Feminism	-1.333	0.539	0.013
Partisan Election	0.425	0.351	0.226
Nonpartisan Election	-0.187	0.289	0.517
Retention Election	0.325	0.285	0.254
Elite Reappointment	0.900	0.307	0.003
Justice Ideology	0.008	0.003	0.001
Intermediate Appellate Court	0.362	0.196	0.065
Number of Amici Briefs	0.076	0.033	0.022
Abortion	-1.351	0.290	0.000
Criminal	-1.382	0.202	0.000
Discrimination	-0.246	0.221	0.265
Family	-0.173	0.168	0.303
Equal Rights Amendment	0.367	0.142	0.010
Right to Privacy in the Constitution	0.036	0.163	0.826
Availability of Direct Democracy	0.287	0.140	0.040
Legal Community	0.000	0.000	0.758
Murder Rate	0.012	0.018	0.511
Government Ideology	0.000	0.002	0.858
Ranney Competition Index	0.188	0.721	0.794
Constant	0.702	0.852	0.410
Number of Observations	2197		
Area Under ROC Curve	0.707		
Correctly Predicted	63.77		

Note: Standard Errors are clustered on the individual justice

Table 43: Logit estimates for the model including the Brace et al. measure of public preferences in cases involving discrimination based upon gender with interactions between retention method and public preferences.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Public Feminism	9.145	5.710	0.109
Public Feminism X Partisan Election	-11.589	5.668	0.041
Public Feminism X Nonpartisan Election	-9.233	5.874	0.116
Public Feminism X Retention Election	-12.379	5.629	0.028
Public Feminism X Elite Reappointment	-7.218	5.992	0.228
Partisan Election	17.942	8.759	0.041
Nonpartisan Election	14.292	9.077	0.115
Retention Election	19.317	8.715	0.027
Elite Reappointment	12.050	9.255	0.193
Justice Ideology	0.008	0.003	0.002
Intermediate Appellate Court	0.272	0.207	0.189
Number of Amici Briefs	0.078	0.034	0.022
Abortion	-1.343	0.288	0.000
Criminal	-1.344	0.198	0.000
Discrimination	-0.233	0.218	0.286
Family	-0.160	0.166	0.336
Equal Rights Amendment	0.548	0.181	0.002
Right to Privacy in the Constitution	-0.159	0.184	0.387
Availability of Direct Democracy	0.251	0.142	0.077
Legal Community	0.000	0.000	0.683
Murder Rate	0.035	0.021	0.098
Government Ideology	0.000	0.002	0.832
Ranney Competition Index	0.364	0.687	0.596
Constant	-15.847	8.830	0.073
Number of Observations	2197		
Area Under ROC Curve	0.715		
Percent Correctly Predicted	65.91		

Note: Standard Errors are clustered on the individual justice

Table 44: Logit estimates for the model including the Erikson et al. measure of public preferences in cases involving discrimination based upon gender.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Public Opinion	-0.523	0.588	0.374
Partisan Election	0.871	0.322	0.007
Nonpartisan Election	0.135	0.310	0.662
Retention Election	0.366	0.305	0.230
Elite Reappointment	0.883	0.311	0.005
Justice Ideology	0.011	0.003	0.000
Intermediate Appellate Court	0.291	0.203	0.152
Number of Amici Briefs	0.096	0.042	0.022
Abortion	-1.808	0.321	0.000
Criminal	-1.544	0.226	0.000
Discrimination	-0.829	0.247	0.001
Family	-0.474	0.196	0.016
Equal Rights Amendment	0.281	0.144	0.051
Right to Privacy in the Constitution	0.148	0.166	0.374
Availability of Direct Democracy	0.182	0.128	0.154
Legal Community	0.000	0.000	0.858
Murder Rate	0.010	0.018	0.578
Government Ideology	-0.004	0.002	0.132
Ranney Competition Index	-0.770	0.656	0.240
Constant	-0.147	0.629	0.815
Number of Observations	1934		
Area Under ROC Curve	0.696		
Percent Correctly Predicted	63.50		

Note: Standard Errors are clustered on the individual justice

Table 45: Logit estimates for the model including the Erikson et al. measure of public preferences in cases involving discrimination based upon gender with interactions between retention method and public preferences.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Public Opinion	2.948	2.899	0.309
Public Opinion X Partisan Election	-4.668	3.259	0.152
Public Opinion X Nonpartisan Election	-4.699	3.005	0.118
Public Opinion X Retention Election	0.410	3.118	0.895
Public Opinion X Elite Reappointment	-5.618	3.134	0.073
Partisan Election	0.624	0.466	0.180
Nonpartisan Election	-0.071	0.324	0.826
Retention Election	0.851	0.325	0.009
Elite Reappointment	0.735	0.331	0.026
Justice Ideology	0.010	0.003	0.000
Intermediate Appellate Court	0.314	0.210	0.134
Number of Amici Briefs	0.084	0.042	0.044
Abortion	-1.674	0.322	0.000
Criminal	-1.532	0.221	0.000
Discrimination	-0.737	0.247	0.003
Family	-0.434	0.191	0.023
Equal Rights Amendment	0.127	0.146	0.383
Right to Privacy in the Constitution	0.210	0.171	0.221
Availability of Direct Democracy	0.290	0.136	0.033
Legal Community	0.000	0.000	0.636
Murder Rate	0.004	0.018	0.812
Government Ideology	-0.004	0.002	0.071
Ranney Competition Index	-1.135	0.650	0.081
Constant	0.178	0.628	0.777
Number of Observations	1934		
Area Under ROC Curve	0.704		
Percent Correctly Predicted	63.55		

Note: Standard Errors are clustered on the individual justice

Table 46: Logit estimates for the model including the Norrander measure of public preferences in cases involving discrimination based upon gender.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	-1.346	0.378	0.000
Partisan Election	0.264	0.324	0.414
Nonpartisan Election	-0.409	0.289	0.157
Retention Election	0.118	0.296	0.689
Elite Reappointment	0.488	0.294	0.097
Justice Ideology	0.009	0.003	0.000
Intermediate Appellate Court	0.201	0.183	0.272
Number of Amici Briefs	0.090	0.041	0.028
Abortion	-1.390	0.283	0.000
Criminal	-1.470	0.194	0.000
Discrimination	-0.381	0.214	0.075
Family	-0.224	0.166	0.178
Equal Rights Amendment	0.467	0.147	0.002
Right to Privacy in the Constitution	-0.086	0.151	0.570
Availability of Direct Democracy	0.367	0.132	0.006
Legal Community	0.000	0.000	0.504
Murder Rate	-0.004	0.017	0.833
Government Ideology	0.002	0.002	0.438
Ranney Competition Index	0.739	0.677	0.275
Constant	-6.070	1.656	0.000
Number of Observations	2320		
Area Under ROC Curve	0.708		
Percent Correctly Predicted	65.00		

Note: Standard Errors are clustered on the individual justice

Table 47: Logit estimates for the model including the Norrander measure of public preferences in cases involving discrimination based upon gender with interactions between retention method and public preferences.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology	-1.805	1.105	0.102
Citizen Ideology X Partisan Election	1.291	1.217	0.289
Citizen Ideology X Nonpartisan Election	-1.141	1.213	0.347
Citizen Ideology X Retention Election	1.879	1.219	0.123
Citizen Ideology X Elite Reappointment	-1.198	1.276	0.348
Partisan Election	5.089	4.173	0.223
Nonpartisan Election	-4.574	4.093	0.264
Retention Election	6.661	4.070	0.102
Elite Reappointment	-3.670	4.334	0.397
Justice Ideology	0.009	0.003	0.000
Intermediate Appellate Court	0.195	0.192	0.308
Number of Amici Briefs	0.085	0.044	0.052
Abortion	-1.425	0.288	0.000
Criminal	-1.643	0.192	0.000
Discrimination	-0.418	0.212	0.049
Family	-0.276	0.160	0.085
Equal Rights Amendment	0.306	0.155	0.048
Right to Privacy in the Constitution	-0.034	0.167	0.837
Availability of Direct Democracy	0.491	0.143	0.001
Legal Community	0.000	0.000	0.494
Murder Rate	-0.028	0.019	0.135
Government Ideology	0.002	0.002	0.367
Ranney Competition Index	0.728	0.699	0.298
Constant	-7.363	3.721	0.048
Number of Observations	2320		
Area Under ROC Curve	0.722		
Percent Correctly Predicted	65.86		

Note: Standard Errors are clustered on the individual justice

Figure 5

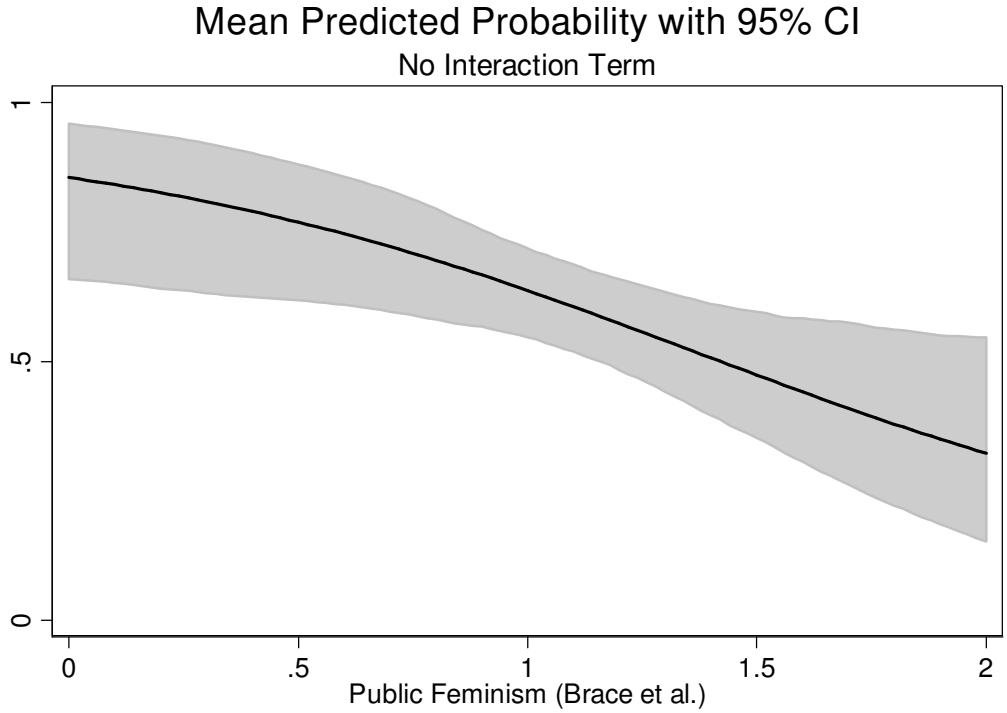
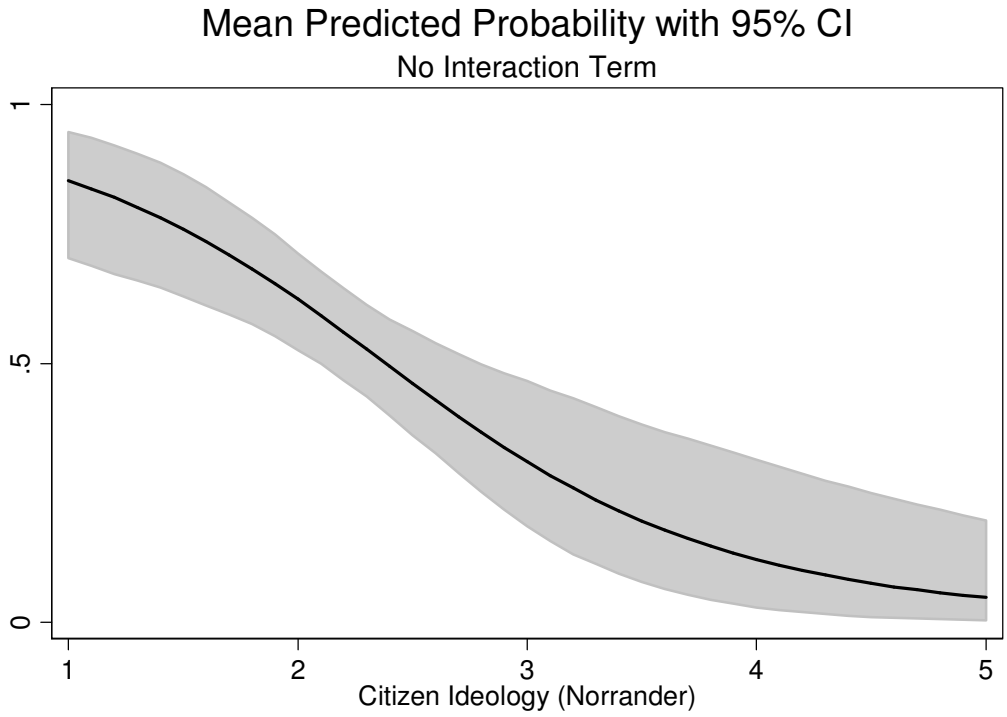

Mean Predicted Probability with 95% CI
No Interaction Term
0
.5
1
0
.5
1
1.5
2
Public Feminism (Brace et al.)

Figure 6


Mean Predicted Probability with 95% CI
No Interaction Term
0
.5
1
1
2
3
4
5
Citizen Ideology (Norrander)

Chapter 6 Conclusion

Studies of non-judicial state policy-making processes have repeatedly demonstrated that public opinion is a major determinant of a state's policy and studies of judicial-decision making that ignore this finding are potentially missing a key explanation. Those who would leave out public opinion as an explanatory variable are making the assumption that the justices of high courts are not concerned about how their decisions are received by the public or other policy makers in state government.

One way to demonstrate that the addition of public opinion variables should be included in judicial decision-making models is to compare models with and without the measures. This comparison of models with and without a measure of public preferences demonstrates that models with public opinion included are slightly better at predicting judicial votes. Tables 50 and 51, located in the appendix to chapter 6 below, compares the percent of cases correctly predicted for models that found a statistically significant effect of a public opinion measure. In four of the six models, adding a measure of public opinion resulted in an increase in the percentage of cases correctly predicted by the model. The two models that did not see an improvement were those that used the issue specific measure of public preferences developed by Brace et al. The inconsistency of the results again demonstrates that the debate over which measurement of public opinion scholars should use needs further examination. Which measure of public opinion should be used in future work is not a question that is addressed in this dissertation. However, given the differences among the measures as demonstrated by the gender discrimination analysis, it is clear that these measures have some subtle differences in what component of public opinion they are capturing. With new measures of public opinion continuing to

be developed, increased consideration will have to be paid by all scholars of state policy as to how public opinion is operationalized.

Another approach to determining the role of public opinion considering the different outcomes from the four measures is to treat them as measuring different components of public preferences. If the four indicators of public opinion included in this analysis are indeed capturing different aspects of the central concept, then it should be possible to include all four in a single equation and perform post-estimation tests to determine the influence of multiple variables on the decision of a justice. The results of these models are available in Tables 52 and 53 in the appendix to this chapter. The four public opinion variables are highly correlated with each other, with a range of values for pairwise correlations from 0.73 to 0.82 in the dataset of gay rights cases and 0.37 to 0.75 in the gender discrimination dataset. A Wald test can be used to test constraints placed on the variables of a model (Long 1997). A likelihood ratio test is not appropriate in this situation because the model is estimated with robust standard errors to account for the repeated observation of justices in the sample. The Wald test will determine whether all four of the public opinion variables are simultaneously equal to zero. For the gay rights model, the Wald test resulted in a chi-square value of 14.83 with a p-value of 0.0051. In the gender discrimination model, the Wald test of all four variables being jointly equal to zero resulted in a chi-square value of 27.76 with a p-value of 0.000. These Wald tests demonstrate that the hypothesis that the effects of all four measures of public opinion are simultaneously equal to zero can be rejected at the 0.01 level for both models. One difficulty with the Wald test is that it does not determine the positive or negative direction of the relationship. Both models contained a public opinion measure that was in

a different direction than the others. In the gay rights model, the Norrander measure was in the negative direction, although it was not statistically significant. In the gender discrimination model, the Brace et al. and Norrander measures of public opinion were in the negative direction, with only the Norrander measure reaching the level of statistical significance. Given the high amount of correlation among the four variables, multicollinearity may be the cause of direction change and changes to the statistical significance of variables. These tests further demonstrate that public preferences are a necessary component when explaining state supreme court judicial decision-making, just as it is when describing the state policy making process.

Policy Differences

The different findings between the gay rights and gender discrimination models confirms that the subject of the policy matters in explanations of the decision-making process of state high courts. This is consistent with previous research on the United States Supreme Court. There are several reasons that can be offered to understand why justices were uniformly influenced by public opinion in cases involving gay rights, but were not similarly influenced in gender discrimination cases. The question of gay rights has been classified as a morality policy (Mooney 2001b). Mooney and Lee have described morality policies as a type of policy that creates political conditions that are ideal for democratic responsiveness (Mooney and Lee 2000). The gender discrimination dataset does contain cases that involve abortion, another morality policy, but these cases comprise less than 10% of the sample and do not provide enough variation to allow for a complete analysis separate from the other gender discrimination cases.

The outcome that only morality policies were affected by public opinion may be a result that justices vote differently in cases that involve issues of greater salience to the public. Hall's study of the Louisiana Supreme Court found that justices altered their behavior in death penalty appeals in order to avoid conflicting with the preferred position of their constituency (Hall 1987). Gay rights and gender discrimination are two policy areas that involve similar legal issues, but they have distinct political differences. As the types of cases that the court considers become less political, the court may be less likely to consider public opinion in its decision-making process. Since state high courts consider a wide range of cases as part of its docket, public opinion may not be an influence on every case. Brace and Hall's examination of state high court dockets reveals that from 1995 to 1997 all but 13 state high courts heard more cases involving civil torts than criminal appeals (Brace and Hall 2005). In their examination of state policy towards gays and lesbians using their own issue specific measures of public opinion, Lax and Phillips (Lax and Phillips 2009a) conclude that states were more responsive when the public held the issue to be salient. Agreement between public opinion and policy was also more likely to occur when the issue was highly salient. The findings of this dissertation are in line with those of Lax and Phillips.

Another explanation that could explain the difference in the findings between the gay rights and gender discrimination models is the composition of that opinion within the states. Mooney and Lee (2000) conclude that the responsiveness of policy makers to public opinion varies depending on the degree of dispersion within the opinion. For issues where the public is divided, policy makers are more responsive to the public. Gay rights as a morality policy is more likely to be divided than issues of gender inequality. If

the law is currently in line with the public's preferences, then justices would not be influenced by public opinion to change the law because they are already congruent.

The difference in the direction of the effect of public opinion between the two policy areas could be attributed to the group that was claiming discrimination. With the gender discrimination cases there were a number of claims made by men. It would be difficult for men to claim that the judiciary is the only institution that could provide relief. Compared to gays and lesbians, women have substantially more political power. As an example, although it was ultimately unsuccessful, the Equal Rights Amendment was ratified by 35 of the 50 states. Conversely, the wave of same-sex marriage prohibitions that were passed in 30 states during the 1990's and 2000's could be cited as evidence that gays and lesbians lack political power.

The ideology measure of the individual justices was statistically significant only for the gender discrimination cases and not in any of the models for gay rights claims. This finding extends the findings of previous research on the United States Supreme Court that the effect of individual ideology varies on the types of cases analyzed. In this study, both models examined discrimination claims, but in one chapter gays and lesbians were the object and in the other chapter was either men or women. Only a few of the cases in the gay and lesbian models were filed by a heterosexual victim claiming discrimination. The difference of the effect of ideology highlights another possible explanation that in situations where there is no division based upon ideology, judges are likely to be influenced by public opinion. The lack of an ideological presumption forces a justice to look for other factors to make a decision. With the gender discrimination cases there already existed an ideological division with respect to women's rights.

However, with gay rights claims, there was no division as both liberals and conservatives did not favor equal treatment.

The inconsistent results found in Chapter 5, with 2 models finding a statistically significant relationship and 2 models not, suggest that there are potential differences between the four measures of public opinion that were employed in this paper. These differences may not have been observed in the analysis of gay rights cases due to the large magnitude of the effect found in morality policies.

Implications

The results of the dissertation also raise a number of practical political questions. What should litigants consider when deciding to litigate as a strategy to produce policy change? Given that there was no evidence that elected judges are more responsive to the public than non-elected judges, what does this research say about the controversy of judicial selection and retention? Why would all judges, regardless of retention method, be influenced by public opinion as in the gay rights cases? Should courts be treated differently compared to other policy makers?

This study demonstrates an additional mechanism for public opinion to influence policy. For those individuals and groups who seek to bring about political change, concentrating resources on changing public opinion may benefit a group's litigation strategy as a side effect. Additionally, those who seek to litigate as a strategy to bring about social change could engage in "forum shopping" to determine where might be the best state to file a suit. Another factor that a group might want to consider is that the ideological composition of the high court may not be as important as the public's preferences in a state if the policy is a morality issue.

The findings of this study also speak to the controversy over whether states should elect their judges. Those who oppose judicial elections claim that the electoral pressures associated with elections creates the potential for judges to make their decisions based upon a desire to be re-elected. This study finds that the effect of public opinion is not dependent on the method of retention a justice will face. The lack of an interactive effect suggests that justices are responsive to public opinion not because of any electoral pressures. This finding raises questions as to whether the negative costs that popular elections may bring to an institution are necessary given that elections do not appear to make justices more responsive to the public. Incorporating public opinion into the judicial decision-making process is also likely because of the ineffectiveness of judicial elections to produce changes to the composition of a court. The re-election rate of state high court judges is comparable to that of Congress (Hall 2001). If elections are not necessary to link the courts with the public and they are not effective at producing substantial turnover on the court, then those that oppose reforms to judicial selection will have to make a more normative argument.

I believe that all judges, regardless of their retention method, are possibly responsive to public preferences due to the nature of their judicial power. Courts lack explicit enforcement powers and as such require the other political branches to implement their decisions. If public opinion is on the side of a court decision, then the implementers of that decision will face similar pressures by the public to follow the decision. If a court does not adjust the law to the preferences of the people, it risks appearing out of touch with the public and enforcing the laws of a previous generation. Excluding measures of public preferences in models of judicial decision-making could result in an incomplete

explanation of how courts participate in the policy process at the state level. Without including a measure of public opinion, judicial scholars are implicitly assuming that the court is not affected by the need to maintain its legitimacy. Since a court relies on its legitimacy in order to be an effective policy making institution, it would be counterintuitive for a court to purposefully diminish its standing with the public.

This dissertation demonstrates that the political environment matters in state judicial decision-making. In comparing the models with gay rights and gender discrimination claims, the justices on state supreme courts act differently when confronted with morality policies. The justices were also influenced by the presence of direct democracy mechanisms. When there was an ideological dimension to the policy issue they were deciding, the justices voted according to their personal preferences. When there was ideological unity, justices deferred to public opinion. Judges on state high courts are contributing to the overall policy environment and are being influenced by many of the same social and political factors that studies of state policy have determined to matter. Because of the reality that justices behave like other political actors when making decisions, the legal nature of their public duties should not exclude policy studies from incorporating court decisions from studies of the state policy environment.

APPENDIX C

Table 48: Logit estimates for cases involving discrimination based upon sexual orientation without a measure of public preferences.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Partisan Election	-0.387	0.523	0.459
Nonpartisan Election	1.002	0.442	0.023
Retention Election	1.019	0.441	0.021
Elite Reappointment	0.484	0.442	0.274
Justice Ideology	0.008	0.005	0.093
Intermediate Appellate Court	0.488	0.581	0.401
Number of Amici Briefs	0.053	0.029	0.070
Same-Sex Marriage	-1.619	1.045	0.121
Sodomy Prohibitions	-1.509	0.695	0.030
Discrimination	-1.183	0.635	0.063
Benefits	-1.016	0.698	0.146
Child Custody	-1.303	0.618	0.035
Same-Sex Marriage Ban	-0.293	0.205	0.153
Legislative Repeal of Sodomy	0.492	0.241	0.041
Right to Privacy in the Constitution	0.225	0.314	0.474
Availability of Direct Democracy	-0.923	0.254	0.000
Legal Community	0.000	0.000	0.314
Murder Rate	-0.041	0.031	0.183
Government Ideology	0.010	0.004	0.014
Ranney Competition Index	-6.314	1.358	0.000
Constant	5.374	1.618	0.001
Number of Observations	693		
Area Under ROC Curve	0.728		
Percent Correctly Predicted	65.08		

Note: Standard Errors are clustered on the individual justice

Table 49: Logit estimates for cases involving discrimination based upon gender without a measure of public preferences.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Partisan Election	0.766	0.287	0.008
Nonpartisan Election	-0.060	0.274	0.826
Retention Election	0.409	0.275	0.137
Elite Reappointment	0.712	0.287	0.013
Justice Ideology	0.008	0.002	0.002
Intermediate Appellate Court	0.239	0.180	0.185
Number of Amici Briefs	0.084	0.037	0.025
Abortion	-1.357	0.277	0.000
Criminal	-1.485	0.197	0.000
Discrimination	-0.410	0.215	0.057
Family	-0.224	0.165	0.176
Equal Rights Amendment	0.245	0.135	0.069
Right to Privacy in the Constitution	-0.091	0.154	0.555
Availability of Direct Democracy	0.285	0.138	0.038
Legal Community	0.000	0.000	0.937
Murder Rate	0.011	0.017	0.515
Government Ideology	-0.002	0.002	0.279
Ranney Competition Index	0.032	0.651	0.961
Constant	-0.718	0.598	0.230
Number of Observations	2320		
Area Under ROC Curve	0.700		
Percent Correctly Predicted	64.310		

Note: Standard Errors are clustered on the individual justice

Table 50: Percent of cases predicted correctly for models involving discrimination based upon sexual orientation.

Public Opinion	Percent Correctly Predicted	Improvement
No Public Opinion	65.08	-
Berry et al.	67.39	2.31
Brace et al.	64.49	-0.59
Erikson et al.	67.85	2.77
Norrander	65.51	0.43

Table 51: Percent of cases predicted correctly for models involving gender discrimination.

Public Opinion	Percent Correctly Predicted	Improvement
No Public Opinion	64.31	-
Brace et al.	63.77	-0.54
Norrander	65.00	0.69

Table 52: Logit results for gay rights cases including all four public opinion measures.

Independent Variable	Coefficient Estimate	Standard Error	P-Value
Citizen Ideology (Berry et al.)	0.035	0.013	0.007
Acceptance of Homosexuality (Brace et al.)	0.459	2.530	0.856
Public Opinion (Erikson et al.)	1.867	1.367	0.172
Citizen Ideology (Norrander)	-0.156	0.769	0.839
Partisan Election	0.443	0.683	0.516
Nonpartisan Election	1.853	0.522	0.000
Retention Election	1.740	0.497	0.000
Elite Reappointment	0.625	0.469	0.183
Justice Ideology	0.001	0.005	0.783
Intermediate Appellate Court	0.675	0.555	0.224
Number of Amici Briefs	0.088	0.031	0.004
Same-Sex Marriage	-2.689	1.112	0.016
Sodomy Prohibitions	-1.456	0.700	0.038
Discrimination	-1.275	0.648	0.049
Benefits	-0.916	0.697	0.189
Child Custody	-1.336	0.624	0.032
Same-Sex Marriage Ban	0.055	0.234	0.814
Legislative Repeal of Sodomy	0.327	0.255	0.201
Right to Privacy in the Constitution	-0.297	0.439	0.498
Availability of Direct Democracy	-0.788	0.282	0.005
Legal Community	0.000	0.000	0.972
Murder Rate	-0.005	0.035	0.892
Government Ideology	-0.002	0.006	0.759
Ranney Competition Index	-5.805	1.432	0.000
Constant	2.748	3.382	0.416
Number of Observations	659		
Area Under ROC Curve	0.749		
Percent Correctly Predicted	66.46		

Note: Standard Errors are clustered on the individual justice

Table 53: Logit results for gender discrimination cases including all four public opinion measures.

Independent Variables	Coefficient Estimates	Standard Error	P-Value
Citizen Ideology (Berry et al.)	0.023	0.006	0.000
Public Feminism (Brace et al.)	-0.131	0.509	0.797
Public Opinion (Erikson et al.)	0.231	0.625	0.711
Citizen Ideology (Norrander)	-1.661	0.444	0.000
Justice Ideology	0.011	0.003	0.000
Partisan Elections	1.085	0.350	0.002
Nonpartisan Elections	0.783	0.314	0.013
Retention Elections	0.992	0.315	0.002
Elite Reappointment	1.122	0.305	0.000
Intermediate Appellate Court	0.308	0.191	0.107
Number of Amici Briefs	0.088	0.040	0.028
Abortion	-1.504	0.299	0.000
Criminal	-1.209	0.194	0.000
Discrimination	-0.729	0.214	0.001
Family	-0.550	0.168	0.001
Equal Rights Amendment	0.670	0.137	0.000
Right to Privacy in the Constitution	0.122	0.166	0.462
Availability of Direct Democracy	0.022	0.122	0.858
Legal Community	0.000	0.000	0.544
Murder Rate	-0.016	0.017	0.349
Government Ideology	-0.009	0.003	0.002
Ranney Competition Index	-0.168	0.648	0.796
Constant	-7.676	2.228	0.001
Area Under ROC Curve	0.676		
Percent Correctly Predicted	65.25		
Number of Observations	2279		

Note: Standard Errors are clustered on the individual justice

Table 54: Correlation between public opinion measures in gay rights cases.

	Berry et al.	Brace et al.	Erikson et al.	Norrander
Berry et al.	1.000			
Brace et al.	0.725	1.000		
Erikson et al.	0.785	0.754	1.000	
Norrander	0.764	0.818	0.732	1.000

Number of Observations = 659

Table 55: Correlation between public opinion measures in gender discrimination cases.

	Berry et al.	Brace et al.	Erikson et al.	Norrander
Berry et al.	1.000			
Brace et al.	0.423	1.000		
Erikson et al.	0.642	0.371	1.000	
Norrander	0.752	0.703	0.631	1.000

Number of Observations = 2279

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