STATE HIGH COURTS: INDEPENDENT OR CONSTRAINED ACTORS?

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This dissertation examines the degree to which judges on state high courts are constrained in their decision-making. Specifically I focus on the relationship between institutional and environmental factors and the likelihood of retaliation for unpopular decisions. Of particular interest is how the above factors relate to both elite and mass retaliation across a variety of different areas of case law. Using several different empirical techniques I study decisions issued by all fifty state high courts from 1995 through 1997. Areas of law examined include: campaigns and elections, social issues, welfare cases, and the death penalty. Evidence suggests that the level of constraint faced by judges varies depending upon institutional structures, ideological distance, and issue salience. These findings expand upon previous research by including the preferences of both elite and mass actors and present a more complete picture of how institutional and environmental factors influence judicial decision-making on state high courts.

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PREFACE

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This dissertation is dedicated to all of you.

1.0 CHAPTER ONE:
INTRODUCTION: DISCRETION AND JUDICIAL DECISION-MAKING

In the United States the judiciary faces a difficult and often contradictory balancing job. On the one hand, they must protect the legal rights of political minorities from the excesses of majoritarian lawmaking, while on the other hand they must remain accountable to the wishes of the majority in a democratic society. This delicate balancing act places judges in a tenuous position and often puts them at odds with other actors – notably the mass public and political elites. These two competing roles raise a basic question: to what degree are judges independent and free from threats posed by other actors in their environment? This dissertation seeks to answer this important question by exploring the relationship between institutional and environmental influences, and discretion in judicial decision-making.

1.1 DEMOCRACY AND JUDICIAL DECISION-MAKING

From the beginning, the founding fathers knew that judges would likely have a central role in the constitutional scheme they established. The writings of both Alexander Hamilton and James Madison affirm the importance of an independent judiciary in preserving the Constitutional structure, and discuss the inherent weakness of the judiciary when compared to the other branches – especially the legislature. In introducing the Bill of Rights for consideration during

the first meeting of Congress in 1789, Madison said: "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights…" (See Wood 1992, 322-323). Hamilton also argued that judges would serve a crucial role in preserving the separation of powers, in addition to protecting the freedoms of individual citizens. In *The Federalist Papers* number 78, he affirmed that "the judiciary … will always be the least dangerous to the political rights of the Constitution…." Despite assigning these important duties to the federal judiciary, Hamilton also noted the vulnerability of the judiciary – judges lack mechanisms to protect themselves and enforce their decisions. Therefore, Hamilton argues that judges must be institutionally shielded from threats by other actors via lifetime tenure (during good behavior). At first glance, Hamilton's arguments may seem to be only theoretical musings from the past, but they clearly illustrate an anticipation of the central role of judges in the U.S. government that has come to pass. They also demonstrate a remarkable awareness of the influences of institutional design in determining the insulation of judges from other actors, and how that insulation affects their ability to fulfill their appointed Constitutional role.

Over time, the role of courts in the affairs of government has expanded far past what the founding fathers could have imagined. Thanks to the growth of governmental responsibilities and the widespread acceptance of the general theory of judicial review, judges in the U.S. now enjoy powers unparalleled anywhere in the world.[1] But it took time for judges to establish their authority, and this did not occur without significant controversy. Over time the specific issues

[1] Only the Supreme Court of Canada comes anywhere close to enjoying the power of judicial review held by the U.S. Supreme Court. However this court's powers of judicial review are much more limited than in the United States.

brought to courts for adjudication have changed, but the judiciary continues to tackle challenges to its decisions.

The delicate balancing act faced by judges has shifted focus several times since the United States was created. In the first period, during the founding, the United States Supreme Court became referee over disputes between the federal branches, and began to clarify the limits of powers listed in the Constitution. The famous case of *Marbury v. Madison* (1803) is the clearest example of the emerging role of courts at the time. William Marbury had asked the Court to issue a writ of mandamus ordering President Jefferson's Democratic-Republican administration to deliver his commission, written during the last few hours of the federalist John Adams' term. This put the federalist-leaning Court and Chief Justice Marshall in a tenuous position: they preferred that Marbury be given the commission, but knew also that James Madison (acting as Jefferson's Secretary of State) would likely ignore the Court's order, thereby damaging judicial prestige and influence.

In a classic case of political maneuvering, Marshall declared the Court unable to issue the writ. Instead, he claimed, the Court must declare the Judiciary Act – which authorized writs of mandamus – to be unconstitutional, by the power of judicial review. The Court thus asserted its broad power of judicial review by declining to order the sitting president to deliver Marbury's commission. This interesting approach - effectively losing the battle but winning the war - highlights the skill with which Marshall and the Court crafted their decision to achieve as close to their preferred outcome as possible, while concurrently dealing with the realities of their political environment. *Marbury v. Madison* is thus a clear early case of judges facing institutional and environmental constraints.

In a later era, the courts were heavily involved in determining the limits of the federal government in regulating the economy. In a series of key cases, the Supreme Court repeatedly struck down government attempts to regulate the national economy in the wake of the Great Depression. The most prominent of these was *Schechter Poultry Corp. v. United States* (1935) and *United States v. Butler* (1936). Contemporary accounts suggest that the Court finally capitulated once Franklin Roosevelt threatened to pack the Court with additional justices (Lauchtenburg 1988).[2] However, the Court's about-face had less to do with the court-packing plan, which was unpopular with the public, and more to do with their realization of a widespread acceptance among both elites and masses of government's increasing role in regulating everyday issues. (See McKenna 2002 for discussion of the Court and the New Deal.)

Today, the most controversial court decisions often involve so-called cultural or social issues such as abortion, capital punishment, gay marriage, rights for criminal defendants, and the separation of church and state. The lion's share of attention goes to Supreme Court decisions, but state high courts can stir up controversy also. A well-known example of ruling-related retaliation against a state court justice occurred in 1986 in California (see Carrington 1998). From her appointment by the liberal governor Jerry Brown in 1978 until her electoral defeat in 1986, Rose Bird led the California Supreme Court in issuing a series of liberal decisions, the most controversial of which struck down death sentences for criminal defendants. In 1986 California's conservative governor led a public relations campaign to deny Bird retention on the basis of her liberal rulings. Unfortunately for Judge Bird, this campaign was successful; she and two other judges with liberal voting tendencies were rejected at the ballot box. This remains one

[2] Roosevelt's court-packing plan would allow him to select one additional justice for every member of the Court over the age of seventy. At the time this would have allowed him to select a majority of justices on the Court.

of the most often cited cases of retaliation against state high court judges for their judicial decisions.

Death penalty rulings are not the only source of great controversy. At the federal level one only needs to look to the bitter debate over the Court's 1973 decision in *Roe v. Wade*, and the close attention during confirmation hearings to federal judicial nominees' views on abortion, to see how the policy preferences of other political actors are relevant to judges. Recently, much has also been made about legal rulings on gay marriage. Yet, interestingly, it is state courts that have had the largest role in determining the legal status of same-sex marriage.

According to Jonathan Martin (2004) of *The Seattle Times*, state courts have been issuing important rulings on gay marriage for years. In 1993, the Supreme Court of Hawaii cleared the way for that state to be the first to sanction gay marriage (*Baehr v. Lewin*). However, voters effectively overturned this ruling by quickly passing a constitutional amendment allowing the legislature to ban same-sex marriages, which they soon did. Next, in 1998, 1999 and 2003 judges in Alaska, Vermont, and Massachusetts (respectively) ruled favorably toward gay marriage (*Brause v. Bureau of Vital Statistics*, *Baker v. State*, and *Goodridge v. Department of Public Health*). The political response to such rulings was somewhat mixed, but overall it was unfavorable. Already in 1996, President Clinton had signed the Defense of Marriage act, spurred by nationwide concerns about such rulings, and in 1998 the people of Alaska amended their constitution to prohibit same-sex marriages. In response to their court's ruling, Vermont created the first "civil union" registry. The latest development came in 2004, when several municipalities in California, Oregon, and Washington begin either issuing same-sex marriage licenses, or recognizing such licenses issued elsewhere. Such moves have galvanized opponents in D.C. and motivated President Bush to support a federal Constitutional amendment to ban

same-sex marriages. Though the amendment was defeated in the House of Representatives, it remains to be seen what ultimately becomes of the legal status of same-sex couples – nonetheless, it is very likely that state courts will continue to have a central role in the dialogue.

Another contemporary controversial issue has involved medical decisions and unconscious patients. The Terry Schiavo case of early 2005 received widespread attention in part because of the intense reaction of members of Congress to decisions made by federal judges. This was most notable in the threatening statements made by House Majority Leader Tom DeLay toward judges who did not "properly" apply the Congressional legislation passed in response to the case (see Hulse 2005). What is particularly interesting about this case is that the state court system had sole jurisdiction until certain elements within the federal government chose to become involved (see Shapiro 2005 for an in-depth history of the case). For thirteen years, the fate of Ms. Schiavo lay in the hands of the Florida courts. In 2001, a state court granted Mr. Schiavo's petition to remove his wife's feeding tube, and the ruling was later upheld by a Florida appeals court. It was not until the Florida high court denied Ms. Schiavo's parents' request to revisit the decision that the case was adopted by federal politicians and became a national issue. The resulting political hubbub concretely shows why judges might consider potential reactions to their decisions in salient cases, while also illustrating that many important issues actually begin in the state court systems.

The Schiavo case is particularly interesting as it featured a series of battles between courts and legislatures. The Florida state legislature passed a law giving the governor power over Terry's care after several lower state courts upheld her husband's attempts to remove her feeding tube. In response to the state legislature's actions the Florida Supreme Court struck down the law as being unconstitutional. Then, in response to the high court's actions, the United

States Congress passed a law removing the case to federal jurisdiction. Then the federal courts became involved, including the U.S. Supreme Court in *Schiavo, ex rel. Schindler v. Schiavo, Michael, et al.* (2005). While legislatures often pass laws in response to particular court rulings, this case was unusual because it involved so many different levels of government and so many different courts battling over the final outcome.

The above examples of controversial rulings included both federal and state decisions for a very important reason. This is to highlight prominent examples of other actors' reactions to judicial decisions, and to stress the vulnerability of all courts. If federal justices - with their lifetime tenure - can be influenced by the prevailing political winds, it seems self evident that state judges, most of which do not have life tenure, are even more likely to be limited by their political environment when making decisions. Understanding courts' degree of protection from retaliation is particularly important at present, given that certain groups in society are currently extremely vocal about their desire to punish both federal and state judges for decisions inconsistent with their political preferences.

In sum, it is clear that while the particular issues in contention change over time, the central role of the courts in resolving important political questions, and the interest of other actors in judicial decisions, does not change. Thus, from the founding period to the present, judges in the United States have been forced to at least consider the potential reactions of other actors when making decisions. As implicitly noted by Alexander Hamilton centuries ago, the institutional circumstances of judges largely determine the degree to which they must consider the preferences of other actors. Methods of appointment and retention are particularly important.

1.2 THE THEORY BEHIND DIFFERENT INSTITUTIONAL CONFIGURATIONS

A wide variety of judicial appointment and retention methods are in use in the United States today. All of these approaches fall into one of three general categories: appointment, partisan elections, and non-partisan elections (see Table 1.1 for a summary list of methods across states). Nearly all states use very different systems than that used for federal judges, who are appointed by the president and confirmed by the Senate. Once approved, federal judges hold their offices for life unless they are impeached and removed from office for major offenses.

Table 1.1: Formal Selection and Retention Methods by State, 1998

State	Initial Selection	Method of Retention
Alabama	Partisan Election	Partisan Election
Alaska	Gubernatorial Appointment*	Retention Election
Arizona	Gubernatorial Appointment*	Retention Election
Arkansas	Partisan Election	Partisan Election
California	Gubernatorial Appointment*	Retention Election
Colorado	Gubernatorial Appointment*	Retention Election
Connecticut	Legislative Appointment	Legislative Appointment
Delaware	Gubernatorial Appointment*	Gubernatorial Appointment
Florida	Gubernatorial Appointment*	Retention Election
Georgia	Nonpartisan Election	Nonpartisan Election
Hawaii	Gubernatorial Appointment*	Nominating Commission Retention
Idaho	Nonpartisan Election	Nonpartisan Election
Illinois	Partisan Election	Retention Election
Indiana	Gubernatorial Appointment*	Retention Election
Iowa	Gubernatorial Appointment*	Retention Election
Kansas	Gubernatorial Appointment*	Retention Election
Kentucky	Nonpartisan Election	Nonpartisan Election
Louisiana	Partisan Election	Partisan Election
Maine	Gubernatorial Appointment*	Gubernatorial Appointment*
Maryland	Gubernatorial Appointment*	Retention Election
Massachusetts	Gubernatorial Appointment*	Life Tenure – until age 70
Michigan	Nonpartisan Election	Nonpartisan Election
Minnesota	Nonpartisan Election	Nonpartisan Election
Mississippi	Nonpartisan Election	Nonpartisan Election
Missouri	Gubernatorial Appointment*	Retention Election
Montana	Nonpartisan Election	Nonpartisan Election
Nebraska	Gubernatorial Appointment*	Retention Election
Nevada	Nonpartisan Election	Nonpartisan Election
New Hampshire	Gubernatorial Appointment*	Life Tenure – until age 70
New Jersey	Gubernatorial Appointment*	Gubernatorial Reappointment
New Mexico	Partisan Election	Retention Election
New York	Gubernatorial Appointment*	Gubernatorial Reappointment*
North Carolina	Partisan Election	Partisan Election
North Dakota	Nonpartisan Election	Nonpartisan Election
Ohio	Nonpartisan Election	Nonpartisan Election
Oklahoma	Gubernatorial Appointment*	Retention Election
Oregon	Nonpartisan Election	Nonpartisan Election
Pennsylvania	Partisan Election	Retention Election
Rhode Island	Gubernatorial Appointment*	Life Tenure

Table 1.1 (cont)

South Carolina	Legislative Election	Legislative Election
South Dakota	Gubernatorial Appointment*	Retention Election
Tennessee	Gubernatorial Appointment*	Retention Election
Texas	Partisan Election	Partisan Election
Utah	Gubernatorial Appointment*	Retention Election
Vermont	Gubernatorial Appointment*	Legislative Election
Virginia	Legislative Appointment	Legislative Appointment
Washington	Nonpartisan Election	Nonpartisan Election
West Virginia	Partisan Election	Partisan Election
Wisconsin	Nonpartisan Election	Nonpartisan Election
Wyoming	Gubernatorial Appointment*	Retention Election

Sources: Rottman, Flango, Cantrell, Hansen, and LaFountain 2000, and American Judicature Society.

* Gubernatorial appointment from judicial nominating commission, or with approval of executive council (NH), or with consent of senate (NJ, ME, and UT)

As of 1998, twenty-eight states formally use an appointment process to initially place judges on the bench (Rottman, Flango, Cantrell, Hansen, and LaFountain 2000). Of these twenty-eight states, twenty-five use gubernatorial appointments while three states (Connecticut, South Carolina, and Virginia) use legislative appointments or elections. However, unlike the federal system, most states do not grant their judges life-tenure. In the time period studied, only Massachusetts, New Hampshire, and Rhode Island gave their judges "life" terms, and even then, judges in Massachusetts and New Hampshire are forced to retire at age seventy. The majority of appointive states subject their judges to retention elections after their initial appointment.

Appointive systems tend to maximize the influence of elites in selecting judges at the time of their appointment, while theoretically maximizing judicial freedom in decision-making after appointment, as judges rarely lose their retention elections. These appointive or merit-based systems (deemed merit because the governor is usually selecting from judges deemed fit by an advisory committee) became popular in the last century and were originally designed to

free judges from the influence of the mass public (see Bonneau 2002, 3-10, for a discussion of the history of state judicial selection). Supposedly, judges immune from the sway of the mass public would make legal decisions using their specialized training and expertise.

However, freeing judges from public accountability can be considered anti-democratic, and allows judges to lose touch with the wishes of the citizenry. In a democracy the people are supposed to determine the activities and values of government. Therefore, some states use elective procedures to select judges. Elective procedures allow the public to exercise periodic checks on the judicial branch. As noted by Bonneau, elections are designed to force judges to be accountable to the public and follow the political climate in their state (2002, 5-6). This is arguably in keeping with the founding fathers' view that the people are the source of all authority in the United States.

In 1998, twenty-two states used competitive elections to select judges to full terms. Judicial elections maximize the independence of judges from political elites, but subject them to the influence of the mass public. Judicial elections can be broken down into two types: partisan and non-partisan. Partisan elections provide voters with the party affiliation of each candidate; these are used in nine states (as of 1998). In contrast, the more common non-partisan elections allow judges to escape political labeling; thirteen states use these. Reformers who support non-partisan elections argue that the public knows little about judges or their decisions, and makes decisions based simply on party affiliation - thereby undermining the intent of partisan elections, which is to provide meaningful options (Hall 2001, 316). Extant research suggests, however, that the degree to which partisan elections promote accountability is much more complex (see Baum 1987; Bonneau and Hall 2003; Bonneau 2005a; Hall 2001; and Lovrich and Sheldon 1983). Despite scholarly skepticism, proponents of non-partisan elections argue that the absence

of party labels encourages meaningful discussion of issues (but see Dubois 1980, Dunn 1976, Hall 2001, and Herndon 1962). However, others claim that non-partisan elections provide voters with no information to evaluate candidates, giving these judges an incumbency advantage of sorts (Hall 2001, 317-319).

Interestingly, the qualifications of individuals elected or selected to sit on the bench do not vary significantly depending upon the method of selection. Research suggests that similar individuals become judges regardless of the selection methods used in a particular state (Canon 1972; Flango and Ducat 1979; Glick and Emmert 1986; Slotnick 1988). Although it might be expected that judges selected in partisan elections (or elections generally) would inherently be more tolerant of risk and politically savvy than their peers in merit-based states, the results of previous studies suggest this is not the case. This means that any strategic results found in this project are likely due to actual strategic choices by the judges and not simply the method of selection.

Because different methods of selection and retention influence elite and mass control over the judiciary, it follows that judges will face differing levels of constraint depending on the institutional environment in their particular state. By exploring how diverse institutional arrangements affect judicial decisions, we can better understand how judges fulfill their dual roles in modern American society. However, it is important to note that the degree of constraint experienced by a judge is also almost certainly conditioned by the salience of a particular legal decision. For example, death penalty decisions tend to be very controversial, because capital punishment enjoys wide support; therefore judges are likely to face intense reactions to those decisions. In contrast, campaign and election decisions are not expected to be *publicly* salient, but are often very important to *elites*. Therefore, in states with elite retention, judges will likely

feel constrained in election law decisions, while their counterparts in electoral retention states will rarely feel the same pressures. Ultimately, therefore, judicial constraint is a function of the interaction of institutional selection and environmental attitudes and salience.

1.3 THE SIGNIFICANCE OF THIS QUESTION

Why should the degree to which state high court judges enjoy decision-making discretion matter? This research question is important for several reasons. First, the importance of courts in daily life cannot be underestimated. Many judicial decisions ultimately have a significant impact on government policy, thereby reinforcing the connection between law and politics. French aristocrat Alexis de Tocqueville (2000) famously noted this connection long ago, which continues to tighten as American society grows more complex, and government becomes ever more involved in providing benefits and regulating actions. Congressional legislation to provide particular benefits or regulate some conduct typically faces numerous legal proceedings, including challenges to legislative authority, the delegation of program administration, the denial of benefits to certain individuals or the application of regulations to certain entities, and the like.

An obvious example of the impact of judicial decisions is in the area of capital punishment. Recent decisions in *Roper v. Simmons* (2005) and *Atkins v. Virginia* (2002) limiting the execution of juveniles and mentally impaired individuals clearly have a sizable public impact, and have won courts both high praise and strong condemnation. However, some court decisions with a similar degree of influence in other areas of law receive far less attention. For instance, *Eldred v. Ashcroft*, the 2003 Supreme Court decision on the power of Congress to extend copyrights, thus keeping works from entering the "public domain", also have wide-

ranging implications - and more practical impact for most citizens - but garner far less attention than more sensational cases. Thus, the extent to which other actors notice or care about the outcome of judicial decisions varies greatly depending on the issue area. Furthermore, the amount of pressure that other actors (mass or elite) can apply to judges varies greatly depending upon the institutional context. Still, regardless of the "importance" of a case, judicial freedom is perennially significant because of its centrality to decisions that affect our lives.

Second, this research question is important because judges need discretion and freedom to make controversial or unpopular decisions, in order to fulfill their counter-majoritarian role. As Hamilton noted, judges protect individuals from the encroachment of government upon their rights. In a democracy, we expect majority factions to overpower smaller factions and infringe upon their rights. The founders' concern over this possibility is clear in Madison's famous argument in *The Federalist Papers 10*, calling for an open system of government where factions compete against each other, to keep democracy from disintegrating into the oppression of unpopular small groups. Madison's competing factions might be insufficient to protect smaller groups, however; in the event that some grow too powerful, Hamilton expects the judiciary to step in to protect the minority from the majority. This line of thought clearly illustrates the notion that democracy too is subject to abuses and excesses, and highlights the important role of courts in protecting the rights of unpopular groups.

Third, it is important to understand strategic judicial decision-making on state high courts because of their predominance in deciding legal disputes in the United States. The United States Supreme Court is often referred to as "the highest court in the land", but in reality, only a tiny fraction of cases are ever appealed to the U.S. Supreme Court and even fewer are actually accepted and decided by it. In fact, the vast majority of cases in the U.S. are decided by a state

high court or lower court (Brace, Hall, and Langer 2001, 85). The U.S. Supreme Court is therefore often only "supreme" in name; in many areas state high courts' decisions have a stronger impact on U.S. law. Understanding how these courts make their decisions, and the pressures they face, is important to the study of judicial decision-making generally, and to the development of legal rights for citizens specifically.

1.4 PLAN OF THE DISSERTATION

Chapter Two begins with a brief review of the history of institutionalism. I then explore prominent theories of judicial behavior and illustrate why neo-institutionalism provides the best framework for understanding judicial decision-making. I conclude with a discussion of relevant neo-institutional research, and briefly explain how this dissertation fits in with previous work.

In Chapter Three, I present my formal model of judicial decision-making, and show how this model provides a valuable clarification of the relationship between institutional arrangements and judicial behavior. I then specify my research design, data, and method. Finally I discuss how my project will add to our understanding of judicial decisions.

Chapter Four presents my four statistical models and their results. I also discuss the importance of my findings and how they fit in with previous research on judicial decision-making.

In Chapter Five, I present case studies in order to further explore the findings of my statistical models. These case studies provide additional evidence that judges' freedom to make decisions is more nuanced than conventional wisdom would suggest.

Finally in Chapter Six I summarize this project and its findings, and reconcile my results with current knowledge. I then conclude with a discussion of avenues for further research.

2.0 CHAPTER TWO:
INSTITUTIONS AND JUDICIAL DECISION-MAKING

Students of politics have examined the effects of institutions on political outcomes for centuries. Both ancient philosophers such as Aristotle and Plato and classical political theorists of the Enlightenment such as Thomas Hobbes, John Locke, and Charles Montesquieu were all concerned with the structure of government. Many of their observations on institutional design were influential in the creation of the United States Constitution. One need only scan the debates that took place during the Second Continental Congress, the arguments presented in *The Federalist Papers* and ratification speeches, and other writings of the founders to realize their immense efforts to design institutions for the best possible outcomes for citizens. Institutional research has been a focus of political scientists ever since the formal organization of the discipline as a specific field of study.

Traditional or "old" institutionalism focused on formal structures and plans of government, such as the structural design set forth in the Constitution, and contained a strong normative foundation (Peters 1999, 3). Research questions tended to revolve around issues of how government was *supposed* to work, with little emphasis on how government *actually* worked. The informal mechanisms of government were ignored in favor of the formal written characteristics such as laws or the text of judicial decisions. This approach discounted the role of informal networks, individual motivations, institutional norms, and the like. The thrust of traditional institutionalism is best summed up by Guy Peters' assertion that the five defining

features of old institutionalism were: legalism, structuralism, holism, historicism, and normative analysis (1999, 6-11).

Starting in the 1950s, the so-called behavioral revolution redefined how many scholars thought about politics. The main features of behavioralism included a concern for explicit theory and appropriate methodology, a positivist focus, individualism, and "inputism" – a focus on the social factors that fed in to government, rather than on government itself (see Peters 1999, 11-15). Behavioralism was a reaction to the structurally oriented institutional approach, which was replaced with a concentration on the study of factors *external* to government - namely, the individual motivations of citizens and elite decision makers.

Generally speaking, the fundamental differences can be summed up succinctly: institutionalism looks primarily at the role of formal structures in influencing outcomes, while behavioralism studies the effect of individual motivations on political decisions. Thus, proponents of these theories have clashed over the appropriate approach to studying politics for years. Unfortunately, the two groups have rarely attempted to integrate the useful and complementary aspects of each view; they are commonly believed to be mutually exclusive.

Clearly both traditional institutionalism and behaviorism are valuable in better understanding politics. However, the important elements of each can and must be synthesized for a complete picture of political phenomena. In recent years an approach known as *neo-institutionalism* has emerged, which combines elements of both views to more fully explain the political world. New institutionalism is an update of "old" institutionalism, incorporating many behavioral assumptions into an integrated theory of political interactions. To many modern scholars, neo-institutionalism represents a welcome theory that utilizes the best of both worlds.

2.1 NEO-INSTITUTIONAL THEORY

Neo-institutionalism traces its inception to the work of James March and Johan Olsen (1984 and 1989). March and Olsen disagreed with what they saw as the overly individualistic behavioralist emphasis of political science at the time, and called for the incorporation of variables like the static nature of institutions, the role of history, and the influence of symbolism into our conception of politics (1984, 1). New institutionalism differs from old institutionalism by including informal factors such as group norms, past history, and individual incentives, in addition to formal structural factors. Over time, neo-institutional researchers have varied their emphasis on certain informal elements in this work.

Currently, at least four primary versions of neo-institutionalism exist: normative, rational choice, historical, and societal (Hall and Taylor 1996; Immergut 1998; Peters 1999; Rothstein 1996; Thelen and Steinmo 1992; Weingast 1996.) Normative institutionalists focus on how informal norms and cultures within institutions shape and constrain behavior (see March and Olsen 1984 and 1999). Rational choice institutionalists also focus on individual behavior within institutions, but see choices in terms of rational calculations – simple incentives or disincentives posed by institutional rules (see Scharpf 1997). Historical institutionalists emphasize the continuing influence of the history of an institution on future choices through concepts like path dependency (Peters 1999, 65). Societal institutionalists focus on the relationship between government and certain groups in society such as interest groups, political parties, and other networks (see Meyer and Rowan 1977).

This dissertation takes a rational choice approach to neo-institutionalism. I argue that conceptualizing judicial interactions with other actors in terms of rational calculations is a particularly fruitful approach to studying the American judiciary. Judges' reactions to potential

threats posed by other actors in their environment inherently involve calculations of risk and of probable reactions of other actors. A rational choice approach clearly provides the best conceptualization of these types of interactions. Rational choice neo-institutionalism embraces economic views of human behavior to understand how institutional arrangements influence decisions (Brace and Hall 1990, 55). As applied to judicial behavior, this version of neo-institutionalism recognizes that judicial decisions are complicated, and likely influenced by the interaction of personal preferences with the institutional environment faced by a judge (Brace and Hall 1990, 1993; Hall and Brace 1989, 1992). Thus, neo-institutionalism represents an excellent theoretical framework for exploring integrated theories of judicial decision-making.

2.2 INTEGRATION, JUDGES, AND NEO-INSTITUTIONALISM

In many ways, theoretical integration is the intellectual core of neo-institutionalism. An integrated approach is vital when studying judicial behavior, as studies have found multiple types of factors to be influential in judicial decision-making. Many of these factors have generated theories of their own, including the legal model, the attitudinal model, and role theory. Of these approaches, the attitudinal model as developed by Jeffrey Segal and Harold Spaeth is the most prominent. Any modern research on judicial decision-making must either incorporate aspects of the attitudinal model, or to at least acknowledge its contributions to contemporary judicial scholarship. The attitudinal model, as developed by Segal and Spaeth, simply posits that judges' decisions are little more than a reflection of their attitudes, or personal political preferences. In their seminal work *The Supreme Court and the Attitudinal Model* (1993), Segal and Spaeth

demonstrate the relevance of the attitudinal model to decision-making on the U.S. Supreme Court.

Despite the widespread attention the model has received, many scholars do not fully appreciate the institutional implications of Segal and Speath's attitudinal model. Attitudes matter particularly on the U.S. Supreme Court because of the special insulated institutional context in which it operates. The Supreme Court is the highest court in the land; its justices enjoy life tenure and nearly complete docket control. These characteristics mean that the Court is unlikely to be overruled - the constitutional amendment process is very difficult. Additionally, the justices are unlikely to be impeached; the Court generally enjoys the highest levels of public support of any of the three branches of government. In sum, the justices enjoy an unusually institutionally protected situation, free of most worries of retaliation.

State courts, however, operate in a very different environment than that of the U.S. Supreme Court. Most state high court judges do not have lifetime tenure, few have complete docket control, and often other actors such as legislators, governors and the general public can retaliate against their state high court judges fairly easily, with little recourse for the courts. This creates a situation in state high courts where judicial attitudes may matter less than on the Supreme Court.

Rational choice neo-institutionalism recognizes both the role of the individual and the role of structure in determining outcomes. This means that the influence of personal attitudes is shaped by the institutional context of a particular state. Such a theoretical approach recognizes the connections between personal preferences, law, and institutional structures in explaining why judges make the decisions that they do. Neo-institutionalism allows us to synthesize a fully integrated approach to better understand judicial decision-making.

2.3 STRATEGIC BEHAVIOR AND NEO-INSTITUTIONALISM

The flexible and inclusive nature of neo-institutional theory also allows us to incorporate the strategic nature of judicial decision-making. Scholars have long recognized that judges must work strategically within internal and external institutional constraints to realize their policy goals (see Baum 1997; Epstein and Knight 1998, 2000; and Wahlbeck, Spriggs, and Maltzman 1998, 1999). Strategic research predicts that sometimes judges will vote "sincerely" (that is, consistent with their personal ideological preferences), and sometimes "strategically" (modifying their voting stances from their true preferences), depending on the preferences and action abilities of other actors in their environment. (See Table 2.1 for the average ideology of courts, elites, and masses by state.)

The scores reveal that Hawaii is by far the most liberal state with ideology values of 86.04, 93.54, and 78.86 for its judges, elites, and mass public respectively. Vermont is also quite liberal (along with Massachusetts) and has scores of 69.20, 84.72, and 70.22. Several western states via for the most conservative title, including: South Dakota, Utah, and Wyoming. Utah has the most conservative elites (3.35) but a judicial score of 28.66 and a mass score of 31.73. Interestingly New Hampshire has an extremely conservative bench (7.44) but a slightly less conservative elite population (15.84) and an even more moderate mass public (34.27). California, the nation's largest state, has nearly ideologically identical conservative judicial and elite scores (33.59 and 33.32) but a more moderate electorate (51.02). These scores reveal an intriguing ideological variation across states and among the three major political players in all fifty states.

Table 2.1: Court, Elite, and Mass Ideology by State, Average 1995-1997

State	Court Ideology*	Elite Ideology*	Mass Ideology*
Alabama	36.87	35.11	32.98
Alaska	41.77	38.20	27.25
Arizona	25.32	2.98	39.61
Arkansas	49.08	62.42	40.26
California	33.59	33.32	51.02
Colorado	45.72	55.85	44.87
Connecticut	57.87	49.42	62.21
Delaware	41.24	62.96	44.97
Florida	47.35	61.39	43.56
Georgia	44.53	82.36	40.37
Hawaii	86.04	93.54	78.86
Idaho	33.78	2.17	18.15
Illinois	44.93	22.76	53.31
Indiana	21.28	48.34	37.82
Iowa	22.45	22.25	41.63
Kansas	23.69	7.56	35.36
Kentucky	44.19	72.69	36.02
Louisiana	37.19	50.57	35.39
Maine	60.00	62.42	61.27
Maryland	78.04	93.11	60.16
Massachusetts	73.59	69.96	76.74
Michigan	47.87	19.76	51.53
Minnesota	61.91	43.02	52.82
Mississippi	33.17	26.26	23.69
Missouri	24.10	70.35	44.62
Montana	35.86	4.33	35.86
Nebraska	39.48	50.95	33.97
Nevada	27.14	53.85	38.56
New Hampshire	7.44	15.84	34.27
New Jersey	53.42	32.70	61.61
New Mexico	46.82	48.98	46.29
New York	57.72	44.27	64.85
North Carolina	41.62	64.42	41.92
North Dakota	45.91	8.19	51.38
Ohio	34.56	12.97	45.45
Oklahoma	35.81	17.74	14.51
Oregon	61.67	56.63	56.34
Pennsylvania	48.58	26.94	52.64
Rhode Island	64.97	60.83	66.24
South Carolina	41.66	25.34	44.37
South Dakota	25.55	6.92	45.13

Table 2.1 (cont)

Tennessee	49.19	30.27	34.06
Texas	29.72	28.57	36.34
Utah	28.66	3.35	31.73
Vermont	69.20	84.72	70.22
Virginia	33.17	30.51	39.19
Washington	50.07	60.36	50.16
West Virginia	48.23	70.25	59.59
Wisconsin	44.64	28.86	49.81
Wyoming	45.17	5.11	31.17

Source: Brace, Langer, and Hall (2000), and Berry, Ringquist, Fording, and Hanson (1998)

*Higher values are liberal, lower values are conservative.

Strategic research in judicial behavior generally falls into one of three major categories. The first involves work dealing with strategic behavior *within* courts; that is, among judges (Baum 1997; Brace and Hall 1990; Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Perry 1991; Wahlbeck, Springs, and Maltzman 1998). The second examines strategic behavior *among* courts, usually hierarchical interactions between the U.S. Supreme Court and lower federal courts (Kilwein and Brisbin 1997; Songer 1987; Songer, Segal, and Cameron 1994; Songer and Sheehan 1990). The third category deals with interactions between high courts - nearly always the U.S. Supreme Court - and political actors, often Congress (Dahl 1957; Gates 1987; Gely and Spiller 1990 and 1992). It is the third category that this dissertation will address. Relationships between various branches of government are commonly referred to as "separation of powers" issues. This is because formal institutional relationships, such as the separation of powers written into the U.S. Constitution, condition these interactions. Paralleling the general

bias found in judicial scholarship overall, most separation of powers studies focus on the U.S. Supreme Court.[3]

Specifically, separation of powers research focuses on the degree to which judges are constrained by the preferences of other actors (Epstein and Walker 1995; Eskridge 1991; Ferejohn and Shipan 1990; Marks 1988; Spiller and Gely 1992). Other actors in the judges' environment include both elite (legislature and executive) and mass (the general public) actors. Traut and Emmert (1998) find that both elite and mass opinion affect capital punishment decisions on the California Supreme Court. Brace, Hall, and Langer (2001) find similar results in their study of abortion decisions across state high courts. However, neither study provides a thorough examination of how state supreme courts react strategically to both elite and mass actors across a wide range of case law areas.

This research examines state high court decisions across multiple types of cases in order to explore the degree to which other actors influence judicial decision-making broadly. It is reasonable to expect that the influence of other actors on case outcomes will vary depending upon the salience of the particular issue area, the potential for retaliation (i.e. opposition during retention bids or constitutional amendments nullifying judicial decisions), and the type actor (elite or mass) that holds power in a state. For example, judges are likely to be constrained and adjust their behavior strategically when the case involves an issue of importance to elite actors and elite actors have control over the judicial retention process.

Of course any discussion of measuring or understanding "strategic" behavior must explicitly recognize the difficulties inherent in capturing such behavior. Since the outcome of

[3] Notable examples of separation of powers research include: Brace, Hall, and Langer 1999; Clinton 1994; Hausegger and Baum 1999; Knight and Epstein 1996; Rogers 2001; Rogers and Vanberg 2002; Segal 1997; Traut and Emmert 1998; Vanberg 2001.

strategically calculated decisions may be the same as non-calculated decisions, we must be careful to have a clear research design enabling us to draw inferences about which results are actually due to strategy, and which are not. My plan to distinguish sincere behavior from strategic behavior that stems from institutional contexts will be discussed in the next chapter.

2.4 STATE HIGH COURTS AND NEO-INSTITUTIONALISM

Developing an explanatory theory is the first step in conducting research. The second step is to develop an empirically accurate and valid way of testing that theory. Testing neo-institutional theories is often difficult because the cases must exhibit meaningful differences in institutional structure and environment, while simultaneously sharing enough common variables to make comparison meaningful, and allow the researcher to focus on variation in the factors of interest. State high courts exhibit the kind of variation in their institutional design and structure that presents an ideal situation for testing institutional theories.

Table 2.2 provides a summary of institutional variation in state high courts, including the difficulty of amendment procedures, the presence of an intermediate court of appeals, and the length of judicial terms. Twelve states utilize easy amendment procedures requiring only legislative approval while the other thirty-eight also require mass approval of constitutional amendments. Eleven states do not have intermediate courts to share the appellate workload while the other thirty-nine do. Judicial term lengths vary across the states and range from a minimum of six years to life. A term length of six years is most common and used by fifteen states.

Table 2.2: Amendment Procedures, Intermediate Court, and Term Length by State, 1995-1997

State	Amendment Procedure[4]	Intermediate Court	Term Length (in years)
Alabama	Difficult	Yes	6
Alaska	Difficult	Yes	10
Arizona	Difficult	Yes	6
Arkansas	Difficult	Yes	8
California	Difficult	Yes	12
Colorado	Difficult	Yes	10
Connecticut	Difficult	Yes	8
Delaware	Easy	No	12
Florida	Difficult	Yes	6
Georgia	Difficult	Yes	6
Hawaii	Difficult	Yes	10
Idaho	Difficult	Yes	6
Illinois	Difficult	Yes	10
Indiana	Easy	Yes	10
Iowa	Easy	Yes	8
Kansas	Difficult	Yes	6
Kentucky	Difficult	Yes	8
Louisiana	Difficult	Yes	10
Maine	Difficult	No	7
Maryland	Difficult	Yes	10
Massachusetts	Easy	Yes	Until age 70
Michigan	Difficult	Yes	8
Minnesota	Difficult	Yes	6
Mississippi	Difficult	Yes	8
Missouri	Difficult	Yes	12
Montana	Difficult	No	8
Nebraska	Difficult	Yes	6
Nevada	Easy	No	6
New Hampshire	Difficult	No	Until age 70
New Jersey	Difficult	Yes	7
New Mexico	Difficult	Yes	8
New York	Easy	Yes	14
North Carolina	Difficult	Yes	8
North Dakota	Difficult	No	10
Ohio	Difficult	Yes	6

[4] Following Laura Langer's (2002) classification system, a state utilizes a difficult amendment system if approval by the electorate is required, in addition to a 2/3 vote in the legislature. An amendment system is categorized as easy if amendments require the approval of two legislative sessions.

Table 2.2 (cont)

Oklahoma	Difficult	Yes	6
Oregon	Difficult	Yes	6
Pennsylvania	Easy	Yes	10
Rhode Island	Difficult	No	Life
South Carolina	Easy	Yes	10
South Dakota	Difficult	No	8
Tennessee	Easy	Yes	8
Texas	Difficult	Yes	6
Utah	Difficult	Yes	10
Vermont	Easy	No	6
Virginia	Easy	Yes	12
Washington	Difficult	Yes	6
West Virginia	Difficult	No	12
Wisconsin	Easy	Yes	10
Wyoming	Difficult	No	8

Source: Book of the States – various years (for amendment difficulty), and Rottman, Flango, Cantrell, Hansen, and LaFountain 2000 (for intermediate court and term lengths)

Two prominent judicial researchers have repeatedly shown that state courts represent a nearly perfect test of neo-institutional theories. In a series of studies, Brace and Hall have illustrated the effects of variations across court system structures, docket loads, judicial predispositions, resources, retention procedures, and state environments, as measured by such variables as government expenditures, partisan competition, and urbanism (Brace and Hall 1990, 1993, 2000; Brace, Hall, and Langer 2001; Hall and Brace 1989, 1992). Many of these variations are not found across federal courts.[5] The Supreme Court has no other counterpart within the United States - some would say in the world - and has experienced few meaningful

[5] In fact, all federal courts are institutionally isolated from threats by other actors. It is unsurprising that the attitudinal model has had such an impact on Supreme Court research, but the relevance of attitudes to that court does not render institutional considerations invalid. It may be precisely because of its particular institutional isolation that attitudes matter so much in Supreme Court decision-making.

changes over time, making it nearly impossible to study in an institutional context.[6] On the other hand, state courts reside in the same country, and share a common history and legal background. In many ways, they are ideal for testing neo-institutional theories of judicial decision-making.

2.5 PREVIOUS RESEARCH

Institutional research on courts has evolved over time. Many early institutionally oriented studies of the judiciary often found measures of socioeconomic and political complexity such as state government expenditures, partisan competition, and urbanism to be important in explaining judicial behavior (Atkins and Glick 1976; Canon and Jaros 1970; Glick and Pruet 1986; Glick and Vines 1973; Jaros and Canon 1971). Other early studies examined the role of structural and environmental elements such as the presence/absence of an intermediate court (Beiser 1974; Canon and Jaros 1970; Glick and Pruet 1986; Handberg 1978) or partisan competition (Glick and Pruet 1986). Later, institutionally based research incorporated more factors such as heavy workloads (Atkins and Green 1976; Wold and Caldeira 1980), discretionary dockets (Glick and Pruet 1986; Hall 1992), and method of recruitment (Brace and Hall 1990; Hall and Brace 1989; Traut and Emmert 1998). Finally, internal arrangements such as method of opinion assignment and voting rules (such as voting order at conference) have all been found to relate to judicial decisions (Brace and Hall 1990; Hall and Brace 1989, 1992).

Many studies have examined how institutional incentives promote judicial dissent. These studies are particularly good at illustrating the influence that institutional factors have on judges'

[6] Studies have compared high courts cross-nationally but such studies are often burdened with fundamental comparability issues. See Gibson, Caldeira, and Baird 1998, Schmidhauser 1987, and Tate 1987 for discussion of the challenges of cross-national research.

behavior. For example, the presence of an intermediate court has been found to increase the likelihood of dissent (Beiser 1974; Brace and Hall 1990; Canon and Jaros 1970; Glick and Pruet 1986; Hall and Brace 1989; Handberg 1978), as has discretionary docket control (Glick and Pruet 1986; Hall 1985). Conversely, though not surprisingly, heavy workloads (Atkins and Green 1976; Wold and Caldeira 1980) and judicial appointment rather than election decrease dissent (Brace and Hall 1990; Hall and Brace 1989). These findings suggest that intermediate courts absorb mandatory workloads, thereby allowing the higher court to have discretionary docket control, which increases the likelihood of attitudinally-based decisions. On the other hand, a heavy workload lessens the tendency to dissent, because judges have less time and energy to write separate opinions. Lastly, some research has suggested that volatile electoral selection methods favor individuals who are not risk-averse – so, appointed judges are less likely to take risks through individual dissent (see Hall and Brace 1989, 398; Riker and Ordeshook 1973; and Weingast 1979). Such studies neatly illustrate the connection between institutional incentives and judicial behavior.

This dissertation seeks to determine the degree to which judges are unconstrained in their decisions and free of potential threats by other actors. In light of previous findings, I expect to find that this varies across different areas of case law, due to the varying salience of certain types of cases to other actors in judicial environments. To fully understand how state high court decisions are influenced by other actors, it is necessary to examine decisions across a range of case law areas. It is likely that judges enjoy a greater freedom to act in some case law areas than in others. For example, some types of cases - campaign and election law among them - are extremely important to state politicians. But the mass public likely cares not at all about such decisions. The groundbreaking work that first tested this conditional relationship between

institutions and judicial decision-making is Laura Langer's *Judicial Review in State Supreme Courts* (2002). Langer tested an integrated model looking for evidence of varying behavior across four different areas of case law.

Langer's research assumes that judges' freedom to follow their attitudinal preferences is constrained by elite actors in their environment - the legislature or governor - in some types of cases. Langer posits that the "safety zone" (the theoretical area in which they are free to make decisions without fearing retaliation from other branches) enjoyed by judges varies depending on the salience of the case to elites. Because of the effect that initial strategic calculations have on the outcome, she tests her theory by incorporating decision-making at both the agenda setting and final decision stages. She finds that the degree to which judges are constrained does vary across four different areas of case law.

Langer's four areas of law, ranging from highest constraint to lowest, are: campaign and election law, workers' compensation law, unemployment compensation law, and welfare benefit law. Her case area selection was conditioned upon the relative interest elites would have in each type of law. Campaign and election laws were posited and found to have generated the most constraint for judges, because such decisions are so important to elected politicians. Workers' compensation law and unemployment compensation were selected because Langer also expected these to be relevant to elites, primarily because of their financial costs, but less than campaign and election law. Finally Langer expected and found welfare law not to matter to elites; welfare policies enjoy a steady degree of public support, and are not open for serious debate. Generally, court decisions in this area have little effect on budgets, since welfare defendants rarely have the resources available to mount an effective legal campaign.

While Langer's (2002) work makes a valuable contribution to understanding state court behavior, it is limited in scope. She examines only elite actors, and does not incorporate measures of mass preferences into her calculations. She assumes that there is an indirect effect for mass preferences and the public's political leanings are channeled through elites. In contrast I argue for a direct effect. There are many opportunities for the mass public to express their policy preferences directly and force judges to care how the mass public perceives their decisions, and adjust their rulings accordingly. The most obvious is the fact that, as of 1998, forty states use some form of election retention. Judges therefore need to pay attention to public opinion, at least in case law areas about which the public is likely to care. One of the aims of this dissertation is determining in which areas judges are constrained by the public in decision-making. If we do not know how the preferences of the mass public affect state high court decisions, then we have an incomplete picture of judicial decision-making. This is especially important in view of the counter-majoritarian role of judges.

Though Langer's (2002) design and analysis is extremely helpful in furthering our understanding of state-level judicial behavior, it is ultimately just a starting point. Langer considers elite actors in the court's environment but does not consider mass actors. She dismisses consideration of mass actors by arguing that public opinion is reflected through the other branches (2002, 3). While it is likely that public opinion in some areas is reflected through elite watchfulness, the mass public often does care independently about judicial decisions. For example, Langer found evidence that judges were relatively unconstrained in their welfare decisions (2002, 121); it is reasonable to expect that the general public is less likely to care about such decisions. Conceptually, cases can be divided into two categories: the first (and probably

the largest) includes disputes that the public has no interest in, while the second includes the cases that do interest the public.

An additional example is tax law. The mass public is unlikely have an interest in the details of corporate tax law, and will leave judgments on the court's decisions in that area for elected politicians to evaluate. On the other hand, it is not difficult to imagine areas of law that *are* relevant to the public, about which the public are reasonably aware, and ready to judge the court for its decisions. Civil liberties decisions on abortion or gay rights, for instance, are extremely likely to be salient to the general public. This is especially true today, in the midst of the heated debate over same sex marriage, and the increasing importance of such social issues in political discourse.

Among other things, this dissertation will test this general theory of limited public interest in some types of cases. Indeed, multiple studies have found evidence that the public is aware of and actively involved in state high court decisions *in certain areas* (Brace, Hall, and Langer 1999; Langer 2002; Traut and Emmert 1998). Langer (2002) examines decisions in campaign and election law, workers' compensation, unemployment compensation, and welfare benefit laws in her research. She argues that each of these areas represent varying degrees of salience to elite actors. This dissertation will use the same principle, but examine areas of varying salience to both elite and mass actors in order to present a more complete picture of decision-making within the institutional environment faced by state high courts.

2.6 CONCLUSION

This dissertation examines how state high court decisions are affected by institutional and environmental factors. I will explore the degree to which judges' decisions are constrained due to threats posed by other actors, both elite and mass, in their environment. This question is significant because of the importance of court decisions in the daily lives of citizens, the vital counter-majoritarian function of courts as delineated by our founding fathers, and because state courts adjudicate the highest percentage of cases in our legal system. I will approach this question using an integrated model based on neo-institutional theory, emphasizing the rational choice perspective. By modifying Laura Langer's basic design, I hope to capture the strategic nature of judicial decision-making, as judges alter their decisional process in response to the potential salience of various types of cases to other actors in their environments.

3.0 CHAPTER THREE:
METHODS, MODELS, AND RESEARCH DESIGN

To what degree are state high court judges' decisions constrained by other political actors? In this dissertation, I seek to discover how institutional and environmental factors influence decision-making, and if the influences on judicial decisions vary across different areas of law. I expect to find that institutional arrangements such as method of retention correlate differently with decision-making across multiple areas of case law. This is because the level of constraint faced by judges depends upon institutional arrangements and salience to other actors.

To fully understand judicial decision-making research must take into account the fact that it is a two-step process. At the appellate level, judges first grant review by deciding to hear a case, and second, make a decision on the merits, by voting on the outcome of a case. It is necessary to examine both stages in order to have a complete picture of how judicial calculations affect outcomes. Judges may refuse to grant review in cases that could put them in direct conflict with other actors. Decisions at the second stage would therefore be virtually unconstrained, because the constraints imposed by other actors would be effectively negated in the first stage through refusal to hear the case.

Failing to account for the two-step nature of the process could easily lead to biased results. As noted by James Gibson: "If we are to have a comprehensive understanding of decision making – one that transcends the limited understanding generated to date -- "cross-

level" models are essential." (1991, 269) Brace and Hall make a similar observation (1993, 915 and 1995, 8).

3.1 THE MODEL

This dissertation includes a formal model (see Figure 3.1) to clarify the judicial processes in question, and to illustrate the sequence of events that make up judicial choice. This model utilizes a standard two-player game format, the only exception being that the first actor (the state supreme court) makes two choices before the second actor (whoever retains judges) takes a turn. In states where judges are retained by mass elections the second player is the general public; in states with elite retention methods the second player is the legislature or the governor.

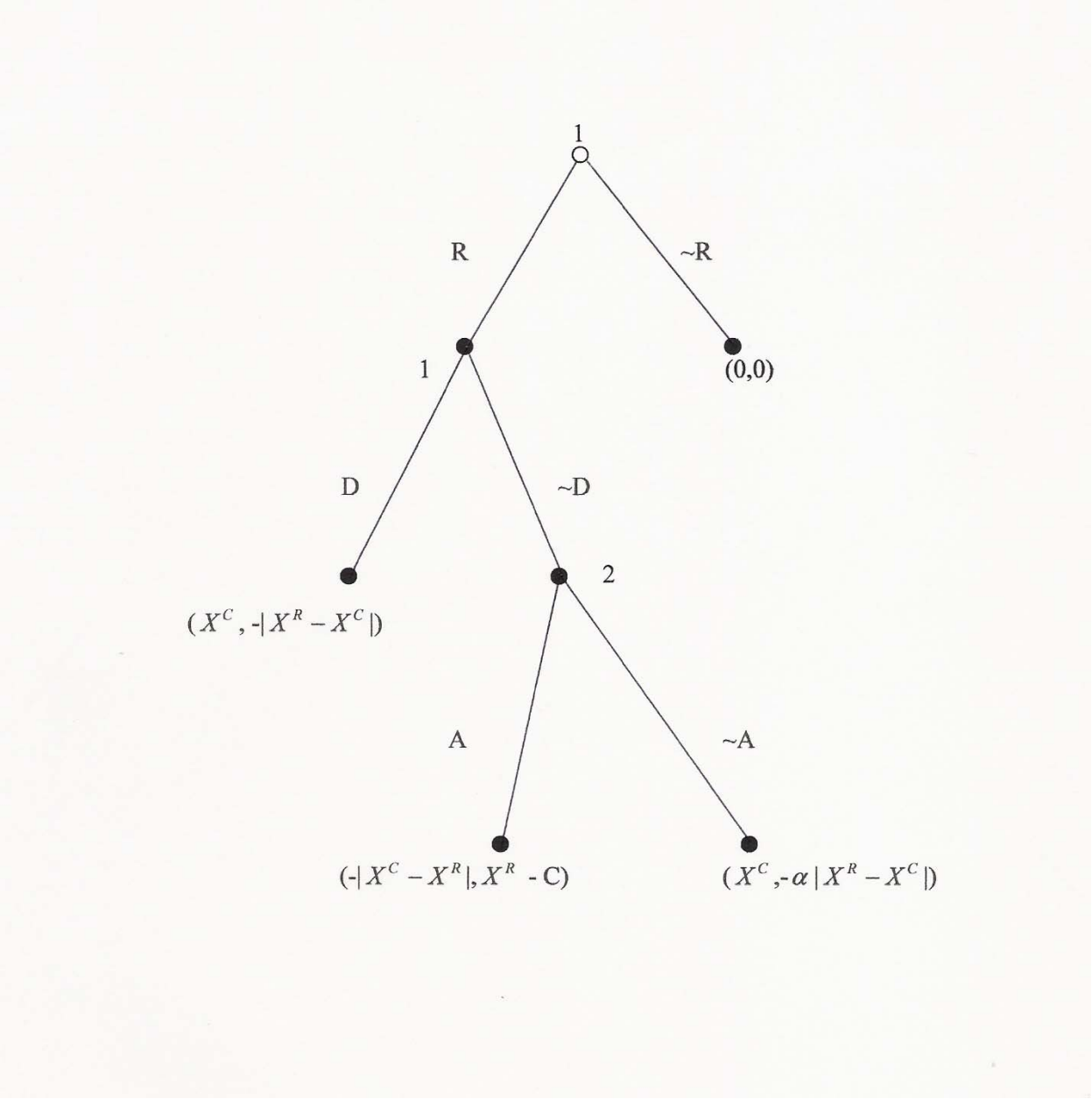

Figure 3.1: Formal Model

A legal status quo exists before the game begins. The status quo is the current state of jurisprudence created by contemporary policies, current standards of review, and past precedent. The game begins when a case is appealed to the state high court. The first choice is the court's

decision to accept a case for review (R) or not (~R). If the court does not grant review, the game ends and the status quo is preserved. Since nothing has changed, the payoff for both players is 0. Note that the payoffs are *changes* in distance from the preferred position of actors. The payoffs are not the actual values of participants' preferences because there is no way to know the value of the status quo to either the court or the retainers. Decisions to grant review are not based simply on satisfaction with the status quo. While the court or the retainers may be pleased or displeased with the status quo, their current state of satisfaction does not change if the court does not grant review, hence the payoff of (0,0).

If the court grants review (R), the judges face two choices. They may either decide the case on the merits in a way that pleases those who retain them (D) or they may decide the case in a way contrary to the preferences of their retainers (~D). If the court and the retainers are in general agreement the payoff for the court will be X^C - the ideal point of the court. The ideal point of the court represents the preferred legal positions of the judges. The ideal point for the elite actors represents their preferred legal outcomes. The payoff for the retainers in this case will be $-|X^R - X^C|$. This payoff is the difference between the court's ideal position and that of the retainers. It is negative because, although the court and the retainers are in general agreement, the exact policy position of the court is unlikely to be *exactly* the same as that preferred by the retainers. The outcome (D) represents the subgame perfect equilibrium.

If the court decides the case in a manner ideologically displeasing to its retainers (~D), then the retainers face a choice of whether to act to change the policy (A) or to choose not to take action (~A) and accept a decision they do not prefer. If the retainers choose to act (usually through the legislative process or constitutional amendment) their payoff is $X^R - C$. X^R is the ideal point of the retainers minus the costs (C) of taking action. Clearly, passing legislation or

amending a state constitution is costly. When transaction costs are too great the retainers are unlikely to act. In the event that the payoff to the retainers makes assuming the transaction costs worthwhile, the payoff for the court becomes $-|X^C - X^R|$, the difference between the court's preferred policy position and that of the retainers.

It is possible that the retainers will choose not to take action (~A) in response to a court ruling, even though they disagree with the ruling. In this case, the payoff for the court will again be X^C (its ideal point) and the payoff for the legislature will be $-\alpha \ |X^R - X^C|$. In this situation, the value of $-\alpha$ times the distance $|X^R - X^C|$ may be greater than the value of that distance when the court and their retainers were in general agreement (D). The $-\alpha$ included in the payoff shows that the court and the retainers are at odds on policy in this outcome. The actual value of α will depend on the salience of the policy area.

This model of judicial decision-making is predicated on the belief that judges will face differing levels of constraint depending upon the particular salience of an issue area to either elite or mass actors. In cases such as welfare policy, where neither elite nor mass retainers are likely to care what the court decides, α will be small. However, in cases such as death penalty or campaign finance, α for elite actors will be larger, reflecting the salience of the issue to politicians. In capital cases and social issues the α for mass actors will be larger, reflecting the salience of those issues to the general public. Depending on the salience of the issue (the value of α), retainers may or may not find it cost effective to choose option (A) - action - over (~A) - inaction. There are many reasons to expect that the two types of actors will be concerned about outcomes in different case law areas. These reasons are discussed in-depth in the following section.

3.2 SALIENCE AND JUDICIAL DECISION-MAKING

Rational choice neo-institutionalism holds that institutional arrangements and structures constrain behavior. This dissertation will examine whether influences on judicial decision-making vary across different areas of case law. This is to be expected, because certain areas of case law are more salient to actors in the judges' environments. It is the interaction of particular institutional arrangements, such as retention method, with other relevant factors, like ideological differences, that should be most likely to vary across different types of cases. Such findings would reinforce the theory that behavior is conditional upon institutional structures and environmental factors.

This research question will be tested using an integrated neo-institutional model incorporating various attitudinal, institutional, and environmental measures. Attitudinal measures will include: judicial ideology, elite ideology, and mass ideology. Institutional and environmental measures will include: divided government, state constitutional amendment difficulty, retention method, the presence of an intermediate court, and term length. Four different types of cases will be examined including: campaign and elections, capital punishment, social issues, and welfare decisions.

One noteworthy feature of this study is its recognition of the nuances of judicial decision-making. Institutional factors are typically thought to have straightforward effects; for instance, divided government consistently permits courts more latitude in their decision-making (Brace, Hall, and Langer 1999; Langer 2002), or a longer term length gives judges more freedom (Brace and Hall 1995, 1997; Brace, Hall, and Langer 1999; Hall 1992). In reality, the situation is likely to be more complicated. Longer term lengths may indeed give judges the most freedom, but only in areas that are of little concern to other political actors. On the other hand, judges may

enjoy the same degree of freedom regardless of term length when the issue in question is not particularly important. The key point is that the relative influence of institutional arrangements is a complex interaction of various factors including environmental salience.

This study examines judicial decisions in campaign and election laws, death penalty cases, social issues cases, and welfare law. Figure 3.2 provides a description of the relative salience of the four areas of law to elite and mass actors. These four particular areas were selected because they represent four different combinations of salience to both elite and mass actors, and the findings of previous studies support their selection.

		Political Elites: Salient	Political Elites: Non-Salient
Mass Public	Salient	Death Penalty	Social Issues
	Non-Salient	Campaigns & Elections	Welfare Cases

Figure 3.2: Issues Areas and Expected Salience

It is expected that elite ideology will correlate with judicial decision patterns in campaign and election law because of the salience of such cases to elected elites. Elite ideology is expected to be significant in death penalty cases as well. In contrast, it is not expected that elite ideology will be a significant influence on decisions in social issues cases, nor in welfare cases. The correlation between judicial decisions and mass ideology is expected to be significant in death penalty cases. Mass ideology is also expected to be significant in social issue decision-

making. Finally, mass ideology is not expected to correlate with campaign and elections decisions or welfare cases.

Langer found evidence that campaign and elections decisions were salient to elite actors (2002, 89-101). Campaign and election law includes such issues as limits on campaign expenditures and contributions, donation disclosure, and political advertising. Because this area of law deals with issues that affect politicians' reelection chances, we can expect elite actors to have a great deal of interest in these decisions. For instance, a court decision upholding advertising regulations could easily have an immediate and strong impact on the electoral fortunes of politicians. A decision restricting donations would likewise have a clear effect on politicians' fundraising abilities. Conversely, decisions in this area are unlikely to attract voters' attention, because they involve complex issues that are difficult to understand, and therefore are not perceived as being particularly salient by the general public. For all these reasons, campaign and election law is an ideal area to test the influence of elite actors on judicial decision-making.

Cases concerning social issues are expected to be salient to the mass public. These include abortion, homosexual conduct, the right to die, and the separation of church and state, which together, according to Geoffrey Layman (2001), form the grounds for an ever-widening gap between religious evangelicals and the rest of society. These types of issues routinely receive media attention and provoke public reactions. While controversies over same sex marriage and feeding tube removal are relatively recent, other social issues have been salient to the general public for years because they invoke deeply held and often theological core beliefs. Since these issues are fundamental to how the mass public views the political world, court decisions in these areas are likely to be of interest to citizens. The findings of Brace, Hall, and Langer (1999, 1294-1295) reinforce the importance of abortion decisions to the general public.

However, social issues are not expected to be as salient to elite actors. This is partly because these issues are often complicated, and many reasoned observers can sympathize with both sides of the debate. For example, abortion can be seen as taking a human life, or as allowing women to exercise the fundamental right to control her own body and destiny. Both arguments are compelling. Furthermore, for every vote gained by a conservative stance on social issues, many politicians lose a vote from a liberal constituent. Such strong feelings among the constituency can make it very difficult for politicians to win pluralities on social issues, hence elected officials often seem happy to "pass the buck" and leave definitive decisions up to the courts.

Recently four states have faced popular backlashes from court decisions supporting same-sex unions. Two states (Hawaii and Alaska) have passed constitutional amendments banning same-sex marriage. Two other states (Massachusetts and Vermont) also faced court induced controversies but did not impose constitutional amendments. While a direct causal relationship cannot be definitively established, it is interesting to note that Hawaii and Alaska both have popularly-driven amendment procedures while the amendment procedures for Massachusetts and Vermont are both elite driven. Although further study is clearly needed, such results are consistent with the theory that social issues are primarily the concern of the mass public.

Death penalty cases are expected to be highly salient both to political elites and to the mass public. In the states that utilize the death penalty, capital punishment is widely believed to be fair punishment for a criminal's actions. Because of this overwhelming public support for capital punishment (Gallup Organization, 2004), and because death penalty defendants are viewed very negatively, elites as well as the mass public are likely to be interested in judicial

decisions in capital cases. It follows that any decision striking down a death sentence leaves judges vulnerable to charges of being soft on crime and a friend of criminals. Americans are notoriously obsessed with law and order when compared to other Western nations, and as a result, public officials who take strong punitive stances are regarded favorably. Because citizens care so much about crime and punishment, politicians are forced to pay attention to judges' rulings on capital punishment. Consequently, it is reasonable to expect that death penalty decisions will be of interest to both elite and mass actors. The previous work of Brace and Hall (1993; 1995; and 1997) support the theory of death penalty salience to both elite and mass actors.

In contrast to capital punishment, I expect that cases involving welfare benefits will be of little interest to either political elites or the mass public. Welfare is still a federal program (though administered by the states) and affects many different types of recipients. As noted by Langer (2002, 58), welfare cases are unlikely to be salient in part because federal law sets guidelines, and because many of the issues raised by welfare programs cut across party lines. This crosscutting makes consensus on retaliation for judicial decisions more difficult. Also, cases involving welfare usually focus on benefits or reimbursements, and primarily involve individuals of modest means, a situation likely to limit the potential impact of such cases. Langer (2002, 115-121) found that court decisions on welfare benefits were of little interest to elite actors.

3.3 DATA AND METHODS

This study utilizes probit analysis. Probit is appropriate when the dependent variable is dichotomous as it accounts for the non-linear nature of the data. The first stage results are used

to generate an Inverse Mill's Ratio (IMR), also known as a Heckman correction, which is then incorporated into the second stage model (Heckman, 1979). The IMR allows for first stage considerations to be incorporated into the second stage. This method is appropriate for the two-step judicial review process. In the first step, judges decide to grant review, or docket a case. In the second step they decide the outcome of the case. The correction is necessary because strategic calculations made in the review stage affect the types of cases that actually make it to the second stage. Failure to include both stages of the process would result in a model with selection bias and biased coefficients, problems that could easily invalidate the results.

Following Langer's example, the dependant variable for stage one equals 1 in the year a state high court docketed a case in one of the four areas of law, and equals 0 if it did not decide such a case.[7] This study must be designed this way because records of the judges' individual votes on decisions to grant cert exist for only two out of the fifty states. Since specific records on cases denied review are largely unavailable, we can observe only when a case has been docketed by a court in a particular year.

There are two dependent variables for stage two. In one model, the dependent variable in stage two equals 1 if a judge voted conservatively and equals 0 if not. In the second, the dependent variable equals 1 if a judge voted liberally and equals 0 if not. Appendix A provides coding guidelines for the classification of conservative and liberal rulings. To understand how judicial ideology impacts decisions, it is necessary to run two separate models with these two different dependent variables in stage two. It would be impossible to evaluate the effects of ideology if the ideological direction of each vote was not specified (see Langer 2002).

[7] It is important to note this study will examine aggregate behavior at the cert stage and individual behavior at the second stage. This is because the specific votes of individual judges are not available at the cert stage. While having different levels of analysis at each stage is not ideal, it is the best that can be done in view of data limitations. Including both stages of decision-making, even if measured differently, is important to have a more complete understanding of state court behavior. Langer (2002) uses the same approach.

Data for this project come from several sources. Data on cases from all fifty states that were accepted for review in 1995, 1996, and 1997 are available from the *State Supreme Court Data Project* (Brace and Hall 2000). Data on both state elite ideology and state mass ideology are available from Berry, Ringquist, Fording, and Hanson (1998). Data on state institutional characteristics are available from *State Court Organization 1998*. This data was collected by Rottman, Flango, Cantrell, Hansen, and LaFountain (2000) and is available courtesy of the National Center for State Courts and the United States Department of Justice. Measures of judicial ideology are available through Brace, Langer, and Hall's (2000) PAJID scores. Finally, measures of divided government are available from Klarner (2003).

3.4 EXPECTATIONS STAGE ONE: DECISION TO GRANT REVIEW

My hypotheses for the first stage are as follows. A summary of the hypotheses for stage one is listed in Appendix B. The coding rules are listed in Appendix C. These hypotheses are concrete expectations for specific institutional and environmental variables and are consistent with the framework established by my model of the judicial decision-making process.

Amendment Difficulty – The likelihood of a docketed case is expected to increase in states with a difficult amendment procedure.

The ultimate way to retaliate against a court decision is to amend a state constitution. The amendment process not only nullifies a current courts' decision, but also binds the hands of future judges. As is specified in the model, retaliation for an unpopular court decision is costly to both mass and elite actors. In states with a difficult amendment process requiring both elite and mass approval of amendments (see Langer 2002) the transaction costs are greater, therefore

it is less likely that courts will need to worry about amendment retaliation down the line and will choose to docket more cases (Hammons 1999; Lutz 1994; Tarr 1996, 1998).

Divided Government – The likelihood of a docketed case is expected to increase in the presence of divided government.

Retaliation against judges requires a degree of coordination among actors. Both the governor and the state legislature must act together to override judicial decisions through lawmaking. Also, an organized voting block must act in concert to remove a judge. Again, divided government decreases the likelihood of judges being removed from office, because the lack of cohesion in either the populace or within government that makes the costs of retaliation greater. Divided government makes undertaking the costs of coordinated action less likely, which in turn grants courts a greater degree of freedom in docketing cases (Weingast 1996). Accordingly, judges will be more likely to docket cases when state government is divided (Langer 2002).

Intermediate Appellate Court – The likelihood of a docketed case is expected to increase when a state has an intermediate appellate court.

Intermediate appellate courts (IACs) manage workloads by handling routine cases and appeals. The presence of an IAC affects the review habits of the state high court by providing an additional forum for sorting through appeals, so that complex and difficult cases are disproportionately appealed to the high court (Langer 2002, 49). Because these cases are so intricate and often encompassing unsettled points of law, high court judges will be more likely to grant review when all else is equal. Several studies have all found IACs to have similar effects on state high court decision-making (Baum 1979; Brace, Hall, and Langer 1999; Glick 1991; Tarr and Porter 1988; Ulmer 1983, 1984).

Term length – The likelihood of a docketed case is expected to increase as the term length increases.

Longer terms increase the likelihood of review (Brace and Hall 1995; Brace, Hall, and Langer 1999; Hall 1992; Langer 2002). The more time that elapses between a displeasing decision and a retention vote, the safer judges will be, due to the diluting effect of other pleasing decisions, the reduction of simmering resentment, and forgetfulness over time. We can expect some time-sensitive variations to be apparent, with judges being particularly careful as they near the end of a term. However, the overall cumulative effect of longer terms should be higher review rates. The longer the term, the more likely it is that judges will try to impact legal policy by reviewing and deciding cases.

Court Ideology – The likelihood of a docketed case is expected to increase as the average court ideology increases.

Higher values indicate a liberal court. Liberal judges are more likely to be protective of individual rights (fulfilling the special role envisioned by the founders in protecting minority rights) and will therefore be more likely to docket cases because they are receptive to such claims.

Empirical findings from previous studies support the above expectations, but there is also a theoretical argument for why judges tend to docket cases. First, an appellate judges' job is to decide cases and rule on points of law. Second, while older precedents may be viewed as settled law, recently decided substantive cases also have precedential value. Current cases reveal the legal orientation of the sitting bench and guide the development of law in a state. Without environmental complications, judges will tend to grant review and decide cases. This predisposition to decide cases should hold no matter what the ideological direction of the cases

being heard. If a lower court decided the case in a way pleasing to the high court, the judges will simply uphold the ruling. If a lower court decided the case in a way different from what the high court prefers, the judges will overrule the lower court. Regardless, the state supreme court is achieving its preferred outcome and setting valuable precedent for judges to follow in the future by deciding cases. When judges are institutionally unencumbered, they will choose to decide cases in order to shape law to their liking.

The effects of ideological distance and retention methods are expected to be a complex interaction among these variables and case law area salience. The use of elite retention methods in a state will affect judicial decision-making when the case involves issues salient to elite actors. The use of mass retention methods in a state will affect judicial decision-making when the case involves issues salient to the general public. However, the actual direction of impact, either increasing or decreasing the likelihood of review, should depend on the ideological distance between the court and other actors.

Elite and Mass Ideological Distance – Two measures of ideological distance are incorporated into each model. Elite ideological distance is the absolute value of the distance between the ideological average of a court and the elite ideology of each state. The second is mass ideological distance, the absolute value of the distance between the ideological average of a court and the mass ideology of the state. In cases that are salient to other actors, as ideological distance decreases, the likelihood of a docketed case is expected to increase. In cases that are salient, as ideological distance increases, the likelihood of a docketed case is expected to decrease. In cases that are not salient to other actors, the likelihood of a docketed case is expected to increase regardless of ideological distance. As is specified in the model, the more salient an issue to retainers, the more likely they will be willing to assume the transaction costs to

retaliate for an ideologically unacceptable decision. Judges understand this and vary their review behavior depending on salience and elite/mass ideological distance.

Langer (2002) found ample evidence that the willingness of judges to review cases as ideological distances increased depended upon the type of case in question. In salient cases, the greater the ideological distance between the court and the actor with retention power, the less likely the court was to docket a case. In non-salient cases, the greater the ideological distance between the court and the actor with retention power, the more likely the court was to docket a case. Such findings are in keeping with the theory that judges fear retribution for unpopular decisions when cases are important to other actors in their environments.

Elite Retention x Elite Ideological Distance – In campaign and election cases and capital punishment cases, the interaction of elite retention methods and elite ideological distance is expected to be significant. All other factors being equal, in these types of cases the presence of elite retention methods and larger ideological distances is expected to result in lower review rates. In contrast, elite retention with small ideological distances is expected to result in relatively higher review rates in cases salient to elites. When a state does not use elite retention, it is expected that the likelihood of review in both campaign and election cases and death penalty cases will increase, no matter what the degree of ideological distance between the court and elites.

Judges fear retaliation primarily when other political actors have both the incentive and opportunity to act. Thus, judges should be most constrained when elite actors such as the governor or legislature have power to retain them, and when a case involves issues of interest to those actors. Judges should avoid taking cases when they and the elite actors are in basic disagreement – when there is a large ideological difference. Judges will tend to take cases when

they and elite actors are in general agreement – when there is a small ideological difference between them. This relationship is particularly likely to be true of elite actors, because such politically savvy individuals are most likely to have knowledge of previous decisions by a court or judge, and can evaluate their actions accordingly. Langer (2002) found evidence that the effects of elite retention varied across different types of cases.

Partisan Elections x Mass Ideological Distance – In social issues and death penalty cases the interaction of partisan elections and mass ideological distance is expected to be significant. All other factors being equal, in these types of cases the presence of mass retention methods and larger ideological distances is expected to result in lower review rates. In contrast, mass retention with smaller ideological distances is expected to result in relatively higher review rates in cases salient to the mass public. When a state does not use partisan elections, it is expected that the likelihood of review in social issues will increase, no matter what the degree of ideological distance between the court and the public.

Social issues and death penalty cases are posited to be of importance to the mass public. Judges are expected to adjust their behavior in these types of cases when a state uses partisan elections, because it is then that citizens have both motive and opportunity to pass judgment on judicial decision-making. Partisan elections provide voters with information about candidates by using party labels. Party identification serves as a powerful cue to voters and makes it easier for them to retaliate against judges for unpopular decisions. For instance, voters in two states may know that their state supreme court recently overturned a death penalty conviction. For the state with partisan elections, voters can easily single out judges (such as "the Democrats") to express displeasure at such a decision, due to the ideology and policy information contained in the party heuristic. Judges in states that use partisan elections are expected to be more cautious about the

possibility of electoral retaliation than their counterparts in nonpartisan states, and a correspondingly stronger correlation on the partisan elections variable should be observed.

3.5 EXPECTATIONS STAGE TWO: DECISION ON THE MERITS

My hypotheses for the second stage are as follows. A summary of the major hypotheses for both stages is listed in Appendix D. The coding rules are listed in Appendix E. As was the case with stage one hypotheses, these specific expectations are consistent with the formal framework established by my model of the judicial decision-making process.

Amendment Difficulty – The likelihood of a liberal (conservative) vote is expected to increase in states with a difficult amendment procedure.

As in the review stage, in states with difficult amendment procedures it is less likely that other actors will retaliate against judges for unpopular decisions by constitutional amendment. While amendments are an effective way of nullifying court decisions and restricting future decisions, such actions are costly. This is especially true when both elite and mass actors must be in agreement to act, as is the case in states utilizing difficult amendment procedures.

Divided Government – The likelihood of a liberal (conservative) vote is expected to increase in the presence of divided government.

Divided government is a reflection of ideological disagreement among both the public and politicians. When other actors are not united it is more difficult to organize action to retaliate against a judge for an unpopular decision. Accordingly, judges will be more likely to decide cases in either a liberal or conservative manner when state government is divided.

Term length – The likelihood of a liberal (conservative) vote is expected to increase as term lengths increase.

Longer term lengths help protect judges from retaliation through the effects of time. As time passes other actors are more likely to forgive unpopular decisions, simply forget about them, or focus on more recent pleasing decisions. The end result of longer terms in office should be an increase in liberal (conservative) judicial decisions.

Judge Ideology – PAJID scores are measures of judicial ideology. Larger values indicate a liberal judge while smaller values indicate a conservative judge. Consequently, larger PAJID values should correspond with an increased likelihood of a liberal decision while smaller PAJID values should correspond with an increased likelihood of a conservative decision.

Elite and Mass Directional Ideological Distance – As in the review stage, two measures of directional ideological distance are included. One is directional elite ideology subtracted from directional court ideology, while the other is directional mass ideology subtracted from directional court ideology. Positive values indicate that a judge is more liberal than other actors, while negative values indicate that a judge is more conservative than other actors. In cases that are salient to other actors, as ideological distance becomes positive (becomes negative), the likelihood of a liberal (conservative) vote is expected to decrease. In cases that are not salient to other actors, the likelihood of a liberal (conservative) vote is expected to depend on the ideology of a judge. Positive values should result in an increased likelihood of a liberal decision, while negative values should result in an increased likelihood of conservative decisions.

The likelihood of deciding a case in a liberal (conservative) manner depends upon the salience of a case and the direction of ideological agreement between the court and the retainer in a state. Judges will be less likely to make liberal (conservative) decisions when the case is

salient and the judge is more liberal (conservative) than the other actors. Non-salient cases should see an increase in liberal (conservative) decisions, depending on the ideology of the judge. As discussed before, judges are expected to want to decide cases for precedential value ceteris paribus therefore they will make more liberal (conservative) decisions consistent with their ideology as long as the cases are not salient.

Elite Retention x Elite Directional Ideological Distance – In campaign and election cases and capital punishment cases, the interaction of elite retention methods and elite ideological distance is expected to be significant. All other factors being equal, elite retention should result in a decreased likelihood of liberal (conservative) votes as ideological distances become positive (become negative). This is because the area is salient to elites but the judge is more liberal (conservative) than the retaining elites. When a state does not use elite retention methods, positive (negative) values should result in more liberal (conservative) decisions. This is because judges are free from threats and may follow their attitudinal preferences.

Judges will be constrained when elite actors such as the governor or legislature have power to retain them, and when a case involves issues of interest to those actors. Judges will avoid making decisions directionally opposed to the wishes of elites when the cases are salient to elites and elite retention methods are used in a particular state.

Partisan Elections x Mass Directional Ideological Distance – In social issues and death penalty cases the interaction of partisan retention methods and mass ideological distance is expected to be significant. All other factors being equal, mass retention should result in a decreased likelihood of liberal (conservative) votes as ideological distances become positive (become negative). When a state does not use partisan election methods, positive (negative) values should result in an increased likelihood of liberal (conservative) decisions.

As with nonpartisan retention, judges will be constrained when mass actors have the power to retain them, and when a case involves issues of interest to those actors. Judges will avoid making decisions directionally opposed to the wishes of the mass public when the cases are salient to citizens and mass retention methods are used in a particular state.

Court Distance – As court distance becomes negative (positive) the likelihood of a liberal (conservative) vote increases. As court distance becomes positive (negative) the likelihood of a liberal (conservative) vote decreases.

As the ideological distance increases between a court and an individual judge, the judge will be more likely to lose a vote; thus it is expected that he or she will be more likely to vote the way the court majority prefers. This outcome is likely because the judge presumably prefers to have some input in shaping the decision, instead of simply dissenting and leaving the majority unfettered.

3.6 CONCLUSION

This dissertation examines institutional and environmental influences on judicial decision-making by exploring the degree to which both elite and mass actors influence state high court decisions. This question is important because while separation of powers games have been explored at the U.S. Supreme Court, very few scholars have looked at similar considerations at the state court level. State courts also provide the perfect opportunity to test such an integrated model of judicial behavior as they vary considerably across institutional and environmental factors.

This question is also important because the degree to which influences on judges' decisions vary across various case law areas has significant ramifications for the role of courts in contemporary American society. Judicial discretion on state high courts matters because of the influence court decisions have on politics, the counter-majoritarian role of courts, and the fact that state courts decided most of the cases in the United States. It is expected that influence on judicial decision-making will vary across different areas of case law, providing evidence of calculated behavior on the part of state court judges in reaction to their institutional environments. Such findings would provide a detailed picture of how judges react in response to different institutional and environmental configurations.

4.0 CHAPTER FOUR: RESULTS: DISCRETION AND DECISION-MAKING

The results from each statistical model are presented in this chapter. The results for campaigns and elections cases are offered first, followed by social issues cases, then welfare cases, and finally death penalty cases. In the first three areas I present the results of the review stage (stage one) followed by the results of final decisions on the merits (stage two). The stage two results are broken down into liberal decisions and conservative decisions. I list both probit coefficients and predicted probabilities because probit coefficients cannot be directly interpreted.

Predicted probabilities allow the researcher to determine the impact on the dependent variable at different levels of particular independent variables. Predicted probabilities are easily calculated using CLARIFY (see King, Tomz, and Wittenberg 2000 for details and Bonneau 2005b for an example). Predicted probabilities assess the substantive impact of independent variables on the dependent variable and show how much of an impact a particular variable has, beyond simple significance tests. Predicted probabilities are normally calculated at a baseline with all variables set at their means. Then, variables of interest are set at different values (often a standard deviation above or below the mean) holding the others constant in order to asses their specific impact on the phenomena of interest.

4.1 CAMPAIGNS AND ELECTIONS

Table 4.1 displays the results of state high court decisions to review campaign and elections cases 1995-1997. The last column of the table lists my hypotheses for each of the key variables, and my expectations are also recounted in Appendix B.

Table 4.1: Results Stage One Review Votes Campaigns and Elections

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	0.549	0.365	0.067	$\beta > 0$
Divided Government	0.484	0.322	0.067	$\beta > 0$
Intermediate Court	0.228	0.297	0.222	$\beta > 0$
Term Length	0.007	0.017	0.343	$\beta > 0$
Elite Ideological Distance	0.015	0.013	0.128	$\beta < 0$
Mass Ideological Distance	0.027	0.019	0.079	$\beta > 0$
Court Ideology	0.025	0.009	0.000	$\beta > 0$
Elite Retention	-0.094	0.626	0.441	
Partisan Retention	-0.514	0.590	0.192	
Nonpartisan Retention	-0.221	0.366	0.273	
Elite Id Distance * Elite Retention	-0.027	0.028	0.064	$\beta < 0$ [b]
Mass Id Distance * Partisan Retention	0.114	0.075	0.064	$\beta > 0$
Year 1996	0.602	0.288	0.018	
Year 1997	-0.145	0.282	0.304	
Constant	2.098	0.837	0.006	
Log Likelihood = -82.683				
Wald Chi2 = 29.73				
Prob > Chi2 = 0.008				
Pseudo R2 = 0.129				
Reduction of Error = 26.47%				
N = 147				

[a] 1-tailed test
[b] When states utilize elite retention procedures

Table 4.2: Predicted Probabilities Review of Campaign and Elections

Situation	Probability of Review
All variables at mean	68.02%
Court Ideology[a]	80.27%
Mass Id Distance * Partisan Retention[b]	80.96%
Mass Id Distance * Partisan Retention[c]	92.37%

[a] Court Ideology set one standard deviation higher
[b] Distance set at mean, Partisan Retention set at 1
[c] Distance set one standard deviation higher, Partisan Retention set at 1

The results in Table 4.1 provide some support for my hypotheses for decisions to review in campaign and elections cases. If all variables at held at their means, there is a 68.02% chance of review. Campaign and elections cases are expected to be salient to elites but not to mass actors, so the interaction of ideological distance and elite retention method should show constraint while the interaction of ideological distance and partisan retention should show no constraint. While the interaction of elite ideological distance and elite retention was not significant, indicating that judges are not constrained in review decisions by elite actors, the findings do support my expectation that judges will not be constrained by mass ideology in campaign and elections cases. The lincom command in Stata shows that the interaction of mass ideological distance and partisan retention is significant at the .05 level.[8] Lincom evaluates the significance of combinations of variables, such as interaction terms. In states that utilize partisan retention the predicted probabilities show that there is an 80.96% likelihood of review, holding all other variables at their means. When ideological distance increases by one standard deviation there is a 92.37% chance of review, again holding all other variables at their means. These results confirm my expectations that campaign and elections cases are not salient to mass actors and judges are unconstrained by mass preferences in their review decisions. When partisan elections are used the judges are more likely to grant review, even as the ideological distance between them and the masses increases. Take as a whole these findings suggest that judges are relatively unconstrained in their decisions to review campaigns and elections cases.

The court ideology variable is also highly significant. If court ideology is increased by one standard deviation, indicating liberal judges, the chance of review increases to 80.27%. This

[8] See Brambor, Clark, and Golder (2006) and Friedrich (1982) for two excellent articles on the proper interpretation of interaction terms.

finding is interesting as it suggests that politically liberal judges are indeed more likely to engage in judicial review. This is not terribly surprising as liberal judges are more likely to regard themselves as protectors of minority rights against the dangers of a majority-driven political process, as envisioned by the founding fathers. Such judges are therefore willing to grant review more frequently to consider such claims. Overall the results for stage one decisions in campaigns and elections do not contradict my expectations that judges will strategically avoid conflict with elites and do confirm my expectation that judges have little to fear from the masses in these cases. However, the overall the evidence suggests that judges face few constraints in their decisions to review cases.

The results of stage two are presented in Tables 4.3 and 4.4. Stage two consists of two separate models. The dependent variable for the first model is a dichotomous measure of a judge's decision cast a liberal vote, while the second model is a dichotomous measure of a judge's decision to case a conservative vote. It is necessary to run separate models to specify the ideological direction of each vote. Without a specific ideological direction it would be impossible to incorporate the effects of judicial ideology on decision-making.

Table 4.3: Results Stage Two Liberal Votes Campaigns and Elections

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	0.393	0.276	0.078	$\beta > 0$
Divided Government	0.101	0.163	0.267	$\beta > 0$
Term Length	-0.002	0.004	0.300	$\beta > 0$
Directional Elite Id Distance	-0.001	0.005	0.403	$\beta < 0$
Directional Mass Id Distance	-0.022	0.011	0.020	$\beta > 0$
Judge Ideology	0.024	0.008	0.002	$\beta > 0$
Elite Retention	0.403	0.390	0.151	
Partisan Retention	-0.069	0.256	0.394	
Nonpartisan Retention	-0.093	0.207	0.327	
Court Distance	0.001	0.008	0.458	$\beta < 0$
Inverse Mills Ratio	0.852	0.568	0.067	
Direct. Elite Id Distance * Elite Retention	-0.012	0.005	0.012	$\beta < 0$ [b]
Direct. Mass Id Distance * Partisan Retention	0.012	0.011	0.136	$\beta > 0$
Year 1996	0.152	0.208	0.234	
Year 1997	-0.496	0.201	0.007	
Constant	-2.057	0.705	0.002	
Log Likelihood = -1007.722				
Wald Chi2 = 42.56				
Prob > Chi2 = 0.00				
Rseudo R2 = 0.049				
Reduction of Error = 2.33%				
N = 1555				

[a] 1-tailed test
[b] When states utilize elite retention procedures

Table 4.4: Predicted Probabilities Liberal Votes Campaigns and Elections

Situation	Probability of Liberal Vote
All variables at mean	42.12%
Judge Ideology[a]	63.15%
Directional Mass Id Distance[b]	42.17%
Directional Elite Id Distance * Elite Retention[c]	56.53%
Directional Elite Id Distance * Elite Retention[d]	44.62%

[a] Judge Ideology set one standard deviation higher
[b] Distance set at mean, Partisan Retention set at 0
[c] Distance set at mean, Elite Retention set at 1
[d] Distance set one standard deviation higher, Elite Retention set at 1

Table 4.5: Results Stage Two Conservative Votes Campaigns and Elections

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	-0.486	0.291	0.048	$\beta > 0$
Divided Government	-0.003	0.184	0.494	$\beta > 0$
Term Length	-0.000	0.004	0.471	$\beta > 0$
Directional Elite Id Distance	0.006	0.006	0.168	$\beta > 0$
Directional Mass Id Distance	0.019	0.011	0.044	$\beta < 0$
Judge Ideology	-0.026	0.008	0.001	$\beta < 0$
Elite Retention	-0.617	0.469	0.095	
Partisan Retention	0.076	0.247	0.380	
Nonpartisan Retention	0.169	0.225	0.227	
Court Distance	-0.002	0.009	0.425	$\beta < 0$
Inverse Mills Ratio	-1.250	0.517	0.008	
Direct. Elite Id Distance * Elite Retention	0.015	0.005	0.002	$\beta > 0$ [b]
Direct. Mass Id Distance * Partisan Retention	-0.015	0.009	0.060	$\beta > 0$
Year 1996	-0.145	0.209	0.245	
Year 1997	0.284	0.169	0.047	
Constant	2.227	0.674	0.001	
Log Likelihood = -017.231				
Wald Chi2 = 40.690				
Prob > Chi2 = 0.001				
Rseudo R2 = 0.055				
Reduction of Error = 10.42%				
N = 1555				

[a] 1-tailed test
[b] When states utilize elite retention procedures

Table 4.6: Predicted Probabilities Conservative Votes Campaigns and Elections

Situation	Probability of Conservative Vote
All variables at mean	52.25%
Judge Ideology[a]	30.78%
Difficult Amendment[b]	49.79%
Directional Mass Id Distance[c]	52.13%
Directional Elite Id Distance * Elite Retention[d]	32.23%
Directional Elite Id Distance * Elite Retention[e]	49.94%

[a] Judge Ideology set one standard deviation higher
[b] Amendment Difficulty set at 1
[c] Distance set at mean, Partisan Retention set at 0
[d] Distance set at mean, Elite Retention set at 1
[e] Distance set one standard deviation higher, Elite Retention set at 1

The results in stage two confirm my expectations for campaign and elections cases in several important ways. If all variables are held at their means there is a 42.12% chance of a judge making a liberal decision and a 52.25% chance of a judge making a conservative decision. Again, judicial ideology is significant in explaining a judge's decisions. As the judicial ideology score increases by one standard deviation (indicating a liberal orientation) there is a 63.15% chance of a liberal decision. As the judicial ideology score increases by one standard deviation there is a 30.78% chance of a conservative decision. These findings show that judicial attitudes have an important impact on state high court decision-making. Politically liberal judges are more likely to make liberal decisions and less likely to make conservative decisions.

Importantly, the results of both models confirm my expectations that judges will be constrained in their decision-making in campaign and elections cases when elite actors have both opportunity and motive- i.e. they have the power to retain judges in a state and there is a large ideological distance between judges and the elites. When elite retention methods are used in a state and directional elite ideological distance is at its mean there is a 56.53% chance of a liberal vote. When ideological distance increases by one standard deviation (indicating that the judges are more liberal than elites), there is a 44.62% chance of a liberal decision. When elite retention methods are used in a state and directional ideological distance is held at its mean there is a 32.23% chance of a conservative vote. When ideological distance is increased by one standard deviation (indicating judges are more liberal than other actors), there is a 49.94% chance of a conservative decision. These findings provide convincing evidence that judges are in fact constrained by elite ideology in campaigns and elections cases. Elite retention combined with large ideological distances results in judges making decisions contrary to their attitudinal

preferences. Also noteworthy is the finding that the Inverse Mill's Ratio is significant (at the 0.01 level) in conservative decisions (decisions favoring those challenging campaign regulations). This illustrates how important it is to consider the decision-making process at both the review and merits stages and indicates that the selection of cases for review is non-random, or strategic.

Of course, there were some unexpected results in these models. It was expected that difficult amendment procedures (that involve both mass and elite approval of state constitutional amendments) would result in an increased likelihood of judicial decision-making. This hypothesis was based on the reasoning that difficult amendment procedures increase transaction costs, thereby lessening the likelihood of retaliation against judges. Amendment difficulty was significant in the conservative decisions model and showed the opposite effect. Difficult amendment procedures lead to a 49.79% chance of conservative votes on the merits. This result could be due to the fact that difficult amendment procedures give elite actors a role in the amendment process. (Easy amendment processes require only mass approval for constitutional amendments.) So, while transaction costs may indeed be greater, elite actors are likely better equipped and more willing to pay such costs when the issue is salient. The fact that difficult amendment procedures result in a decreased likelihood of conservative decisions indicates that judges are constrained by elite-centered amendment procedures.

A second unexpected finding is the significance of mass ideology in campaign and elections decisions on the merits. When partisan retention procedures are not used in a state, as ideological distance becomes positive (indicating that judges are more liberal than other mass actors) there is a 42.17% chance of a liberal decision. In states that do not use partisan retention, as ideological distance becomes positive there is a 52.13% chance of a conservative decision.

One possible explanation is that elite actors care about campaign and elections decisions so they motivate the mass public to take action (such as constitutional amendment) only after judges issue an unacceptable ruling on the merits. This would explain why mass ideological distance is statistically significant in the second stage even when the people do not vote on their retention. The issue of how elites are able to motivate mass retaliation will be explored further in the Chapter Five case studies.

4.2 SOCIAL ISSUES

Table 4.7 displays the results of state high court decisions to review social issues cases 1995-1997.

Table 4.7: Results Stage One Review Votes Social Issues

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	-0.581	0.278	0.019	$\beta > 0$
Divided Government	-0.391	0.257	0.064	$\beta > 0$
Intermediate Court	-0.119	0.314	0.353	$\beta > 0$
Term Length	0.031	0.017	0.036	$\beta > 0$
Elite Ideological Distance	-0.017	0.010	0.440	$\beta > 0$
Mass Ideological Distance	-0.003	0.019	0.064	$\beta < 0$
Court Ideology	0.011	0.008	0.154	$\beta > 0$
Elite Retention	-0.615	0.603	0.212	
Partisan Retention	0.362	0.453	0.282	
Nonpartisan Retention	0.150	0.260	0.053	
Elite Id Distance * Elite Retention	0.049	0.030	0.046	$\beta > 0$
Mass Id Distance * Partisan Retention	-0.010	0.046	0.414	$\beta < 0$ [b]
Year 1996	0.022	0.307	0.472	
Year 1997	0.380	0.241	0.057	
Constant	-0.094	0.793	0.453	
Log Likelihood = -92.052				
Wald Chi2 = 31.66				
Prob > Chi2 = 0.0045				
Pseudo R2 = 0.090				
Reduction of Error = 28.89%				
N = 147				

[a] 1-tailed test
[b] When states utilize partisan retention procedures

Table 4.8: Predicted Probabilities Review of Social Issues

Situation	Probability of Review
All variables at mean	45.01%
Difficult Amendment[a]	39.50%
Term Length[b]	52.99%
Elite Id Distance[c]	44.86%

[a] Amendment Difficulty set at 1
[b] Term Length set one standard deviation higher
[c] Distance set at mean, Elite Retention set at 0

The results for decisions to review social cases provide general confirmation for my institutional hypotheses. Holding all variables at their mean results in a 45.01% chance of review. If term length is increased by one standard deviation there is a 52.99% chance of review. This illustrates the expectation that certain institutional configurations such as longer term lengths facilitate judicial independence. However, the results of stage one in social issues cases suggest that social issues decisions are salient to elite actors. I had originally hypothesized that social issues would not be salient to elite actors because the issues are complex with strong arguments on both sides. The results suggest a different reasoning when one considers the current nature of political discourse. Some of the policies that most clearly define each of the two major political parties today are social issues. Political stances on abortion, prayer in schools, and the separation of church and state represent clear distinctions among the parties. Perhaps because the issues are so divisive and salient to the masses it explains why I find that the results suggest that such highly charged issues are also important to elite actors. Even when elite retention is not used in a state there is a 44.86% chance of review.

Interestingly, the use of difficult amendment procedures in a state again results in a decreased likelihood of review. In states that utilize difficult amendment processes there is a 39.50% chance of review. These findings further suggest that difficult amendment procedures increase constraint by giving elite actors a role in the retaliation process. Since the results suggest that social issues are of interest to elite actors, it makes sense that judges would be less likely to review those cases.

The results of stage two are presented in Tables 4.9 and 4.11.

Table 4.9: Results Stage Two Liberal Votes Social Issues

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	-0.156	0.467	0.370	$\beta > 0$
Divided Government	-0.428	0.224	0.028	$\beta > 0$
Term Length	0.019	0.007	0.004	$\beta > 0$
Directional Elite Id Distance	-0.004	0.007	0.282	$\beta > 0$
Directional Mass Id Distance	-0.020	0.012	0.054	$\beta < 0$
Judge Ideology	0.021	0.011	0.031	$\beta > 0$
Elite Retention	0.428	0.340	0.104	
Partisan Retention	0.251	0.337	0.228	
Nonpartisan Retention	0.086	0.290	0.383	
Court Distance	0.005	0.014	0.366	$\beta < 0$
Inverse Mills Ratio	2.380	0.810	0.002	
Direct. Elite Id Distance * Elite Retention	-0.007	0.004	0.047	$\beta > 0$
Direct. Mass Id Distance * Partisan Retention	0.020	0.016	0.111	$\beta < 0$ [b]
Year 1996	-0.080	0.264	0.382	
Year 1997	0.361	0.315	0.127	
Constant	-3.139	1.005	0.001	
Log Likelihood = -414.051				
Wald Chi2 = 38.17				
Prob > Chi2 = 0.001				
Rseudo R2 = 0.135				
Reduction of Error = 20.93%				
N = 698				

[a] 1-tailed test
[b] When states utilize partisan retention procedures

Table 4.10: Predicted Probabilities Liberal Votes Social Issues

Situation	Probability of Liberal Vote
All variables at mean	57.71%
Divided Government[a]	49.02%
Judge Ideology[b]	75.81%
Term Length[c]	76.56%
Directional Elite Id Distance * Elite Retention[d]	68.43%
Directional Elite Id Distance * Elite Retention[e]	56.52%

[a] Divided Government set at 1
[b] Judge Ideology set one standard deviation higher
[c] Term Length set one standard deviation higher
[d] Distance set at mean, Elite Retention set at 1
[e] Distance set one standard deviation higher, Elite Retention set at 1

Table 4.11: Results Stage Two Conservative Votes Social Issues

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	0.193	0.450	0.335	$\beta > 0$
Divided Government	0.733	0.227	0.001	$\beta > 0$
Term Length	-0.025	0.007	0.000	$\beta > 0$
Directional Elite Id Distance	0.002	0.007	0.373	$\beta < 0$
Directional Mass Id Distance	0.018	0.013	0.080	$\beta > 0$
Judge Ideology	-0.017	0.009	0.030	$\beta < 0$
Elite Retention	-0.609	0.312	0.026	
Partisan Retention	-0.417	0.306	0.087	
Nonpartisan Retention	-0.085	0.288	0384	
Court Distance	-0.002	0.013	0.435	$\beta < 0$
Inverse Mills Ratio	-2.243	0.864	0.005	
Direct. Elite Id Distance * Elite Retention	0.002	0.007	0.388	$\beta > 0$
Direct. Mass Id Distance * Partisan Retention	-0.013	0.015	0.202	$\beta > 0$ [b]
Year 1996	0.382	0.259	0.071	
Year 1997	-0.145	0.326	0.328	
Constant	2.370	0.934	0.006	
Log Likelihood = -377.245				
Wald Chi2 = 90.22				
Prob > Chi2 = 0.000				
Rseudo R2 = 0.161				
Reduction of Error = 8.33%				
N = 698				

[a] 1-tailed test
[b] When states utilize partisan retention procedures

Table 4.12: Predicted Probabilities Conservative Votes Social Issues

Situation	Probability of Conservative Vote
All variables at mean	30.70%
Divided Government[a]	44.47%
Judge Ideology[b]	17.97%
Term Length[c]	11.88%
Elite Retention[d]	18.78%

[a] Divided Government set at 1
[b] Judge Ideology set one standard deviation higher
[c] Term Length set one standard deviation higher
[d] Elite Retention set at 1, Distance set at 0

The results for stage two decisions on the merits of social issues cases provide ample evidence of the impact of institutional, attitudinal, and strategic factors on judicial decision-making. With all variables at their mean, there is a 57.71% chance of a liberal decision and a 30.70% chance of a conservative decision. A one standard deviation increase in term length results in a 76.56% chance of a liberal decision, while the presence of divided government results in a 44.47% chance of a conservative decision. Both results indicated that institutional structures affect judicial constraint in the expected way. Positive PAJID scores (positive values indicate more liberal judges) result in a 75.81% chance of liberal decisions and only a 17.97% chance of conservative decisions. This shows that judicial ideology matters as expected. But, when a state utilizes elite retention there is evidence of judicial constraint. When elite retention is used there is a 64.43% chance of a liberal decision with ideological distance at its mean. When states use elite retention and ideological distance is increased by one standard deviation the chance of a liberal decision drops to 56.52%. This clearly indicates that the judges are behaving strategically and modifying their behavior based on institutional and environmental considerations. Finally, the Inverse Mill's Ratio is significant in both models, indicating that a selection bias is occurring.

The only surprise finding in social issues cases is that longer term lengths result in a decreased likelihood of conservative decisions. When term length increased by one standard deviation the chance of a conservative decision declines to 11.88%. However, there is an interesting possible explanation for this result. At least some of the founding fathers believed that judges would provide a safeguard to individual liberties by checking the popular passions embodied in the elected branches. Longer term lengths insulate the judiciary thereby allowing

judges to be counter-majoritarian protectors of individual rights, which would naturally lead them to make fewer conservative decisions.

4.3 WELFARE

Table 4.13 displays the results of state high court decisions to review welfare cases 1995-1997.

Table 4.13: Results Stage One Review Votes Welfare

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	-0.146	0.375	0.485	$\beta > 0$
Divided Government	-0.093	0.372	0.401	$\beta > 0$
Intermediate Court	-0.050	0.341	0.442	$\beta > 0$
Term Length	0.050	0.026	0.033	$\beta > 0$
Elite Ideological Distance	0.002	0.014	0.438	$\beta > 0$
Mass Ideological Distance	0.007	0.023	0.001	$\beta > 0$
Court Ideology	0.021	0.014	0.078	$\beta > 0$
Elite Retention	-0.201	0.740	0.393	
Partisan Retention	0.351	0.716	0.312	
Nonpartisan Retention	0.534	0.411	0.097	
Elite Id Distance * Elite Retention	0.021	0.031	0.253	$\beta > 0$
Mass Id Distance * Partisan Retention	-0.053	0.070	0.224	$\beta > 0$
Year 1996	-0.241	0.249	0.167	
Year 1997	0.216	0.267	0.209	
Constant	-1.148	1.050	0.079	
Log Likelihood = -75.529				
Wald Chi2 = 24.79				
Prob > Chi2 = 0.037				
Pseudo R2 = 0.141				
Reduction of Error = 28.89%				
N = 147				

[a] 1-tailed test

Table 4.14: Predicted Probabilities Review of Welfare

Situation	Probability of Review
All variables at mean	75.93%
Term Length[a]	84.49%
Mass Id Distance[b]	75.67%

[a] Term Length set one standard deviation higher
[b] Distance set at mean, Partisan Retention set at 0

The stage one results for decisions to review welfare cases again confirm my hypotheses. Holding all variables at their means results in a 75.93% chance of review. If term length is increased by one standard deviation the chance of judicial review increases to 84.49%. This finding illustrates the effect of institutional configurations in shaping judicial behavior and again confirms that institutional insulation (i.e. longer term lengths) allows for greater judicial discretion. The model also provides evidence that judges are not constrained by mass actors in welfare decisions. In states that do not utilize partisan retention, a one standard deviation increase in mass ideological distance results in a 75.67% chance of judicial review. This is as expected and confirms that court actions in welfare cases are of little interest to mass actors. Taken in their entirety, the results suggest that state high courts judges face few constraints in their decisions to review welfare cases.

The results of stage two are presented in Tables 4.15 and 4.17.

Table 4.15: Results Stage Two Liberal Votes Welfare

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	0.210	0.188	0.132	$\beta > 0$
Divided Government	0.009	0.178	0.479	$\beta > 0$
Term Length	-0.005	0.003	0.086	$\beta > 0$
Directional Elite Id Distance	-0.001	0.004	0.386	$\beta > 0$
Directional Mass Id Distance	-0.016	0.007	0.011	$\beta > 0$
Judge Ideology	0.016	0.005	0.001	$\beta > 0$
Elite Retention	0.119	0.188	0.265	
Partisan Retention	0.137	0.336	0.341	
Nonpartisan Retention	-0.107	0.199	0296	
Court Distance	0.002	0.006	0.396	$\beta < 0$
Inverse Mills Ratio	-0.109	0.467	0.408	
Direct. Elite Id Distance * Elite Retention	-0.001	0.003	0.310	$\beta > 0$
Direct. Mass Id Distance * Partisan Retention	0.018	0.006	0.179	$\beta > 0$
Year 1996	0.092	0.257	0.361	
Year 1997	-0.018	0.170	0.457	
Constant	-1.263	0.369	0.001	
Log Likelihood = -1087.735				
Wald Chi2 = 45.63				
Prob > Chi2 = 0.000				
Rseudo R2 = 0.029				
Reduction of Error = 8.57%				
N = 1746				

[a] 1-tailed test

Table 4.16: Predicted Probabilities Liberal Votes Welfare Issues

Situation	Probability of Liberal Vote
All variables at mean	33.51%
Judge Ideology[a]	48.92%
Directional Mass Id Distance[b]	32.67%

[a] Judge Ideology set one standard deviation higher
[b] Distance set at mean, Partisan Retention set at 0

Table 4.17: Results Stage Two Conservative Votes Welfare

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	-0.188	0.186	0.156	$\beta > 0$
Divided Government	-0.057	0.167	0.367	$\beta > 0$
Term Length	-0.001	0.004	0.414	$\beta > 0$
Directional Elite Id Distance	-0.000	0.004	0.492	$\beta < 0$
Directional Mass Id Distance	0.015	0.005	0.002	$\beta < 0$
Judge Ideology	-0.012	0.006	0.021	$\beta < 0$
Elite Retention	-0.052	0.199	0.396	
Partisan Retention	-0.173	0.308	0.288	
Nonpartisan Retention	0.406	0.183	0.013	
Court Distance	-0.004	0.008	0.307	$\beta < 0$
Inverse Mills Ratio	0.201	0.454	0.330	
Direct. Elite Id Distance * Elite Retention	0.001	0.003	0.339	$\beta > 0$
Direct. Mass Id Distance * Partisan Retention	-0.002	0.006	0.359	$\beta > 0$
Year 1996	-0.054	0.218	0.402	
Year 1997	-0.308	0.165	0.032	
Constant	0.783	0.445	0.039	
Log Likelihood = -1141.992				
Wald Chi2 = 114.42				
Prob > Chi2 = 0.000				
Rseudo R2 = 0.053				
Reduction of Error = 16.67%				
N = 1746				

[a] 1-tailed test

Table 4.18: Predicted Probabilities Conservative Votes Welfare Issues

Situation	Probability of Conservative Vote
All variables at mean	53.72%
Judge Ideology[a]	42.35%
Directional Mass Id Distance[b]	54.76%
Direct. Mass Id Distance * Partisan Retention[c]	48.17%
Direct. Mass Id Distance * Partisan Retention[d]	58.41%

[a] Judge Ideology set one standard deviation higher
[b] Distance seta at mean, Partisan Retention set at 0
[c] Distance set at mean, Partisan Retention set at 1
[d] Distance set one standard deviation higher, Partisan Retention set at 1

Despite the stage one finding that judges seem to be unconstrained in their decisions to review welfare cases, the stage two results provide a slightly different picture of judicial constraint. Holding all variables at their mean results in a 33.51% chance of a liberal vote while the same leads to a 53.72% chance of a conservative vote. On one hand judicial ideology matters greatly, as increasing judicial ideology by one standard deviation increases the chance of a liberal decision to 48.92%, while increasing judicial ideology by one standard deviation decreases the chance of a conservative decision to 42.35%. On the other hand, there is evidence that suggests that judges behave strategically with regards to mass ideology when making final decisions on the merits in welfare cases. The lincom procedure shows that the interaction of mass ideological distance and partisan retention is significant. When partisan retention is used holding directional mass ideological distance at its mean results in a 48.17% chance of a conservative decision. When partisan retention is used, a one standard deviation increase in ideological distance (indicating judges are more liberal than other actors) results in a 58.00% chance of conservative decisions, significant at the 0.05 level. Even when partisan retention procedures are not used, there is a 32.67% chance of a liberal decision and a 54.76% chance of conservative decisions, indicating that judges are constrained by mass preferences.

These findings are particularly interesting because my expectations for judicial freedom in welfare cases were conditioned upon Laura Langer's work. However, Langer did not test for mass influences and looked at only elite influences. The inclusion of mass effects represents a major step forward and clarifies current research on state court behavior in a significant way. It is problematic to assume that mass preferences are simply reflected through elite actors. Elite and mass actors may very well have different preferences. Elite actors may use court decisions

to “pass the buck” on politically contentious issues or may actually believe in unpopular concepts such marriage for all, regardless of sexual orientation. Mass actors (whom scholars know are less politically sophisticated) are more likely to desire to punish judges whenever a judge or court does something unpopular. When examining judicial constraint it is important to consider both potential sources. While elites and masses may often be in agreement, they will not always be, especially not on the same issues. It is not surprising to find that mass ideology relates to conservative decision-making when one considered political behavior research that suggest that negative racial stereotypes play heavily into public perceptions of welfare.

4.4 DEATH PENALTY

Death penalty cases present a unique situation. Due in part to decisions of the U.S. Supreme Court, as well as the state laws governing capital case appeals, state high court judges do not have discretion in taking death penalty cases (Langer and Brace 2005). This means that there is no opportunity for a selection mechanism to influence state high court death penalty decisions. This lack of docket control likely limits the judges’ ability to behave strategically with regards to other actors. Since judges face mandatory review, I did not run a stage one model of the decision to grant review in death penalty cases. The results of stage two (liberal and conservative decisions on capital cases) are presented in Tables 4.19 and 4.21.

Table 4.19: Results Stage Two Liberal Votes Death Penalty

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	0.368	0.177	0.019	$\beta > 0$
Divided Government	0.101	0.128	0.215	$\beta > 0$
Term Length	-0.010	0.030	0.365	$\beta > 0$
Directional Elite Id Distance	-0.002	0.002	0.174	$\beta < 0$
Directional Mass Id Distance	0.007	0.006	0.140	$\beta < 0$
Judge Ideology	0.006	0.007	0.178	$\beta > 0$
Elite Retention	-0.116	0.305	0.352	
Partisan Retention	-0.261	0.211	0.109	
Nonpartisan Retention	0.021	0.124	0.434	
Court Distance	-0.009	0.007	0.093	$\beta < 0$
Direct. Elite Id Distance * Elite Retention	0.008	0.005	0.065	$\beta < 0$ [b]
Direct. Mass Id Distance * Partisan Retention	0.001	0.005	0.383	$\beta < 0$ [c]
Year 1996	0.074	0.089	0.204	
Year 1997	0.119	0.136	0.191	
Constant	-1.107	0.476	0.010	
Log Likelihood = -3678.700				
Wald Chi2 = 52.27				
Prob > Chi2 = 0.000				
Rseudo R2 = 0.026				
Reduction of Error = 10.34%				
N = 6306				

[a] 1-tailed test
[b] When states utilize elite retention procedures
[c] When states utilize partisan retention procedures

Table 4.20: Predicted Probabilities Liberal Votes Death Penalty

Situation	Probability of Liberal Vote
All variables at mean	28.23%
Difficult Amendment[a]	30.13%

[a] Amendment Difficulty set at 1

Table 4.21: Results Stage Two Conservative Votes Death Penalty

Variable	Coefficient	Robust SE	P > |Z|[a]	Hypotheses
Amendment Difficulty	-0.342	0.162	0.118	$\beta > 0$
Divided Government	-0.162	0.117	0.083	$\beta > 0$
Term Length	0.010	0.030	0.374	$\beta > 0$
Directional Elite Id Distance	0.000	0.003	0.456	$\beta > 0$
Directional Mass Id Distance	-0.009	0.006	0.061	$\beta > 0$
Judge Ideology	-0.002	0.007	0.359	$\beta < 0$
Elite Retention	0.189	0.321	0.278	
Partisan Retention	0.234	0.216	0.140	
Nonpartisan Retention	0.027	0.119	0.412	
Court Distance	0.008	0.007	0.117	$\beta < 0$
Direct. Elite Id Distance * Elite Retention	-0.008	0.005	0.049	$\beta > 0$ [b]
Direct. Mass Id Distance * Partisan Retention	0.001	0.004	0.356	$\beta > 0$ [c]
Year 1996	-0.065	0.100	0.257	
Year 1997	-0.186	0.177	0.147	
Constant	0.886	0.469	0.030	
Log Likelihood = -3836.520				
Wald Chi2 = 59.35				
Prob > Chi2 = 0.000				
Rseudo R2 = 0.029				
Reduction of Error = 2.94%				
N = 6306				

[a] 1-tailed test
[b] When states utilize elite retention procedures
[c] When states utilize partisan retention procedures

Table 4.22: Predicted Probabilities Conservative Votes Death Penalty

Situation	Probability of Conservative Vote
All variables at mean	68.66%
Difficult Amendment[a]	66.77%

[a] Amendment Difficulty set at 1

It is extremely surprising and very interesting that few institutional or environmental variables are significant in explaining state court decisions in death penalty cases. If all variables are held at their mean there is a 28.23% chance of a liberal vote and a 68.66% chance of a conservative vote. Amendment difficulty is the only variable that shows an impact on judicial decisions on the merits in capital disputes. Difficult amendment procedures result in a 30.13% likelihood of liberal decisions but result in a 66.77% chance of conservative decisions. Apparently difficult amendment procedures result in marginally greater judicial discretion in liberal decisions but result in slightly less judicial discretion in conservative decisions, suggesting that influences on decisions vary depending on the ideological direction of the decision. These different findings make sense when one considers the special nature of capital punishment. Capital punishment is expected to be extremely salient to other actors and generally supported so it makes sense that judges would often be constrained in such decisions and that a judge making a liberal decision in a capital case would have to be strategic. However, even though the death penalty enjoys a high level of public support, it is possible that sometimes legal factors such as poor quality legal representation, faulty jury instructions or the like would compel a judge to strike down a sentence. While such a decision on the surface would seem to be unsophisticated it would make sense once legal factors were taken into account. Essentially even politically sophisticated judges would strike down sentences (a liberal vote) if blatant legal violations make it unavoidable.

The paucity of significant findings may indicate that although death penalty cases are salient to both elite and mass actors, such considerations have a limited influence on judicial decision-making. Certainly such an interpretation would be in contrast to the bulk of research on

capital cases. The work of Paul Brace and Melinda Gann Hall (1993, 1995, 1997) and Hall 1992 all suggest that state high court judges' decisions on death penalty cases are influenced by numerous factors including environmental considerations. In her 1992 article Hall concluded that single member districts, prior representational service, narrow vote margins and the like encouraged judges to be attentive to constituent opinion. In 1995 Brace and Hall examined how case characteristics, state party competition, judicial elections, and special statutes all affected decisions in capital cases. They concluded that institutional and environmental features best explained decisions and that judges were more likely to uphold death sentences in politically competitive states with elected judges. However it is important to keep in mind that the bulk of previous research studied only a few particular courts during specific years. Hall 1992 examined only four courts, Brace and Hall 1993 examined six, and Brace and Hall 1995 and 1997 both examined eight. In contrast, this dissertation examines all fifty state high courts, albeit also for a limited number of years.

While further research is necessary before strong conclusions are drawn, I believe that the oddities found in my results are likely due to several factors. The first factor is the effect of routine death penalty appeals. Judges do not have docket control on capital cases because appeals to the state high court are mandatory. Without discretionary jurisdiction the courts are forced to decide a number or routine appeals. Since the cases are routine and many are without serious legal merit it is not surprising that the decisions the reached by the judges would show little evidence of strategic behavior. A second possible reason for the differences in findings is measurement. Nearly all of the states examined by the articles mentioned above utilize electoral retention methods. By including almost exclusively states that utilize electoral retention the finding of constraint is more likely. Also, each of the articles cited above used different

approaches to measuring the political environment. These previous works looked at peripheral measures of environmental constraints such as party competition and partisan ballots instead of the direct measures of elite and mass ideology that I use. While it is puzzling that I found minimal evidence of institutional constraint, the differences in measurement combined with characteristics of the limited number of states examined in the previous studies could conceivably go a long way in explaining the differences. A third possible reason for my results is the fact that I do not include legal factors into my models like many of the previous death penalty studies. It is reasonable to assume that legal factors such as mitigating/aggravating factors, jury issues, and trail procedures may help explain judicial outcomes in capital cases. However, such a test is beyond the scope of this dissertation.

The reason that legal factors are not included is twofold. First, the aim of this project was to test neo-institutional theories of judicial behavior, specifically how institutional and environmental factors influence decision-making. My entire theory was based on the premise that judges would react strategically to the interaction of ideological distances and institutional configurations under specified circumstances. Based on this approach the inclusion of legal factors is not necessary. A second reason is practical and is due to data limitations. The original dataset used in this project was constructed with a single case as the unit of analysis instead of each judge's decision as the unit of analysis. The computer program Access was used to flip the dataset to the proper unit of analysis but unfortunately Access could handle only a limited number of variables so I was forced to drop many variables including legal factors in order to complete the transformation. Fortunately legal factors can be included in future versions of this research as a National Science Foundation grant is currently providing funding for a project to

flip the dataset in its entirety.[9] Future versions of this research will include legal factors in an effort to understand this surprising finding.

4.5 SUMMARY OF RESULTS

Overall the findings support many of my expectations, both generally and specifically. Generally, I found evidence that influences on decision-making vary across different areas of case law, across both stages in the decision-making process, and variation across both liberal and conservative decisions on the merits. Specifically, there is clear evidence that institutional arrangements and environmental factors affect judicial discretion. It is also obvious that judicial ideology plays an important role in judicial decision-making. However, the most important point is that there is substantial evidence that judges will behave strategically and make decisions inconsistent with their attitudinal preferences when cases are salient to other actors who have the institutional power to retaliate for unpopular decisions. These findings are important because they show that the level of constraint faced by judges depends on a variety of factors. The level of constraint is important because it has a tremendous impact on the performance of courts in our system of government and their ability to fulfill their counter-majoritarian role.

The statistical results also raise two puzzling questions. The first question is why I found such unanticipated results for capital cases. I expected that judges would be highly constrained in death penalty decisions, likely by both elite and mass actors. But my findings indicate nearly the opposite. I will explore this discrepancy in my next chapter by examining the fates of two different judges on the California Supreme Court to see how elite and mass ideology and

[9] NSF "Collaborative Research: An Individual-Level State Supreme Court Database" (SES 0518491, SES 0516409, SES 0516600) Chris W. Bonneau, Paul Brace, and Kevin Arceneaux, co-Principal Investigators.

salience relate to retaliation for judicial decisions on capital cases. It is necessary to focus on retaliation and the death penalty for two reasons. The first is because my results were so startling and the second is because capital punishment is an important political and ethical issue with major ramifications for the legal system in the United States.

The second question raised by the results involves the classification of mass and elite salience and the four areas of case law. I expected campaigns and elections to be of interest to elite actors, death penalty cases to be of interest to both elite and mass actors, social issues to be of interest to mass actors, and welfare cases to be of interest to neither type of actor. Despite my theoretical expectations, the results suggest that many areas are of salience to both types of actors. This view is supported by evidence that judges are strategic in their review of social issues cases and take into account the preferences of elite actors in those cases. Moreover, I found that mass preferences seem to affect judicial decisions on the merits in welfare cases. These findings are unexpected based on my classification scheme which neatly predicted that the four different areas of case law represented the four different possible types of salience. Although my expectations for campaigns and elections and welfare cases were based on previous research, it is possible that salience is more complicated when it comes to topics such as the death penalty or social issues. Differences in outcomes will be examined further in Chapter Five by focusing on how elite and mass actors reacted to the rulings of the Hawaii and Vermont high courts on the issue of same-sex marriage.

5.0 CHAPTER FIVE: SAME-SEX MARRIAGE AND CAPITAL PUNISHMENT

Specific incidents of retaliation against judges are examined in detail in this chapter. The use of qualitative case studies illustrates my quantitative findings in order to present a more complete picture of judicial decision-making. The first case study investigates political reactions to decisions of the Hawaii and Vermont courts supporting same-sex marriage. The second case study analyses the electoral fates of two judges of the California Supreme Court, and specifically focuses on their decisions on capital cases.

These cases were selected for a number of reasons. First, they provide variation in outcomes. The Hawaiian court faced retaliation for its decision; the Vermont court did not. Chief Justice Bird was voted off the bench, while Justice Stanley Mosk kept his seat. Second, they illuminate issues raised by the statistical results. I decided to explore the debate over same-sex marriage debate because it is a timely social issues topic with great contemporary relevance. The Hawaii and Vermont cases also provide insight into the relationship between elite actors, the amendment process, and cultural issues. I choose to delve into the death penalty further because the paucity of results in my statistical model surprisingly contradicts years of judicial scholarship which suggests that both elite and mass actors are deeply concerned with state court decisions in capital cases.

Third, these particular case studies represent varying approaches to retaliation. In the case of gay marriage, the reaction to the Hawaii high court's decision came in the form of an

amendment to the state constitution. In contrast, in California political elites led the mass public in retaliating against Judge Bird by utilizing the state's retention elections process. It is important to look at both types of retaliation in order to fully understand the ways in which judges face constraint.

Fourth, the cases selected present examples of both institutional and environmental influences having effects on efforts to retaliate for unpopular judicial decisions. Hawaii and Vermont were selected because the state high court ruled in favor of same-sex marriage but the reaction of other actors to the decision varied greatly, in part due to the degree of freedom permitted by different institutional structures. I decided to examine the fates of two different judges on the same court (Rose Bird and Stanley Mosk) in order to fully explore the effects of environmental factors, specifically the ideological distance between a judge and other actors. In the case of the California high court, each judge faced the same institutional configurations but experienced very different outcomes: Mosk was retained while Bird was not. Evidence suggests that the difference in outcomes is due to the differing environmental constraints faced by the two judges.

5.1 LINKING CASE STUDIES TO THEORY

This dissertation is based on the premise that both institutional structures and environmental factors affect judicial decision-making. Institutional factors often vary across states. For example, judges in Massachusetts do not face retention and instead hold their positions for life (technically until the age of seventy), while judges in Vermont are retained via legislative elections, judges in Hawaii are subject to a nominating committee's vote, and Alaska utilizes

simple retention elections. Different arrangements have the potential to result in varying levels of judicial constraint, depending upon the system utilized in a particular state.

It is important to note that institutional structures such as retention method, term length, and state constitutional amendment procedure affect all members of a particular court in the same way; each judge on a state court faces the same constraints. Conversely, environmental factors do not affect all judges on a court equally. The threats posed by other actors in the judge's environment differ depending upon the partisan makeup of elite and mass actors and the particular judicial ideology of a judge.

My dissertation theory recognizes that there are two primary ways for other actors to retaliate against judges for unpopular decisions. The first is opposition at retention time. While fairly uncommon, such challenges can be successful. Judges in California, Florida, and Tennessee have all faced major (and mostly successful) challenges at election time.[10]

A second form of retaliation is constitutional amendment. Constitutional amendment is particularly effective because it binds the hands of future judges in addition to negating the decision of the current bench. Constitutional amendments are not costless however, and many require the approval of both the electorate and the legislature in many states. Electoral retaliation may be the obvious method, but if a state (such as Hawaii) utilizes non-mass non-elite retention methods such as a judicial nominating committee then constitutional amendment is one of the few available options. These case studies are designed to fill in the picture presented by my theory and illuminate my statistical results. These cases specifically examine the influence of institutional and environmental factors, and scrutinize both amendment based and retention based retaliation for unpopular judicial decisions.

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[10] See Bright (1997, 1998), Bright and Keenan (1995), and Paonita (1986) for discussion of the cases of Rosemary Barkett, James Robertson, Penny White, and others.

5.2 SAME-SEX MARRIAGE IN HAWAII AND VERMONT

Same-sex marriage is a contentious and timely social issue. Many religiously devout Americans believe that it is an abomination and specifically prohibited in the Bible. Others believe that gay marriage is an important civil liberty and that couples of all types should enjoy the benefits that go along with state sanctioned marriages.[11] Like the perennial debate over abortion, court decisions on same-sex marriage are extremely salient and very important to contemporary political debate. The cases of *Baehr v. Lewin* 1993 (later litigated as *Baehr v. Miike*) and *Baker v. State* 1999 show that courts need to think about both structural factors and environmental influences when considering the likelihood of retaliation for their decisions. In Hawaii (the *Baehr* cases) the court issued a strong ruling in favor of gay marriage that was quickly rebuffed by a constitutional amendment driven by the mass public. In Vermont (*Baker*) the court also ruled for same sex couples but left the details of implementation to the legislature with a very different end result.

5.2.1 The Hawaiian High Court and Same-Sex Marriage

In 1993 the Supreme Court of Hawaii announced its decision in *Baehr v. Lewin.*[12] In doing so the court was one of the first to become embroiled in the dispute over same-sex marriage.[13] Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melilio, three same sex couples and residents of Hawaii sued John Lewin (the director of the Department of Health - DOH) because of the state's refusal to grant them marriage licenses.

[11] See Backer (2002) and Strasser (2001) for two different takes on religion, morality, and the same sex marriage debate.
[12] See Cahill (2004) and Wardel et al (2003) for summaries of the court's ruling.
[13] Alaska's high court also addressed same-sex marriage in *Brause v. Bureau of Vital Statistics* (1998). See Eskridge (2001), Goldberg-Hiller (2002), and Strasser (1999) for discussions of the Alaska case.

The complaint argued that (1) the actions of the DOH were unconstitutional because they denied marriage licenses solely on the basis of the applicants being of the same sex, and (2) asked the court to issue an injunction prohibiting the denial of marriage licenses on that basis. The state countered that the complaint should be dismissed because it failed to state a claim upon which relief could be granted for a multitude of reasons. The seven reasons given by the state were: state law "contemplates" marriage as a union between a man and a woman, only heterosexual marriage is a legally recognized right, state law does not hurt private relationships such as those enjoyed by the plaintiffs, the state has no legal obligation to recognize homosexual unions, state laws are designed to support the basic family unit, homosexuals are not of a class that required heightened "judicial solicitude", and state laws do not penalize gay couples in any way and so must be sustained. The circuit court eventually dismissed the couples' complaint holding that the case was settled as a matter of law and no relief could be granted.

The plaintiffs then appealed the case to the Hawaiian high court on the basis of three points. First, they maintained that the circuit court should not have dismissed the complaint unless it appeared beyond any doubt that they could not prove their claims. Second, that they had a fundamental constitutional right to their non-traditional sexual orientation. And third, the DOH's denial of marriage licenses violated their rights to privacy, equal protection, and due process under the Hawaii Constitution. Their claims were legally bold and partially successful. The state high court's ruling was technically mixed: the couples won some claims and lost others. But, by sustaining a few of the couples' claims the court made a stunning change to the state of the law.

The supreme court agreed with the plaintiffs' first claim and reversed the circuit court's dismissal, ruling that the lower court should have viewed the "plaintiff's complaint in a light

most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." The high court disagreed with the lower court's findings against the couples and instead argued that the allegations likely could be proven. Having resolved the dismissal issue, the court then considered the substance of the case.

The court rejected the plaintiffs' privacy argument although the court acknowledged that privacy rights existed under both the federal and state constitutions, and the rights given under the state constitution minimally "encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution." The court accepted that the right to marry is part of the right to privacy implicit in the due process clause of the Fourteenth Amendment, citing *Maynard v. Hill*, *Skinner v. Oklahoma*, and *Zablocki v. Redhail*. But the court went on to say that the Hawaii courts have consistently interpreted their state privacy rights as flowing from the federal privacy rights, citing *State v. Mueller*. Since the court had consistently applied the limited federal interpretation, the court concluded that:

> [w]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicitly in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed….

However, the court sided with the plaintiffs when it ruled that the couples were entitled to a hearing to determine whether the state's actions violated their equal protection rights.[14] The court recognized that marriage is a state-sanctioned benefit and that "marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship." The court agreed that the state's refusal to grant same

[14] See Strasser (2000, 78-80) for a in-depth summary of the legal reasoning behind the Hawaiian high court's equal protection decision in *Baehr v. Lewin*.

sex couples a marriage license deprived them of a variety of benefits enjoyed by other married couples including: tax advantages, public assistance, community property benefits, inheritance rights, child custody and divorce support, premarital agreements, name changes, and other benefits.[15] While the court reaffirmed the state's right to sanction marriages it noted that that both federal and state jurisprudence made clear that marriage was a fundamental right, citing *Loving v. Virginia.* *Loving* was a landmark case which held that marriage restrictions based on race were subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment. The application of strict scrutiny meant that most restrictions would be found unconstitutional.

The Hawaiian court then addressed the issue of the appropriate level of scrutiny for sex-based classifications challenged under the equal protection clause of the Hawaii constitution. Traditionally the federal courts have almost universally held that sex-based classifications were subject to intermediate scrutiny, as opposed to strict scrutiny.[16] In this case, the Hawaiian court announced that strict scrutiny was the appropriate test to use in evaluating sex based equal protection claims. The court cited its previous decision in *Holdman v. Olim* which announced that it was free as a matter of law under the state constitution to accord individuals more protections. The high court then vacated the circuit court's previous ruling and remanded the case for further proceedings consistent with the ruling.

It is significant that the court chose strict scrutiny as the appropriate test for sex-based classifications. While the court did not explicitly say that same sex-marriage must be allowed, by specifying the most restrictive test it made the outcome all but inevitable. Under intermediate

[15] Johnson (2002) makes the argument that one of the primary benefits of marriage that is denied to same sex couples is interstate recognition of the relationship.
[16] Of course, the notable exceptions to the federal cases specifying intermediate scrutiny are *Frontiero v. Richardson* and *Lawrence v. Texas*.

scrutiny (the rational basis test) a statute is constitutional if it rationally furthers a legitimate state interest. This level of scrutiny makes the likelihood of a court finding the government's actions constitutional much higher than the strict scrutiny test. Under strict scrutiny government regulations are presumed to be unconstitutional unless the state shows a compelling interest that justifies classifications and the laws must be narrowly drawn to avoid unnecessary infringements. The application of strict scrutiny set a high hurdle for the government to justify limiting marriage to heterosexual couples only.

Since the Hawaii Supreme Court had been so clear in its finding of an equal protection violation and its instructions to use strict scrutiny in sex-based classification schemes, it was immediately clear what conclusion that circuit court would reach. The following year in *Baehr v. Miike* the circuit court ruled that the sex-based classification apparent in Hawaii's law governing marriage was unconstitutional as a violation of the equal protection clause of the Hawaii constitution and enjoined the Department of Health from denying marriage licenses to same sex couples.

The supporters of same-sex marriage had won a major victory in the Hawaiian courts. Although the decision was a solid victory for supporters of gay marriage, there was an immediate public backlash. In the month following the decision, the House Judiciary Committee held hearings on the issue and that same month 5,000 protesters rallied at the state capital demanding action. It was the largest rally in state history (Goldberg-Hiller 2002, 42). Multiple groups opposing gay marriage immediately formed and started running well organized media campaigns with prominent newspaper ads. On the other hand, their opponents were few and loosely organized (Goldberg-Hiller 2002, 72). Public opinion was solidly against the court's ruling (Eskridge 2001, 874; Gerstman 2004, 195; Goldberg-Hiller 2002, 54 and 74). The focus of the

debate centered on the negative impact of same-sex marriage on society, with little discussion of the civil rights of individuals comprising same-sex couples (Goldberg-Hiller 2002, 71-72). Interestingly, one of the few strong arguments made against the amendment explicitly focused on the consequences of taking the power to determine the constitutional rights of citizens away from the courts (Goldberg-Hiller 2002, 72-74).

Given all the public pressure it is unsurprising that the quickly legislature passed a bill to put a constitutional amendment before voters. The amendment gave the legislature the power to pass a bill reserving marriage to only opposite-sex couples. It was necessary to amend the constitution in order to get around the high court's ruling that denying same-sex couples the benefits of marriage violated the equal protection clause of the state constitution. In the fall of 1998 the amendment passed with an astoundingly high sixty-nine percent of the vote (Goldberg-Hiller 2002, 43).[17] It was interesting that a state as solidly liberal as Hawaii negated its own court's decision and banned same-sex marriage by amending its constitution.

The amendment to the Hawaiian constitution effectively amended the role of the Hawaiian courts in determining the legality of same-sex marriage. In 1999 the case of *Baehr v. Miike* was again appealed to the state's highest court. The high court's decision in the case was anti-climatic. The court simply noted the passing of the constitutional amendment and the resulting law limiting marriage to opposite-sex couples and again reversed the circuit court's ruling (see Ross 2002). Thus, the issue of same-sex marriage was resolved for the state of Hawaii.

The Hawaiian constitutional amendment had an indirect impact beyond its borders. The decisions of the Hawaiian court and the Alaska court were jointly influential in spurring the

[17] At virtually the same time a similar measure passed in Alaska with strong support to negate a similar ruling by that state's high court (Goldberg-Hiller 2002, 43).

national debate over same-sex marriage. In 1996 Congress passed the Defense of Marriage Act (DOMA), which permits states to deny recognition of same-sex marriages that are legally binding in other states, and limits the federal definition of marriages to that between a man and a woman. This definition severely limits federal benefits for same sex couples, including benefits given to opposite-sex couples (Cahill 2004, 5-6 80-81). The bill was heavily promoted by Republicans in Congress but was signed by Democratic president Bill Clinton. Clearly same-sex marriage was politically unpopular in most parts of the United States.

5.2.2 The Vermont High Court and Same-Sex Marriage

The same year that the *Baehr* cases were finally laid to rest in Hawaii, Vermont's high court tackled the issue in *Baker v. State* (1999)[18]. As in *Baehr v. Lewin* and *Baehr v. Miike*, several same-sex couples were denied marriage licenses in Vermont took their case to court. While the broader issue was similar, the precise legal issues raised were distinct. However, the court's legal remedy was unique, which allowed Vermont to make history as the first state in the nation to legally recognize same-sex unions.

Initially the plaintiffs in *Baker* argued that the refusal of the state to grant them a marriage license violated both the Vermont statutes governing marriage and the Vermont constitution. As in Hawaii, the state countered that the couples failed to state a claim on which relief could be granted. During the initial dispute the main focus was on the proper reading of Vermont's marriage statutes. The state contended that the statutes clearly contemplated marriage as being between a man and a woman while the plaintiffs argued that the statutes were not clear

[18] A few years later another prominent case *Goodridge v. Department of Public Health* (2003) was litigated in Massachusetts. See Cahill (2004), Chauncey (2004), Harrison (2005), and Mello (2004) for discussion.

and could be interpreted as to include same-sex couples. Unsurprisingly, the trial court dismissed the claim and ruled for the state, finding the marriage statutes to be constitutional because they promoted a reasonable state interest in procreation which justified the exclusion of same-sex couples.

The Vermont high court upheld the thrust of the trial court's argument and explicitly rejected the couples' claim that marriage statutes contemplated same-sex couples. The court argued that it was clear that the plain meaning of the statute was designed to apply to opposite-sex couples as evidenced by the use of words such as "male" and "female" in the law. The court also rejected the couples' claims that concerns for the well-being of children allowed marriage to encompass same-sex couples. Although the court acknowledged that many same-sex couples (including two out of the three plaintiffs) had children and the law had allowed the same-sex partners of individuals to jointly adopt children, the court rejected the argument that same-sex marriage was linked to the best interests of children.

Instead, the court focused on the constitutional claim raised by the plaintiffs, specifically the contention that the Common Benefits Clause of the Vermont constitution prohibited the state from denying same-sex couples the wide-ranging legal benefits given to opposite-sex couples through marriage. As done previously in Hawaii the court was careful to make clear that it was basing its decision on state law. The Vermont court also opined that the state constitution was able to provide citizens with more expansive legal rights than those granted by the equal protection clause under the federal constitution. This distinction was necessary because currently same-sex couples have no support for their claims under federal interpretations of the equal protection clause of the Fourteenth Amendment.

The state high court noted that "Vermont case law has consistently demanded in practice that statutory exclusions from publicly-conferred benefits and protections must be 'premised on an appropriate and overriding public interest.'" After a careful recounting of the constitutional history of the Common Benefits Clause the court determined that the government's claim of supposed public benefits (traditional marriage encouraged stable couples which benefited children) did not outweigh the rights of couples excluded by the restrictive marriage laws to benefits accorded to other couples. Accordingly, the court held that it was unconstitutional for the state to exclude same-sex couples from legal marriage.

Aside from being a controversial ruling, the Vermont court's decision is intriguing from a strategic standpoint. At the outset of the opinion the court goes to great pains to argue that they cannot duck the case and that their "constitutional responsibility to consider the legal merits of issues properly before us provides no exception for the controversial case." Also interesting is the court's decision of how to handle the implementation of the decision. Normally courts issue a precisely worded order for someone (usually one of the parties or a lower court) to follow specific instructions listed in the opinion. In this case the court said:

> We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note … what are typically referred to as "domestic partnership" or "registered partnership" acts, which generally establish an alternative legal status to marriage for same-sex couples…

Such an order is extremely interesting as the court made a major and controversial change in the law and then left the implementation to the legislature. While the choice was strategic in that they did not force a solution that could have brought retaliation the court did take a risk that the legislature would duck the issue and the court would be left with an unenforceable decision.

And so the issue was passed to the legislature. From the beginning reports indicated that public opinion was such that same-sex marriage was simply not a viable option so the focus of lawmaking quickly shifted to a domestic partnership program (Mello 2004, 74-75). From the beginning the legislature's response to the court's decision was led by a handful of politicians including: House Speaker Michael Obuschowski, Representative Bill Lippert, Representative Tom Little (the chairman of the House Judiciary Committee), Governor Howard Dean, Senator Peter Shumlin (the president pro temp of the Senate), and Senator Dick Sears (the chairman of the Senate Judiciary Committee). It was this small group who was responsible for most of the strategy behind the civil union bill passing in the legislature[19].

The decision to take on a contentious political issue and pass a bill of any sort was not a forgone conclusion. Some politicians including Bill Lippert favored ignoring the court's decision and simply doing nothing (Moats 2004, 149). Others including Senator Vincent Illuzzi introduced a bill to vacate the court's decision (Mello 2004, 111). In the end, none of these actions were taken. The legislature passed a landmark bill granting same-sex couples legal recognition through civil unions thereby granting them the same rights afforded married opposite-sex couples. According to David Moats this was because of a dedicated group of politicians who believed that they had the duty to work within political possibilities to implement the spirit of the ruling made by the court (2004, 150).

While the compromise of civil unions did not make either opponents or supporters of same-sex marriage happy, the feeling among most of Vermont's liberal political elites was that civil unions were as far as things could go (Mello 2004, 157). Senator Illuzzi was one legislator who understood the political implications of strong public sentiment and dropped his original

[19] See Moats (2004) for details.

support for same-sex benefits because of stiff opposition from his constituents (Mello 2004, 157-158). Even with careful consideration of political factors and the most politically acceptable option passed, some legislators faced electoral retribution. Sixteen House members who had voted for the civil union bill lost in the next election cycle (Moats 2004, 260).

5.2.3 Lessons of Hawaii and Vermont High Court Rulings

On a superficial level, the court decisions in Hawaii and Vermont were remarkably similar. Both courts found the denial of same-sex marriage benefits to be unconstitutional. And both courts were careful to base their decisions on interpretations of state law which prohibited review by the federal courts. Although the decisions were base upon different constitutional clauses (equal protection vs. common benefits) both rulings hinged on disparate treatment afforded to same-sex couples. The outcome of both court cases was a strong legal statement in favor of gay rights. In both situations there were immediate and intense negative reactions to the court decisions, but Hawaiian voters passed a constitutional amendment to negate the court's decision while Vermont's legislature passed comprehensive legislation implementing the court's ruling through civil unions.

The difference in outcomes reinforces my contention that retaliation for judicial decisions is motivated by issue salience, ideological distance, and the ability of the other actors to respond. The Hawaiian court demonstrated a remarkable lack of consideration (or major misperception) of public reaction to its decision. By ordering the lower court to evaluate an equal protection violation utilizing strict scrutiny the court made a legal ruling requiring gay marriage a foregone conclusion. This put it on a legally uncharted path that led straight to confrontation with the public. In contrast, under riskier circumstances (as Hawaii consistently rates more liberal than

Vermont – see Table 2.1), the Vermont court issued a ruling establishing a Common Benefits violation but declined to specify the form which the remedy must take.

The subsequent reaction to the Vermont decision (particularly the level of care shown by leading legislators) to act with the court, instead of against it, shows that the discretion given by the court went a long way to negating opposition. Although the issue was clearly salient and there was the opportunity for retaliation, the discretion the court gave to the legislature allowed the legislature to fashion a politically acceptable solution which resulted in civil unions.

These cases illustrate the real possibility of retaliation for unpopular decisions and reinforces the likely influence of institutional and environmental factors on judicial decisions. The Hawaiian court showed little concern for its political environment and was permanently overruled by constitutional amendment. The Vermont court took a restrained approach which resulted in landmark legislation creating civil unions. The difference in results in large part can be attributed to strategic behavior on the part of the Vermont judges that was lacking in the Hawaii case. The Vermont court's opinion has a surprisingly non-legalistic tone which shows they were aware of their political environment.

The type of retaliation used often depends upon structural factors. The willingness of other actors to act may depend on salience and ideological distance, but the precise form of retaliation will depend upon their possible options. Hawaii faced a constitutional amendment because the judicial retention procedures in the state precluded electoral reaction. This is not the case in the state of California. The next case study examines the fates of two justices of the California Supreme Court. Unlike in the Hawaii and Vermont cases, the issues leading to sanction in California could not be traced to a specific case. Instead the issue in California

focused on a consistent pattern of decision-making on salient death penalty cases that was in direct contrast to the political ideology of both elite and mass actors within the state.

5.3 CAPITAL PUNISHMENT AND THE CALIFORNIA HIGH COURT

Conventional wisdom suggests that Chief Justice Rose Bird[20] lost her seat on the California Supreme Court in 1986 because she was too liberal and consistently voted to strike down death penalty sentences. While her opposition to capital punishment was indeed a major part of her defeat, a detailed examination reveals an unexpectedly complex story. The California high court had been making liberal decisions for years, including under the previous two chief justices – Roger Traynor and Donald Wright. Rose Bird's defeat was instead due to a multitude of factors including: issue salience, ideological distance between her and other actors, her high public profile, and her lack of defenders within the legal community. The importance of these factors is illustrated by comparing the retention election results of Rose Bird with the different outcome enjoyed by her colleague Stanley Mosk.

The key contention of this dissertation is that judges will likely face retaliation for their decisions under three conditions: when they (1) make decisions contrary to the wishes of other actors on (2) salient issues and those actors (3) have the ability to retaliate. The case of Rose Bird (appointed initially in 1977 by the liberal Edmund G. "Jerry" Brown) neatly illustrates each point. For most of the 1960s through the 1970s the political climate in California was quite liberal. The court was well respected and considered to be a leading innovator in law and often issued landmark legal developments ahead of the United States Supreme Court. But the political

[20] Also voted out of office in 1986 were Justices Joseph Grodin and Cruz Reynoso. See Grodin (1988) for a firsthand account of his experience.

mood did not last forever. The election of George Deukmejian in 1983 reflected a shift in political attitudes in California. Conservatives came to power and the general public held strong law and order beliefs on a variety of issues, including criminal law. Unfortunately for Bird, her decision-making did not change with the times; she continued to compile a strong leftwing record on many issues, including an unfailing opposition to capital sentences. And of course the death penalty proved to be an issue of high salience to both political elites and the general mass public. Furthermore, Rose Bird was a controversial figure in California politics: she was well known but not necessarily well respected and quickly became a major target for conservatives. Finally, her personality and her leadership style insured that few among either the legal or political communities were willing to publicly support her. All these factors added up to defeat during her 1986 reelection bid.

The electoral situation in 1986 was quite different for her colleague Stanley Mosk. This is puzzling, as at first glance they seem to be similar: Stanley Mosk was initially appointed by Edmund G. "Pat" Brown to the high court in 1964. Like Bird he was quite liberal, in fact he was a leading force behind many of the court's major rulings in the 1960s and 1970s and had compiled a record of being a leading progressive scholar. This situation begs the question of why was Mosk not removed from the bench during the 1986 elections when three of his colleagues were? The reasons why Mosk was not removed include the fact that he was more moderate than Bird on highly salient decisions – particularly with regard to capital punishment. Additionally he personally was not a high profile target. He was not selected as a poster child for conservatives angry at the court, and he had a much stronger legal reputation which he had built up over many years in public service. His reputation and his personality afforded him

support within the legal community which, when combined with his restrained opposition to the death penalty, helped him survive the tumultuous 1986 election.

Careful analysis of the reelection bids of Rose Bird and Stanley Mosk support the foundation of this dissertation. The difference in the fates of Bird and Mosk reinforce the belief that retaliation against judicial decisions is due to the interaction of issue salience, ideological differences, and opportunity. However, these cases also raise the question of how legal expertise and support from the legal community affect judicial fortunes. In sum, the results of the 1986 election support the idea of the importance of judicial strategy. Bird was voted out of office because she was not strategic – she persisted in making decisions on death penalty cases that were out of touch with a large number of elite and mass actors. The same can be said for judges Reynoso and Grodin who were also voted out of office in 1986. Reynoso and Grodin nearly always joined Bird in opposing capital sentences. There is strong evidence that Mosk was calculating about his decisions, as he clearly modified his stance on the death penalty in some years, and was therefore able to keep his seat on the high court.

5.3.1 Historical Background of the California High Court

To understand Bird's actions one must understand the position of the court before her appointment. Throughout the 1960s and 1970s the California Supreme Court was well-regarded and considered to be an extremely prestigious court on the cutting edge of jurisprudence (see Caldeira 1985 and Tarr and Porter 1988). The Court's decisions were often liberal but so were

the times. The political leaning of the early California court is particularly clear in the cases of: *People v. Anderson*, *People v. Norman*, and *People v. Disbrow.*[21]

In *People v. Anderson* (1972) the court ruled that the death penalty violated the California constitution. The case was noteworthy for several reasons. The first was because the judges made their decision prior to the landmark Supreme Court decision of *Furman v. Georgia* (1972) which held the death penalty to be unconstitutional under the federal constitution. The second reason was because the California court relied solely on the state constitution. By announcing their own legal reasoning, they prevented review by the United States Supreme Court and insured that their decision would be more likely to withstand legal challenges. Third, it brought about swift public reaction and a constitutional update which expressly negated the court's view of the constitutionality of capital punishment. (See Latzer 1996, 155-158 for an in-depth discussion of the decision and the public's subsequent reaction.) *People v. Anderson* shows how the California public has a long history of passing initiatives to correct the high court's interpretation of law when it disagrees with prevailing political sentiment (Tarr 1996, 159, 164). Interestingly, despite the threat of initiatives sometimes the court persists in its viewpoint as later happened with capital punishment.

The court also made noteworthy decisions in other areas beyond the death penalty. The case of *People v. Norman* (1975) represented a significant departure in search and seizure law. In 1969 the U.S. Supreme Court upheld wide ranging warrantless seizures when they take place incident to arrest[22]. And in *United States v. Robinson* (1973) the federal Supreme Court held that full searches incident to arrest are justified, no matter how minor the infraction. In *People v.*

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[21] Other notable cases pre-Bird were *Mulkey v. Reitman* (1966) and *Serrano v. Priest* (1971). See Culver 1998 for a thorough discussion.
[22] *Chimel v. California*

Norman the California court rejected the Robinson rule and held that warrantless searches were valid only when the immediate personal area of the suspect is searched. This represented a major departure from the Robinson case and largely curtailed the ability of police to gather evidence. The rights of suspects were later further expanded in *Wimberly v. Superior Court* (1976) and *People v. Ruggles* (1985).[23]

In *People v. Disbrow* (1976) the California court rejected the Miranda exceptions issued by the U.S. Supreme Court in *Harris v. New York* (1971). This meant that self-incriminating statements made before a suspect was read his rights were not admissible in California courts, even if the defendant voluntarily chose to testify.[24] All of these cases represented departures from federal law and showed the willingness of the California court to strike out on its own and establish its own interpretations of state law using the state constitution. These developments are generally referred to as new judicial federalism (Fino 1987).

In 1977 Rose Bird ascended to a court with a reputation as a major legal innovator with a track record of strong protections for criminal defendants. Unfortunately for her, the public's interest in the death penalty and other criminal matters increased over the years as sentiments became increasingly conservative. The salience of such issues combined with ever greater right wing leanings of the electorate was instrumental in her defeat. Interestingly Stanley Mosk was on the court for many of the path breaking liberal decisions of the 60s and 70s and yet retained his seat in 1986. So why was Rose Bird voted off the bench when Mosk, a liberal icon, was able to hold on to his seat? In order to understand this seeming paradox one must start at the beginning and compare the past experiences and confirmations of each judge.

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[23] See Latzer (1996, 159-162) for details of all these cases.
[24] See Latzer (1996, 163-164).

5.3.2 Comparing the Backgrounds of Rose Bird and Stanley Mosk

Stanley Mosk was a former attorney general of California who was experienced in California politics, had extensive judicial experience, and was well connected with the legal establishment (Stolz 1981; 6 and 423). His elevation to the court was widely praised, as he had extensive experience directing and pursuing cases as attorney general. In fact, many thought that Mosk was the one that Governor Brown should have nominated to be chief justice instead of Bird in 1977 (Stolz 1981, 95).

In contrast to Mosk's lengthy record of public service, Rose Bird had been nominated to the bench by Jerry Brown after a brief stint as his secretary of agriculture, a position she reportedly earned by her support during his gubernatorial campaign. Bird's nomination (along with that of Wiley Manuel, an African American) was widely viewed as a concerted attempt by the governor to challenge the established legal community and diversify the state bench (Stolz 1981, 84; Thompson 1988, 2021).

Bird's difficulties were foreshadowed from the very beginning. California law mandates that judges must be confirmed by two out of three members of a judicial commission. The committee is composed of the chief justice of the supreme court, the chief judge of the courts of appeals, and the attorney general. The acting chief justice Matthew Tobriner and Attorney General Evelle Younger both voted to confirm Bird, although the latter did so reluctantly (Culver and Wold 1986, 82; Stolz 1981, 87 and 92-93). But the powerful judge of the courts of appeals Parker Wood, voted against her nomination because he felt that she did not have sufficient legal experiences to be the chief of the state's highest court (see Culver and Wold 1986 and Stolz 1981).

In addition to concerns about her legal experience, Bird's personal demeanor became an issue during her confirmation hearings, largely due to the allegation that she had almost been fired from her early job as a public defender for misconduct (Culver and Wold 1986, 84). Detractors argued that her personal temperament was not appropriate for someone in a leadership position (Culver and Wold 1986, 84; details in Stolz 1981, 88-91). Her opponents may have had a point as shortly after Bird assumed office her management style came into question. An important and well-liked high ranking staff member who had been with the California court system for years resigned early in her term due to her personal abrasiveness (Thompson 1988, 2023). Bird was also said to be secretive, in marked contrast to that of previous chief judges, and these issues created a difficult working environment for the permanent court personnel who traditionally served under each successive chief justice (Culver and Wold 1986, 84; Stolz 1981, 109 and 115; Thompson 1988, 2023-2024).

5.3.3 Decisions of Rose Bird and Stanley Mosk on the Court

Given their very different personalities and backgrounds it is unsurprising that Bird and Mosk compiled diverse records on the bench. Mosk was liberal but not dogmatically so; the same cannot be said of Bird. Bird was virtually always on the left side of an issue while Mosk showed a moderate streak. In 1976 Mosk actually voted against affirmative action programs when the famous *Bakke*[25] case was heard by the California court before being reviewed by the U.S. Supreme Court (Stolz 1981, 363). Nowhere were the differences between Bird and Mosk clearer than on their decisions on capital punishment.

[25] *Bakke v. Regents of the University of California*

According to Culver and Wold (1986, 86) after only six years on the bench Bird compiled the most liberal record out of her colleagues, voting in favor of criminal defendants a full 75 percent of the time. And by 1986 the court had upheld sentences in only three out of fifty-six death penalty cases, and Bird had compiled a 100 percent record of opposition to capital punishment (Culver and Wold 1986, 86). Even more importantly, during period preceding the 1986 election (January 1985 to November 1986) Bird's record of 100 percent votes to reverse death sentences differed sharply with Mosk's much smaller 46 percent reversal rate (Traut and Emmert 1998, 117).

The statistics compiled by Traut and Emmert further suggest that Mosk was strategic about his opposition to the death penalty as his votes changed dramatically over time. They found that Mosk voted to reverse death sentences 80 percent of the time during the period from January 1981 through November 1982. This is in stark contrast to his votes prior to the 1986 retention election – essentially his votes to reverse death sentences declined by fully 34 percent (1998, 117). These differences are consistent with a strategic explanation of judicial behavior. These statistics suggest that Mosk showed some awareness of the salience of capital punishment and the changes in political environment over time and adjusted his voting accordingly, particularly as the 1986 election neared. Bird's voting record, on the other hand, shows no corresponding decline.

The votes of judges Reynoso and Grodin also support the importance of strategy. In the early time period, the records of Reynoso and Grodin are the same as Bird as each voted 100 percent of the time to reverse capital convictions (Traut and Emmert 1998, 117). In the period immediately prior to the 1986 election, Grodin was the only one of the three who deviated from complete opposition, but he still had a high reversal rate of 82 percent (Traut and Emmert 1998,

117). Thus, the three judges rejected in 1986 all showed consistent opposition to the death penalty over the years, in contrast to Mosk who modified his behavior prior to the election and managed to keep his seat.

It is interesting that Bird did not seem to take note of the changing times and adjust her decision-making accordingly. She should have had experience in recognizing when she was in political trouble as she barely survived her first reelection bid in 1978. Although she had been on the court only one year, Bird faced stiff opposition in 1978 (Culver and Wold 1986, 85). Her primary opponents were agricultural interests whom she had offended during her stint as Secretary of Agriculture. They were joined by a well organized conservative state senator H.L. Richardson (Culver and Wold 1986, 85). Her retention nearly failed when on Election Day in 1978 the *Los Angeles Times* reported that the court had delayed announcement of a controversial decision in order to facilitate Bird's reelection bid (Culver and Wold 1986, 85).

The case mentioned in the L.A. Times article was *People v. Tanner* (1978). Bird's decision in the case reveals both her liberalism and her boldness in taking controversial legal stances. In 1976 a law passed requiring prison terms for people using a gun during a violent crime. Harold Tanner robbed a convenience store where he had previously been a security guard, but used an unloaded gun. Because of serious questions raised about his mental health, the trial judge threw out the gun charge on a technicality (since it was unloaded during the robbery) to circumvent the requirements of the "use a gun, go to prison" law and instead sentenced Tanner to probation and psychiatric counseling. The appeals court reversed the trial judge's decision and the matter was appealed to the California Supreme Court. A majority held that the legislature did not intend to remove all judicial discretion when passing the law and so upheld the trial judge's actions. Although the majority took a position ideologically consistent

with Bird, she chose to write a strongly worded separate opinion where she argued that the legislature could not restrict judges' options in sentencing defendants. Instead of joining the court majority and allowing the legislature to amend the previous legislation as they saw fit, Bird's opinion took a firm stand for judicial independence, which virtually guaranteed a strong public reaction[26].

Although she managed to win retention, following the *Los Angeles Times* story Bird quickly issued a call for an investigation. While a commission found in 1979 that no wrongdoing or purposeful delay was found, the entire incident (and its resulting shenanigans) made her reelection that much more difficult in 1978. In the long run it also damaged the prestige of the court and brought to light animosity among judges, particularly between Chief Justice Bird and Justices Mosk and Clark.[27] Although Bird survived her first reelection bid, the election of 1978 it made clear that she personally was a target and that there were many in California, both elite and mass actors, who were unhappy with her decisions. Unlike Stanley Mosk, Rose Bird showed little evidence of considering the preferences of other actors in her political environment, particularly when ruling on highly salient issues. The lessons she could have learned in 1978 would have come in handy during her second reelection bid in 1986.

5.3.4 Election of 1986

In 1986 Governor Deukmejian made it clear that would oppose Chief Justice Bird along with Justices Grodin and Reynoso because of their pro-defendant votes on the death penalty (Bright and Keenan 1995, 3; Wiegand 1986; Wolinsky 1986). While the governor was a

[26] See Stolz (1981, 193-266) for an extremely thorough discussion of the *Tanner* case.
[27] See Stolz 1981 and Thompson (1988, 2026).

powerful opponent, he was not the only one to oppose Bird. Eight different organizations opposed Bird's reelection. The two largest were Crime Victims for Court Reform headed by Governor Deukmejian's former campaign manager Bill Roberts and Californians to Defeat Rose Bird, which had a number of prominent state politicians including Howard Jarvis, Paul Gann, and state senator Ed Davis on its executive committee (see Culver and Wold 1986, 87-88 for details). Bird had powerful elite enemies and few public supporters. Among the few to speak on her behalf were ex-governor Pat Brown and her own campaign organization, the Committee to Conserve the Courts (Culver and Wold 1986, 89). Bird's opponents heavily outspent her, by nearly five and a half million dollars (Tarr 1996, 166). With such formable opponents it was clear from the beginning that Bird was in danger of loosing her reelection bid (Stolz 1986).

Bird's opponents used emotional rhetoric and graphic descriptions to mobilize the electorate and sway public opinion against her. They publicized the crimes of capital defendants whose sentences were overturned by Bird. These tactics painted her as an out of control bleeding heart liberal more concerned with the rights of criminals than concerned with the lives of ordinary law abiding citizens (Thompson 1988, 2038-2039). Culver and Wold (1986, 87) suggest that Bird's liberalism, high visibility, gender, and unique name explain why Bird was such a lighting rod for the ire of conservatives. In the end Bird was defeated with 66 percent of voters rejecting her while only 34 percent voted to keep her (Wold and Culver 1987, 351). Citizens also voted to reject Cruz Reynoso by 60 percent and Joseph Grodin by 57 percent (Wold and Culver 1987, 351). In contrast to Bird, Reynoso, and Grodin, Stanley Mosk won reelection with 74 percent of the vote (with only 26 percent voting to reject) and continued to serve on the California Supreme Court until his death in 2001 (Wold and Culver 1987, 351). After the election Governor Deukmejian was able to appoint three new judges and was able to remake the

court in his ideological image (Wicker 1986). In an ironic twist of fate, Deukmejian's opportunity echoed that of Jerry Brown's opportunity years before when he appointed Bird and Manuel thereby securing a strong liberal majority in 1977 (Stolz 1981, 83).

In sum, the story of the differing fates of Rose Bird and Stanley Mosk confirm my theory and expectations. Judges will likely face retaliation for decisions when there is a large ideological gap between their rulings and the ideology of other actors who have the opportunity to retaliate, especially on salient issues. Rose Bird was defeated because the persisted on making extremely liberal decisions especially on high profile capital punishment cases even as the electorate became increasingly conservative. In contrast, Stanley Mosk showed a marked tendency to moderate his liberalism on salient death penalty cases particularly as the court neared the 1986 election. Undoubtedly Bird's unwillingness or inability to strategically modify her decision-making combined with her difficult relationship with many in the political and legal communities insured her defeat.

5.4 CASE SELECTION AND LIMITATIONS

As with any other type of research one must take a step back and examine how cases were selected and how that relates to the reliability/validity of conclusions that can be drawn. This is particularly important with case studies. The selection of particular cases in large part depends upon the goal of the researcher. Some case studies are designed to develop general theories while the point of other case studies is to provide an in-depth examination of specific incidents (George 1979 and Mahoney 2000). The purpose of this case study is to use particular examples

of judicial retaliation in order to test my theory of judicial behavior and to illuminate the unexpected portions of my statistical findings (an approach supported by Gerring 2002, 1).

Overall, the two pairs of cases selected (four in total) have multiple attributes that support their selection and illustrate their appropriateness. First, and most importantly, they vary in outcomes. The Hawaiian court faced successful retaliation for its decision while the Vermont court did not. Rose Bird was not retained while Stanley Mosk was. Clearly it is necessary to have variation on the outcome to conduct any sort of meaningful analysis. Second, these cases represent a good selection because they examine two areas of odd statistical findings. The death penalty results, which suggest that judges are not constrained in their decision-making, are very surprising given both conventional wisdom and previous research. And, contrary to my general expectations, the social issues results suggest that the mass public is not the only actor to care about court outcomes on such issues. The reactions to same-sex marriage are salient and timely topics to use to explore the relationship between mass and elite salience on social issues. Third, the cases selected involve two different types of retaliation: constitutional amendment and electoral retaliation. Both are possible methods used to constrain judges and so should be considered. The use of one versus the other often depends upon the particular institutional structures in a state, and so it important to examine examples of both types of retaliation when one is focused on the effects of institutions. Fourth and finally, these case studies examine the importance of both institutional and environmental factors. As noted above, structural factors strongly influence the type of retaliation considered while environmental factors often influence whether retaliation will actually take place or not. The California cases are particularly strong in this regard, as they focus on environment while holding institutional factors constant. The cases

vary on all four of these dimensions and allow me to examine the factors that influence judicial decision-making.

The states have other attributes that recommend their selection as well. While each state utilizes gubernatorial selection to appoint judges to initial terms, they all utilize different procedures for retention. California uses retention elections, Hawaii uses approval of a nominating commission, and Vermont uses legislative elections to retain judges. The states also vary on amendment difficulty. Vermont utilizes easy amendment procedures which require only mass approval while Hawaii and California both utilize difficult amendment procedures which require elite approval as well as mass approval.

As strong as these particular case studies are, there are still some weaknesses in their selection. The primary concern is a lack of generalizability, although as mentioned previously, that is not their main purpose. First, I examined the fortunes of two judges in the state of California, on the same court, at the same time. While their similarities allowed me to hold constant institutional factors, it does limit the generalizability of the findings. California is a state unlike any other. It is much larger, much wealthier, and often confronts issues ahead of most other states. The death penalty is also an extremely important issue in California; probably more so than in any state except Texas. While I still believe that there are strong reasons for examining the fates of Rose Bird and Stanley Mosk, their selection does limit the broad conclusions that can be drawn.

A second weakness involves the same-sex marriage cases. I examined cases in Hawaii and Vermont. Hawaii and Vermont are both historically very liberal states. (See Table 2.1 for their elite and mass Berry et al. ideology scores.) Because these states are so far to the left on the political spectrum it does limit the generalizability of the conclusions that can be drawn. It is

conceivable that liberal states are fundamentally different from more conservative states and these differences could impact the findings. However, there is not much that can be done to get around this problem. The two other notable examples of gay marriage take place in Massachusetts and Alaska. It is not surprising that three out of the four cases take place in politically liberal states as a strong argument can be made that one would rarely see examples of a court ruling in favor of gay marriage except in very liberal states. In moderate or conservative states the chance of success would be so improbable that (a) few would bother to bring a case, (b) it would be unlikely that the case would make it through the court system, and (c) judges would certainly not be inclined to rule in the favor of the plaintiffs.

In conclusion I believe that these cases represent good selections for in-depth case studies to further explore my statistical findings. They vary on outcomes, represent two areas of interesting quantitative results, highlight to two different types of retaliation, and examine both institutional and environmental factors. It is very difficult to have a perfect case selection, and what constitutes perfect often depends upon the goal of the research so that is why I have chosen to stress other considerations over generalizability.

6.0 CHAPTER SIX: CONCLUSION

The purpose of this chapter is threefold. First, I will summarize the theory behind and methods used in this test of judicial decision-making. Second, I will reconcile my empirical findings with both my specific hypotheses and the broader body of research. Third, I will suggest future courses of action for this project. Overall this dissertation was a success as it provided strong quantitative and qualitative evidence in support of neo-institutional theories of judicial behavior. In particular, the inclusion of both elite and mass preferences into the judicial calculus represents a major step forward in scholarship. Although previous studies focused on the impact of elite actors, it is important to consider the wishes of mass actors. This study provides clear evidence that elite and mass actors do not have the same preferences and that each have the potential to influence judges in different ways and on different issues.

6.1 THEORY, EXPECTATIONS, AND TESTING

My research question is: to what degree are state high court judges constrained in their decision-making by other actors? Neo-institutional theory suggests that institutional structure and environmental factors will have an impact on judicial constraint. Essentially formal arrangements and the preferences of elite and mass actors should shape the behavior of individual judges. I expect constraint to vary across case law areas and to be a function of the

above factors and attitudinal preferences. Judges should be constrained by elite or mass preferences when there is a large ideological distance between the judges and the other actors, institutional configurations facilitate retaliation, and the issue area is salient to the other actor.

This question is important for three reasons. First, judicial decisions have a major impact on the daily lives of citizens. Nearly all political questions eventually become legal questions. In the U.S. courts resolve issues of great importance and play a critical role in defining individual rights and governmental powers. Second, judges have an essential counter-majoritiarian role to fulfill in our society. Years ago the founding fathers recognized that the judiciary was likely to be the branch most protective of the rights of citizens, even in the face of opposition. Judges often fulfill their special role by legally checking popular passions detrimental to minority rights. Third, state judges decide the majority of cases in the United States. Contrary to conventional wisdom, state high courts are actually the last to review most cases as the federal Supreme Court reviews an astoundingly small number of cases every year. While federal courts are most often studied, it important to understand how state judges decide cases since they have the most impact and are the least institutionally protected. Unlike federal judges, most state judges do not have lifetime tenure.

As noted before judicial constraint should be a function of distance, opportunity, and motivation. A key component of the motivation for retaliation is issue salience. Political actors will be most likely to retaliate for unpopular decisions when the particular issue is highly salient. I hypothesized that campaign and elections cases were of interest to elite actors but not mass ones. This is because the intricacies of campaign finance and redistricting laws are central to the electoral fortunes of politicians but likely to be complicated and uninteresting to the general population. I hypothesized that cases involving social issues would be of interest to mass actors

and not elite actors. This is because cultural issues such as abortion, affirmative action, and same-sex marriage are difficult moral issues where strong arguments can be made for both sides. I hypothesized that death penalty cases would be of interest to both elite and mass actors. Capital punishment has long been a major issue in political discourse. Because of its consistent salience I expected judges to face the highest levels of constraint in these types of cases. Lastly, because of previous research, I expected that welfare cases would not be of interest to either type of actor as so judges would be relatively unconstrained in their decision-making on those types of cases. My intent was to test four areas that neatly represented all possible combinations of elite and mass salience.

Certain institutional configurations should promote judicial independence. Difficult amendment procedures (requiring both elite and mass approval), divided government, longer term lengths, and the presence of an intermediate court of appeals should all result in greater discretion in judicial decision-making. Attitudinal factors are also expected to influence judicial outcomes. A judge's personal ideology should have an impact on their tendency to make either liberal or conservative rulings.

Data for the project was provided by Brace and Hall's Supreme Court Data Project which includes the decisions of all fifty state high courts from 1995 through 1997. Probit analysis was used in all models because of the dichotomous dependent variables while the Inverse Mill's Ratio was calculated to take into account the two step nature of judicial decision-making. The inclusion of both the review and decision on the merits stages is important to have a complete picture of the process. Failure to include both stages of the process would result in a model with selection bias and biased coefficients, problems that could easily present a misleading picture of judicial decisions.

6.2 QUANTITATIVE RESULTS

Overall the quantitative results support many of my expectations, both generally and specifically. Influences on decision-making vary across different areas of case law, across both stages in the decision-making process, and across both liberal and conservative decisions on the merits. Also, institutional arrangements and environmental factors affect judicial discretion, as well as judicial ideology. I found substantial evidence that judges will behave strategically which confirms the substance of my expectations.

The most noteworthy results suggest that judges are indeed strategic actors. In both the campaigns and elections models and the social issues model the IMR was significant, meaning that there is a selection bias going on in decisions to review cases. Additionally there is evidence that judges are constrained by elite preferences in campaigns and elections cases as well as social issues. Throughout all four issue areas there is evidence of the importance of institutional factors such as term length and divided government. Finally, there is evidence of the importance of judicial attitudes in nearly all areas as well.

There were two puzzling findings in my statistical results. The first concerns unanticipated results for capital cases. I expected judges to be highly constrained in death penalty decisions by both elite and mass actors. But my findings indicate minimal institutional effects, which is in contrast to previous research. A second surprise involves the breakdown of mass and elite salience and the specific areas of case law.

Despite my theoretical expectations, the results suggest that many areas are of salience to both types of actors. There is evidence that judges are strategic in their review of social issues cases and take into account the preferences of elite actors in those cases. I also found evidence that mass preferences seem to affect judicial decisions on the merits in welfare cases. These

findings are unexpected based on my classification scheme and shows the importance of including the preferences of both elite and mass actors. Previous studies finding that judges were unconstrained in welfare cases did not account for mass actors. Also, when planning my research design I had wanted to test all possible combinations of elite and mass salience in order to have a thorough examination of all four types. However, the evidence suggests that such an ideal classification scheme might not be realistic. If an area is of concern to mass actors then elite actors are forced to care in order to please their constituents. This would explain the results suggesting elite actors influence judicial decisions on social issues. These findings serve as a reminder that political phenomena is complicated and all research must simplify reality to some degree in order to create models of the real-life process.

6.3 CASE STUDIES

The case studies provide alterative evidence that confirms my expectations for the impact of institutions, environment, and strategy in judicial decision-making. The differing fates of Rose Bird and Stanley Mosk of the Supreme Court of California clearly show the importance of strategy in judicial retention. Rose Bird was defeated because she persisted in making extremely liberal decisions especially on high profile capital punishment cases even as the electorate became increasingly conservative. Stanley Mosk moderated his liberalism on death penalty cases as the court neared the 1986 election so Mosk kept his seat while Bird did not. The case is a real-world example showing that judges will likely face retaliation for decisions when there is a large ideological gap between their rulings and the ideology of other actors who have the

opportunity to retaliate on salient issues. The case also highlights the role of elite in driving mass relation as Bird's opponents were primarily organized by the governor.

In Hawaii and Vermont both high courts ruled that the denial of same-sex marriage benefits violated the state constitutions. In Hawaii a liberal populace quickly passed a constitutional amendment to negate the court's decision while Vermont's legislature passed comprehensive legislation implementing the court's ruling through the establishment of civil unions. The difference in outcomes supports my contention that retaliation for judicial decisions is motivated by issue salience, ideological distance, and the ability of the other actor to respond.

The variation in results can be attributed to strategic behavior on the part of the Vermont judges that was lacking in the Hawaii case. The Hawaiian court showed little concern for its political environment and did not give other actors any discretion in implementing its ruling and so was permanently overruled by constitutional amendment. The Vermont court took a cautious approach which resulted in landmark legislation creating civil unions. It is interesting that elite and mass actors played roles in each case which supports my statistical findings that both types of actors are concerned about social issues. As expected, mass actors were the driving force behind retaliation in the Hawaii case. Public uproar drove the push for a constitutional amendment to negate the court's decision. In Vermont, it was certain politicians within the legislature who hammered out the compromise of civil unions, despite other elites' opposition. Vermont's case shows the salience of the issue and the lengths to which other elites went to respect the court's ruling. This also provides evidence that some elites understand the court's special counter-majoritarian role. These nuanced findings are the strength of qualitative research.

The California and Hawaii cases illustrate how the precise form of retaliation will depend upon specific structural configurations or the possible options available. Hawaii faced constitutional amendment because the judicial retention procedures in the state precluded electoral reaction: elite and mass actors had no other recourse. This was not the case in the state of California. where electoral retaliation was used because it was possible and likely more convenient that the difficult process of amending the constitution. Clearly institutional arrangements influence retaliation and judges who are strategic in their decisions are likely to minimize conflict when necessary thereby avoiding possible sanctions.

6.4 BROADER CONTEXT

I utilized multiple empirical techniques in order to have the best picture possible of judicial constraint. Over all the findings are as expected with the exception of the non-strategic death penalty results and the difficulties in separating mass interest from elite interest in a particular case law area. The qualitative results for social issues reinforce my statistical results in that both suggest that social issues are of interest to both elite and mass actors. While this was not what I had predicted it illustrates the strengths of qualitative research to pay attention to nuances that help explain unexpected results.

I have already discussed in detail why I think that my statistical results on death penalty cases are so different from those of previous studies. I have also already discussed the inclusions that need to be added to the model in the future to be more confident in my results. This is particularly important because my statistical results are less conclusive than my case studies which suggest that strategy is important for judges to avoid retaliation for their decisions on this

issue. However I think this finding is also due to the fact that I looked at California. Nowhere else but Texas of perhaps Florida is the death penalty such a salient topic. I chose to look at two judges on the same court in order to hold certain institutional factors constant but that also meant that the case is not so valuable for comparing to my statistical results. I would expect judges in California to be more constrained that nearly every other state so the differences in findings is not terribly surprising.

At this point I cannot conclude that there is no judicial constraint on death penalty decisions. However my statistical findings have piqued my curiosity about how judges can think in legal terms to reach decisions while political scientists look at the same decisions and analyze them in institutional and ideological terms. Of course I suspect the difference between my statistical results and those of previous research is really due to the particular measures used. Also, there is a good chance that the previous studies found constraint because they examined states where judges faced high levels of constraint due to institutional factors while judges in other states may be able to focus on legal factors without caring so much about the political context and impact of their decisions.

6.5 FUTURE RESEARCH

There are at least three different directions in which this research can be expanded. First, legal variables must be included in the death penalty model. The inclusion of legal factors may change my unexpected results and will definitely make for a more definitive test of judicial decision-making on capital punishment. A second area of future research is the inclusion of preferences of business or legal interests. Research suggests that outside groups have an

important effect on the financing of judicial campaigns (see Bonneau 2004, 200; Glaberson 2000; Kozlowski 2002; Phillips 2002). This research is supported by my analysis of the 1986 California retention election which suggested that the lack of support of specialized interests played a role in the electoral fortunes of Rose Bird. Given the availability of appropriate data, it would be interesting to test the effect of such groups' on judicial decisions. Third, my research could be expanded into other case law areas beyond the four studied here: campaigns and elections, social issues, death penalty, and welfare cases. Exploring major issue areas such as torts or other economic disputes would help present a complete picture of judicial constraint. It is likely that the results of specialized economic disputes would different from the results of common public law disputes.

APPENDIX A

CLASSIFICATION OF CONSERVATIVE/LIBERAL RULINGS

Campaign and Elections:

A decision is classified as conservative if an individual (citizen or politician) or political group won.

A decision is classified as liberal if the government won.

In campaign and election cases the government is the entity enacting disclosure requirements or financial restrictions. Citizens, political groups, and individual politicians involved in court cases are usually the ones challenging such regulations. According to the classification scheme utilized by Langer (2002), decisions upholding regulations are coded as liberal while decisions supporting challenges to government restrictions are coded as conservative.

Capital Punishment:

A decision is classified as conservative if the government won.

A decision is classified as liberal if an individual or political group won.

The government prosecutes individuals charged with crimes. Support for the death penalty is a conservative position while opposition to it is a liberal policy position. Following contemporary ideological discourse, and consistent with the classification system utilized by Langer, decisions

supporting the government and upholding capital convictions are conservative while decisions striking down death sentences for defendants are liberal.

Social Issues:

A decision is classified as conservative if the government won.

A decision is classified as liberal if an individual or political group won.

Generally social issues pit the government against individual citizens or political groups asserting personal rights. Again, in contemporary society liberals support individual freedoms, while conservatives support government regulations limiting individual freedoms.

Welfare Policy:

A decision is classified as conservative if the government won.

A decision is classified as liberal if an individual or political group won.

Welfare cases typically involve the government trying to limit benefits while individuals (or groups arguing on their behalf) are trying to obtain benefits. Following Langer's 2002 coding scheme, decisions limiting welfare benefits are classified as conservative while decisions extending benefits are classified as liberal.

APPENDIX B

SUMMARY OF KEY HYPOTHESES STAGE ONE

Institutional Hypotheses

Difficult amendment procedures should lead to higher rates of review.

Divided government should lead to higher rates of review.

The presence of an intermediate appeals court should lead to higher rates of review.

Longer term lengths should lead to higher rates of review.

Strategic Hypotheses

Elite Retention interacted with Elite ID Distance:

If case law area is salient to elites and a state utilizes elite retention then higher ID distances should result in lower rates of review.

Partisan Retention interacted with Mass ID Distance:

If case law area is salient to masses and a state utilizes partisan retention then higher ID distances should result in lower rates of review.

APPENDIX C

CODING STAGE ONE

Variable		Variable Description
Dependent Variable Stage 1	=	1 if a particular state supreme court resolved a case in a particular case law area in a particular year. (For example: the dependent variable would equal 1 if Alabama heard a campaigns and elections case in 1995.)
Amendment Difficulty	=	1 if amending the state constitution requires a 2/3 vote in the legislature and electoral approval 0 if amendment requires approval by 2 legislative sessions
Divided Government	=	1 if the governor and a majority of either chamber of the legislature are of different parties 0 if not

Intermediate Appellate Court = 1 if intermediate appellate court is present

0 if not

Term Length = The number of years in a full judicial term

Court PAJID = Average ideology of all judges sitting on court.

Higher values are liberal.

Elite/Mass Ideological Distance

= This measure is the absolute value of each court's ideology score minus the relevant state ideology score (either elite or mass).

Elite Retention = 1 if a state utilizes elite retention methods

0 if not

Nonpartisan Elections = 1 if a state utilizes nonpartisan elections

0 if not

Partisan Elections = 1 if a state utilizes partisan elections

0 if not

APPENDIX D

SUMMARY OF KEY HYPOTHESES STAGE TWO

Institutional Hypotheses

Difficult amendment procedures should lead to higher rates of liberal (conservative) decisions.

Divided government should lead to higher rates of liberal (conservative) decisions.

Longer term lengths should lead to higher rates of liberal (conservative) decisions.

Attitudinal Hypotheses

Higher PAJID scores should lead to an increased likelihood of liberal decisions.
Smaller PAJID scores should lead to an increased likelihood of conservative decisions.

Strategic Hypotheses

Elite Retention interacted with Directional Elite ID Distance:

If case law area is salient to elites and a state utilizes elite retention then positive (negative) ID distances should result in a lower likelihood of liberal (conservative) decisions.

Partisan Retention interacted with Directional Mass ID Distance:

If case law area is salient to masses and a state utilizes partisan retention then positive (negative) ID distances should result in a lower likelihood of liberal (conservative) decisions.

APPENDIX E

CODING STAGE TWO

Variable		Variable Description
Dependent Variable Stage 2 Liberal		
	=	1 if a judge voted liberally
		0 if not
Dependent Variable Stage 2 Conservative		
	=	1 if a judge voted conservatively
		0 if not
Amendment Difficulty	=	1 if amending the state constitution requires 2/3 of votes in the legislature and electoral approval
		0 if amendment requires approval by 2 legislative sessions

Divided Government = 1 if the governor and a majority of either chamber of the legislature are of different parties
0 if not

Term Length = The number of years in a full judicial term

Judge PAJID = Individual ideology of judge.
Higher values are liberal.

Elite/Mass Directional Ideological Distance
= This measure is the value of each judge's ideology score minus the relevant state ideology score (either elite or mass). Positive values indicate that a judge is more liberal than the other actor, while negative values indicate that a judge is more conservative than the other actor (either elite or mass).

Elite Retention = 1 if a state utilizes elite retention methods
0 if not

Nonpartisan Elections = 1 if a state utilizes nonpartisan elections
0 if not.

Partisan Elections	=	1 if a state utilizes partisan elections 0 if not
Court Distance	=	Judge ideology score minus the average of court ideology score. Positive values indicate a judge more liberal than a court and negative values indicate a judge more conservative than a court.

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