

DELEGATION AND POLICY-MAKING
ON STATE HIGH COURTS

By

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ABSTRACT

As courts in separation-of-powers systems are said to have the power of neither the purse nor the sword, their institutional legitimacy is essential for ensuring compliance with their decisions. While institutional legitimacy has been examined in-depth for national high courts, the legitimacy of sub-national courts has been overlooked. In this dissertation I develop a new measure of court-level institutional legitimacy for state high courts. I use multilevel regression and poststratification to create state-level measures from individual-level survey results. In this dissertation, I develop a theory of review and delegation by state high courts. I argue that these courts work toward two main goals: implementing their policy preferences and maintaining the legitimacy of their institution. I argue for a two-stage process that considers whether or not the court will decide on the constitutionality of a statute in the first stage and whether they will overturn the statute and delegate policy control back to the other branches of government in the second. Relying on the literatures on both institutional legitimacy and political delegation, I suggest that courts may delegate policy control back to the other branches of government by specifically stating this in their opinion. Finally, I examine the conditions under which a state high court will delegate to either the state legislature or the executive branch. Overall, I find that legitimacy is important when considering state high court decision-making; and it must be considered along with political context and institutional rules as one of the central motivations for state high courts in separation of powers theories.

CHAPTER 1: INTRODUCTION AND REVIEW OF THE LITERATURE

Introduction

State supreme courts are an essential part of the policy-making process in the American states. As the U.S. Supreme Court now hears fewer and fewer cases, these state courts of last resort have the opportunity to have an even greater impact on public policy. State high courts make decisions on a wide range of the most controversial social and political issues of the day, including voting and elections, capital punishment, education policy and privacy rights. Although state high courts are determining policy outcomes in these issue areas, they remain highly constrained institutions because their decisions are only enforceable with the compliance of the other branches of government and the public.

Much prior research on state high court decision-making has focused on the courts in these constrained environments by examining two central components to their decision making: institutional rules and political context. Research on these institutional rules and parameters by Hall and Brace (1989; 1995; 1997) and Langer (2002; 2003), which often focuses on the methods of selection and retention, provides a clear theoretical grounding for how one should examine decision-making on these state high courts. It is clear from these studies that elected justices often change their decision-making as reelection approaches to maintain their seats on the bench (e.g. Hall 2001; Huber and Gordon 2004). Other studies that focus on political context have generally centered on how courts react to the other institutions in state government when they have difference policy goals. From this literature we know that courts consider the preferences of the state legislature and the public when making their decisions (Langer 2002).

Using these studies as a foundation, I introduce a third main component to the decision-making process of state high courts: institutional legitimacy. I draw on what is known about the legitimacy of the Supreme Court and other national high courts and incorporate the legitimacy of each state high court into their decision-making process. To do this I develop a measure of the level of institutional legitimacy that each state high court has. This measure is derived from national surveys that ask respondents about their levels of trust and confidence in their state courts. Using multilevel regression and poststratification (Park, Gelman and Bafumi 2006; Lax and Phillips 2009), a newly-developed method, I am able to create an empirically-sound, comparable measure of state court legitimacy for all states. Given this measure, I also address the extent to which state high court legitimacy, or the lack thereof, empowers or constraints decision-making on these courts. This leads me to suggest that justices on state high courts evince strategic decision-making behavior in the face of three main constraints: political differences among the branches; constraining institutional rules and a lack of court institutional legitimacy.

In addition to bringing legitimacy into the decision-making process of state high court justices, I also examine other avenues of strategic behavior by state high court justices in this dissertation. I argue courts turn to this type of behavior to achieve two specific goals: (1) to have their policy preferences implemented, (2) to maintain their levels of institutional legitimacy, which are essential to being co-equal partners in government with the state legislature and governor. Following Langer (2003), I develop a two-stage model of judicial review; however, I suggest that the second stage of the model includes more than just a decision to overturn or uphold a statute on constitutional grounds. I argue that state high courts have the opportunity in their written opinion to either make a new policy or delegate

policy control to one of the other branches of government. As the written opinion is where the court holds much of their policy-making power, we can gain additional insight into judicial decision-making by examining these opinions in depth.

Concerning the control of the final policy outcome, I suggest that state high courts can delegate policy-making power in their opinions, much like legislatures delegate to agencies in statutes. Relying on the principal-agent models of delegation from the legislative and bureaucracy literatures, I argue that under certain conditions of high political differences and low institutional legitimacy, a state high court may be in a position to give up policy-making power through delegation. In doing so the court avoids writing a decision that the other branches of government will ignore or fail to implement. When a court makes decisions that are not implemented by the other branches of government, they can lose legitimacy. A court can therefore achieve their goal of maintaining their institutional legitimacy by avoiding this noncompliance as often as possible.

In this dissertation I incorporate these components to provide a more complex theory of constitutional judicial decision-making and institutional interactions in the American states. This theory allows courts to overturn or uphold the statutes passed and also make a decision on whether they or another institution will control the final policy outcome. Further, the court also has a decision about which institution they will delegate to. This final decision on which institution is given policy control should be based on both political and institutional arrangements: the court will avoid delegating to institutions that have different preferences as well as certain institutions, like amateur legislatures, that may not have the capacity to create new policy. In developing this theory I integrate the literatures on court legitimacy and delegation with what we already know about state high

court decision-making. I propose that legitimacy is the third motivating factor in state high court decision-making, joining political context and institutional rules. I bring this addition full-circle by describing how courts can strategically address their need to use and maintain their institutional legitimacy.

By arguing that state high courts do delegate, I suggest that it is the court that has the final word on who makes policy. This is a departure from the current state of the literature where the court has the power to overturn or uphold a statute, but the interaction ends there. Courts are seen as reactive institutions, responding to statutes passed by the legislature. While it is true that courts make policy, having the ability to delegate policy control only allows courts to have more control in the policy-making process, even if they are not specifically determining the policy outcome. Having this power allows the court a strategic opportunity to passively affect policy while avoiding possible noncompliance that could result from making their own policy. Delegation may not be the modal choice for state high courts, but should they engage in this action, even infrequently. Delegation provides an additional decision-making option as they attempt to see their preferences become law but also maintain the legitimacy of their institution.

In the following chapter, I present a two-stage model where state high courts first decide whether or not to engage in judicial review. In this first stage the court can decide to decide on the constitutionality of a statute or they can decide to avoid making a decision on the constitutionality. I argue that this decision is determined by two main factors: the political differences between the court and the other branches of government and the legitimacy of the state high court. These two factors interact to determine the outcome in the second stage of the model. In this stage the court decides to overturn or uphold the

statute, if they have decided in the first stage to engage in judicial review. In addition, the court makes a simultaneous decision to either make a new policy, delegate the policy-making control to the other branches of government or not delegate at all. I also argue that the institutional rules that determine the power balance in the interaction between the court and the other branches of government set additional parameters for the court's decision in the two stages of the model.

Contributions of the Dissertation

The contributions of this dissertation lie in two areas: (1) the effect of legitimacy on judicial review, and (2) delegation of policy control by state high courts to the other branches of government. Both legitimacy and policy control are centrally related to a court's power and its ability to operate in a separation-of-powers system. While higher legitimacy protects the court and increases its power, delegation is a defense mechanism for the court, which gives power back to the other branches of government. As a result of the findings presented in the forthcoming chapters, I argue that we should consider a new motivation for justices on state high courts: maintaining their legitimacy. Legitimacy can provide a safeguard to allow state high courts to implement their preferences. I find that legitimacy acts as a protection for state high courts just as it does other courts. This is important for how we think about separation of powers in the American states. For so long, scholars have lamented the constrained conditions of state high courts that have been found to alter decision-making on these courts. State high courts are forced to take into consideration the preferences of the other branches of government. In addition they must be constantly concerned with their retention. Unlike the Supreme Court, state high court justices enjoy very few institutional protections. As a result of institutional design, state high courts have

limited power in the separation of powers setting; however, institutional legitimacy can alleviate the lack of power courts might feel they have by protecting the decisions of the court.

As Easton (1965) argued, legitimacy is ultimately about the power of the institution. In a democratic environment, an institution with legitimacy inherently has power because their decisions will be respected and implemented by the other branches of government and the public. While past literature has emphasized legitimacy's importance to courts, the protection that institutional legitimacy may provide will prove particularly important to courts that are inherently constrained institutions. Therefore, applying and testing the theories of court institutional legitimacy to state high courts provides an important examination of the idea that courts that have restricted power due to their institutional circumstances (see Staton 2010). I find that state high court legitimacy allows for these courts to more freely engage in judicial review and overturn statutes on constitutional grounds. This is important because it provides support for the conclusion that institutional legitimacy can provide a protection mechanism to even the most constrained courts. Given that institutional legitimacy allows courts to more freely exercise this power, it is hard to overstate the importance of legitimacy to state high courts.

1.1 Judicial Decision-Making

The policy-making power of a court is maintained through their decisions. As a result, scholars have long focused on how and why justices make the decisions they do. Examining justices' decisions from a behavioral perspective began when Pritchett (1948) suggested that justices on the Supreme Court are motivated by their own ideologies and attitudes. Segal and Spaeth (1993; 2002) revolutionized this behavioral perspective with their

‘attitudinal’ model of judicial decision-making. According to the attitudinal model, justices on the Supreme Court make decisions in light of the facts of the case, based on their ideological attitudes or preferences. This model is presented as an alternative to the legal models of decision-making where justices are thought to make decisions based on precedent, the facts of the case, or the plain meaning of statutes or the Constitution. Under the legal model, the law itself exclusively influences the decisions of the justices. Segal and Spaeth (1993; 2002) present overwhelming evidence to support their argument that the attitudinal model explains much of the decision-making on the Supreme Court. Justices on the Supreme Court have the ability to vote based on their sincere beliefs because they operate in a relatively unconstrained environment (Segal 1997; Segal and Spaeth 2002). Supreme Court justices serve life terms, so that even if they hand down a disagreeable decision, their removal from the bench is difficult and rare. Also, Supreme Court decisions are difficult for Congress to overturn, leaving justices with minimal fear of reversal. Finally, the U.S. Supreme Court enjoys consistently high levels of institutional legitimacy, meaning that citizens believe in the fairness of their decisions (e.g. Gibson, Caldeira and Spence 2003b). As a result, the decisions of the court are likely to be respected and implemented by the other branches of government.

An alternative to the attitudinal model is the separation of powers model, first suggested by Murphy (1964). Murphy argues that Supreme Court justices must consider the preferences of other actors when trying to see their preferences become law. Based on this model, scholars conclude that Supreme Court justices specifically alter their decisions to take into consideration the preferences of Congress who can override the Court’s decision (Eskridge 1991; Gely and Spiller 1990; Spiller and Gely 1992). The separation of powers

model is steeped in the rational choice tradition where actors choose from all possible alternatives in order to maximize their benefits (Gely and Spiller 1990). As Epstein and Knight argue, in these cases the court may “misrepresent its true policy preferences to protect its legitimacy” (1998; 144).

Researchers have found mixed results in the ability of separation of powers models to explain the decision-making of justices on the Supreme Court (Segal 1997; Segal and Westerland 2005). Much of the initial support for separation of powers models on the Supreme Court relied on single case evidence (Gely and Spiller 1990; Spiller and Gely 1992). However, new research that incorporates additional aspects of the relationship between the Supreme Court and Congress has found that under certain circumstances, the Court will alter its decision-making to avoid either Congressional backlash or a loss of legitimacy (Clark 2009). Despite the minimal evidence for separation of powers models as an explanation of Supreme Court behavior, these models have been applied to other national high courts with more robust results (Helmke 2002; 2005; Staton 2004; 2006). National high courts in Latin American countries must contend with political contexts and institutional rules that offer no guarantee of compliance with court decisions and little or no security of maintaining their place on the court (Helmke 2002). As a result, justices on these courts are forced to consider the preferences of other actors when making decisions. State high court justices face similarly constraining sets of political and institutional contexts.

Because state high courts have many constraints that alter their ability to see their preferences become law, separation of powers models and theories of strategic behavior have gained traction in explaining the decision making of state high court justices. These constraints on state high courts come in two forms: institutional rules and political

differences between the court and the other state institutions. Hall and Brace (e.g. 1992; Brace and Hall 1995; 1997) have provided significant evidence for their neoinstitutional models of state court decision-making where the relationship between state courts and legislatures is dictated by institutional rules that make it easier for one branch to implement their preferences. The rules that have been found to affect the court's ability to implement their preferences are the length of a justice's term and the difficulty of passing an amendment to a state's constitution.

In addition, the institutional rules that dictate how justices gain and retain their seats on the bench have a particularly important effect on state court decision-making (Hall 1992; Brace and Hall 1989; Langer 2002). When justices must seek reelection, they must concern themselves with the opinion of the public who will reelect them. Justices up for reelection try to avoid casting unpopular dissents as the election approaches (Hall 1992). New research has presented evidence that justices alter their behavior in criminal and death penalty cases when they face reelection (Huber and Gordon 2004; Brace and Boyea 2008). The link between voters and justices can be easily made when considering sentencing or capital cases, because of the saliency these cases have and the ease with which the public can understand the consequences of these cases (Baum 2003). Although research has found a consistent and direct link between the method of selection and decision-making in some cases (e.g. Brace and Hall 1995; 1997), it is less clear what role the public might play in decisions on the constitutionality of statutes.

Just as justices face constraints from institutional rules, the political context of a state also constrains the decision-making environment on state high courts. There are two ways the political context of a state can alter the decision-making of the justices: the ideological

differences among the institutions and a divided government between the state legislature and governor. Langer (2002; 2003) finds that when state high courts are constrained by a legislature with different preferences, justices can alter their decisions to accept cases for review or change their final vote on a case to avoid retribution from the legislature. Specifically, the decision examined in models of strategic behavior is judicial review, or the decision to overturn a statute passed by the legislature on constitutional grounds. This is a two-stage process, where the decision-making in both stages is highlighted by a concern for the preferences of the state legislature. In the first stage of the process of judicial review the court makes a decision whether or not to decide on the constitutionality of a statute. This is referred to as the agenda-setting stage. The second stage is the decision-on-the-merits stage, where the court makes a decision on the outcome of the case, more specifically on the constitutionality of a statute. When the preferences of the state high court and the state government differ, (and as this difference increases) justices are less likely to decide on the constitutionality of a statute, and are less likely to overturn statutes they consider (Langer 2003).

In order to overturn a decision of a state high court either a new law or a constitutional amendment must be passed. All judges are concerned about being overturned by either a higher court or the other branches of government (see Baum 1997; 2006). So a state high court must alter their decision-making as the likelihood of being overturned increases. As discussed above this likelihood is most clearly related to different preferences among the institutions. When the legislature and governor do not share preferences, however, this makes it less likely that they will have the ability to overturn a court decision they disagree with (Brace and Hall 1997; Langer 2003). Under this condition of divided

government, the court will be under less pressure to consider the preferences of the other branches because the ability of the other branches of government to override the court is limited.

Although the court is constrained by the other branches of government it is important to note that research has found that state high courts can influence policy-making in the other branches. Langer and Brace (2005) argue that the state court affects policymakers in that they consider the preferences of the court when decided which laws to enact and when. These legislators want to see their own preferences become law and they fear being overturned by the court as their reelection approaches. This research suggests that policy-making in the American states is an inter-institutional endeavor: all three branches work together and constrain each other in the policy-making process. Therefore state high court decision-making cannot be examined in a vacuum, but must be considered as part of a separation of powers process.

1.2 Compliance

Justices on state high courts must consider the preferences of the members of other branches of government for two main reasons: because they want to avoid retribution from these branches and because the ability of courts to implement their policy preferences is contingent on the level of compliance the court gets from the other branches of government. The other branches can punish the court for a decision they disagree with in several ways, including altering the jurisdiction of the court, cutting the court's budget, or, most importantly, by not implementing the decisions made by the court. Because the court has little enforcement power, they rely on the state legislature, the governor and the public to implement the decisions they hand down.

Spriggs (1996) summarizes three theories of judicial implementation: rational choice theory, communications theory and organizational theory. The rational choice theory argues that a bureaucracy will implement the court's opinion if the benefits of implementation outweigh the costs (e.g. Giles and Gatlin 1980). In contrast, the central idea of communications theory is that the clarity of the court's directive will affect the level of impact (Baum 1976; Spriggs 1996; 1997). Finally, Baum (1976) argues that we can look to organizational theory to understand compliance with court decisions, suggesting that the clarity of communication, the preferences and interests of the implementer and the authority of the court will all affect the level of compliance (see also Johnson and Canon 1984).

In perhaps the most complete statement on compliance with judicial decisions, Johnson and Cannon (1984) suggest there are four 'populations' who are most directly related to the implementation of court decisions. The population charged with implementing the court's decision is influenced by three factors: the clarity of the court's directive, the environmental setting of the agency and the organization of the agency (102-3). So while the court has some control over the implementation, as Baum (1980) argues, they are generally in a weak position to elicit any significant control. The actors who are charged with implementing the court decisions are political actors, who must consider their own set of preferences when determining the allocation of resources to implement the court's decision (Johnson and Canon 1984; 25).

A fourth, legitimacy-based theory has more recently been proposed to explain the instance of compliance with judicial opinions (Carrubba 2005; Staton 2004; Vanberg 2005). The legitimacy-based theory offers a different path to compliance, providing for a more active role for the public. The legitimacy-based theory argues that diffuse support for a court

allows the court the ability to make decisions that go against the preferences of the implementing authority (most often the legislature), without sacrificing compliance by this authority. As Vanberg (2005) argues, this public support is a mechanism that gives force to judicial decisions in light of the implementation problems courts face. In other words, public diffuse support insulates the courts because, for legislatures with control over implementation, the “fear of public backlash can be a forceful inducement to implement judicial decisions faithfully” (2005; 20). In these models the court is aware of and sensitive to how they are viewed by the public. However, the context must meet two main conditions: there must be significant public support to make a legislative noncompliance unattractive; and it must be likely that citizens will become aware of this noncompliance so the threat of public backlash is a real one (21). When these conditions are met, courts may rely on the reservoir of goodwill they have with the public to see that their decisions are complied with.

1.3 Legitimacy

Legitimacy is a concept that has wide application across the social sciences. Beginning with Easton (1965) its application to political institutions suggests that legitimacy is a “reservoir of goodwill” that helps citizens to accept the decisions of an institution. Under this conceptualization, legitimacy is a long-term belief, one that is not affected by individual decisions. This is especially important for democratic political institutions because, as Tyler suggests, “seeking to gain influence over others based solely on the possession of power is costly and ineffective” (2006a; 376). Central to legitimacy is the idea that the rule or outcome decided by the institution was derived from a fair process (Tyler 1990; 2006a; 2006b). In the United States, Hibbing and Theiss-Morse (2002) find that

dissatisfaction with the process of the American government can have important consequences. When individuals believe in the fairness of the process an institution follows, they are more likely to comply with the institutions' decisions (Tyler 1990; 2006b). As a result, Hibbing and Theiss-Morse find that American disagreement with a policy outcome is not related to compliance with a decision; but disagreement or frustration with the process is related to compliance (2002; 82). Legitimacy is, therefore, essential in order for an institution to remain an effective part of democratic government.

The legitimacy granted to courts has garnered the most attention in research. This is because it is argued that courts have neither the 'power of the purse nor the power of the sword'. As a result, courts must rely on the goodwill of other institutions and the citizens in order for their decisions to be implemented. In this case, the courts are forced to rely on their legitimacy to ensure that their decisions are complied with. The extent to which legitimacy leads to compliance is an empirical question, albeit one with few empirical answers. Any discussion of Supreme Court legitimacy must necessarily begin with Dahl (1957), who argues that the Court's legitimacy is central to their policy-making authority. The Court has legitimacy-conferring power, where it grants legitimacy to current policies, and risks this power when they overturn the governing coalition and make their own policy. The decisions of the court legitimize the behaviors necessary for democracy (Dahl 1957).

More recent research has focused on the Supreme Court's legitimacy, especially in the wake of the 2000 presidential election. Using an experiment surrounding the 2000 Supreme Court decision *Bush v. Gore*¹, Gibson, Caldeira and Spence (2005) find evidence that

¹ 531 U.S. 98 (2000)

one's belief in the institutional legitimacy of the Supreme Court affects the degree of acquiescence they grant the Court's decisions. Other factors specific to a court's decision may affect the level of compliance the court receives, such as opinion clarity or opinion length (Spriggs 1996; 1997) a court can be seen as having a much more significant role in government when they have substantial amounts of institutional legitimacy.

There are generally two ways researchers have examined individual's views on courts. The first is diffuse support. Diffuse support refers to a "reservoir of goodwill" that citizens have for courts. In contrast, specific support is a measure of a citizen's reaction to an individual decision of the court in the immediate aftermath of a decision. An individual either agrees or disagrees with the decision, and the specific support for a court will decrease when the individual disagrees with the decision. The literature on court legitimacy mainly focuses on diffuse support (Gibson and Caldeira 1992; Gibson et al 2003; but see Vanberg 2005) because diffuse support is a more lasting and durable attitude that allows individuals to accept decisions that they might otherwise disagree with. Diffuse support's relationship to legitimacy is that as an individual believes in the fairness of the court's process, they are more likely to support the decisions of the court, irrespective of their personal agreement with these decisions. As a result, although diffuse support and legitimacy may indicate a confidence and trust in the institution; researchers have operationalized Supreme Court legitimacy as an individual's support for the maintenance of the institution (Gibson and Caldeira 1992; Gibson et al 2003; Gibson and Caldeira 2009).

What affects American citizens' decision to have and maintain this support for courts as institutions? First, knowledge of the courts leads to diffuse support. Exposure to the courts creates individual knowledge about the institution, and as a result, these citizens

are also exposed to the legitimizing symbols of the courts (Gibson and Caldeira 2009). In addition to knowledge of the courts, those individuals with a commitment to democratic values such as tolerance, support for the rule of law, and support for a multiparty system have a strong belief in the institutional legitimacy of the courts (Gibson and Caldeira 1992; 2009). What does not affect a citizen's belief in the legitimacy of the court is their ideology or partisan affiliation. Gibson and Caldeira (2009) find that even though Americans are deeply divided on many of the policy issues the Supreme Court will decide, neither the individual's ideology nor the polarization of public opinion directly affects the Court's institutional legitimacy.

Research has found that diffuse support for the U.S. Supreme Court remains relatively high and stable over time. Support for the Supreme Court is consistently higher than support for both Congress and the Executive branch. Further, this support is more stable over time than is support for the other institutions (Mondak and Smithey 1997). When citizens view the court as just another political institution whose decisions are made on the basis of politics and not law, however, people lose support for the court. When its processes cannot be differentiated from the political processes that define Congress and the Executive branch, the Court loses some of its public support.

Although the Supreme Court and many national high courts have been found to enjoy a significant and consistent reservoir of this diffuse support, the same cannot be said of all state high courts (Wenzel, Bowler and Lanoue 2003; Benesh 2006). Cann and Yates (2008) find that many state courts enjoy this support, meaning the citizens believe in the legitimacy of the court as an institution and that this belief is maintained even when the court produces decisions the citizens disagree with. Because institutional legitimacy is based

on the fairness of the process, if citizens are forced to view courts as political rather than legal institutions, they can lose their belief in the fairness of the process, and therefore lose their belief in the legitimacy of the court. However, for those courts whose members are elected, their election and campaigning can have significant implications for public's assessment of the legitimacy of the state courts.

In elected courts a “reservoir of citizen goodwill toward state courts may dwindle, and the courts may find it increasingly difficult to weather the storm of unpopular decisions” (Cann and Yates 2008; 316; but see Gibson 2007). As discussed, we also know not only that justices alter their votes when they will soon face reelection (Huber and Gordon 2004), but also that the public uses some form of retrospective voting when making decisions in judicial elections (Hall 2001; Hall and Bonneau 2006). As a result, majority opinion writers on state high courts with elections might lack the reservoir of goodwill to protect their decisions from outright noncompliance, but they may be able to use the public for protection through shared policy preferences. Given this clear variance in the citizens' belief in the legitimacy of the court, state high courts are ripe for testing the implications of the legitimacy-based theories of judicial compliance and implementation.

1.4 Opinion Writing

When a court issues an opinion it does not only settle a dispute, but it also outlines the legal and public policy that is to be enforced by other actors. Much has been written about the opinion writing process on the U.S. Supreme Court (Maltzman, Wahlbeck and Spriggs 2000) and the federal Courts of Appeals (Hettinger, Lindquist and Martinek 2004; 2006). Decisions such as opinion assignment, coalition formation and the drafting of the written opinion are all subject to within-court strategic and accommodating decision-making

by the justices on the Supreme Court (Rohde 1972; Maltzman and Wahlbeck 1996; Maltzman, Spriggs and Wahlbeck 2000). Research has told us much about the internal opinion writing process on the Supreme Court, but we know comparatively little about opinion writing and the opinion as a tool of judicial power on state high courts.

Lower courts and legislative and executive officials alike are expected to heed the legal principles and policies delineated in the majority opinion. Because the content of these opinions is directly related to public policy, examining their content can greatly add to our understanding of the policy-making role of courts. It is, therefore, not surprising that judicial scholars have long studied the content of majority opinions; however more recent research is beginning to quantify opinion output beyond the dichotomous indicators of overturn or uphold and or liberal or conservative. Staton and Vanberg (2009) use the concept of vagueness as an indicator of opinion output. They argue that vague opinions are a tool for courts to give power back to the other branches of government. More specifically, Clark and Lauderdale (2010) develop a measure of the ideological content of the opinion by using the citations of other judicial decisions in the opinion.

This research has allowed scholars to reconsider the role of the opinion as a tool of judicial power. There are competing theories about opinion content and its ability to ensure compliance by the implementing actors (see e.g. Baum 1976; Giles and Gatlin 1980; Spriggs 1996; 1997; Staton and Vanberg 2008); but these theories all work from the premise that opinion content can affect the level of compliance. In contrast, new research on opinion content is premised on the idea that justices may be able to encourage compliance by altering their decisions. By highlighting the role of the public and its belief in the court's legitimacy, this theory posits that the opinion writer, either representing herself or the court, will write a

vague opinion to encourage compliance. This is because the legislature has more discretion over the interpretation and thus the implementation of the decision when the opinion is vague (Staton and Vanberg 2008). In an opinion, the court may be active in dictating policy or it may delegate it to other branches of government. Delegation is when one branch of government leaves the bulk of the policymaking responsibility to another branch, presumably one with more policy expertise. Legislatures have been found to write less specific policies for administrations to implement when they are constrained by a range of factors (e.g. Huber and Shipan 2002).

1.5 Delegation

Many theories of delegation have overlooked the role of the courts. Delegation models usually consider the levels of discretion the legislature grants to bureaucratic agencies to make policy, while treating the legislature as the principal and the bureaucracy as the agent (see Bendor, Glazer and Hammond 2001 for an overview). Given this framework, many models of political delegation use formal theory to explain the decision of the principal to delegate and even the decision of the agent to work or shirk. One of the most common delegation frameworks in political science is the principal-agent model, where the principal delegates authority to act to the agent. Scholars have added many complexities to these models that include controls on the agents (e.g. McNollgast 1987; 1989); multiple agents; and multiple principals. Fiorina (1986) developed a model that gave Congress a choice of multiple agents to delegate policy control to, including administrative agencies or the courts. Bendor and his colleagues recount a second set of delegation models that developed that focus on signaling games (2001). Some of the most recent delegation models incorporate the principals of the delegation of authority and signaling models (Bendor et al 2001).

In their seminal study of congressional delegation, Epstein and O'Halloran (1999) derive testable hypotheses from a formal model. Volden (2002) succinctly summarizes their hypotheses: "legislators are more likely to delegate to bureaucrats (1) when executive and legislative preferences are aligned, (2) when legislators face high levels of uncertainty, and (3) when legislators are limited in their ability to gain information within the legislature" (189). Delegation, Epstein and O'Halloran argue, is not done wholesale by Congress to give unencumbered power to the executive branch. Delegation is part of the separation of powers process that simultaneously grants power to administrative agencies while constraining the agencies. Epstein and O'Halloran conclude by arguing that delegation allows legislators to avoid certain hard decisions they might otherwise have to face, which makes it possible to enact laws that may have been politically infeasible otherwise.

Because delegation applies so clearly to the separation of powers context, theories of delegating authority have been extended to the context of the American states. In their seminal work on delegation in the states, Huber and Shipan (2002) rely on evidence from the national level to develop a theory of delegation that takes into account state legislative capacity. They find that legislators will delegate power to state administrative agencies under conditions of uncertainty and when their ability to gain information is limited (i.e. less professionalized legislatures). In his study of delegation at the state level, Volden (2002) finds support for the second and third hypotheses of Epstein and O'Halloran, yet both Volden (2002) and Huber and Shipan (2002) find only tenuous support for the political alliance thesis, or the idea that a principal will delegate to an agent only when their preferences are aligned (see also Bendor et al 2001). They conclude that political alliance delegation is dependent on other factors.

The idea that courts would willingly give policy-making power back to the legislature is in direct contrast with the assumptions of the attitudinal model, where implementing preferences is the central goal for justices (Segal and Spaeth 2002). Previous literature has considered this challenge. Spiller and Tiller (1996) argue that under certain conditions, it is rational for the justices to vote against their preferences, in order to invite congressional override. Hausegger and Baum (1999) expand this argument in their examination of Court invitations for congressional overrides. They conclude the Supreme Court may invite congressional overrides due to a concern for both good law and good policy. Staton and Vanberg (2008) provide a new motivation when they argue that vague decisions are an implicit way of delegating policy control to the other branches of government. Central to their model is judicial concern for compliance and maintaining institutional legitimacy.

As Bendor and Meirowitz (2004) point out, the models of delegation proposed by Epstein and O'Halloran (1996; 1999) and Huber and Shipan (2002) are models of risk reduction. This is important because delegation from this perspective focuses on the idea that the unknown outcome is the worst possible outcome. Bendor and Meirowitz argue that in more traditional models of delegation, the actors are averse to bad, or distant outcomes (2004; 294). State high courts should have an aversion to both the unknown outcome as well as the distant policy outcome. As a result, they should use delegation to balance the choice between the unknown (whether or not they will receive compliance) and the distant outcome (a policy decision by an actor with different preferences).

Outline of the Dissertation

In this dissertation I develop and test a theory that brings legitimacy into the literature on state high courts. In doing so, I first create a measure of state high court

legitimacy that is both theoretically and methodologically sound and provides estimates of state high court legitimacy that are comparable across the states. Further, I use this measure in the two-stage model of review and delegation I propose. I then expand on this model by examining in depth the actors that state high courts delegate to.

Theoretical Argument

The second chapter of this dissertation provides an expansive theory on judicial review and delegation on state high courts. In addition, the theory in the second chapter addresses the conditions under which state high courts will delegate to either the state legislature or a state executive agency. Considering both the preferences of each institution and the relative policy expertise, I outline when the court will delegate to each institution.

The third chapter of this dissertation focuses on the measurement of state high court legitimacy. I use national survey data where individuals indicate their trust and confidence in their state high court in order to create a state-level measure of legitimacy. Using a newly developed method called multilevel regression and poststratification (MRP), I am able to use the survey responses of about 1,200 individuals, weighted by the demographic population of each state, to create a state level measurement. This measure is the first methodologically-sophisticated, comparable legitimacy indicator for each of the states. Not only will this measure allow more empirically valid tests in this dissertation, but it will also allow researchers to more easily incorporate legitimacy theories into examinations of state high court behavior.

In the fourth chapter of this dissertation, I test the first part of the theory proposed in Chapter 2. Chapter 4 examines the two-stage process of judicial review and delegation. As previously stated, I argue that political conditions and court legitimacy determine the

conditions under which the state high court can engage in judicial review and then can either make policy or delegate policy control to the other branches of government. Using an original dataset of education cases from all fifty states from 1995-2005, I test the theoretical implications of this model, and find support for the hypotheses. As a result, I conclude that state high courts do delegate policy control under certain political and institutional conditions and that state high court legitimacy may be an important determinant in the decision-making processes of these justices.

The fifth chapter in this dissertation includes a test of the delegation theory examined in Chapter 2. In Chapter 4 I find that political confrontation between the branches to lead the court to delegate the policy outcome to the other branches and that delegation is more likely when the legitimacy of the court is low. The court has several choices when deciding which actors to delegate to, or the court can be ambiguous about who has the responsibility to implement a new policy. There are three factors that should determine which branch the court delegates to: the political context, legislative professionalism and the complexity of the policy. Again, using data on education cases from all fifty states, I test the hypothesis that when a court is dealing with a less professional legislature they are more likely to delegate to the executive branch. In addition, I hypothesize that state high courts are also more likely to delegate to the branch they are ideologically closest to.

In the sixth and final chapter I review the results from the empirical chapters and discuss what these conclusions can tell us about state high court behavior. I also fit these conclusions into the current literature and suggest directions for future research on state high court legitimacy and the use of delegation by these courts.

CHAPTER 2: A THEORY OF LEGITIMACY, JUDICIAL REVIEW AND DELEGATION

Introduction

One of the most important roles of courts in separation-of-powers systems is to check the constitutionality of the statutes passed by the legislative branch. This power of judicial review has been examined by scholars in many contexts (e.g. Rogers 2001; Langer 2002; Vanberg 2005). In reviewing and overturning the policies of the legislature, the court should maintain control over the final policy outcome. However, scholars have often assumed that the legislative body has the final move in separation of powers games (e.g. Eskridge 1991; Spiller and Gely 1992; Epstein and Knight 1997; but see Segal 1997).² The policy product of judicial review is the absence of a policy or a return to the status quo. Oftentimes, a new policy is determined by the reviewing court or implemented by a legislature as a result of the old policy being deemed unconstitutional. Ignored in the literature is an essential aspect to this process: who is given the power to create the new policy? Further, why would the court not always keep this power and create a new policy in line with their preferences?

In this chapter, I begin to address these questions as I develop a theory where the court decides both whether to uphold or overturn a statute on constitutional grounds and who has the final say on a policy through the use of delegation. We know that legislatures often delegate policy control to more policy-oriented departments in the executive branch,

² As Ferejohn and Weingast (1992) note, there is no ‘last word’ in politics (see Segal 1997). The interaction I propose in this chapter could continue, and the two-step process I develop does not have to end the game. However, I end the process with the court delegation because the court determines who the ‘final mover’ is.

and I argue there is reason to believe courts will follow a similar process as a result of political and institutional conditions, as well as the levels of legitimacy the court enjoys. Therefore I argue that courts can delegate and I further address why and to whom do state high courts delegate.

The process of judicial review and subsequent assignment of policy control is ultimately about two goals: courts want to see their preferences become law and they want to maintain the legitimacy of their institution.³ One way courts can see their preferences become law is to engage in judicial review, overturning policies of the legislature on constitutional grounds. However, courts can only productively engage in judicial review and new policy creation if they believe the legislature will comply with and implement their new policy. Courts have little ability to impel other institutions to comply with their decisions. Noncompliance can be highly costly for the courts because it can diminish their institutional legitimacy and create a cycle of more noncompliance (Cannon and Johnson 1984; Staton 2004; Vanberg 2005); but previous research has found that courts with high institutional legitimacy are more likely to have their decisions implemented by the other branches of government. In this case, the legislature may fear public backlash when refusing to implement the decisions of a court with high degrees of legitimacy from the public.

The combination of political differences and varying levels of legitimacy characterizes the court's ability to engage in judicial review and either set a new policy or give

³ Past research has suggested that a desire to maintain their seat on the bench is also a central goal for state high court justices (e.g. Brace and Hall 1992; Langer 2002; Bonneau and Hall 2009). I believe this is a central motivation for state high courts justices, but that its role in the judicial review and delegation process is not directly causal. The way justices are selected is theoretically important and will be addressed later in the chapter.

the policy-making power back to the legislature. However, this relationship will be further conditioned by the rules that define each institution's ability to implement their preferences. Certain institutional rules such as longer judicial terms, a more difficult constitutional amendment process and a discretionary docket can insulate justices from legislative retribution, allowing them more ability to vote their sincere preferences (Brace and Hall 1990; 1995; 1997; Langer 2002; 2003). These rules define the ability of each branch to implement their most preferred outcome, and therefore are expected to condition the judicial review and delegation process as well.

This chapter outlines the theoretical motivation for a two-stage process of judicial review and delegation by state high courts. In the first stage, the justices decide whether to decide on a constitutional issue, in other words, whether to grant themselves the opportunity to engage in judicial review. In the second stage, the court then chooses one of six possible combinations of judicial review and delegation. As shown in Table 2.1, the court can choose to overturn or uphold the constitutionality of the statute. Further, the court simultaneously chooses the final mover in which the court can make a new policy, delegate to the other branches of the state government or not delegate the final outcome. In this chapter I rely on legitimacy theory and the separation-of-powers context, where judicial decision are made with the preferences of other actors in mind. In addition, I address the difference in expectations across elected and non-elected courts in detail, and what effect elections may have on the ability of these justices to engage in judicial review and delegation. Finally, I consider all possible state governmental actors to whom the court can delegate and develop a theory that explains when and why the court will delegate to each of these actors.

2.1 Two-Stage Process of Judicial Review and Delegation

As discussed in the previous chapter, political differences between the branches of state government have been shown to affect the decision-making of the justices on state high courts. Separation-of-powers models explain how state high court justices consider the preferences of the other branches of government when making their decisions. We know that when these differences in ideology exist and are large, courts are much less likely to engage in judicial review and are much more likely to engage in strategic behavior. However, when the ideological or political differences between the institutions is smaller, the justices on state high courts behave sincerely (Langer 2002).

Research examining national high courts has shown that the level of institutional legitimacy a court enjoys can provide an essential protection in the decision-making process (e.g. Gibson and Caldeira 1992a; 1992b; Gibson, Caldeira and Baird 1998). While research on the legitimacy of state high courts has been limited to how individuals view their state's courts and what affect elections might have on legitimacy, theories from other courts suggest court legitimacy provides an important protection mechanism (e.g. Cannon and Johnson 1984; Vanberg 2005; Staton and Vanberg 2009). I argue that, as a result of the public's belief in the legitimacy of the institution, state high courts should be able to make decisions and have them implemented by a legislature that fears backlash from the public should they ignore the court.

Stage 1: Deciding to Decide on the Constitutionality of a Statute

In the theory I propose, the court follows a two-stage process in which they first determine whether or not to decide on the constitutionality of a statute (the first section in Table 2.1). In the second stage the court simultaneously decides to either overturn or

uphold the statute and decides who will control the final policy outcome. In other words, they decide whether or not to delegate policy control to another branch of the state government (second row in Table 2.1).

Some state high courts have no formal docket discretion, meaning that they cannot choose the cases they will hear. Such courts must hear all cases that come before them, which constrains their decision making process. Yet even when this constraint exists, all state high courts have a selection opportunity when they hear a case. A state high court can decide whether or not to make a decision on the constitutionality of the statute presented in the case. This decision to consider the constitutionality of a statute can be made whether or not the litigants raise the constitutional issue. This creates a selection process before the justices even consider whether to overturn or uphold a statute on constitutional grounds (Langer 2003). This selection process is especially important because it allows even those state high courts with a mandatory docket to avoid what would necessarily be a constitutional decision that may be unpopular with the other state institutions as well as the public. The decision to decide on the constitutionality of a statute affords the courts the ability to make constitutional decisions and it also grants courts the power to avoid making these same constitutional decisions.

We already know much about this step of the decision-making process on state high courts. These constitutional cases are often among the most important cases to the court as well as to the state legislature and governor who passed the laws the court will consider. The policy preferences of the different institutions can determine, in part, the court's decision to consider the constitutionality of the statute. I expect that when political differences between the branches are high, the decision to engage in judicial review will be more likely and when

political differences are low, judicial review will be less likely. If the justices have an ultimate goal of seeing their policy preferences become law, a legislature with similar policy preferences will pass statutes the justices will favor. As a result, no judicial review would be necessary.

Beyond their desire to have their preferences become law, the second goal of state high courts is to retain and maintain their level of institutional legitimacy. I expect that state high courts with higher institutional legitimacy will be more likely to decide on the constitutionality of a statute. This is possible because even in these contentious decisions, the hands of a legislature who might retaliate are tied by a public who believes that the court made their decision in a fair and legitimate manner. This legitimacy allows the court more freedom to pursue their policy preferences, in much the same way that shared political goals with the other branches of government does. However, when a court has lower institutional legitimacy, they should often avoid decisions on the constitutionality of a statute. In doing so, the court may avoid any potential noncompliance in this first stage. This is especially important because noncompliance is the worst outcome for a state high court.

Finally, the decision to consider the constitutionality of a statute is often altered by the parameters set by institutional rules. The institutional rules or contexts that allow the legislature or state government the ability to easily pass new legislation or constitutional amendments should give these branches more power. On the other hand, when these branches are divided the court will have an increased ability to engage in judicial review because of the difficulty of passing new legislation through a divided government. Justices on state high courts also maintain an increased ability to implement their preferences as the length of their terms increases.

Stage 2: The Decision on Review and Delegation

The second-stage of the review and delegation process is the court's decision on the constitutionality of the statute and their determination of which institution will have control over the final policy outcome. There are six possible options for the court in the second stage; these options are shown in Table 2.1.

Political Differences

As stated before, one of the main goals of state high court justices is to see their policy preferences become law. A clear result of this goal is that state high court justices will overturn laws they disagree with on constitutional grounds, when this is possible. I argue that as the ideological distance increases the court will be much more likely to overturn statutes on constitutional grounds. As the political distance between the branches decreases the court will be less likely to overturn these statutes. In this case, the legislature has the same policy goals as the court and would therefore pass laws the court is in agreement with. The court would have no need to overturn these statutes.

Legitimacy

In addition to deciding to overturn or uphold the statute on constitutional grounds, the court also has the ability to determine in their opinion which institution has control over the final policy outcome. I argue this decision will be determined by the legitimacy of the state high court. Legitimacy of a court is directly related to the compliance necessary from external actors. For courts, legitimacy is measured as the diffuse support of the public. Diffuse support is the reservoir of goodwill the public has toward the court's decision-making process, even if they disagree with the immediate outcome. When the legitimacy for a state high court is high, the public can act as protection for the court. A public that

supports the legitimacy of the court will be more likely to punish a state legislature that fails to comply with the court. The legislature might be obligated to comply because the public will be able to punish a noncompliant legislature through elections. As a result, I argue that when legitimacy for a state high court is high, they can implement their preferences, even after engaging in judicial review. In other words, when the court has a reservoir of goodwill with the public, they should be able to make a new policy within their opinion because the state legislature could be punished by the public if they fail to comply with the decision of the court.

At times the legitimacy for a state high court will be low. In this case, the court is less likely to have the legislature comply with their decisions. When the state high court has low legitimacy, the public will not act as a monitoring mechanism, and will not force the legislature to comply with the decision. As a result, when the court has low legitimacy they are expected to delegate the policy outcome back to the legislature. In this case, the justices may check the action of the legislature through review, but ultimately give the policy-making power back to the legislature. In this case, as Staton and Vanberg argue, courts may “lose the battle, but win the war’ by preserving and potentially enhancing judicial power for future cases” (2008; 516). The legislature may make the final policy outcome, but the court maintains its institutional legitimacy.

In most cases, the legitimacy a state high court will be somewhere between very high and very low levels. These median levels of legitimacy make the decision of the court less clear. I argue that in this case, a state high court will not make a decision determining who has control of the final policy outcome; the court will not engage in specific policy-making but they will also not delegate policy-making power back to the other branches of the state

government. In this case, a court will decide on the constitutionality of the statute and make no designation on final policy control.

Summary of Theoretical Argument and Hypotheses

What I have proposed is a process of judicial review and policy delegation, where state high courts decide whether or not to overturn a statute and which actors will make the final policy decision. Taken together, this theory of judicial review and policy delegation can result in six possible outcomes. I display these outcomes in Figure 2.1. I expect that when the ideological distance between the court and legislature is high, the court will be more likely to overturn a statute on constitutional grounds. When legitimacy is also high, the court should use the opportunity to create a new policy. When the court is at its most protected, when legitimacy is higher and when the court disagrees with the legislature, they should engage in the strongest of these options, overturning the legislature and implementing their own policy.

When the political differences across the branches are lower the court should be less likely to engage in judicial review. Concurrently, as the level of legitimacy decreases, the court is expected to avoid specifying the new policy or determining which branch is to implement this policy. In this case, depending on the disagreement between the court and the legislature, the court should either overturn or uphold the statute and not delegate the policy outcome at all. When legitimacy is low, the court should delegate the policy-making power back to the legislature. In doing so, the court will state specifically in their opinion that the legislature should enact a new policy. Finally, when the political differences are lower and legitimacy is lower, the court should be at its most passive. Justices will be

reluctant to overturn statutes they are in agreement with and will delegate if any further policy needs to be made because they have little legitimacy to ensure compliance.

2.2 Additional Considerations

Transparency

For legitimacy theories to work there must be some degree of transparency among the public. The court is relying on the public to be aware of the legislature's failure to comply with their decision. In order for this public protection mechanism to work, the public must be aware of both the court decision and the legislative noncompliance. This will only be possible in issue areas that are salient to all actors. Without salience the public will not care enough or be aware enough to implement their enforcement mechanism against a noncompliant legislature.⁴ At minimum there must be an active policy elite that will monitor court decisions and activate in support of the court when noncompliance occurs (Vanberg 2005; 21). The ability of the policy elite to effectively monitor only needs to reach a minimum level, enough to swing the calculations of state legislators. This becomes especially true as the complexity of the issue declines. For relatively simple issues it is not difficult for policy elite to communicate the lack of compliance to the general public. As the issue gets more complicated, the ability of the elite to communicate the noncompliance to the public

⁴ This can be read to say the theory proposed in this chapter has a limited application in that it will only explain court behavior in salient policy areas. This is not a limitation of the theory. In non-salient policy areas courts are expected to make their decisions sincerely, based on their policy preferences. It is precisely these constrained decisions in salient policy areas that alternative theories (to the attitudinal model) are trying to explain.

becomes more difficult. In more complex issue areas, the legislature will have an increased ability to engage in noncompliance.⁵

Accounting for the different levels of transparency across the states is a difficult task. One can start by examining a policy area that is almost solely confined to the state level and which all states pursue. The first test of the theory can be confined to an issue area that is salient in all states, irrespective of the specific political context of the states. In Chapter 4 I test this theory using education policy. This policy area is appropriate because almost all education policy is made at the state level. Education policy issues are most often highly salient to the public, as well as the legislature. Further, education policy is consistently an issue over all fifty states over long periods of time. As a result, testing the theory using education policy cases is theoretically appropriate.

Method of Selection and Elected Justices

Previous state court research has found that the way justices are elevated to the bench can have important effects on their decision-making (see e.g. Brace and Hall 1991; 1995; 1997). As a result, a theory of judicial behavior at the state level would be incomplete without considering the method of selection of the justices. Justices who are appointed and

⁵ The courts themselves have an incentive to make the public aware of their decisions (Staton 2006; 2010). Although determining if the court publicized each individual case may not be possible, some mediated activity of the court could alter this legitimacy mechanism. However, court generated media coverage is not always effective, comes at a cost and is still dependent on the saliency of the policy. In addition, court-generated public relations has been shown increase tensions between the branches, and can effect legislators' perceptions of the impartiality of state high courts (Langer, Leonard and Ross 2007).

retained by the other branches of government may find themselves in a position to delegate to the governor or legislature who appointed them. Because these branches are likely to appoint justices they agree with, the justices may be more likely to delegate to these branches because they will implement policies similar to the court's own preferences. In addition, if the court must rely on the legislature for retention, the court may be less likely to overturn a legislature they must rely on for retention and may be more likely to give policy-making power back to this same legislature.

Many of the processes described above must be altered when considering judicial decision-making on elected state courts. These justices seek not only to see their preferences become law, but also must retain their seat on the bench through elections. The public plays a heightened role in the decision-making of elected justices. It has been argued that elected courts are much less likely to have a reservoir of diffuse support for their institution (e.g. Wenzel, Bowler and Lanoue 2003; Cann and Yates 2008; but see Gibson 2007; Gibson et al. 2008). Institutional legitimacy for a court is contingent upon the extent to which the public believes the court to be a neutral, non-political decision-making body (Hibbing and Theis-Morse 1995). When justices receive campaign contributions, especially from actors who have business before the court, this can have a corrosive effect on the public's view of the court's legitimacy (Gibson 2007). This should seriously harm their ability to use the public's legitimacy to impel the legislature to comply. As a result, these justices are less able to rely on the public enforcement mechanism to impel compliance. Therefore, elected justices should be increasingly likely to delegate the policy outcome to the legislature. However, this result will be seen through legitimacy. Because the theory presented is an institutional one and electoral goals are concerns for individual justices, the role of elections

in this theory is indirect. There is already much evidence that the method of selection alters the decision-making process of justices on state high courts (e.g. Hall and Brace 1995; 1997). If it is found that in the states where justices are elected, legitimacy is dampened and cannot be used to ensure compliance, then courts in these states are far less powerful with respect to judicial review and separation of powers that previously thought.

2.3 Courts and Delegation

Above, I developed a theory for judicial review and the delegation of the resulting policy outcome. However, courts can delegate to multiple actors throughout state and local government. Much of what we know about delegation involves legislatures delegating decision-making to the more highly specialized administrations in the executive branch. If courts are part of the policy making process, they should be able to delegate to external actors, just as legislatures do. I argued above that when used by courts in their majority opinion, delegation is used to maintain a level of compliance. Below I outline a theory of delegation that suggests when and to whom courts might delegate. I test the implications of this theory in Chapter 5.

Delegation: Policy Expertise or Political Context

There are two ways to interpret the use of delegation in court opinions. In one case, the court may simply be delegating to the legislature or other implementing authority, respecting the policy expertise of these actors. On the other hand, the court may be using delegation as a way to avoid political confrontation and noncompliance. In this sense, the court hands down an opinion allowing the implementing actor control over the final policy outcome in order to reduce the potential for noncompliance. When theorizing about the use

of delegation in judicial opinions, this distinction becomes problematic because the two interpretations are observationally equivalent. As a result, the first question that must be answered is whether the use of delegation is motivated by political differences and to maintain legitimacy or is delegation motivated by practical concerns about policy expertise.

Political differences are always present during the opinion writing stage because justices must contend with multiple audiences. When the preferences of any of these actors diverge significantly from the majority opinion coalition this could lead the opinion writer to delegate the policy making to another actor. First, a majority opinion writer must write an opinion that all members of the majority coalition will agree to. When this majority coalition is increasingly large and increasingly ideologically diverse, the opinion writer will be more likely to delegate because it will be more difficult to agree on a specific policy outcome.

In addition to the opinion coalition, the majority opinion writer must contend with external actors. Foremost is the state government. When the court and the state legislature are ideologically distant, delegation becomes a tool for the court, allowing them to increase the likelihood of compliance. Producing this opinion allows an open interpretation by the legislature, and avoids complete noncompliance, the worst possible outcome for the court. When the court and the legislature have similar ideologies the court has less need to be concerned with noncompliance, and can therefore dictate public policy in a specific manner. Finally, as stated previously, when the legitimacy of the court is low, they should be more likely to delegate control over the final policy outcome. In this case the court must be worried about potential noncompliance, and their most important leverage to ensure compliance is not available.

If the court were to use delegation solely to defer to the policy expertise of the legislature, one would expect this delegation to occur most often in states with professional legislatures irrespective of the political and legitimacy context. State legislatures have varying degrees of policy expertise, because they have varying degrees of legislative capacity. Some state legislatures are highly professionalized, where members are well compensated and the legislature is in session year round. Members in these highly professionalized legislatures can be viewed as policy experts. These individuals maintain seats on specialized committees and operate in a manner similar to Congress. As a result, if delegation was used to take advantage of policy expertise, courts with more professional counterparts should use delegation more, all else being equal.

Despite this, I argue that a court's decision to delegate is based on the political context of the court-legislature relationship because courts want to see their preferences implemented and want to avoid noncompliance. Yet, there is one case in which the policy expertise of the state legislature may incite delegation: when the court and the legislature are ideologically similar and the state legislature is highly professional, the court may find delegating to a legislature that has policy expertise especially beneficial.

Institutional Rules and Delegation

There are certain institutional structures that should condition this relationship, as was the case in the above model of judicial review. The most important of these is the method of selection of the justices. State high courts that are retained by the other branches of government should be more likely to give power back to these branches through delegation. The state high court should be more likely to delegate to one branch if they are solely responsible for the retention of the justices. However, if retention is determined by

both branches, the court should just be more likely to delegate, all else being equal. In addition, state governments have varying degrees of leverage, which is defined as the costs for resisting judicial decisions, across the states. As it becomes easier for the state government to resist judicial decisions, or overturn them, the majority opinion writer should be more inclined to delegate. In this case, the opinion writer may give policy control to the state government and avoid the possibility of being completely overturned or otherwise punished.

Fundamentally, I expect the political constraints placed on the majority opinion writer will lead to delegation, supporting the argument that delegation is used to avoid political confrontation. A majority opinion writer should delegate when they are in a large or ideologically diverse majority coalition. The state high court should also delegate when they are ideologically distant from the state legislature. Finally, under the specific conditions of ideological closeness and high legislative professionalism, the court may also choose to delegate to take advantage of the policy expertise of a politically friendly state legislature.

Delegation: Which Institutions Should Courts Delegate to?

The court has multiple choices when deciding which actors to delegate to. The main delegation choice comes between the legislature and the administrations of the executive branch, although all possibilities are outlined in Table 2.2. The theory I present focuses on the decision to delegate to either the legislature or the executive branch because these are the most common options and are the most theoretically relevant. There are three factors that should determine which branch the court delegates to: the political context, legislative professionalism and the complexity of the policy.

If the state high court is going to delegate policy responsibility, they should delegate to the branch of government that is closer to their own preferences. In the case of delegation, the court is giving up control of the final policy outcome. If their ultimate goal is to have their preferences become law, then they should delegate to the institution that has preferences closest to those of the court. In addition, the ability of each of these branches to address and implement a new policy should matter when the court decides whom to delegate to. When the state legislature is not highly professional, the court should be less likely to delegate to them. In this case, the court should delegate to the executive administration because it can address this policy issue in an efficient manner. In fact, amateur legislatures are more likely to delegate to administrative agencies (Huber and Shipan 2002). Finally, the complexity of the issue should affect the delegation choice by the court. For more complex issues the court may delegate to the administrative agency that specializes in this issue. This should be increasingly true as the legislature becomes less professionalized.

There are other actors to which the court can delegate control over the final policy outcome. The court can give policy control back to the lower courts or may even delegate to the public, by arguing a referendum is necessary in a certain policy area. These are very rare occurrences, and therefore no theory exists to specifically define the conditions under which these may happen. Further, a court can delegate a policy decision without being specific about which actor has control over the final outcome. In this case, a court may argue that the elected or policy-making branches should be responsible, but does not specify whether the executive or legislative branch should maintain control over the outcome. Again, this should be a rare, though interesting, event in which the court is foregoing the ability to address the final policy outcome and avoiding naming the branch that should

control this. I would expect this to be the response of a highly constrained court. Further, when the court has no policy allies in either the executive or legislative branches, meaning that the court disagrees with both branches, they may be more likely to delegate generally.

Conclusion

In the previous sections I have outlined a theory for a process of judicial review and the delegation of the policy making control, as well as a theory for general delegation on state high courts. As mentioned, justices on state high courts have a goal of seeing their policy preferences become law and maintaining the institutional legitimacy of their court. The theory presented keeps these goals as central. Justices are expected to engage in judicial review when their policy goals differ from those of the legislature. However, beyond just overturning statutes, justices can delegate control of the policy outcome to other actors. In doing this, the court seeks to maintain its institutional legitimacy as they attempt to avoid the noncompliance that can be harm this legitimacy. This theory provides a more expansive conception of judicial review on state high courts, a concept that moves beyond past dichotomous conceptions and considers explicitly which branch of the state government maintains control of the final policy outcome. This is especially important when thinking about the role of the judicial branch in the states and the relative power it maintains compared to the other branches.

In addition, I consider why, when and to whom courts may delegate. A court may find itself in a position to delegate a policy outcome because either the political conditions would lead to noncompliance or because they are seeking policy expertise from either the legislature. Further, I argue that courts will choose to delegate to either the executive branch or the legislature as a result of the political context, legislative professionalism and the

complexity of the policy. As was the case with the expanded judicial review, courts will use this delegation to reach their goals of seeing their policy preferences become law and maintain institutional legitimacy.

The theories presented in this chapter make three main contributions. First, I move past dichotomous indications of judicial review. While courts may appear to simply overturn or uphold the constitutionality of a statute, this decision is actually more complex and includes a decision on who the court delegates final policy control to. By examining the text of the written opinions, we can learn more about the decision-making process of these state high courts. Second, I maintain the court has the ability to delegate in their written opinion. In using the opinion content to gain more insight into the decision-making process, I can determine if the court makes a new policy in their opinion or if they explicitly delegate this policy control to one of the other branches of government. Finally, I bring the concept of judicial legitimacy into the decision-making process of state high courts. Researchers have examined how individuals view the legitimacy of their state high court and how legitimacy influences national high courts. What is missing is the role of the varying levels of legitimacy on state high court decision-making. I begin to address whether the public enforcement mechanism works in the states. I empirically test the implications of this theory in Chapters 4 and 5.

Appendix 2A**Table 2.1: Two-Stage Decision-Making: Judicial Review and Delegation**

Stage 1	(1) Court does not decide on constitutional issue, <i>if selected no Stage 2 decision</i> (2) Court decides to rule on constitutional issue, <i>if selected, then Stage 2</i>	
Stage 2	(1) Uphold Make new policy (3) Uphold No Delegation (5) Uphold Delegate to Other Branches of Government	(2) Overturn Make new policy (4) Overturn No Delegation (6) Overturn Delegate to Other Branches of Government

Figure 2.1: Summary of Theoretical Argument

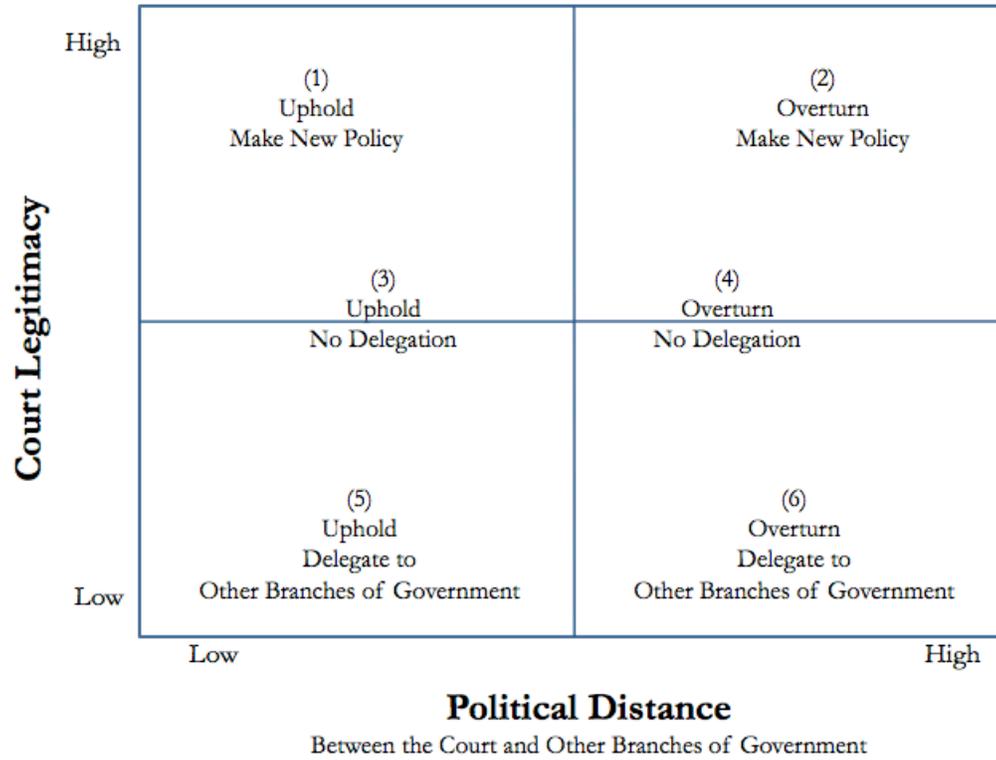


Table 2.2: The Possible Institutions that can be Delegated to

In Stage 2 the Court can Delegate to the State Government

- (1) State Legislature
 - (2) Governor
 - (3) Administrative Agency
 - (4) Lower Courts
 - (5) Local Governments
 - (6) Public
-

CHAPTER 3: STATE HIGH COURT LEGITIMACY: THEORY AND MEASUREMENT

Introduction

Easton (1965) argued that legitimacy should lead citizens to behave in ways not always consistent with their short-term self-interests. Individual citizens afford institutions such as courts, this legitimacy because of both the actions of the court and the individuals' own characteristics, knowledge and experiences. These normative perceptions of a court's fairness are based not on short-term reactions to court output, but are long-term views of courts as procedurally fair institutions (Tyler 2006; 27). Views of the legitimacy of the court, while inherently individual, are extremely important for the court's position and policymaking power in the state. When individuals have trust or confidence in their state high court, the court can expect compliance from the other institutions in state government.

While research on the legitimacy of national high courts in the United States, Germany and Mexico has done much to extend scholars' understanding of the role of legitimacy, we know little about legitimacy and sub-national courts. In the United States state courts make the vast majority of all legal decisions and those opinions handed down by state high courts continue to have dramatic influence on public policy in a variety of policy areas. If legitimacy allows the Supreme Court to hand down controversial decisions such as *Bush v. Gore*⁶ with only minor consequences (see Yates and Whitford 2002; Gibson and Caldeira 2009), we should also determine if state high courts have this ability. In doing so, we can learn much about the policy-making abilities of these institutions.

⁶ 531 U.S. 98 [2000]

In this chapter I begin this task of determining the role of institutional legitimacy for state high courts. The goal of this chapter is to develop a measure of institutional legitimacy that is theoretically driven and comparable across the states. To do so I utilize the method developed by Park, Gelman and Bafumi (2006), which employs multilevel modeling techniques to impute scores when the amount of individual survey respondents is less than needed for simple aggregation. I provide descriptive statistics of this measure and compare it to previously developed measures as well as the results for each state when the data is aggregated. In addition, I examine and discuss the descriptive statistics of the measure, which can provide first insights into state high court legitimacy.

3.1 The Microfoundations of State High Court Legitimacy

Individual Characteristics and Legitimacy

Individual characteristics such as one's race can affect how a citizen views a court. Clawson and Waltenburg (2009) suggest that African Americans enjoy a special, historical relationship with the Supreme Court. The Supreme Court played an active role in the Civil Rights movement and was often the institutions that black leaders looked to in order to gain individual and political rights. As a result, Clawson and Waltenburg argue, many African Americans were left with a deep reservoir of diffuse support for the Supreme Court (2009; 152-3). However, Gibson and Caldeira (1992) find that this support has waned beginning in the Warren Court era and continuing through the Rehnquist court. Scherer and Curry (2010) show that for African Americans, descriptive representation on the federal bench increases their diffuse support for the federal courts. In the same study they find that white Americans lose support for the courts when blacks were increasingly represented on the bench, this result is conditioned by ideology where the most liberal black and the most conservative

white citizens were affected most significantly by the descriptive representation. Taken together, these studies indicate that an individual's race is related to how they view the legitimacy of federal courts; but the relationship between race and support is a complex one.

Knowledge and Legitimacy

What can affect and alter American citizens' decision to have and maintain this support for courts as institutions? First, knowledge of the courts leads to diffuse support. To know courts, it is argued, is to love them. This is true because exposure to the courts creates individual knowledge about the institution. When they gain knowledge about the court, citizens are exposed to the legitimizing symbols of these courts (Gibson and Caldeira 2009; but see Spill and Oxley 2003).⁷ Further, despite debate, recent research has concluded that the American public has far more knowledge of the Supreme Court than conventional wisdom suggests (Gibson and Caldeira 2009; 34).

In addition to knowledge of the courts, those individuals with a commitment to democratic values such as tolerance, support for the rule of law, and support for a multiparty system have a strong belief in the institutional legitimacy of the courts (Gibson and Caldeira 1992; 2009). What does not affect a citizen's belief in the legitimacy of the court is their ideology or partisan affiliation. Specific support for a decision does not affect the way an

⁷ Clearly, the information individuals are exposed to about the Supreme Court is directly affected by the media's coverage of the Court. Spill and Oxley (2003) argue that different media outlets report about the court in different ways. This coverage can affect the legitimizing symbols the public receives. Baird and Gangl (2006) build on this by showing that the presence of a legal argument in the media coverage of the court's decision can serve as a legitimizing symbol, while the public reacts negatively to a decision that is perceived as purely political. Surely the media's coverage of a court decision can and will affect the legitimizing symbols individuals receive (but see Mondak 1994). However a full examination of the role of the media in affecting the court's legitimacy is beyond the scope of this project.

individual views the diffuse support of the court. Gibson and Caldeira (2009) find that even though Americans are deeply divided on many of the policy issues the Supreme Court will decide on, neither the individual's ideology or the polarization among the public directly affects the Court's institutional legitimacy. However, when citizens view the court as just another political institution, whose decisions are made on the basis of politics and not law, people lose support for the court. For example, while the confirmation battle for Justice Alito did not itself affect the institutional legitimacy of the court, when advertisements framed the confirmation battle in terms that were explicitly political, those who saw the advertisements lost some of their support for the court (Gibson and Caldeira 2009; 124-5). Thus, while the Court is generally the most supported of the three branches of government, when its processes cannot be differentiated from the political processes that define Congress and the Executive branch, citizens lose support for the institution.

Experience and Legitimacy

Clearly related to an individual's knowledge of court is their exposure to courts. As previously stated, to know courts is to love them. Much of the literature in political science focuses on the reinforcing symbols of courts leading to individual feelings of trust and confidence in the court. This work focuses on symbols that are inherent in high appellate courts such as the U.S. Supreme Court and the state high courts. Individuals hold these courts in high esteem as they view their marble buildings and statutes of justice as indicators of legitimate decision-making. Yet, most actual interaction with courts occurs at the state trial court level, including smaller courts such as traffic and family courts. Given that these interactions are most frequent and most common, it is important to examine what affect this experience has on an individual's belief in state court legitimacy.

In his groundbreaking work on individuals and legitimacy, Tyler examines the impact of experience on views about legal authority and legitimacy (1990; 2006). While Tyler focuses on the question ‘why do people obey the law’, it is clear that his research has important implications for how individuals view their state court systems. In many ways people view their state high courts through a similar lens used when they are in traffic court. Tyler finds that “when people’s reactions to their experiences are examined, judgments of distributive and procedural fairness are found to have an important effect beyond any influence of the favorability of the outcome” (2006; 112). This belief in the legitimacy of a court because of the process, despite the outcome is referred to as procedural justice. However, an individual’s interactions with the court can vary in their importance. Those individuals whose interactions with the court are “high stakes” have lower evaluations of courts than those citizens whose interaction is more low stakes (Benesh 2006). Many citizens will eventually have court experience whether through jury duty or a traffic ticket.

3.2 Legitimacy on State High Courts

Despite the extant research on the role of institutional legitimacy on both the U.S. Supreme Court and other national high courts, we know very little about how institutional legitimacy may affect sub-national courts. As Gibson and his colleagues (2008; 4) argue, because state high courts are less salient than the Supreme Court, it is likely that institutional legitimacy and citizen’s attitudes about state courts are more malleable. Research has focused on conceptualizing and measuring the legitimacy of these courts at the individual level (Wenzel, Bowler and Lanoue 2003; Benesh 2006; Cann and Yates 2008). These studies have focused on the aspects of an individual that may lead them to have more or less diffuse

support for their state courts⁸. First, Kelleher and Wolack (2007) find that unlike the Supreme Court, state courts do not enjoy the same high levels of diffuse support. Also unlike the national level, the courts in the states do not receive the highest level of support of the three branches, in fact individuals have more confidence in state executive branches than in state courts.

One of the main themes in all of these works is the role of elections. Clearly that some state high courts justices are elected creates a drastically different set of institutional circumstances for these justices as compared to their appointed counterparts. The assumption made is that political elections for justices threaten the legitimacy of the state high court. This is said to be true because it forces citizens to view the court as a political institution, as no different than a legislature. Because institutional legitimacy is based on the fairness of the process, if citizens are forced to view courts as political rather than legal institutions, they can lose their belief in the fairness of the process, and therefore lose their belief in the legitimacy of the court. Benesh (2006) finds additional support for the role of elections as she finds that citizens in states with partisan elections have less support for their state courts. However, the affect of elections is more complex than measuring just the election type suggests. Cann and Yates (2008) find that those citizens most concerned about the role of campaign contributions have much less support for their state courts.

Using experiments, another set of research seeks to delve more deeply into the affect of elections on individual's views of the legitimacy of their state high courts. Examining

⁸ It is important to note that most of these studies focus on state courts generally and are based on surveys that generalize about state courts, and do not specifically address the state's highest court.

state high court elections in Kentucky, Gibson (2008) finds that campaign activity can hurt the legitimacy of a state high court. When justices receive contributions from individuals who will face the court, citizens view this behavior as illegitimate and lose support for the court. In addition, attack ads used in these campaigns can hurt court institutional legitimacy. Candidates for judicial can, importantly, engage in policy debates without undermining the institutional legitimacy of their institution (2008; 72). Another experimental study from Pennsylvania finds that the effects of elections and electioneering activity may be less harmful to legitimacy than assumed. In fact, the authors argue that elections may be beneficial to legitimacy as they bring attention to courts and the symbols of law and courts that reinforce their views. However, the authors also find that not all campaign activity increases legitimacy; and those politicized ads can hurt the overall growth in legitimacy (Gibson et al 2008). What this line of research suggests is that judicial elections have a more complex effect on legitimacy than originally assumed. On one hand, they increase information, forcing individuals to be exposed to those legitimizing symbols that remind them of the uniqueness of courts. On the other hand, too much political exposure in these elections can ‘backfire’ and hurt the legitimacy of state high courts.

3.3 Public Opinion in the American States

Capturing state high court legitimacy is ultimately about individual public opinion. As a concept, legitimacy works through the public. Previous research provides individual characteristics that affect a citizen’s belief in the legitimacy of their state courts. Combining what we know about these predictors of an individual’s belief in the legitimacy of their state high court and new advances in methodologies to estimate public opinion, I develop a state-

level measure of state high court legitimacy based on individual microfoundations of legitimacy.

Measuring public opinion in the American states is a pursuit rife with empirical challenges. Although advances in surveys, archiving, and methodology have made measuring public opinion in sub-national units a much improved task, and measures have become more reliable over time (Jones and Norrander 1996; Cohen 2006). The central problem with measuring any type of public opinion in the states, whether it be citizen ideology, citizen opinion on a specific policy, or citizens beliefs about current government officials, is that most surveys are conducted nationally, where the sample is drawn from the entire country. As a result, the number of individuals from any one state that are surveyed is inherently determined by the population of that state; and for most states the number individual respondents is limited. Over time scholars have proposed solutions to this by using the individual states as primary-sampling units for large national surveys (e.g. Norrander 2000; 2001; 2006) or by conducting individual surveys at the state level (Beyle, Niemi and Sieglman 2002; see Cohen 2006 for complete overview).

However, the most widely used and adopted solution to the lack of observations in each of the individual states is pooling and disaggregation. Wright, Erikson and McIver (1987; 1989) pioneered this method when they pooled CBS News/*New York Times* polls from over time and disaggregated individual responses to the state level. With this, they created valid and stable measures of opinion in the states (also Erikson, Wright and McIver 1993). This method has been used often to create measures of public opinion in the states (e.g. Brace, Butler, Arceneaux and Johnson 2002; Brace, Arceneaux, Johnson and Ulbig 2004), however it is not without its drawbacks. In order for disaggregation to be possible surveys

must be available for multiple years, as many as ten to twenty-five (Brace et al 2002). While this information is available for some questions of particular interest to state politics scholars, for many questions or for questions that focus on topical policies, or lesser - examined institutions, this data is often not available.

Park, Gelman and Bafumi (2006; see also Gelman and Hill 2007) developed an alternative methodology designed to overcome many of the problems of the disaggregation method discussed above. This multi-level regression and poststratification (MRP) model is a two-stage estimation process. The first stage the process uses multilevel logistic regression. This model consists of individual survey respondents nested within the level-2 units, the states. These states can also be nested in third level units such as regions. The individual survey respondents are modeled as a function of certain demographic and geographic predictors. These predictors are used to create person-types that allow the model to yield predictions about demographic types that occur in the state. In addition, state-level predictors can be used in the model.

Using census data, the poststratification process takes into consideration the entire population of each demographic-geographic person type in each state. For example, if the individual level predictors are race, gender and education, one would need to know the percentage not just of women, African-Americans and individuals with a college degree, but the percentage of African-American women with a college degree in each state (see Lax and Phillips 2009). Using predicted probabilities from the multilevel model, each demographic-geographic type is weighted by the actual population of that type in each state. These weighted predictions are then aggregated over the state to get state level predictors (see Lax and Phillips 2009a; 2009b; and Kestellec, Lax and Phillips 2010). The MRP method has

been shown to outperform disaggregation, by producing estimates that are more robust and accurate. This is especially true for smaller states. In addition, MRP can be used on much smaller sample sizes. A survey of just 1,400 respondents can produce accurate estimates of state level opinion (Lax and Phillips 2009a). As a result, MRP has been used to answer questions where survey data over time is limited. This method has been applied to newly salient questions of gay rights (Lax and Phillips 2009b) and to public opinion about each Supreme Court nominee dating back to Bork (Kastellec, Lax and Phillips 2010).

3.4 Measuring the Institutional Legitimacy of State High Courts

Theory and Measurement of Legitimacy of State High Courts

When developing a measure of institutional legitimacy, one has to be clear about what they are trying to predict. When conceptualizing state high court legitimacy, one is seeking to understand how the citizens feel about the court. I want to measure how much confidence they have in the court, so that if the legislature disagrees with the court's decision or is otherwise considering overturning a court decision, they must be concerned with the reaction of the public. It is this public enforcement mechanism that makes the concept of legitimacy a central one.

As previously discussed measuring diffuse support often turns on the trust and confidence an individual has in the court. This trust is an institutional loyalty. As a result, scholars of the Supreme Court have measured legitimacy not just by asking individuals how much trust and confidence they have in the court, but also about their loyalties to the institutional processes the Court follows. Unfortunately, some past research suggests that only using measures of confidence as indicators of legitimacy is inadequate at best, and

theoretically invalid at worst (Gibson, Caldeira and Spence 2003).⁹ Yet, there is no national survey data that would allow a complete measure of institutional loyalty to be replicated at the state high court level.¹⁰ As Cann and Yates (2008; 321) suggest, one way to overcome validity problems with measures of state high court legitimacy is to show that individuals who may have policy disagreements with their state high courts still respond that they have confidence in the institution. To measure legitimacy then, I rely on two different surveys, one from 2001 and a second from 2009 that both ask about the level of trust and confidence individuals from all fifty states have in their state high court. However, using survey data such as this can pose difficult methodological problems that I will discuss in the next section.

Empirical Measurement of State High Court Legitimacy

In order to develop a measurement of court-level institutional legitimacy, it is necessary to begin with a national survey. Ideally, a measure of legitimacy, as with any measure of public opinion, would be drawn from multiple surveys with large samples and comparable estimates across the states. Unfortunately, this is not available for state court legitimacy. Two surveys have used a national sample to inquire about the individual's beliefs in their state courts. Ideally, these surveys would follow national survey's line of questioning about the Supreme Court as an institution by asking about institutional loyalty, but they do

⁹ Gibson and his colleagues argue "those who analyze the etiology of confidence may mistakenly conclude that court legitimacy is more volatile than it is in fact were a more valid measure of legitimacy available" (357). In other words a measure of confidence is more akin to presidential popularity than a long-term loyalty to a court as an institution.

¹⁰ Surveys that ask about institutional loyalty toward state high courts have been conducted, but only on a limited basis (e.g. Gibson 2008; Gibson et. al 2007.). As the goal of this chapter is to produce a measure that is available and comparable across as many states as possible, these surveys would not be appropriate here.

not. So, despite the warnings of Gibson, Caldeira and Spence (2003) I must rely on simple questions of trust and confidence in a state court.

The first survey was conducted for the Justice at Stake Campaign. It is a national telephone survey of registered voters conducted between October 30 and November 7, 2001. There are 985 observations.¹¹ The exact question wording from the survey is “how much trust and confidence do you have in courts and judges in your state?” Table 3.1 displays the overall results. The second survey was conducted for the National Center for State Courts between February 17 and March 9, 2009.¹² This survey had 1,200 respondents and surveyed a random sample of American adults. The specific question from this survey asks “Please tell me how much confidence you have in each of the following state and local government institutions to do their job. How much confidence do you have in the state courts?” The overall results here are presented in Table 3.2. The questions asked were worded differently and were answered on different scales, however the overall responses to the surveys show some indication of similarity in the results. In each survey around 75% of the respondents have at least some trust or confidence in their state high courts. Although a more empirically sound measure is necessary to draw any conclusions, this would indicate that citizens generally trust state courts. In the 2009 survey, individuals were also asked about their levels of trust in the state legislature and state governor. As many as 66% and 65% of individuals had at least some trust in their state legislature and governor respectively. This gives some indication that state courts are the most trusted of the state institutions, which is

¹¹ See Cann and Yates (2008) for a more detailed description of the survey.

¹² See Appendix A for more information on the surveys.

in line with previous research on the states (Benesh 2006; Kelleher and Wolak 2007) and at the national level (Hibbing and Theiss-Morse 1995).

State Court Systems and Legitimacy of the State High Court

Compounding the problem with the surveys available for measuring state high court legitimacy is that the two surveys described above ask about “state courts” and “courts and judges in your state” and not specifically about the state high court. Yet, the measure I am deriving from these surveys is the legitimacy of the state high court. The difference in individual’s belief in the legitimacy of these courts is mostly tied to experience with the court. Many citizens will have some knowledge about their state high court, yet many will not have personal experience with these high courts. Yet, many citizens will have experience with the state courts referenced in the survey question. Both knowledge and experience allow citizens to see the procedural justice that leads to their belief in the legitimacy of the courts. Using individual characteristics that predict knowledge (education) and experience (age) should account for any differences between survey questions that ask about trust and confidence in state courts and not state high courts.

3.5 Multilevel Regression and Poststratification

Measuring state high court legitimacy by breaking a national survey down into state-by-state results is difficult for many of the reasons that measuring any state public opinion is (see e.g. Erikson, Wright and McIver 1993; Brace, Sims-Butler, Arceneaux and Johnson 2002; Norrandar 2007; Lax and Phillips 2009). The generally accepted way of using nation surveys to get state-level measure of ideology or public opinion is through disaggregation. Wright, Erikson and McIver (1985) first introduce this method when they used national polls and disaggregated the responses to the state level to create measure of state-level

ideology and partisanship. This disaggregation method can create useful measures when done correctly (see e.g. Jones and Norrander 1996); but without very large samples, can be problematic. However, I begin by disaggregating the data available from these two surveys, these results are shown in Table 3.2. This disaggregation creates a state-level legitimacy score that ranges from 1 to 4 for each survey. The graph in Figure 3.1 shows the correlation between the two aggregated measures by state. There is no clear relationship between the two measures and in fact, the correlation between them is low (-0.30). This could be because of change over time in individual's trust and confidence in their state high court, but we cannot conclude this with the survey data aggregated as it is. The problem lies in the sample size available for each state. The number of individuals surveyed in each state ranges from 0 to 107. These small samples for each state cannot produce state-level results that are generalizable to the state as a whole and therefore the measure of legitimacy created by the aggregation method is neither reliable nor valid.

Lax and Phillips (2009a) provide a new way to estimate public opinion by simulating measures from national surveys. This strategy provides a promising possibility for creating national, comparable and reliable measures of the public opinion and has already been used to further our understanding of public opinion on gay rights (Lax and Phillips 2009b) and the Senate confirmation of Supreme Court nominees (Kastellec, Lax and Phillips 2010). The method used is a multilevel regression and poststratification, or MRP (see Gelman and Little 1997; Park, Gelman and Bafumi 2006; Lax and Phillips 2009a). As Lax and Phillips (2009a) show this method not only outperforms the disaggregation methods relied upon before, it also can be used with a single national poll. As described by Kastellec and his coauthors, MRP is a two-stage process. In the first stage, the individual response to the survey question

is modeled as a function of predictors. These predictors are demographic and geographic (2010). In the case of state court legitimacy, the individual level predictors include gender, age, race, and education level.¹³ In lieu of having measures of individual experience, I argue that age is an appropriate approximation, where older citizens should be much more likely to view the court as legitimate because they are more likely to have had “low stakes” experience with their state court system. In addition, education is used as a substitute for specific knowledge about state court systems. These are all characteristics of an individual known to affect how they view the legitimacy of each state high court as described above. The state-level predictor I use is court ideological distance (Brace, Langer and Hall 2000 PAJID scores) from public opinion (Berry et al 1997).

The MRP method calls for a multi-level logistic regression model. The survey questions I rely on are divided into four categories. Because MRP has not been extended to the multi-level multinomial regression context, I was forced to collapse the categories for each of the surveys. I collapsed the first two and the last two categories in each survey. In the 2001 survey a (1) corresponds to having some or a great deal of confidence whereas a (0) corresponds to having just a little or nothing at all in terms of confidence. For the 2009 survey the (1) category includes responses of a lot or some confidence and the (0) category includes responses not too much and no confidence at all. Unfortunately because of the way the questions were asked in each survey, the outcome categories cannot be considered equivalent. As a result, I cannot combine the surveys. This can prove problematic because

¹³ I use education level instead of specifically court knowledge. I will use both as predictors, but due to their high levels of correlation, I do not expect this would change the outcomes of the models.

the additional number of observations from combining the surveys could have provided more empirical leverage for the model.

In many previous uses of the MRP methodology, there was a level-3 predictor, region. In this model, I replace region with method of selection. This allows predictions from individuals nested in states nested in the same methods of selection to use information from other states with the same method of selection in the predicted probabilities derived from the model. Regions are used as hierarchical groups because states near each other tend to have similar characteristics in terms of demographics. Since we know that method of selection can have an important effect on how individuals view their state court, I argue that states are nested within methods of selection, which are far more theoretically important to state high court legitimacy than the regions they are geographically nested in.¹⁴

The second stage of the MRP process is poststratification. In this stage, coefficients from the first stage are used to calculate predicted probabilities of nominee support for each demographic-geographic (method of selection) type. Using data from the 2000 United States Census, the prediction of each ‘type’ of person is weighted by their actual frequency in the Census (see Kestellec, Lax and Phillips 2010). These predictions are aggregated for each state to create a measure of predicted confidence in the court. In doing this I predict a model with confidence as the (1) in the dichotomous outcome. The MRP results for each survey are shown in Table 3.3.

¹⁴ The regions of method of selection are as follows: Partisan Elections: AL, IL, LA, NC, OH, PA, TX, WV; Non-Partisan Elections: AR, GA, ID, KY, MI, MN, MS, MT, NV, ND, OR, WA, WI; Merit Selection (with retention elections): AK, AZ, CA, CO, FL, IN, IA, KS, MD, MO, NE, NM, OK, SD, TN, UT, WY; Gubernatorial or Legislative Selection (no elections): CT, DE, HI, MA, ME, NH, NJ, NY, RI, VT, VA, SC.

3.6 Descriptive Statistics and Validity of the Measure

The results of the MRP of the legitimacy measures are presented in Table 3.3. The first column of data includes the legitimacy scores for each state in 2001. The second column includes the legitimacy scores for 2009. The first thing to notice about the data is the variance of the measure is rather small. This is likely because of the small sample sizes from each of the surveys. Even though MRP can make up for small sample sizes because the surveys could not be combined, the sample size may still be too small to get very accurate or robust estimates.¹⁵

Moving beyond the problems with sample size, the measures of legitimacy presented provide two main conclusions: (1) state high court legitimacy is very high; (2) state high court legitimacy is somewhat stable over time. Table 3.3 shows, at the aggregate, a high percentage of citizens have at least some confidence in their state high court. This is reflected in the two measures generated from the MRP procedure. The measures presented in Table 3.4 are on a 0 to 1 scale. The mean levels of legitimacy are 0.6817 for 2001 and 0.6906 for 2009. These scores correspond to the predicted percentage of individuals in each state who have some, a great deal or a lot of confidence in their state courts. In other words state high courts are institutions with very high legitimacy. Although this might be in conflict with conventional wisdom, previous research has found that national high courts enjoy high levels of legitimacy. While the results in Table 3.3 are not exactly what I expected, they are in

¹⁵ Clearly, the problem of small sample size is an important one. However, there are no other national surveys that ask about state high court legitimacy. In addition because no two surveys ask the exact same question about state high court legitimacy, there is no way to gain additional sample size leverage without conducting another survey.

line with much of what we know about legitimacy on the Supreme Court (Gibson, Caldeira and Spence 2003a, 2003b; Mondak and Smithey 1997).

Interestingly, although the legitimacy decreases between 2001 and 2009, the change is not a significant one. In fact the median change in the legitimacy score is 0.024. All but two of the states decreased in legitimacy between 2001 and 2009, and I give some possible reasons for this across the states decrease below. Yet, the difference in means between the two years is statistically significant ($p < 0.00$). This suggests that changes over time are significant and that views of a state high court can vary from year to year, if only slightly. That being said, the levels of legitimacy are high even after the decrease. Therefore, if state high courts do not actively hurt their own legitimacy, they should be able to enjoy these high levels consistently.

MRP, Group Means and the Variance of the Legitimacy Scores

The MRP process includes a three level model where individuals are nested within states that are nested within groups based on the method of selection of the justices. There are many states that have very few respondents, as little as one respondent in some cases (see Table 3.2 for state level n). The way the multilevel modeling works is that these states with few respondents gain information from the mean of the group of states with the same method of selection. For example, there were only 4 and 2 respondents from Rhode Island in 2001 and 2009 respectively. Because you cannot gain very much information from this small sample, the score from Rhode Island will be pulled toward the mean of all states with the same appointment selection system. The legitimacy score for Rhode Island is therefore essentially the group mean for all states with appointed state high courts.

Because the measures of legitimacy for states with a small number of respondents are drawn close to the group mean, then the variance in the legitimacy scores among the states will necessarily be small. This artifact of the model helps to explain the small variance in the scores. While the variance is small and the scores for some states are represented by the group mean, this measure of institutional legitimacy is a vast improvement over the alternatives. Disaggregation methods would take information from only the 2 and 4 respondents in Rhode Island. But, since the score for Rhode Island in the MRP modeling is based on actual individual responses to survey questions from individuals in states with similar institutional situations, this score is a vast improvement over the alternative.

Face Validity

One way to examine the validity of this measure is to check it against the support for other the other state institutions. Courts should enjoy higher levels of legitimacy than state legislatures, but the legitimacy of courts should be less varied across the states. Citizens views of the legislature should vary with policy outcomes and is not stabilized by democratic symbols, in other words the state legislature is always a political institution for citizens. Table 3.3 includes a measure of confidence in the state legislature. This measure includes much higher variance among the states. The standard deviation of these scores is four times that of the court legitimacy measure.

Face Validity and Elections

If *Bush v. Gore* was a legitimacy crisis for the Supreme Court, and the Supreme Court recovered with very little negative effect (Yates and Whitford 2002; Gibson, Caldeira and Spence 2003). Gibson and Caldeira (2009) examine the role of the Alito confirmation and the effect some of the most controversial ads of the campaign had on the citizen's view of

the legitimacy of the Supreme Court. While they do find that those individuals exposed to these ads had a lower view of the legitimacy of the court, they also find that these confirmation battles ‘wake people up’ to the courts. Similarly, research has also shown that election battles for seats on the state high court bench do not negatively affect individual’s views unless the individuals recognize contributions from individuals who will later have business in front of the state high court (Gibson 2007). It is possible that the variance expected between elected courts and courts that have appointed justices is made up by individuals in elected states being ‘waken up’ to large amounts of information about courts during these elections thereby increasing their knowledge of and support for their court. In addition, the survey from 2009 was taken just weeks after the Supreme Court heard the *Caperton v. Massey*¹⁶ oral arguments. This case centered on campaign contributions to state high court candidates from large corporations who would then be in court with this candidate on the bench. While the levels of change between the two years was not very high, the fact that almost all of the state high courts lost legitimacy could be related to the Supreme Court docket at the time of the 2009 survey.

In addition all of the states that have partisan elections lost legitimacy. If the states are ranked from highest to lowest in legitimacy all of those states with partisan elections (Alabama, Illinois, Louisiana, Michigan, Ohio, Pennsylvania, Texas and West Virginia) fell in the state rankings an average of nine places. This proves interesting given that the rise in spending and campaigning in state high court elections happened mostly between 2001 and 2004. This increase was rapid and well documented (Bonneau and Hall 2009). So, while

¹⁶ 556 U.S. ____ 2009

there is no large difference in each given year between the legitimacy of the states with elections and those without, there is some indication in the data that elections could be decreasing the legitimacy of state high courts.

Conclusion

In this chapter I address the lack of an adequate measure of state high court legitimacy. Legitimacy is essential for a political institution to be an effective partner in government in separation of powers systems. As courts in separation of powers systems are said to have neither the power of the purse nor the power of the sword, their institutional legitimacy is essential for ensuring compliance with their decisions. While institutional legitimacy has been examined in-depth for national high courts, the legitimacy of sub-national courts has been overlooked.

Using a newly developed statistical tool, multilevel regression and poststratification I am able to use national surveys with a limited number of respondents to create statistically robust and nationally comparable measures of institutional legitimacy. Although the measures presented in this chapter would be significantly improved with more observations from survey respondents, the measures created can begin to tell us much about the diffuse support for state high courts. Using the surveys from 2001 and 2009 the measures of legitimacy of state high courts are consistently high. People have high levels of diffuse support for their state high court. In addition, while the levels of legitimacy decrease over time, individuals remain highly supportive of their state courts.

Conventional wisdom suggests that elections for seats on the state high court bench will hurt the legitimacy of those state high courts. The elections would allow citizens to view these courts as political institutions, thereby calling into question the fairness of the judicial

process. While I find little variance across the states between elected and non-elected state high courts, I find some variance over time for those state high courts that have partisan elections. The legitimacy of these state high courts decreased between 2001 and 2009 which, incidentally is the same time period in which these elections increases significantly in their political tones. While these changes are not enough to make any strong conclusions they fit well with prior research on both state high courts (Bonneau and Hall 2009) and on the Supreme Court (Gibson and Caldeira 2009).

In creating this measure of state high court legitimacy, the ultimate goal was to determine what, if any affect legitimacy had on the decision-making of state high courts. In the next chapter I begin to address the theory developed in Chapter 2. In doing so, I use the measure created here to test the hypothesis that legitimacy affects the decision of state high courts to consider constitutional issues in cases that come before them. I also test the hypothesis that lower levels of legitimacy force the court to delegate more often, whereas higher levels of court legitimacy allow state high courts to be able to implement their preferences. Given that legitimacy is an important source of court power, examining empirically this causal effect is an important task. I take this up in the next chapter.

Appendix 3A:

Table 3.1a: Trust and Confidence from 2001 Survey

	A great deal	Some	Just a little	Nothing at all
How much trust and confidence do you have in courts and judges in your state? <i>(985 total respondents)</i>	25% (248)	53% (524)	16% (160)	5% (53)

Table 3.1b: Confidence from 2009 Survey

	A lot of confidence	Some confidence	Not too much	No confidence at all	Don't know/Refused
How much confidence do you have in the state courts? <i>(1,200 total respondents)</i>	21% (254)	54% (656)	13% (153)	8% (90)	4% (47)

Table 3.2: Aggregation Method of Legitimacy Measures from Surveys in 2001, 2009

State	Legitimacy	Sample Size	Legitimacy	Sample Size	Change
Alabama	2.909	22	2.5769	26	0.3321
Alaska	2.4	5		0	
Arizona	2.46	13	2.7222	18	-0.2622
Arkansas	2.9	10	3.235	17	-0.335
California	2.7857	84	2.8785	107	-0.0928
Colorado	3.14285	14	2.85	20	0.29285
Connecticut	3.0833	12	2.75	20	0.3333
Delaware	3.5	4	3.667	6	-0.167
Florida	3.04255	47	2.918	61	0.12455
Georgia	3.125	16	3.055	36	0.07
Hawaii	3.5	2	3	1	0.5
Idaho	3	3	4	1	-1
Illinois	2.975	40	2.8181	44	0.1569
Indiana	3.1818	33	2.884	26	0.2978
Iowa	3.36363	11	3.41667	12	-0.05304
Kansas	2.9166	12	3.125	16	-0.2084
Kentucky	2.9565	23	2.7647	16	0.1918
Louisiana	3	17	2.176	17	0.824
Maine	2.8333	12	3.214	14	-0.3807
Maryland	2.923	12	3.2272	22	-0.3042
Massachusetts	3	18	2.708	22	0.292
Michigan	3.05	38	2.978	27	0.072
Minnesota	3.167	18	3	22	0.167
Mississippi	3.18181	11	3	16	0.18181
Missouri	3	22	3.108	37	-0.108
Montana	2.857	7	4	2	-1.143
Nebraska	2.8	10	3.8333	6	-1.0333
Nevada	3	6	2.9	10	0.1
New Hampshire	2.75	4	3.1111	9	-0.3611
New Jersey	3.03225	31	2.7619	21	0.27035
New Mexico	3	3	2.375	8	0.625
New York	2.898	59	2.8	55	0.098
North Carolina	2.9069	43	3.08	36	-0.1731
North Dakota	2.667	3		0	
Ohio	3.189	37	2.91667	48	0.27233
Oklahoma	2.697	13	2.8667	15	-0.1697
Oregon	2.8125	16	2.888	16	-0.0755
Pennsylvania	2.94117	51	3.03636	55	-0.09519
Rhode Island	2.25	4	3	2	-0.75
South Carolina	3.111	9	2.9375	16	0.1735
South Dakota	3.25	4	3.667	3	-0.417
Tennessee	2.9444	18	2.7667	30	0.1777
Texas	3.04477	67	2.9718	71	0.07297
Utah	2.7	10	3	13	-0.3
Vermont	3	3	3	2	0
Virginia	3.1923	26	3.25	32	-0.0577
Washington	3.125	24	2.7407	27	0.3843
West Virginia	2.5556	9	2.8421	19	-0.2865
Wisconsin	3.269	26	2.931	29	0.338
Wyoming	3	2		0	

Figure 3.1: Correlation between Disaggregated Legitimacy Measures

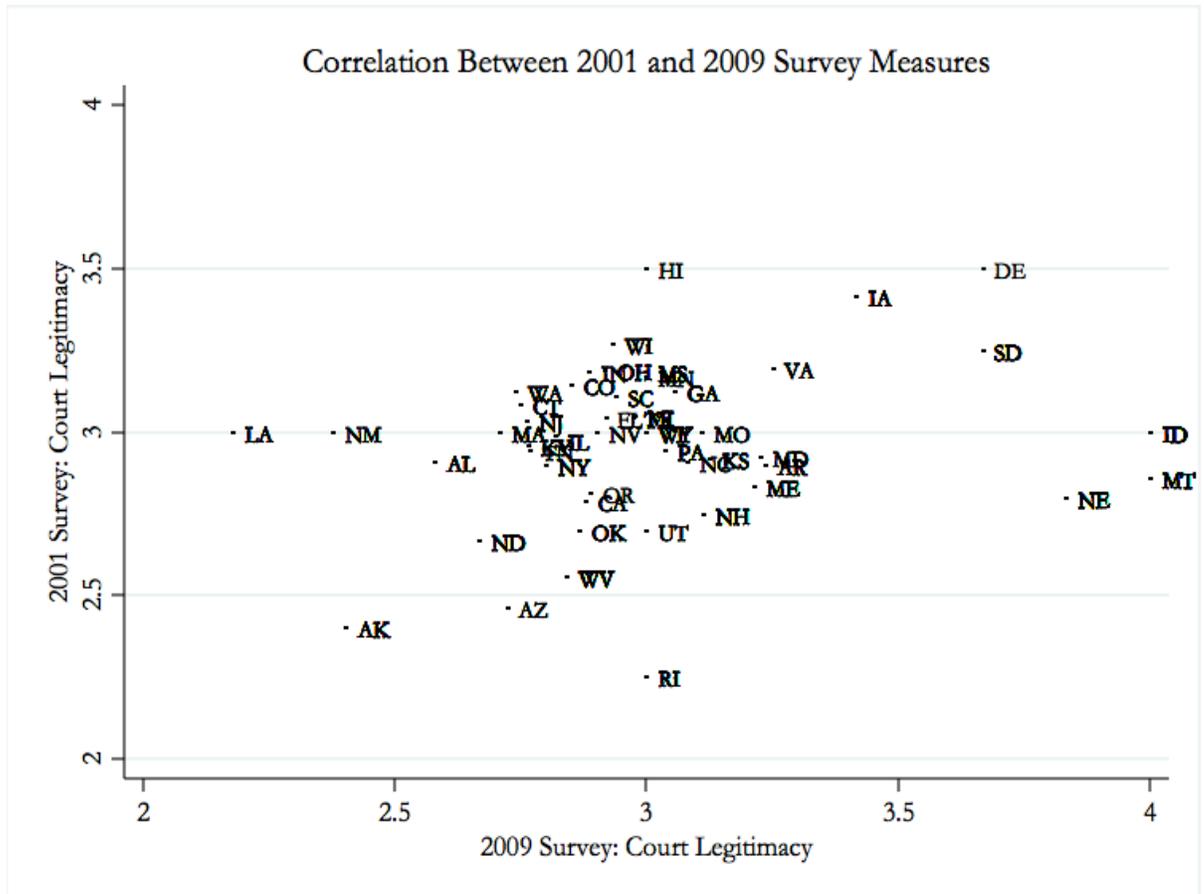


Table 3.3 MRP Legitimacy Results

State	Legitimacy 2001	Legitimacy 2009	Difference	Legislature
Alabama	0.6767	0.6807	-0.0040	0.5282
Alaska	0.6835	-	-	-
Arizona	0.6871	0.6880	-0.0009	0.5366
Arkansas	0.6816	0.6956	-0.0140	0.5212
California	0.6829	0.6886	-0.0057	0.5121
Colorado	0.6757	0.6899	-0.0142	0.5231
Connecticut	0.6834	0.6868	-0.0035	0.5308
Delaware	0.6840	0.6920	-0.0080	0.5404
Florida	0.6825	0.6885	-0.0060	0.5420
Georgia	0.6772	0.6889	-0.0117	0.5611
Hawaii	0.6816	0.6925	-0.0109	0.5267
Idaho	0.6765	0.6956	-0.0190	0.5519
Illinois	0.6825	0.6809	0.0016	0.5277
Indiana	0.6827	0.6912	-0.0085	0.5438
Iowa	0.6796	0.6972	-0.0176	0.5564
Kansas	0.6836	0.6953	-0.0116	0.5579
Kentucky	0.6819	0.6906	-0.0088	0.5369
Louisiana	0.6780	0.6768	0.0012	0.5265
Maine	0.6832	0.6939	-0.0108	0.5080
Maryland	0.6833	0.6945	-0.0112	0.5447
Massachusetts	0.6812	0.6876	-0.0064	0.5384
Michigan	0.6845	0.6895	-0.0051	0.5376
Minnesota	0.6810	0.6974	-0.0164	0.5289
Mississippi	0.6708	0.6899	-0.0191	0.5523
Missouri	0.6822	0.6901	-0.0079	0.5431
Montana	0.6960	0.6966	-0.0006	0.5283
Nebraska	0.6856	0.6943	-0.0087	0.5448
Nevada	0.6818	0.6941	-0.0123	0.5512
New Hampshire	0.6874	0.6944	-0.0070	0.5461
New Jersey	0.6737	0.6862	-0.0125	0.5231
New Mexico	0.6694	0.6840	-0.0145	0.5274
New York	0.6823	0.6867	-0.0044	0.5206
North Carolina	0.6686	0.6897	-0.0211	0.5253
North Dakota	0.6848	-	-	-
Ohio	0.6862	0.6931	-0.0069	0.5512
Oklahoma	0.6829	0.6919	-0.0090	0.5464
Oregon	0.6808	0.6948	-0.0140	0.5124
Pennsylvania	0.6852	0.6911	-0.0059	0.5395
Rhode Island	0.6846	0.6931	-0.0085	0.5362
South Carolina	0.6793	0.6877	-0.0084	0.5463
South Dakota	0.6861	0.6945	-0.0084	0.5421
Tennessee	0.6827	0.6812	0.0014	0.5361
Texas	0.6831	0.6892	-0.0062	0.5563
Utah	0.6867	0.6941	-0.0074	0.5374
Vermont	0.6776	0.6938	-0.0162	0.5537
Virginia	0.6826	0.6888	-0.0063	0.5349
Washington	0.6870	0.6948	-0.0078	0.5271
West Virginia	0.6815	0.6923	-0.0108	0.5428
Wisconsin	0.6853	0.6885	-0.0032	0.5506
Wyoming	0.6815	-	-	-
Observations	985	1149	Mean -0.0089	1157
Standard Deviation	0.0048	0.0046	Correlation 0.4213	0.044613

CHAPTER 4: LEGITIMACY, JUDICIAL REVIEW AND DELEGATION: WHO CONTROLS POLICY IN THE STATES

Introduction

When deciding the constitutional fate of statutes, state high courts can dictate new public policy, or they can delegate policy-making power back to the other branches of the state government. These decisions are driven by a court's need to balance the desire to implement their policy preferences with the need to maintain the legitimacy of their institution. This idea of balancing preference-driven goals with legitimacy needs is similar to that introduced by Staton and Vanberg (2008) who argued that the tension among goals creates incentives for justices to delegate through vague opinions in order to both “deal with their limited policymaking abilities in an uncertain world” as well as “build and maintain institutional prestige in the face of potential opposition” (2008; 505).

With these goals in mind, I developed a two-stage theory of judicial review and delegation in Chapter 2. In the first stage the court makes a decision on whether or not to consider the constitutionality of a statute. In the second stage the court chooses from six possible outcomes that allow the court to either uphold or overturn the statute and to delegate policy control back to the other branches of government, make their own policy or not delegate. I begin this chapter with examples of the six possible outcomes of review and delegation introduced in Chapter 2.

In 2002 as part of an ongoing case challenging the constitutionality of the Arkansas' education funding system, the Arkansas Supreme Court again deemed the system unconstitutional. In doing so, the court did not change the funding system, or even give specific rules for how a new system should be implemented as they would if they were intent

on making new policy or imposing their own personal preferences. The court delegated the power to create a new funding system back to the state legislature. Justice Brown stated in the opinion “we are strongly of the belief that the General Assembly ... should have time to correct this constitutional disability in public school funding and time to chart a new course for the public education in this state” (*Lake View School Dist. No. 25 v. Huckabee*¹⁷).

A state high court can also overturn a statute on constitutional grounds but make no determination on who controls the final policy outcome. One example of this is the 1999 Vermont Supreme Court case, *Chittenden Town School District v. Department of Education*¹⁸. In this case the town in question does not maintain a high school for its students. The local government pays tuition for its residents to attend other local high schools. The court found that the local government’s paying of this tuition to local parochial schools violated the state constitution and the court overturned the statute that allowed this practice. However, the opinion ended with the explanation of the violation but made no determination on further policy control. This example is distinct from the cases where the court overturns the statute on constitutional grounds but then specifically makes a new policy in their opinion. In Colorado, the state high court heard a case seeking to determine the constitutionality of drug testing of students participating in extracurricular activities. In the case, *Trinidad School District No. 1 v. Lopez*¹⁹, the Colorado Supreme Court determined the testing policy was unconstitutionally vague. However, instead of ending the case there or asking the legislature to change the policy, the court determined which students participating in these activities

¹⁷ 91 S.W.3d 472 (2002)

¹⁸ 738 A.2d 539 (1999)

¹⁹ 963 P.2d 1095 (1998)

would have to submit to a drug test and which students were not. Members of school marching bands, the court determined, have a higher expectation of privacy than student athletes. The state high court made the decision that the policy would not be applied to all students equally, thereby making public policy beyond the ramifications of declaring the statute unconstitutional.

Similar outcomes are possible even if the court upholds the statute in question on constitutional grounds. In this case, the court can still delegate as they do in the Ohio example, however, they do so having first determined the statute in question is constitutional. In a South Carolina case, the state high court considered the constitutionality of a statute that granted counties authorization to distribute fees to local school districts in lieu of property tax revenue from local businesses. In *Horry County School District v. Horry County*²⁰, the court argues that although the statute is constitutional, the law has inherent problems, ones that the legislature should address and fix. In other words, while the court finds that the statute is constitutional, they delegate policy control back to the legislature to address the problems inherent in the statute. In contrast, the court can make new policy even after finding that a statute does not violate the constitution. For example in the Main Supreme Judicial Court case *Anderson v. Town of Durham*²¹, this court also takes up the issue of public funding for parochial school tuition. However, the court in Maine finds the statute as written constitutionally valid. Yet, while arguing that the specific statute is valid, the court brings up a new issue not discussed in the specific case regarding the curriculum at these religious schools. The court argues that if these religious schools do not adhere to state

²⁰ 552 S.E.2d 737 (2001)

²¹ 895 A.2d 944 (2005)

curriculum standards, then using public money for tuition at these schools is unconstitutional. This case is an example of upholding the constitutionality of a statute, but also making new policy. The final possible outcome is upholding and no delegation or determination of new policy. Clearly, in these cases, the court considers the constitutionality of a statute and simply finds no violation of the constitution. The case ends there.

With these examples in mind I test my theory of judicial review and delegation in this chapter. I begin with a brief review of the literatures on judicial review, delegation and court legitimacy. Next, I restate the theory presented in Chapter 2. Following this, I describe in detail the cases and data I will use to test this theory. Finally, I present and discuss the results and conclusions from the empirical model.

4.1 Courts and Delegation

Given that state high courts make strategic decisions on judicial review to see their preferences become law and to avoid being overturned, the idea that courts would willingly give policy-making power back to the legislature is in direct contrast with the assumptions of previous decision-making models (e.g. Langer 2003). However, Staton and Vanberg (2008) provide a new motivation when they argue that vague decisions are an implicit way of delegating policy control to the other branches of government. Central to their model is judicial concern for compliance and maintaining institutional legitimacy. I extend this argument to state high courts. I argue that state high courts explicitly delegate control over the final policy outcome in their opinions to avoid noncompliance, especially when their institutional legitimacy is low. I also argue that this delegation is part of a more complex decision, where state high courts decide to overturn (or overturn in part or uphold) a statute

based on constitutional grounds and concurrently decide whether to delegate policy control back to the state government (or make new policy or not delegate control at all).

Models of delegation rest on the basic argument that a principal will delegate to an agent when the benefits outweigh the costs. In the delegation story I propose, the state high court is the principal, and the other branches of state government are the agents. For courts, the costs and benefits are determined concurrently both by having the justices' preferences become law and by having their opinions complied with by the other branches of government. I argue that state high courts have the opportunity to delegate after they engage in judicial review of a statute. If the state high court decides on the constitutionality of the law, then either they overturn or uphold the statute. In doing so, the court may create a void in policy or return policy to the status quo determined by the legislature. In either case (but especially the first) additional policy can be made. Concurrent with the decision to overturn (uphold), the court can implement their preferences; delegate policy control back to the state government; or not delegate and make no determination on new policy.

4.2 Theory

As previously stated, state high courts must balance two main goals: translating their policy preferences into law and maintaining the legitimacy of their institution.²² In the second chapter, I proposed a two-stage model of judicial review that allows state high courts to balance both these goals. In the first stage, the courts decide whether or not to decide on the constitutionality of a statute. Courts might avoid deciding on the constitutionality of a

²² Clearly for individual justices on state high courts, maintaining their seats on the bench is another central goal. However this goal is not a motivating factor for the courts in this institutional model; but I address how the method of selection affects the decision making by the court in the aggregate later in this chapter.

statute when they face a legislature that has differing policy preferences or that can more easily override a constitutional decision of the court.

In the second stage, if the court has decided to rule on the constitutionality of a statute, they decide to overturn or uphold the statute, while also deciding to control the policy, delegate policy control back to the state government or not to delegate at all. A summary of both the stage 1 and stage 2 options available to the state court is shown in Table 4.1. This decision is determined by the political differences between the court and the state government as well as by the level of institutional legitimacy the court enjoys. The institutional rules that affect the interaction between the state court and other branches of government temper the parameters of this decision. The level of political difference is directly related to the justice's goal of having their policy preferences become law. The level of institutional legitimacy determines the ability of the court to have their preferences implemented. When a court enjoys higher legitimacy, they are more likely to have the other branches of government comply with their decisions. Lower levels of legitimacy are unlikely to enjoy compliance (except when the state government shares policy goals).

State high courts will delegate to the other branches of government when the benefits of delegating outweigh the costs. When the court and the state government have similar policy preferences, the court should almost always decide to uphold the constitutionality of a statute. As these preferences diverge, the court should be more likely to find the government's statutes unconstitutional. When the court's institutional legitimacy is higher, they are likely to enjoy compliance with their decisions by the other branches of government. Under conditions of higher institutional legitimacy, the benefits of delegation will almost never outweigh the costs. In this case, the court should receive compliance and

will not be forced to give policy control back to the legislature to enjoy this compliance. The conditions of higher legitimacy should allow the court to implement its own policy preferences, thereby controlling the final policy outcome. When institutional legitimacy is lower, the court will be more likely to delegate policy control back to the state government. This is especially true if the court deems a statute unconstitutional. When this happens, the costs include likely noncompliance. As stated, noncompliance is highly costly to state high courts. Therefore, if the court overturns a statute, but has low institutional legitimacy, they should be likely to delegate the control of the policy back to the state government.

When the levels of legitimacy and political differences are near their median, as they will be in the majority of cases, the court faces a less clear decision regarding judicial review and delegation. In these cases, I argue that the court will either uphold or overturn (based on their preferences) but will not delegate policy control back to the state government. Although noncompliance is highly costly, I expect delegation to be somewhat rare. Delegation is a face-saving move, a last resort for the courts. If the court delegates too often, they may exacerbate their compliance problems. In this case, the government could come to expect delegation and be less likely to comply with decisions that do not give them any policy control. Therefore, in the cases near the median, I expect the court to decide based on policy preferences. The resulting policy will be determined by the court's decision.

4.3 Alternative Explanations and Hypotheses

In following theories of legislative delegation, I also argue that courts will delegate when their informational capacities are limited and when the informational capacities of the government are high. By capacity I am referring to the ability of the other branches of government to pass laws and otherwise comply with the decisions of the court. The ability

of the other branches of government to pass laws is largely dependent on the professionalism of the state legislature. Courts are limited in information when they have a high workload and no ability to choose their cases. Further, the benefits of delegating increase when the capacity of the legislature increases. In other words, when the court has a professional legislature as a counterpart, they will be more likely to delegate, *ceteris paribus*. Similarly, other institutional designs should affect the court's decision to delegate. When the state government is divided, or when the ability of the legislature to pass a constitutional amendment is limited, the court will find itself in a position of institutional protection. In this case, it will be much more difficult for the state government to act as a result of the court's decision and the court will be able to see their decision become the final policy. The method of selection and retention of state high courts provides an interesting set of circumstances for this theory of judicial review and delegation. The method of selection is related to the costs and benefits of delegation outlined above. I expect that the courts retained by other state government institutions should be more likely to delegate to these institutions.

4.4 Case Selection and Data

Case Selection

Theories of legitimacy rest on the assumption of transparency. The court is relying on the public to be aware of the legislature's failure to comply. In order for this public protection mechanism to work, the public must be aware of the court decision and the legislative noncompliance. This will only be possible in salient issue areas. At the very least there must be an active policy elite that will monitor court decisions and activate in support of the court when noncompliance occurs (Vanberg 2005; 21). The ability of the policy elite

to effectively monitor only needs to reach a level just high enough to shift the calculations of state legislators at the margins. This becomes especially true as the complexity of the issue increases. For relatively simple issues it is not difficult for policy elite to communicate the lack of compliance to the general public. As the issue gets more complex, it becomes more difficult for the elite to communicate this noncompliance to the public becomes more difficult.

I examine education cases for several reasons related to transparency. First, education is salient to all influential actors at the state level. Education law is important to the public and the state government (Wilhelm 2007). Using a policy area that is salient to the public is important because the state government will be concerned with the policy outcomes and there will be elites to communicate noncompliance to the public. However, when this is true, the state high court is most likely to exhibit strategic behavior in relation to the other branches of government. The theory presented is not likely to apply in policy areas with low saliency, especially in policy areas that the state government is less interested in (i.e. welfare). As shown, in these cases we should expect state high court justices to vote almost solely on their policy preferences (Langer 2002). I expect this theory to hold across multiple policy areas, and perform differently across areas depending on their level of saliency.

Coding Rules

To test the theory proposed, I examine a random sample of all education cases decided on by state high courts from 1995-2005. The cases were determined by using a Westlaw search for all education cases during this ten-year period. In order to determine the stage one and stage two outcome, the opinion for each case had to be read individually. The

case was first read to determine if the court was considering the constitutionality of a statute, the stage one decision. If the court did consider the constitutionality of a statute, the opinion was used to determine if the court overturned or upheld this statute. The written opinion makes very clear whether and how much of a statute was to be deemed constitutional or unconstitutional.

Next, the decision on the delegation of policy control had to be coded. While this step was more difficult and subjective, the courts often used phrases such as “this is the duty of the General Assembly” or “this will be conducted/overseen/completed by the Department of Education” when delegating control to other branches of government. If the court is making their own policy, the coding rule is to look for explicit determinations of policy outcomes.²³ A court making policy is distinct from the policy change determined by a statute being deemed unconstitutional. Examples of making their own policy would be statements such as: “the level of taxation can be no higher than...”; “school vouchers can only be used for...”; “school funding cannot be determined by property taxes...”; etc. In these cases, the court was making policy that was separate from any policy determination made by judicial review. In other words, a court stating that using state funds to bus children to parochial schools is unconstitutional is overturning a statute on constitutional grounds. Expanding on policy outcomes beyond the specific parts of the statute that were determined to be unconstitutional, such as in the Maine Supreme Judicial case described

²³ If the coder was unsure, they were instructed to code no delegation, the most common outcome and the most conservative use of court power. The complete codebook including the Westlaw search code is included in Appendix C included at the end of this dissertation. Inter-coder reliability scores are available in Appendix D.

above, was coded as the court making its own policy. In the case of making policy, the court is moving beyond judicial review and expanding their policy control.

In addition to the review and delegation, each case also included coding for the type of petitioner and respondent; if the government was a party to the case; if there were any amicus briefs included; the justice-level decisions and opinion writers; the actual decision; whether or not the decision was unanimous; if the case considered an action or a law; the general and specific policy areas of the case and if the decision of an executive branch agency was overturned. For each case, the majority, concurring and dissenting opinion coalitions were determined. Each opinion coalition was given an ideological score equal to the median ideology of the justices in that coalition. In total 1,006 cases across the fifty states from the ten-year period were coded. The level of analysis is the individual case.

Dependent Variables

The proposed theory describes a two-step process of judicial review and delegation. In the first stage, the court decides whether or not to decide on the constitutionality of a statute. This reflects a level of selection in the process. Not modeling this stage would result in selection bias as the decision to determine the constitutionality of a law is not random. Therefore, the dependent variable in stage 1 is a dichotomous indicator (0) the court does not decide on the constitutionality of a statute and (1) the court decides on the constitutionality of a statute.

The second stage of the process is the decision on review and delegation. As stated, this decision is simultaneous. The court has two options for review: overturn or uphold. The court has three options for delegation: make a new policy; delegate to the state government; or do not delegate. As a result, the court has six possible outcomes available to

them. These six outcomes are listed in Table 4.1. Table 4.2 includes descriptive statistics of all possible outcomes for the dependent variable.

In order to most clearly test the implications of the theory proposed and compare across categories, I collapse the outcomes listed in Table 4.1 into four categories and use a baseline category logistic regression model.²⁴ These categories are: uphold and no delegation (the baseline category); overturn and no delegation; uphold and delegate to the state government and overturn and delegate to the state government. Collapsing the categories is consistent with the theory presented. The four categories allow for distinctions between the choices of overturning and upholding as well as delegation and no delegation and the categories are consistent with the expectations from the theory. Further, while using all six possible outcomes would allow for more nuance in the results, this is not possible for a categorical logistic model with the small n available.²⁵

Independent Variables

Political Differences: I use the PAJID ideology scores to measure the preferences of the justices on each of the state high courts (Brace, Langer and Hall 2000). I use indicators of both the median ideology of the court, as well as the median ideology of the majority coalition. To measure the ideology of the state government I apply the Berry et al (1998) government ideology scores. The PAJID and Berry et al. ideology scores are on the same

²⁴ In addition I test each of the six outcomes in six separate logistic regression models. These results are presented in Appendix 4D. The conclusions I make are not significantly different when testing each outcome separately.

²⁵ It is possible that the dependent variable is ordinal, however, the exact rankings of the middle outcomes may not be obvious. I have included an ordinal model with the collapsed responses as the dependent variable in Appendix 4C, to ensure any results are not an artifact of modeling strategy.

metric, making them easily comparable.²⁶ Therefore to measure political differences between the branches and between the state government and the majority coalition, one just subtracts and takes the absolute value, to obtain a non-directional difference.

Legitimacy: Measuring state high court legitimacy is difficult for many of the reasons that measuring any state public opinion is (see e.g. Erikson, Wright and McIver 1993; Brace, Sims-Butler, Arceneaux and Johnson 2002; Norrander 2007; Lax and Phillips 2009). In the previous chapter I addressed the theoretical and methodological problems that must be overcome to create a reliable cross-state measure of state high court legitimacy. Using a multilevel regression and poststratification approach (Park, Gelman and Bafumi 2006; Lax and Phillips 2009), I developed a measure of state high court legitimacy for each state for the year 2001. Information on how the measure was derived and the surveys used to create the measure is included in the previous chapter.

Information and Institutional Rules: The second part of the delegation story is based on the informational capacities of the branches. For courts, when this capacity is limited, they should be more likely to delegate, all else being equal. I measure the court's capacity through whether they have a mandatory or discretionary docket. The docket type is a dichotomous indicator of whether there is any discretionary docket in the state.²⁷ When a state high court has a mandatory docket, the justices have more cases and less time to devote to each

²⁶ The Berry et al scores are particularly apt here, because here I want to consider state government, including the executive and legislative branches, and the Berry scores include both. I expect there to be different motivations for the court to delegate to one branch over another. Since I do not consider that choice here, a measure that combines the ideology of the branches will be appropriate.

²⁷ Caseload and docket type can be found in the *Book of the States*. Some states have a mostly mandatory docket, where death penalty appeals are mandatory. These states are coded as discretionary.

opinion. With less time to devote to each opinion, justices have less time to craft a decision that makes policy and may be more likely to give the policy-making control back to the institutions better equipped to determine the specifics. This also becomes more likely when the court serves with a professional legislative counterpart. These professional legislatures have a higher capacity to make policy (e.g. Squire 1992). In some states, however, institutional rules may limit this capacity. When it is more difficult for the legislature to pass a constitutional amendment, the court should be less likely to delegate. In this case, the court has less fear of being overturned, the most obvious form of noncompliance.

Finally, the method of selection and retention of state high court justices has long been known to affect their decision-making. In this analysis I am most interested in the method by which the justices retain their seats on the bench. Courts with justices who are retained through reappointment by members of the other branches of government should be more likely to delegate policy control to those branches.

Political Context: Political context should alter the justices' decisions on delegation. When the legislative and executive branches are divided (when the same party does not control both houses and the governorship) it is more difficult for the court to be overturned. This political context should lead to less delegation and the court is protected by the political diversity of the other branches. However, within the court, when the justices in the majority are ideologically diverse, they should be more likely to delegate because their own policy-making capacity is decreased by their disagreement. The opinion coalition ideological diversity is a measure of the standard deviation of the PAJID ideology scores for each opinion coalition for each case.

Descriptive Statistics

Before approaching the empirical model, one way to gain traction on some of the most basic questions of this paper is to examine the descriptive statistics. First, I can answer: do courts delegate at all? In all, 1,006 randomly selected state high court cases on education from 1995-2005 were coded. Of these, 14%, or 144 considered the constitutionality of a statute. The reason the ratio of cases to constitutional decisions is so skewed is due to the fact that a number of state high courts have mandatory dockets. As a result, these courts are often overwhelmed with cases of minor importance. Nevertheless, these cases regarding education must be included in the sample. It is at this point when state high court justices make the first decision in the two-step process outlined above. In 44% of the cases when the court considers a constitutional issue, the court specifically and clearly delegates policy control back to the state government. In 56.8% of the cases in which the court delegates, the court is delegating after having overturned or partially overturned a statute. Clearly, state high courts delegate. In those cases most important to the court-government relationship, where the court considers the constitutionality of a statute, the court is delegating policy control back to the state government almost one-third of the time.

The descriptive statistics for all the variables are shown in Table 4.3. The dependent variable can also be show graphically. Figure 4.1 shows a scatter plot with the same axes as the theory presented in chapter 2. Figure 4.1 plots the stage-two outcome variable on the plane of legitimacy and political differences. The lines represent the median of the political differences and the median of political legitimacy. Figure 4.1 gives a first-cut look at how the data match up to the theoretical predictions. The numbers represent the six different outcomes. In Figure 4.1, we should expect to see 1s in the upper left quadrant; 2s in the

upper right quadrant; 3s and 4s across the median; 5s in the lower left quadrant and 6s in the lower right quadrant. This figure shows some representation of the expected relationship. There is a second set of cases in which the court overturns and delegates back to the state government (6s) in the lower right quadrant, which represents lower levels of legitimacy and a larger ideological distance between the branches; exactly as expected. Similarly, those cases where the court overturns and does not delegate (4s) are found mostly around the median of legitimacy but to the right of the ideological distance median, also as expected. Further, while the uphold and no delegation points (3s) are scattered more broadly across the levels of legitimacy, the scatter plot shows some evidence that the court upholds statutes when they are ideologically similar to the state government and overturns statutes when this political distance is greater. While Figure 4.1 cannot be read as a definitive statement on the accuracy of the theory, it begins to show us that the relationship between these concepts is, on some level, as expected.

4.5 Empirical Analysis

The theory I have developed suggests that state high courts follow a two-stage process of review and delegation. In the first stage the court decides to decide on the constitutionality of a statute. In the second stage, if they are deciding on the constitutionality, the court chooses to overturn, partially overturn or uphold the statute as well as whether to delegate control of the final policy outcome, to make a new policy or to not delegate at all. This two-stage process should empirically be tested with a selection model where the first stage has a dichotomous dependent variable and the second stage has a discrete choice dependent variable (which could be modeled as either ordered or categorical). Unfortunately, no such mathematical model exists to implement this process.

To ensure that I am accounting for the selection process, I use a first stage probit analysis where the dependent variable is whether or not the court decides on the constitutionality of the statute. From this model, I derive the inverse mills ratio, which I implement as an independent variable in the second set of models to account for this selection bias. In doing this, I attempt to account for the selection process where state high courts make a strategic choice to decide on the constitutionality of a statute in certain cases.

In the second stage I collapse the categories into four choices: uphold and make new policy or no delegation; overturn and make new policy or no delegation; uphold and delegate; and overturn and delegate. Using the multinomial logit approach, the results from each regression are relative to the baseline category, which allows for a different type of comparison across the categories.

Stage 1: Probit Regression Model

The first stage in the theory outlined here is the choice justices make to decide on the constitutionality of a statute. The results are presented in Table 4.4. The results lead to two main conclusions: that political context is not significantly important when deciding to decide, but case context is important. The results for those variables measuring the political context of the state are surprising. I expected that the court may avoid deciding on constitutional issues altogether as the political context became more hostile for the court (i.e. when they disagreed with the legislature, and when it became easier for the other branches to constitutionally change their decisions because of a more easy process or through unified government). However, this does not seem to be the case. The only variable that reaches a level of significance is the ideological diversity of the court, and this is in the opposite of the expected direction. The court seems to be driven more by the context of the case.

The results suggest that state high courts are deciding on constitutional issues in more “important” cases. Those cases in which the state government is a party, either as a petitioner or respondent are more likely to be decided on a constitutional basis. In addition, when there are amicus briefs present, the court will be more likely to decide on the constitutionality of the statute. As the number of these briefs increases, the court is more likely to decide a case on constitutional merits, at a statistically significant level. These conclusions fall in line with much previous research on the importance of the other branches of government as parties to a case, as well as the importance of amicus briefs.²⁸

Finally, the probit model here is used to derive the inverse mills ratio. This will allow for some control of the selection bias that I theoretically expect to exist in the second stage. This selection bias is due to the fact that state high courts pick certain cases to decide on the constitutionality of, as the results show. As a result, I cannot assume that the cases in stage two are a random sample of state high court cases. The inverse mills ratio is included in the stage two model as an independent variable.

Stage 2: Baseline Category Logistic Regression Model with Collapsed Dependent Variable

The second stage of the model represents the choice state high courts have to review the statutes and decide whether or not to delegate control over the final policy. The dependent variable is an indicator of this choice (shown in Table 4.1).²⁹ The central problem with this model and results is that the sample size only includes 142 cases. This n of 142

²⁸ Of course the model could be showing selection effects, where amicus briefs are more likely to be filed more often when it is clear that a case will be important. In either case, it is clear that the state high court is more likely to review constitutional cases when they are deemed important.

²⁹ Because this variable may also be considered ordered, I include an ordered probit model in Appendix 4c. The ordered dependent variable includes the same four possible outcomes.

clearly limits the degrees of freedom in the model. As a result, I collapse the dependent variable into four categories: uphold and either make new policy or do not delegate; uphold and delegate back to the state government; overturn and either make new policy or do not delegate and overturn and delegate back to the state government. Further, the results are necessarily only a first look because a larger sample size would be needed to give more reliable results.

The coefficients in Table 4.5 refer to the change in the variable going from the baseline category to the category in the table. I specifically chose uphold and no delegation as the baseline category, because courts consider a statute constitutional until it can be proved otherwise. This baseline therefore best represents the comparison of the options of the court. In the first column, the coefficients are the change when moving from upholding with no delegation to overturning with no delegation. This column represents the strongest outcomes for the court, as it is when they overturn and do not delegate or make their own policy that their policy preference become law. Therefore, as expected, because higher levels of legitimacy provide the court with the protection to implement their own policy preferences, the results indicate that as legitimacy increases, the court is much more likely to use this strategy.

In the second column of Table 4.5 tells us very little about the relationships proposed in the theory. The coefficients in this column compare the likelihood of upholding and delegating to the state government to simply upholding the constitutionality of the statute and making no determination on final policy control. Although this outcome is possible, it occurs rarely. Therefore, the model does not produce any statistically significant relationships.

The last column in Table 4.5 compares the choice to uphold and not delegate to the choice to overturn and delegate back to the state government. In this case, the expectation is that as the political differences increase, the court should be more likely to choose to overturn. Further, as legitimacy decreases, they should be more likely to delegate. There is support for the political difference hypothesis. The results indicate that at a statistically significant level, as the ideological distance between the branches increases, the court is more likely to overturn and delegate final policy control than they are to uphold and make no determination on the final policy outcome. Further supporting the theory, I find that when the legitimacy of the court decreases they are significantly less likely to overturn and delegate. Yet, the interaction term of court legitimacy and the political distance is also significant in this column. This gives some indication that the court concurrently considers their political context and legitimacy levels when making the decision to overturn and delegate. Given that overturning a statute and then delegating policy control back to the other branches of government is a strategic decision by the court, this supports the theory that under certain circumstances, a state high court will give back policy control after they overturn a statute when they feel they must to maintain their legitimacy and see something close to their policy preferences become law. These results clearly demonstrate that state high courts balance their costs and benefits when making decisions on review and delegation.

One final way to examine the results of the multinomial logit model is through graphing the most interesting of the independent variables. Because in the theory I suggest that review and delegation are clearly tied to political context, I graph these results in Figure 4.2. Figure 4.2 shows the change in the predicted probability of being in each of the four outcome categories based on the ideological distance between the branches of government.

The graph clearly shows that as this distance increases, the court is less likely to uphold and not delegate the policy outcome. In addition, as the distance between the branches increases, the court is much more likely to overturn the statute on constitutional grounds and delegate policy control back to the other branches of government. This further demonstrates the court's desire to balance its goals and ensure that the costs of overturning a statute do not outweigh the benefits. The outcomes for overturn and no delegation and uphold and delegate are not significant, therefore no conclusions can be drawn from them.

Conclusion

In this chapter, I suggest that state high courts follow a two-stage process of judicial review and delegation. I test the implications of this theory first addressed in the second chapter. I argue that state high courts may be, at times, forced to give up control over policy outcomes as they balance two main goals: implementing their political preferences and maintaining the legitimacy of their institution. Drawing from separation of powers theories and principal-agent models of delegation, I incorporate the role of institutional legitimacy into the strategic choices state high courts make. First, and most important, courts do delegate. After they decide to consider the constitutionality of a statute, they give policy control back to the state government almost one-third of the time. This is not an insignificant amount of delegation. I also find that both ideological distance between the court and state government and the courts institutional legitimacy are related to these review and delegation decisions. Further, I find that under certain conditions state high courts seemingly want to make good policy.

This chapter begins to address some general questions regarding state high courts. I examine their role in the policy making process in the states and find that at time courts can

be so constrained by political and institutional conditions, that beyond avoiding making policy, they are actually giving up this policy-making power to the other institutions. This is a significant conclusion. We know that courts are strategic in their decision-making and they strive to be co-equal partners in policy making in the states. However, under certain conditions, courts are forced to relinquish this power to other branches of government. As such, this chapter allows us to further our understanding of court's decision-making in separation of powers systems.

Further, I address the role of institutional legitimacy on the decision-making of state high courts. Legitimacy is essential for courts because it allows them to gain compliance with their decisions. Without this compliance, a court's decision is meaningless. The institutional legitimacy that the U.S. Supreme Court enjoys allows them to make unpopular decisions, but maintain their standing as an institution and have these decisions complied with. It is clear that institutional legitimacy provides the state high courts the some level of protection. However, I expected that state high court legitimacy was ultimately tied to their decision to delegate policy control back to the other branches of government. What I find, is that legitimacy is closely related to the decision to overturn or uphold a statute on constitutional grounds. When a state high court enjoys high levels of legitimacy, they are more likely to overturn a statute. This conclusion falls in line with previous research that legitimacy acts as a protection mechanism. State high courts have more ability to exert their power and to implement their own preferences as their legitimacy increases.

The results presented also indicate that state high courts are concerned about implementing their policy goals. State high courts are less likely to uphold a statute on constitutional grounds as the distance between them and the other branches of state

government increases. In addition, these courts are more likely to overturn statutes as this distance increases. Yet, when they overturn statutes, state high courts are also likely to delegate policy control back to the other branches of government, just as the theory predicts.

In the next chapter, I build on these results as I develop a theory that determines when courts delegate to the state legislature or the state executive branch. Courts are in a position to delegate to either an amateur legislature with a minimal policy capacity, a legislature with the capacity to make new policy or a specialized bureaucratic agency. I argue that their choice is determined by the tension between their desire to have their policy preferences implemented by delegating to a like-minded institution and their desire to see good policy by delegating to an institution with the capacity to implement good policy.

Table 4.1: Two-Stage Model of Judicial Review and Delegation

Stage 1	(1) Court does not decide on constitutional issue, <i>if selected no Stage 2 decision</i> (2) Court decides to rule on constitutional issue, <i>if selected, then Stage 2</i>	
Stage 2	(1) Uphold Make new policy (3) Uphold No Delegation (5) Uphold Delegate to Other Branches of Government	(2) Overturn Make new policy (4) Overturn No Delegation (6) Overturn Delegate to Other Branches of Government

Table 4.2: Dependent Variable Descriptive Statistics

	Stage 1		Stage 2		
	Court does not Consider Constitutional Issue	Court Considers Constitutional Issue	No Delegation	Delegation to State Government	Court Makes Policy
No Review	862	0	843	15*	4*
Overturn	0	55	18	25	11
Uphold	0	89	64	19	6
Total	862	144 (1,006)	926	59	21 (1,006)

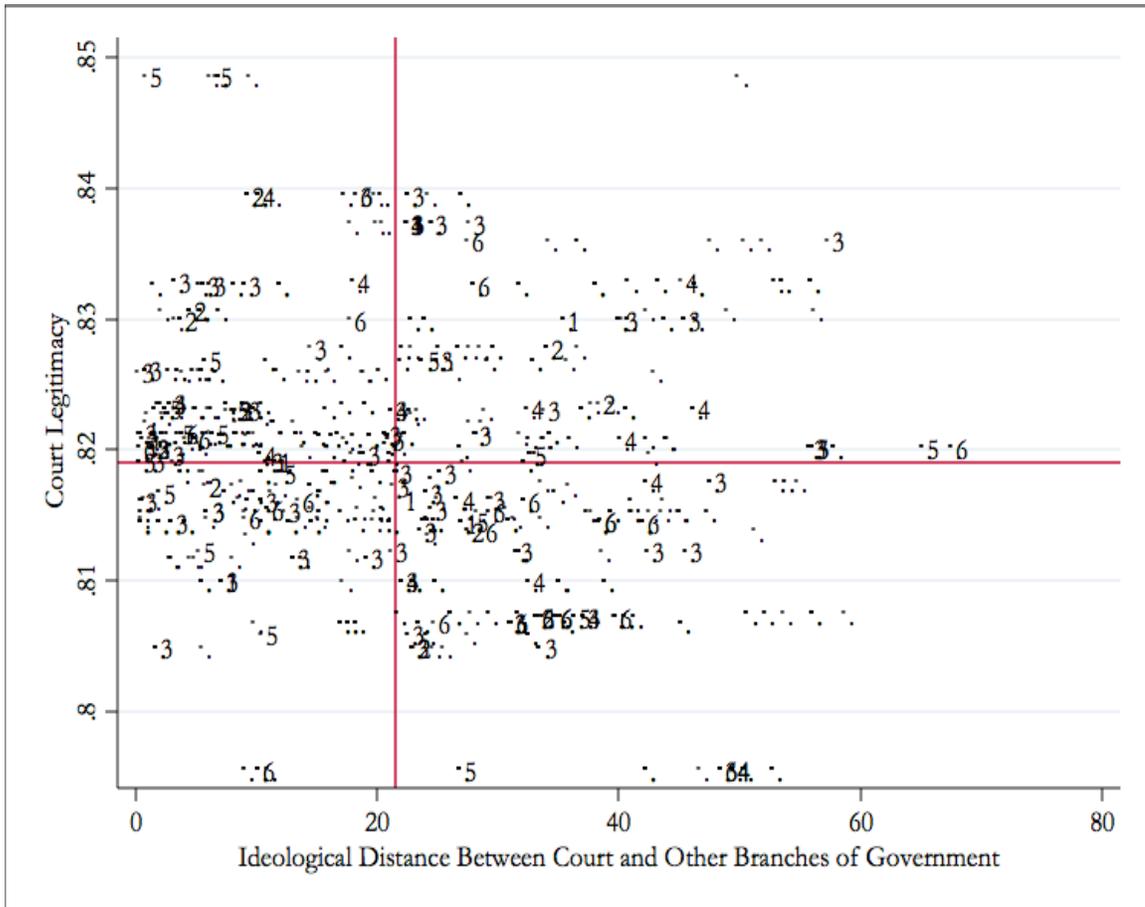
*These numbers are not 0 because although the court does not review the statute on constitutional grounds, they did delegate policy control to the other branches of government. These cases are only considered in the first stage of the analysis and are only considered as not making a decision on the constitutionality of a statute.

Table 4.3: Descriptive Statistics

Variable	Observations	Mean	Standard Deviation	Min.	Max.
<i>Stage 1 Dependent Variable:</i> Court Considers Constitutionality	1,006	0.143	0.350	0	1
<i>Stage 2 Dependent Variable:</i> Review and Delegation	145	2.255	1.284	1	4
State Legislative Ideology	1,006	42.99	25.71	0	97.92
State Legislative Professionalism	1,006	0.243	0.222	0	1
Difficult to Pass Constitutional Amendment	1,006	0.856	0.315	0	1
Court Ideological Diversity	1,006	10.13	6.694	0.919	30.39
Unanimous Decision	1,006	0.599	0.490	0	1
State Govt. was Petitioner	1,006	0.057	0.232	0	1
State Govt. was Respondent	1,006	0.181	0.385	0	1
Amicus Present	1,006	0.181	0.385	0	1
Number of Amicus	1,006	0.607	2.077	0	22
Divided State Government	1,006	0.545	0.498	0	1
Dissenting Opinion	1,006	0.266	0.442	0	1
Ideological Distance:					
Court and State Government	1,006	21.44	15.35	0.015	67.38
Majority Opinion Writer and State Government	780 ³⁰	20.52	15.08	0.010	67.38
Majority Coalition and State Government	1,006	19.32	13.29	0.010	61.02
Legitimacy	1,006	0.6818	0.005	0.669	0.696
Elected	1,006	0.524	0.499	0	1

³⁰ Note, this number is less than the total n because not all opinions have a majority opinion writer, for example, opinions that are per curiam.

Figure 4.1: Scatter-Plot of all Case Outcomes



Numbers Refer to Outcome Categories

Key:

Stage 2	(1) Uphold Make new policy	(2) Overturn Make new policy
	(3) Uphold No Delegation	(4) Overturn No Delegation
	(5) Uphold Delegate to Other Branches of Government	(6) Overturn Delegate to Other Branches of Government

Table 4.4: Stage 1 Probit Analysis for Selection

Variable	Coefficient (S.E.)
Political Context and Legitimacy	
Difficult to Pass a Constitutional Amendment	-0.163 (0.212)
Ideological Diversity of the Court	0.021** (0.090)
Divided State Government	-0.119 (0.121)
Ideological Distance between Court and State Government	-0.006 (0.006)
Intermediate Appellate Court, Discretionary Docket	0.164 (0.183)
Elected	0.167 (0.166)
Legitimacy	-3.658 (14.828)
Case Context	
Specific Policy Area of Case	-0.156 (0.117)
State Government is Petitioner	0.726** (0.191)
State Government is Respondent	1.163** (0.150)
Amicus Briefs for Case	0.677** (0.156)
Number of Amicus Briefs	0.094** (0.038)
Constant	0.827 (10.262)
N=971 ** p > 0.00; * p > 0.05 Prob > chi ² = 0.000 Standard Errors clustered on State Goodness of Fit: Pearson chi ² (677) = 757.22; Prob > chi ² = 0.017 Percent Correctly Classified = 88.57%	

Table 4.5: Stage 2: Multinomial Logistic Regression for Collapsed Dependent Variable

Variable	Overturn: No Delegation/ Make New Policy	Uphold: Delegate to State Government	Overturn: Delegate to State Government
Political Context			
Distance Between Majority Coalition and State Government	-1.173 (1.369)	-1.269 (2.815)	2.256** (1.172)
Divided State Government	-0.921 (0.647)	-0.377 (0.551)	-1.288** (0.508)
Opinion Coalition Ideological Diversity	0.004 (0.038)	0.007 (0.043)	-0.035 (0.031)
Legislative Professionalism	0.701 (0.922)	-1.991 (1.407)	-0.483 (1.062)
Legitimacy			
Court Legitimacy	120.7* (72.49)	66.57 (129.5)	-126.2** (63.96)
Court Legitimacy * Political Distance	1.720 (2.019)	1.871 (4.144)	3.371** (1.723)
Institutional Rules			
Difficult to Overturn a Constitutional Decision	0.178 (0.474)	-0.608 (0.812)	0.466 (0.482)
Intermediate Appellate Court (Discretionary Docket)	-0.997* (0.578)	1.572 (1.209)	-0.963* (0.539)
Retained by Other Branches of Govt.	-0.879 (0.591)	0.148 (0.883)	-0.733 (0.661)
Case Facts			
Government is Party	0.676 (0.816)	-0.037 (0.456)	0.589 (0.606)
Dissenting Opinion	-0.236 (0.735)	0.199 (0.716)	0.333 (0.511)
Inverse Mills Ratio	-1.088** (0.623)	-1.11* (0.647)	-0.940** (0.482)
Constant	-83.23 (49.05)	-45.12 (88.06)	87.15 (43.49)

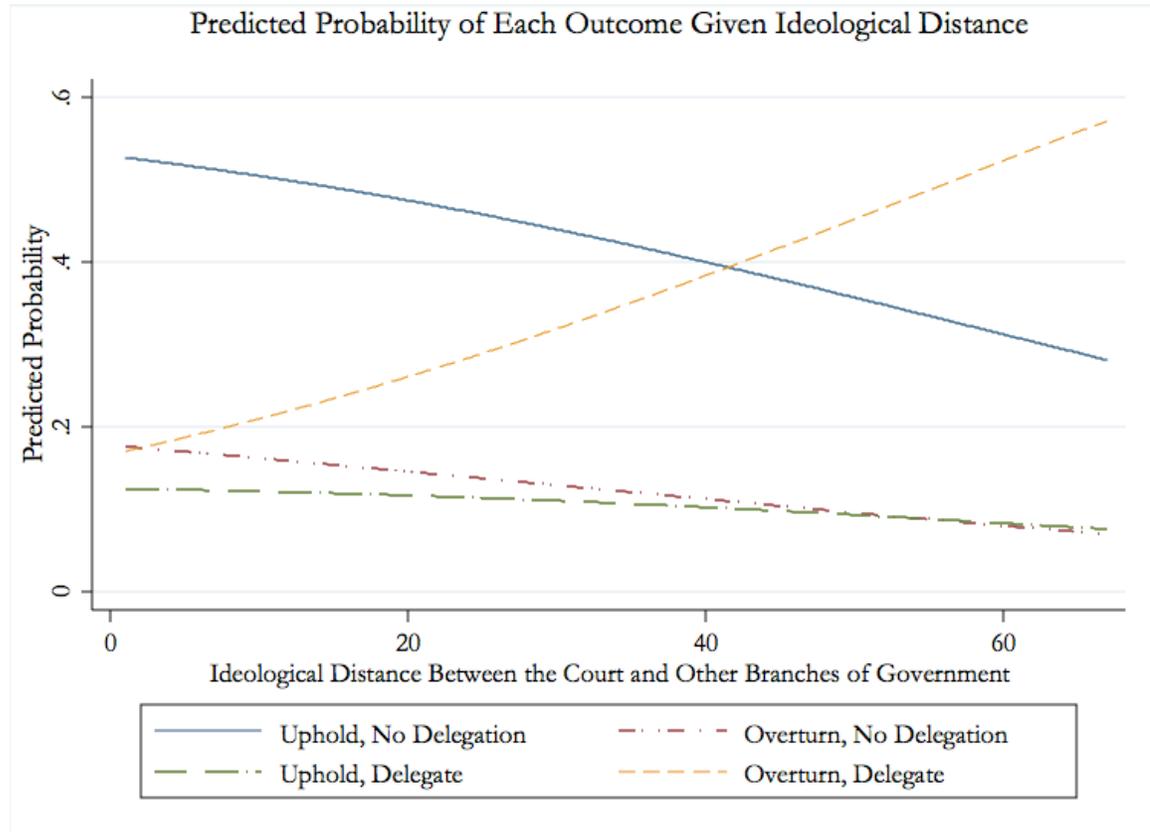
N= 142

Standard Errors Clustered on State

* p > 0.10; ** p > 0.05

Baseline Category: Uphold and No Delegation/Make new Policy

Figure 4.2: Predicted Probability Graph



Appendix 4A:**Table 4.A:Description and Coding of Variables**

Variable	Coding
Court Considers Constitutionality	Coded from State High Court cases, Westlaw search
Review and Delegation	Coded from Case
State Legislative Ideology	Berry et al (1998) measure of state government ideology
State Legislative Professionalism	Coded from Langer, Leonard, Ross (2007); Squire (1992)
Difficult to Pass Constitutional Amendment	1= must pass more than 1 legislative session; or must pass with super-majority 0=must pass with majority in leg. session (Book of the States)
Court Ideological Diversity	Standard deviation of ideology of justices on the court in each year. Langer Natural Courts Data
Unanimous Decision	Coded from Case
State Govt. was Petitioner	Coded from Case
State Govt. was Respondent	Coded from Case
Amicus Present	Coded from Case
Number of Amicus	Coded from Case
Divided State Government	1= State Senate, House and Governor are not from same party; 0=Senate, House and Governor are from state party. (State Politics and Policy Data Archive)
Dissenting Opinion	Coded from Case
Ideological Distance:	
Court and State Government	Absolute Value of Berry et al. score minus PAJID score
Majority Opinion Writer and State Government	Absolute value of Berry et al. score minus PAJID of majority opinion writer (coded from case)
Majority Coalition and State Government	Absolute value of Berry et al. score minus median PAJID of majority coalition (coded from case)
Legitimacy	Cann and Yates 2007, See Description in Text

Appendix 4B: Ordinal Model**Table 4.B: Stage 2 Ordered Probit with Collapsed Dependant Variable**

Variable	Coefficient (S.E.)
Political Context	
Distance Between Majority Coalition and State Government	0.136 (0.010)
Divided State Government	-0.379 (0.233)
Court Ideological Diversity	-0.005 (0.015)
Legislative Professionalism	-0.982** (0.431)
Legitimacy	
Court Legitimacy	0.281 (11.20)
Institutional Rules	
Difficult to Overturn a Constitutional Decision	0.050 (0.363)
Intermediate Appellate Court (Discretionary Docket)	-0.099 (0.297)
Justices Retained by Other Branches of Government	-0.204 (0.328)
Case Facts	
Government is Party to the Case	0.305 (0.197)
Dissenting Opinion	0.274 (0.2432)
Inverse Mills Ratio	-0.474 (0.210)
cut1 = -0.423 (8.933) cut2 = 0.153 (8.927) cut3 = 0.630 (8.933)	
N= 144 Standard Errors Clustered on State * p > 0.10; ** p > 0.05	

Appendix 4C:

Table 4.C: Stage 2: Six Outcome Category Separate Logistic Regression Results³¹

Variable	Uphold Make New Policy	Overturn Make New Policy	Uphold No Delegation	Overturn No Delegation	Uphold Delegate to StateGovt	Overturn Delegate to State Govt
Political Context						
Distance Between Court and State Govt	5.110* (3.064)	-3.961 (2.777)	-2.117* (1.277)	-4.343** (1.924)	-0.431 (2.435)	-0.234 (1.453)
Divided State Govt	-0.762 (1.348)	-1.103 (0.929)	1.189** (0.423)	-1.430 (0.959)	0.231 (0.494)	-0.575 (0.598)
Coalition Ideological Diversity	-0.127 (0.148)	0.066 (0.054)	0.024 (0.022)	0.016 (0.492)	0.035 (0.045)	-0.053 (0.042)
Legislative Professionalism	1.779 (1.895)	0.352 (1.249)	0.638 (0.789)	3.162* (1.462)	-1.972 (1.514)	-2.118 (1.361)
Legitimacy						
Court Legitimacy	149.1 (137.4)	-171.33** (71.84)	111.15* (69.33)	-236.0** (107.6)	24.075 (120.4)	-26.51 (89.75)
Court Legitimacy* Ideological Distance	-7.526* (4.515)	5.732 (4.027)	-3.129* (1.874)	6.426** (2.819)	0.622 (3.584)	0.382 (2.134)
Institutional Rules						
Difficult to Overturn a Const'nal Decision	-1.178 (1.349)	0.833 (0.856)	-0.022 (0.543)	0.423 (0.918)	-0.855 (0.768)	0.632 (0.623)
Intermediate Appellate Court	-2.514 (1.696)	1.315 (1.452)	0.333 (0.425)	-0.396 (0.875)	2.007* (1.211)	-0.791 (0.802)
Retained by Other Branches of Govt.	-0.731 (1.608)	-3.086** (1.080)	0.570 (0.423)	dropped	00.404 (0.889)	0.379 (0.822)
Case Facts						
Government is Party	-1.901 (1.541)	2.022** (0.896)	-0.266 (0.458)	-0.546 (0.710)	-0.137 (0.452)	1.328** (0.673)
Dissenting Opinion	-1.019 (1.106)	-0.343 (0.827)	-0.142 (0.507)	-1.003 (0.722)	0.201 (0.552)	0.701 (0.496)
Inverse Mills Ratio	-2.497 (2.125)	0.029 (1.411)	0.819 (0.849)	0.553 (0.973)	-0.232 (1.389)	-1.063 (1.009)
Constant	-95.09 (90.54)	111.2 (48.43)	-77.69* (47.45)	157.12* (73.58)	13.45 (82.98)	17.499 (61.51)
N=	142	142	142	142	142	142
Percent Correctly Class	95.77%	92.96%	70.42%	87.61%	86.62%	81.69%
Standard Errors Clustered on State						
* p > 0.10; ** p > 0.05						

³¹ The six separate logit models provide some evidence for the theory presented in this chapter and in chapter 2. When the court legitimacy is high, they are less likely to overturn a state government they agree with, but will overturn statutes on constitutional grounds when the distance between them and the other branches of government increase. However, these results also indicate that state high courts want good policy. They take time to delegate when they can and they delegate to governments with the capacity to make the requisite policy changes. The results of the multinomial logit model largely corroborate this story.

CHAPTER 5: CHOOSING AMONG THE AGENTS: WHICH INSTITUTIONS DO COURTS GIVE POLICY CONTROL TO

Introduction

In the previous chapter I concluded that state high courts delegate policy control back to the other branches of government under certain conditions. I argued that this decision was in part because of the two main goals of state high courts: to see their preferences become law, and to maintain their legitimacy. While it is the case that Congress will delegate to a bureaucracy that has more policy expertise, state high courts can choose between two branches that have more policy expertise to delegate to. Yet, in the American states, the policy expertise and ability to create, pass and implement new policies varies across the states. Some state legislatures are highly professionalized as they operate like smaller versions of Congress, with high pay, large staffs and full time legislative responsibilities. For example, the state legislatures in California, Michigan, New York and Massachusetts are all considered to be highly professional. On the other hand, states such as New Hampshire, Wyoming, Montana and Utah have amateur legislatures where the members only serve part-time, sessions are shorter and the legislative pay is minimal. Clearly, these sets of states will have differing abilities to implement any new policies that the state high court may delegate to them.

While the ability of the other institutions to create new policies and implement laws when the court delegates is an especially important consideration, justices on state high courts are also interested in seeing their policy preferences become law. As discussed in the previous chapters, this goal is central to justices on all courts. A state high court may want to delegate to a branch that has the ability to create a new policy, but the court also should

delegate to the branch of government that will create and implement a policy aligned with the preferences of the court. As a result, state high courts must balance the tension between delegating based on policy expertise and delegating to the branch of government that shares their political preferences.

This chapter picks up where the previous chapter left off. In the previous chapter I argued that state high courts will delegate when they do not enjoy high enough levels of legitimacy to assure their decisions will be implemented. The theory also suggested courts would delegate to institutions with shared political preferences. What I found is that legitimacy and political differences are more related to the decision to either overturn or uphold laws and they are not as clearly related to the decision to delegate. While these results were unexpected, evidence for this ‘political alliance’ hypothesis, where institutions delegate to those with shared preferences has been limited in many different delegation contexts (e.g. Huber and Shipan 2002; Volden 2002a). I do expect that this delegation with policy outcome motivation may be more clearly demonstrated when examining the choice between delegating to the state legislature and delegating to the state executive branch. With this in mind, in this chapter I develop the theory first introduced in chapter 2 that pits delegating to branches with policy expertise against delegating for reasons of political preferences.

5.1 Congress, the Bureaucracy and Delegation

Bureaucratic or Congressional Control?

Theories of delegation are steeped in the tradition of rational choice institutionalism. In considering the interaction between Congress and the federal bureaucracy, much of the original research focused on the bureaucratic control and autonomy. As Huber and Shipan

(2002; 19) point out, the central reason for this assumption of bureaucratic control is the policy expertise of the bureaucracy. This policy expertise is a ‘double-edged sword’ as it gives incentives for legislatures to delegate policy control to the bureaucracy, who can then act counter to legislative preferences. Niskanen (1971) first formalized this theory of bureaucratic control by arguing that bureaucrats are in control because of their advantages over the legislature. These bureaucrats have a near monopoly of information, they are perfectly informed and they are able to control the legislative agenda by submitting strict proposals. Later research would challenge this notion by rethinking the power and control Congress possessed.

While most research agrees that bureaucracies have more policy expertise and more information, Congress does have certain oversight powers and responsibilities that allow them to keep bureaucracies in check. McCubbins and Schwartz (1984) challenge the traditional notion that Congress neglects this oversight responsibility. They argue that by using what they term ‘fire-alarm’ oversight, Congress uses a system of procedures, rules and informal practices that allows citizens and interest groups to provide oversight. In doing so, Congress has “devised a reasonably effective and noncostly way to articulate and promulgate its own legislative goals. ... Congress has not necessarily relinquished legislative responsibility to anyone else. It has just found a more efficient way to legislate” (1984; 174-5). Beyond oversight after bureaucratic action, the coalition that created the agency can ‘stack the deck’ to ensure the agency’s decision-making will mirror the political context that gave rise to the creation of the agency. This deck-stacking combined with the fire-alarm oversight together create a way for political control of the bureaucracy. In the principle-agent

framework of Congress and the bureaucracy, this deck-stacking and fire-alarm oversight are useful monitoring mechanisms (McCubbins, Noll and Weingast 1987).

In addition to oversight and institutional design, Congress has other ways to control or influence the bureaucracy. Wood and Waterman (1991) find that bureaucratic agencies are responsive to political tools. The joint appointment and confirmation powers of the President and Congress, is a very important tool, as all of the agencies examined in their study were more responsive after a shift in leadership. Other tools available to Congress, budget control, signals, and reorganization are less important than the appointment power. Bringing the judiciary into their model of Congressional influence on bureaucracy, Ferejohn and Shipan (1990) find that judicial review can shift the equilibrium outcome toward the median member of Congress. Yet, Congressional committees are not always able to use the threat of legislation as a means of political control. Shipan (2004) concludes that it is no longer a question of whether Congressional influence over the bureaucracy exists, but when it does. While the extent to which Congress might influence or control bureaucratic agencies is still up for debate, what is clear is that in this principal-agent relationship, Congress must rely on the policy expertise of the bureaucracy and they do so by delegating policy control to these agencies. Through this delegation, Congress can influence bureaucratic decision-making by limiting the discretion in the policies that they pass. However, limiting this discretion creates a tradeoff between ensuring their policy preferences are implemented and allowing the bureaucracy to use their own expertise (Epstein and O'Halloran 1994).

5.2 American State Institutions and Delegation

State Legislative Delegation

Huber and Shipan (2004) argue that theoretical bias can occur when studies of delegation focus on a single institutional context. For example, we cannot know the effect an institutional rule will have on delegation if that institutional rule is a constant. Therefore, by examining delegation across the fifty states, research can maintain the separation of powers context that sets the parameters for the principal-agent framework, but the institutional rules that affect decision-making vary across the states. In this chapter, I focus on two institutional rules in particular: the level of professionalism of the state legislature and the retention method of justices on state high courts.

In their seminal work on delegation in the states, Huber and Shipan (2002) rely on evidence from the national level to develop a theory of delegation that most importantly takes into account state legislative capacity. Huber and Shipan (2002) find that legislators will delegate power to state administrative agencies under conditions of uncertainty and when their ability to gain information (when their professionalism is low) is limited. In his study of delegation at the state level, Volden (2002a; 2002b) reaches similar conclusions. Yet, both Volden (2002a) and Huber and Shipan (2002) find only tenuous support for the political alliance thesis, or the idea that a principal will delegate to an agent only when their preferences are aligned (see also Bendor et al 2001). They conclude that political alliance delegation is dependent on other factors.

Legislatures in the American States

To more clearly examine why the state high court might delegate to the state legislature or the bureaucracy, understanding how state legislatures work is important.

Clearly the most relevant institutional condition that affects state legislative behavior is their level of professionalism (e.g. Squire 1992; 1998; Kousser 2005; Squire and Hamm 2005; Squire and Moncreif 2009). State legislative professionalism is a widely employed concept that generally measures the capacity of these institutions. The most commonly used measure of state legislative professionalism includes the percentage relative to that of Congress of member pay, staff members per legislator and total days in session. As a result, each state is given a score from 0 to 1 that approximates how close the legislature is to the professional characteristics of Congress (Squire 1992; 71).³² Under certain conditions, state legislatures have the ability to ‘overcome’ their professionalization levels and operate in many of the same ways internally that Congress does (e.g. Aldrich and Battista 2002; Bianco and Sened 2005; Cox, Kousser and McCubbins 2010).³³

³² Kousser (2005; 204) succinctly demonstrates that the benefits of increased professionalism are three-fold and related to the three components that make up the concept. Higher salaries in state legislatures give individuals the incentive to maintain their position in the legislature and create opportunity costs when they do not perform their duties. More staff members provide informational advantages for legislators in professional chamber. Finally, more days in session allow more time, an essential component to accomplishing any legislative goals. These three benefits are not only related to the transaction costs of legislating in the states, but the decision to give policy control to the legislature from the court.

³³ Cox, Kousser and McCubbins find that the majority party uses its control over the agenda to protect the policy interests of their members (2010). While the majority party in state legislatures may assert agenda control enough to get the policy outcomes their members’ desire, the legislature’s ability to exert their power in interactions with the other branches of government is less sure and much more dependent on their level of professionalism (see Alt and Lowry 1994; 2000; Kousser and Phillips 2009). Kousser and Phillips (2009) model the interaction between state legislatures and governors over the state budget. Using what they term a ‘staring-match’ model they find that governors will often be powerful and exert influence over the budget. Yet, the level of influence a legislature has over the budget is directly related to their level of professionalism. Those legislatures that have longer sessions have an increased ability to be in a long, protracted fight with the governor over the budget. These same considerations that give a professional legislatures the ability to implement their

5.3 Courts and Delegation

Staton and Vanberg (2008) provide a motivation for court delegation when they argue that vague decisions are an implicit way of delegating policy control to the other branches of government. Central to their model is judicial concern for compliance and maintaining institutional legitimacy. This model of delegating to avoid noncompliance fits well with models of Congressional delegation because as Bendor and Meirowitz (2004) point out, the models of delegation proposed by Epstein and O'Halloran (1996; 1999) and Huber and Shipan (2002) are models of risk reduction. This is important because delegation from this perspective focuses on the idea that the unknown outcome is the worst possible outcome.

Bendor and Meirowitz argue that in more traditional models of delegation, the actors are averse to bad, or distant outcomes (2004; 294). State high courts should have an aversion to both the unknown outcome as well as the distant policy outcome. As a result, they should use delegation to balance the choice between the unknown (whether or not they will receive compliance) and the distant outcome (a policy decision by an actor with different preferences). While few models of delegation consider the court as the principal in the principal-agent framework, there is some research that suggests that courts can have political control over agencies (Mashaw 1990). Howard and Nixon (2002) find that federal appellate courts exert influence over regional behavior of the IRS. While incomplete, these models

preferences should affect the decision of the court to delegate policy control either back to the legislature or to the executive branch.

suggest a few things, that bureaucracies may have two principals and that bureaucracies pay attention to court output. This will be especially true if they are a party to the case.

5.4 Theory

The two main assumptions driving this theory is that political actors in all three branches of government want to see their policy preferences implemented. In addition, when delegating, the court wants policy outcomes to be made efficiently. The court has multiple choices when deciding which actors to delegate to, or the court can be ambiguous about who has the responsibility to implement a new policy. When the court does delegate, the main delegation choice comes between the legislature and the administrations of the executive branch. There are three factors that should determine which branch the court delegates to: the political context, legislative professionalism and the complexity of the policy. Because I am only testing this theory on one policy area I will make the assumption that policy complexity will remain constant in this model. In general, one would expect that courts will delegate policy control when the policy area the case considers is increasingly complex. Thus, using education policy is helpful because the policy area is not so complex that the court will always delegate to the other branches, but neither is it simple enough that state high courts would have the ability to always make their own policy. As such, I continue with a theory explaining how the tension between policy expertise and political differences should encourage the court to delegate to one institution over the other.

The ability of the state legislature and the state executive branches to address and implement a new policy should matter when the court decides whom to delegate to. When the state legislature is not highly professional, the court should be less likely to delegate to them. As previously discussed, less professional legislatures have higher opportunity costs,

less time and fewer resources (Kousser 2005). Given these conditions, state high courts would be less likely to see policy changes if they delegate to an amateur legislature. In this case, the court should delegate to the executive administration that can address this policy issue in an efficient manner. In fact, amateur legislatures are more likely to delegate to administrative agencies (Huber and Shipan 2002). It is important to note, however, that I assume that all state bureaucracies are professionalized and have high degrees of policy expertise. Previous research makes this same assumption. In either case, the goal in delegating to a professionalized branch is to see policy made efficiently by experts in the policy area. In this sense, this goal follows with the conclusions of the previous chapter where I find evidence that state high courts want good policy under certain conditions.

While I argue that state high courts will delegate to If the state high court is going to delegate policy responsibility, I expect they will delegate to the branch of government that is closer to their own preferences. In the case of delegation, the court is giving up control of the final policy outcome. If their ultimate goal is to have their preferences become law, then they should delegate to either the executive administration or legislature with preferences closest to those of the court.

Elected justices may have different motivations when delegating policy outcomes. These justices must face the public to remain on the bench and therefore need to be more cautious about their final policy outcomes. As such, when they are deciding on a highly salient issue, justices on elected courts may be more likely to delegate control over the policy outcome to either the legislative or executive branch. Some research indicates the public uses retrospective voting when voting for state high court justices. Although making vote choice based on policy outcomes has not been shown to be part of the decision calculus for

voters in state court elections, we do know that justices do alter their voting as an election approaches (e.g. Huber and Gordon 2004). As a result, I expect elected courts to delegate policy control to either branch because they are worried about the final policy outcome. The choice between the branches is less important to justices who must face reelection.

The non-election methods of retention should be particularly important when considering which branch a court might delegate too. Most state high court justices are retained in one of three ways, through election; through reappointment and reconfirmation or through legislative reconfirmation.³⁴ For those justices who must face the governor or legislature or both for their retention, the decision to delegate to one branch or the other should be more complex. Justices who are retained by either the legislature or the governor should delegate to that branch more often. However, most justices must face both branches during their retention process. I argue in this case, the court should be more likely to delegate to the legislature. Senators are highly responsive to their constituents when it comes to the President's Supreme Court nominees (Kastellec, Lax and Phillips 2010). These confirmations have become quite contentious and are used as policy issues during election campaigns. It would not be surprising to expect a similar pattern at the state level. So, when the justices on the court must be reappointed by the governor and reconfirmed by the state legislature, I expect they will be more likely to delegate to the legislature as an act of goodwill to those who would vote on their retention.³⁵

³⁴ Justices in Massachusetts, New Hampshire serve until the age of 70 with no retention and justices in Rhode Island serve lifetime appointments.

³⁵ There are other actors to which the court can delegate control over the final policy outcome. The court can give policy control back to the lower courts or may even delegate to the public, by arguing a referendum is necessary in a certain policy area. These are very

To summarize, I expect state high courts delegate for either reasons of policy expertise or political preferences. State high courts want to see good policy made in their state. Therefore, when state legislatures are highly professionalized, I expect the court to delegate to the state legislature. As the professionalization of the state legislature decreases, the court should be less likely to delegate to the state legislature. However, I also expect state high courts want to see their policy preferences become law.

5.5 Data and Methods

Case Selection and Data

The cases used in the analysis are those cases from the previous chapter in which the state high court delegated policy control back to the other branches of government. In the cases listed here, there is no requirement that the state high court also engage in judicial review, as the research question focuses on which institution the court delegates to under what conditions. I examine state high court cases that focus on education from 1995 through 2005. From the 1,006 cases that were originally coded, 61 delegated some policy control to the other branches of government. In 33% of the 61 cases the court gave policy control back to the state legislature. In 36 of the cases (or 59%) the court delegated policy

rare occurrences, and therefore no theory exists to specifically define the conditions under which these may happen. Further, a court can delegate a policy decision, but can be unspecific about which actor has control over the final outcome. In this case, a court may argue that the elected or policy-making branches should be responsible, but does not specify whether the executive or legislative branch should maintain control over the outcome. Again, this too should be a rare event. However, this presents an interesting case, where the court is foregoing the ability to address the final policy outcome and avoiding naming the branch who should control this. I would expect this would be the response of a highly constrained court. Justices on elected courts should be more likely to delegate, to avoid making policy decisions as discussed above. Further, when the court has no policy allies in either the executive or legislative branches, if the court disagrees with both branches, they may be more likely to delegate generally.

control to the governor or an executive branch agency. Finally in the last 8% of the cases the court delegated to another institution, such as a lower court or local government. Table 5.1 lists all of the cases that included state high court delegation. This table also includes whom the court delegated to, as well as the level of professionalism of the state legislature. From examining the table, the relationship between delegation to the legislature and professionalism is not as clear as I expected. It seems that state high courts delegate to legislatures with a wider range of professionalism than expected. However, the multivariate model presented below will provide more information on the significance of this relationship.

Dependent Variable

The dependent variable is the specific branch of government the court has delegated to. While the court can and does delegate to institutions other than the state government, this happens too rarely for it to be included in a model. In fact, in only five of the cases reviewed here did the court delegate to an institution other than the state legislature or executive branch. Therefore, the dependent variable is a dichotomous indicator of which branch the court delegated to. A zero indicates delegation to the state legislature and a 1 indicates delegation to the executive branch. I include delegation to the governor, a department of education or department of revenue all delegations to the executive branch. In total, there were 56 instances of delegation across the fifty states over the ten-year period. While this is not a very large amount of delegation this is 5% of the total cases examined. As explained in the previous chapter, although 5% is a small number, in many states, the high court does not have a discretionary docket, so they must hear all cases on appeal. This

increases the number of cases state high courts hear, so even a small percentage translates to a relatively large number of cases over time.

Hypotheses and Independent Variables

Policy Expertise: I previously discussed the importance of legislative professionalism for state legislatures. Professionalism gives state legislatures more time and resources to create and pass new policies. Therefore, I expect that as professionalism increases, the state high court should be more likely to delegate to the state legislature. Because the indicator of the dependent variable for delegating to the legislature is 0, I expect a significant and negative relationship from the model.

Political Preferences: The other main reason that should drive the court to chose to delegate to one branch over the other is shared policy preferences. As a court wants to see their preferences become law, they should delegate to a branch with shared policy preferences. When this branch implements the new policy, the court will see their preferences become law. However, measuring shared policy preferences at the state level proves difficult. The best way to measure preferences would be to have scores of ideological distance between the court and both of the other branches of government. Given current ideology measures of state institutions, this is not possible. The Berry et al. (1997) measure of ideology of the state government used in the previous chapter is a measure of legislative ideology weighted by the ideology of the governor. While the scores have been separated previously, the resulting measures of legislative and governor ideology have resulted in measures where the ideology of the legislature is highly correlated to the government ideology (see Wilhem 2007, note 3). What this suggests is that the measure for the governor

in the Berry et. al. concept is not a very comprehensive measure. Therefore breaking down the ideology scores would not be a very representative measure of shared preferences.

In order to indicate shared preferences between the court and each branch of the state government I use indicators of the majority party on the court, shared majority control of both house of the legislature and the party of the governor. There is an indication of the political affiliation of each justice in the Langer Natural Court database. These party affiliations come from either the party identification they use for elections; from the governor that appointed them or from a biographical search that would help indicate party identification. It is important to note that many justices, even those justices in states with elections, are originally appointed by governors as many ascensions to the bench are interim appointments. When the party that controls the court is the same party that controls both houses of the legislature, this indicates shared preferences between the court and state legislature. Similarly, when the party that controls the court is the same party as the governor, I indicate shared preferences between the court and the executive branch. The state high court can share preferences with one, both or neither of the other branches of government. In the model I include two dichotomous indicators, same party as governor and same party as legislature to indicate shared preferences. I expect a positive and significant coefficient for shared preferences with the executive and a negative and significant coefficient for shared preferences with the state legislature.

Finally, because I expect delegation in the case of policy expertise or delegation in the case of share political preferences, I include an interaction term. I interact the measure of state legislative professionalism with the indicator for shared preferences with the state legislature. I expect legislative professionalism should be an especially important component

of the court's decision-making when the court shares preferences with the legislature. If the court will delegate to a branch they share preferences with, they should want these preferences translated into law in an efficient manner. I expect a negative and significant coefficient for the interaction term, because as this term increases, the court should be more likely to delegate to the legislature. The dependent variable indicates delegating to the legislature when it is 0.

Institutional Rules: One of the most important benefits to studying delegation with state institutions is the variance in institutional rules across the states. As a result, more nuanced conclusions about the role of institutional structures can be made. In this model, I include an indicator of the method of retention of the justices. I argued previously that when the justices are retained by one of the branches, they should be more likely to delegate to that branch. Unfortunately, with the cases in which the court delegates, there is not enough variance on either of these indicators to include them in the model. However, the theory also suggested that when state high court justices must be retained through a re-nomination and re-confirmation process in both branches, they should be more likely to delegate to the legislature. In this case, I argued that legislators are more likely to use votes for or against nominees as public posturing for reelection. Therefore state courts should be more strategic about interacting with these legislators as they seek to maintain their seats on the bench.

Case Context: In the previous chapter, the results showed that when the government is a party to the case, the court is much more likely to decide the case on constitutional grounds. The state high court is also more likely to overturn the statute and delegate policy control back to the other branches of government when the government is a party to the

case. Therefore, I expect this specific case context to be an important part of the court's decision calculus. In every case that the government was a party, if specified, it was an executive branch agency that was the specific petitioner or respondent. As such, I expect that when the government is party to a case the court should be more likely to delegate back to the executive branch. In this case they are giving policy control to a branch already steeped in the political issues being considered. Therefore, I expect a positive and significant effect for the indicator that the government is a party to the case.

Methodological Approach

The theory presented suggests a very simple model of the choice a state high court has between delegating to the state legislature or the executive branch. The choice between delegating to either branch is represented with a dichotomous dependent variable. In this case a 1 indicates delegation to the executive branch and 0 indicates delegation to the legislature. Therefore, a positive coefficient indicates an increased likelihood to delegate to the executive branch. A negative coefficient indicates that as that independent variable increases, the court is more likely to delegate to the legislature. Given that the dependent variable is dichotomous, a logistic regression model is most appropriate. In addition to the independent variables listed above I consider the differing contexts across the states. I take these effects into account by clustering the standard errors on the twenty-six individual states in the analysis. In Table 5.2 I provide descriptive statistics of all the variables included in the model. While the model is simple, there are only fifty-six observations included. Although I

believe the results presented are robust, as with all small-n modeling strategies, I might gain more statistical traction on the hypotheses with more cases in the model.³⁶

5.6 Empirical Results

The results of the logistic regression are presented in Table 5.3. First, the goodness of fit tests indicates this is an appropriate model. The model correctly classifies almost 77% of the observations. The results show some support for the hypotheses proposed, but not all of the hypotheses are confirmed. I expected that professionalism would have a negative and significant effect on the dependent variable, indicating increased likelihood of delegating to the state legislature. The prediction for professionalism is not statistically significant. Unfortunately, neither of the shared political preference indicators are statistically significant. I expected state high courts would delegate to a branch they shared policy goals with. However, the model does not support this hypothesis. Further, I expected that a state high court would be especially likely to delegate to a more professional legislature when they shared political preferences with this branch. This interaction term also does not reach a level of statistical significance.

The result for legislative professionalism is interesting. Although it does not reach a level of statistical significance using a two-tailed test, if one applied a one-tailed hypothesis testing strategy, the professionalism variable would be statistically significant, however it is in

³⁶ The results presented were the same given any iteration of the model I tried. I also included the measure of legitimacy in the model, but the result was not statistically significant, so I dropped the independent variable to keep the model parsimonious. I included legitimacy to test the expectation that state high courts delegate to state legislatures when their legitimacy is low. I would expect this because it is through the public's threat mechanism against the legislators that legitimacy provides protection. Therefore, if the court was lacking legitimacy, they might delegate to a state legislature who would be less likely to implement policies without higher levels of institutional legitimacy.

the unexpected direction. In Figures 5.1a and 5.1b I graphed the relationship between professionalism and the decision to delegate to each of the branches. Figure 5.1a shows that as professionalism increases, the court is far more likely to delegate to the executive branch. Inversely, Figure 5.1b shows that as the professionalism increases, a state high court is much less likely to delegate to the state legislature. It is important to note that in many of the cases where there is delegation the legislature is amateur. But, that state high courts delegate back to these institutions is interesting. It could be possible that state high courts avoid delegating to highly professional legislatures as they want to avoid being overturned. Or, they could delegate more when the legislature is less professional because the statutes from these legislatures are less specific or more problematic, suggesting that less professional state legislatures need to be corrected more often. I will discuss more on these possibilities in the results.

Other results in the model reach standard levels of statistical significance. I expected that state high courts will delegate more to state legislatures when their retention process includes both a re-appointment and a re-confirmation.³⁷ I expected this because state legislators could be more likely to use votes on nominees as position-taking in the Mayhew (1984) sense. The results support this hypothesis. When the members of the court are retained through both branches of government, they are more likely to delegate to the state legislature.

³⁷ I included two separate indicators for retained by the governor only and retained by the legislature only, but because there are so few states where this is the method of retention, both variables perfectly predicted and had to be dropped from the model.

Finally, I expected the context of the case should alter the court's decision-making. When the state government is a party to the case, the court is more likely to delegate to the state executive branch. The probability they will delegate to the executive branch increases by 38.8% when the court is a party to a case as opposed to when they are not either the petitioner or the respondent. This results is as expected. It is the state executive branch that is named as a party in these cases, so I expected the court to delegate back to the executive branch when they were already involved in the case. Overall, the model does not support many of the hypotheses derived from the theory presented, but some interesting conclusions can be drawn.

Conclusion

I began this chapter with the goal of determining to which branch the state high court delegates, and under which conditions are these decisions made. I proposed a theory first introduced in the second chapter that drew heavily from previous theories of Congress to the federal bureaucracy delegation. Using the same principal-agent framework and cost-benefit structure, I argued there are two main motivations for state high court delegation. Courts should delegate to take advantage of the policy expertise of the other branches of government and they should delegate to institutions with which they share policy preferences.

I expected that courts will delegate to executive agencies or professionalized legislatures to take advantage of the policy expertise of these institutions. To test this, I examined the relationship between professionalization and the decision to delegate to one branch over the other. The results were unexpected. Courts delegate to less professional legislatures, and they are more likely to delegate to the legislative branch as they become less

professional. While this conclusion clearly needs further examination, there are some possible explanations. Given that courts cannot be policy experts and that even the least professional legislatures should have some expertise in education policy, when the court delegates to either branch they should be giving policy control back to an institution with more expertise. Another possible explanation is that legislatures with less professional legislatures pass more policies that need to be reviewed by the state high court. And, as a result the state high court gives policy-making power back to the amateur legislature so they might fix their mistakes. While this is not possible to test with the data, the cases in Table 5.1 provide some initial evidence that it is states with the least professional legislatures have more delegation by their state high courts. As many as 70% of the cases listed come from states with professionalism scores less than 0.5. This might indicate that professionalism affects state high court delegation, in that those states with less professional legislatures will have more court delegation as the statutes are more vague or problematic.

The political alliance hypothesis as it is called argues that a principal will delegate to an agent when that agent shares the principal's political preferences. Despite the simplicity of this hypothesis, in studying legislative delegation to executive agencies, previous research has found little support for this (see Huber and Shipan 2002; Volden 2002a, 2002b). The results of the model presented in this chapter fall in line with these conclusions. State high courts do not delegate only to institutions that share their political preferences. This could be because even the least professional legislatures have more policy expertise than state high courts, so no matter whom they delegate to, the court will always benefit with a more well-crafted policy outcome.

In the next and final chapter I address what these specific conclusions mean in light of scholarly work on court decision-making, institutional legitimacy, delegation and separation of powers. In this chapter I readdress previous literature that is more relevant in light of the conclusions reached in these previous two chapters. In general I reassess how we should think about the goals of state high court justices. Prior to this, most scholars believed they were motivated by two central goals: see their policy preferences become law and maintain their seat on the bench. I believe this project provides its most important contribution to the goals of state high courts by considering how institutional legitimacy affects the decision-making of these justices. Clearly, legitimacy matters and its affect should be further explored.

Table 5.1 Cases with Delegation

Year	State	Case Name	Delegation	Policy Area	Prof.
1995	Missouri	<i>Fort Zumwalt Sch. Dist v. State</i>	State Legislature	School Funding	0.22
1995	West Virginia	<i>Randolph County Board of Education v. Adams</i>	State Legislature	Cost of Schools	0.119
1996	Colorado	<i>Board of Commissioners of Douglas County v. Bainbridge Inc.</i>	Local Gov't	Buildings	0.205
1996	Connecticut	<i>Sheff v. O'Neill</i>	State Legislature	School Funding	0.227
1996	Kentucky	<i>Board of Education of Calloway County v. Williams</i>	State Legislature	Taxes for Schools	0.136
1997	Arizona	<i>RL Augustine Construction Co. v. Peoria Unified School Dist.</i>	Executive Agency	School Board	0.186
1997	New Hampshire	<i>Claremont v. Governor</i>	State Legislature	School Funding	0.042
1997	North Carolina	<i>Leandro v. State</i>	State Legislature	School Funding	0.273
1997	Ohio	<i>DeRolph v. State</i>	State Legislature	School Funding	0.505
1997	Ohio	<i>DeRolph v. Ohio</i>	State Legislature	School Funding	0.505
1997	Oklahoma	<i>Grimes v. City of Oklahoma City</i>	Local Gov't	Local Taxes	0.309
1997	Vermont	<i>Brigham v. State</i>	State Legislature	School Funding	0.135
1997	West Virginia	<i>Board of Education of the County of Wood v. Johnson</i>	Executive Agency	Employees	0.119
1998	Arizona	<i>Hull v. Albrecht</i>	State Legislature	School Funding	0.186
1998	Kansas	<i>BOE of Unified School District no. 43 v. Kansas State BOE</i>	Governor	Board of Education	0.131
1998	New Hampshire	<i>Claremont v. Governor</i>	State Legislature	School Funding	0.042
1998	New Jersey	<i>Abbott v. Burke</i>	Executive Agency	School Funding	0.526
1998	New Mexico	<i>Regents of UNMr. New Mexico Federation of Teachers</i>	Executive Agency	Labor Relations	0.02
1998	Ohio	<i>Chambers v. St. Mary's School</i>	State Legislature	Negligence	0.505
1999	Michigan	<i>Federated Publications Inc. v. Board of Trustees of Michigan State</i>	Executive Agency	Board of Regents	0.675
1999	Ohio	<i>AAUP v. Central State University</i>	State Legislature	Employees	0.505
1999	South Carolina	<i>Abbeville County School Dist. v State</i>	State Legislature	School Funding	0.195
2000	Maryland	<i>Frankel v. Board of Regents of the University of Maryland System</i>	Executive Agency	In State Tuition	0.21
2000	Ohio	<i>DeRolph v. State of Ohio</i>	State Legislature	School Funding	0.505
2000	Wyoming	<i>Campbell County School Dist. v. Catchpole</i>	Executive Agency	Taxes for Schools	0
2001	New Jersey	<i>Distribution of Liquid Assets</i>	Executive Agency	School Assets	0.526

2001	New Mexico	<i>Rogers v. Heller</i>	State Legislature	School Funding	0.064
2001	Ohio	<i>DeRolph v. State</i>	Governor	School Funding	0.505
2001	Ohio	<i>DeRolph v. State of Ohio</i>	State Legislature	School Funding	0.505
2001	South Carolina	<i>Horry County School Dist. v. Horry County</i>	State Legislature	Taxes for Schools	0.195
2001	Utah	<i>Utah School Boards Association v. Utah State Board of Education</i>	Executive Agency	Charter Schools	0.026
2001	Wyoming	<i>State v. Campbell County School District</i>	State Legislature	School Funding	0
2002	Arkansas	<i>Lakeview School Dist. v. Huckabee</i>	State Legislature	School Funding	0.083
2002	Mississippi	<i>Board of Trustees of State Institutions of Higher Learning v. Ray</i>	Executive Agency	Board of Trustees	0.129
2002	Montana	<i>Ponder River County v. State</i>	Executive Agency	Taxes for Schools	0.024
2002	New Hampshire	<i>Claremont School Dist v. Governor</i>	State Legislature	School Funding	0.042
2002	New Jersey	<i>Abbott v. Burke</i>	Executive Agency	School Funding	0.526
2002	New Mexico	<i>Cockrell v. Board of Regents of New Mexico State University</i>	State Legislature	Sovereign Imty.	0.02
2002	Ohio	<i>DeRolph v. State</i>	State Legislature	School Funding	0.505
2003	New Jersey	<i>Warren Community College v. Warren County Board of choosen</i>	Executive Agency	Funding for	0.526
2003	New York	<i>Campaign for Fiscal Equity v. State</i>	State Legislature	Projects School Funding	0.843
2003	Texas	<i>West-Orange Grove Consolidated v. Alanis</i>	State Legislature	Taxes for Schools	0.233
2003	Washington	<i>Mader v. The Health Care Authority</i>	Executive Agency	Health Benefits	0.266
2004	Arkansas	<i>Lakeview School Dist. v. Huckabee</i>	State Legislature	School Funding	0.083
2004	Montana	<i>Snetsinger v. Montana University System</i>	Executive Agency	Partner Benefits	0.024
2004	New Jersey	<i>Petition for Authorization to Conduct Referendum...</i>	Executive Agency	School Districts	0.526
2004	North Carolina	<i>Hoke County Board of Education v. State</i>	State Legislature	School Funding	0.273
2005	Alabama	<i>Collins v. Bennett</i>	Lower Court	Education Board	0.099
2005	Arkansas	<i>Lakeview School Dist. v. Huckabee</i>	Other	School Funding	0.083
2005	Arkansas	<i>Lakeview School Dist. v. Huckabee</i>	State Legislature	School Funding	0.083
2005	Idaho	<i>Idaho Schools for Equal Educational Opportunity v. State</i>	Lower Court	School Funding	0.081
2005	Idaho	<i>Idaho Schools for Equal Educational Opportunity v. State</i>	State Legislature	School Funding	0.081
2005	Kansas	<i>Montoy v. State</i>	State Legislature	School Funding	0.131
2005	Kansas	<i>Montoy v. State</i>	State Legislature	School Funding	0.131

2005	Massachusetts	<i>Hancock v. Commissioner of Education</i>	State Legislature	Const'l Right to Education	0.512
2005	Michigan	<i>Studier v. Michigan Public Schools Retirement Board</i>	State Legislature	Retirement Benefits	0.675
2005	Montana	<i>Dupuis v. Board of Trustees</i>	Executive Agency	Native American Mascot	0.024
2005	Montana	<i>Columbia Falls Elementary School Dist No. 6 v. State</i>	State Legislature	School Funding	0.024
2005	New Jersey	<i>Board of Education of the City of Milville v. New Jersey Department of State v. State Board of Education</i>	Executive Agency	School Funding	0.526
2005	Ohio	<i>State v. State Board of Education</i>	State Legislature	Charter Schools	0.505
2005	Texas	<i>Neeley v. West-Orange Grove Independent School Dist.</i>	State Legislature	Taxes for Schools	0.233

Table 5.2 Descriptive Statistics

Variable	Observation	Mean	Standard Deviation	Minimum	Maximum
Delegation	56	0.6428	0.4834	0	1
Same Party as Governor	56	0.3395	0.1812	0	1
Same Party as Legislature	56	0.3395	0.1812	0	1
Retained by Both Branches	56	0.0071	0.0843	0	1
Government is Party to Case	56	0.3137	0.4642	0	1
Professionalism	56	0.2431	0.2217	0	1

Table 5.3 Logistic Regression: Delegation to Other Branches of Government

	Expectation	Coefficient	Standard Error	Δ Prob 0 -> 1
Professionalism	- β	2.748	2.586	--
Same Party as Governor	+ β	0.103	0.727	--
Same Party as Legislature	- β	0.695	1.027	--
Retained by Both Branches	- β	-2.857	1.612*	-0.603
Government is Party to Case	+ β	1.675	0.620**	0.388
Professionalism* Same Party as Legislature	- β	-1.635	3.011	--
Constant	--	-1.099	1.029	--

N=56

Standard Errors
clustered by State

% Correctly Classified =76.79%

* $p > 0.10$; ** $p > 0.05$ **0= Delegate to Legislature; 1=Delegate to Executive Branch**

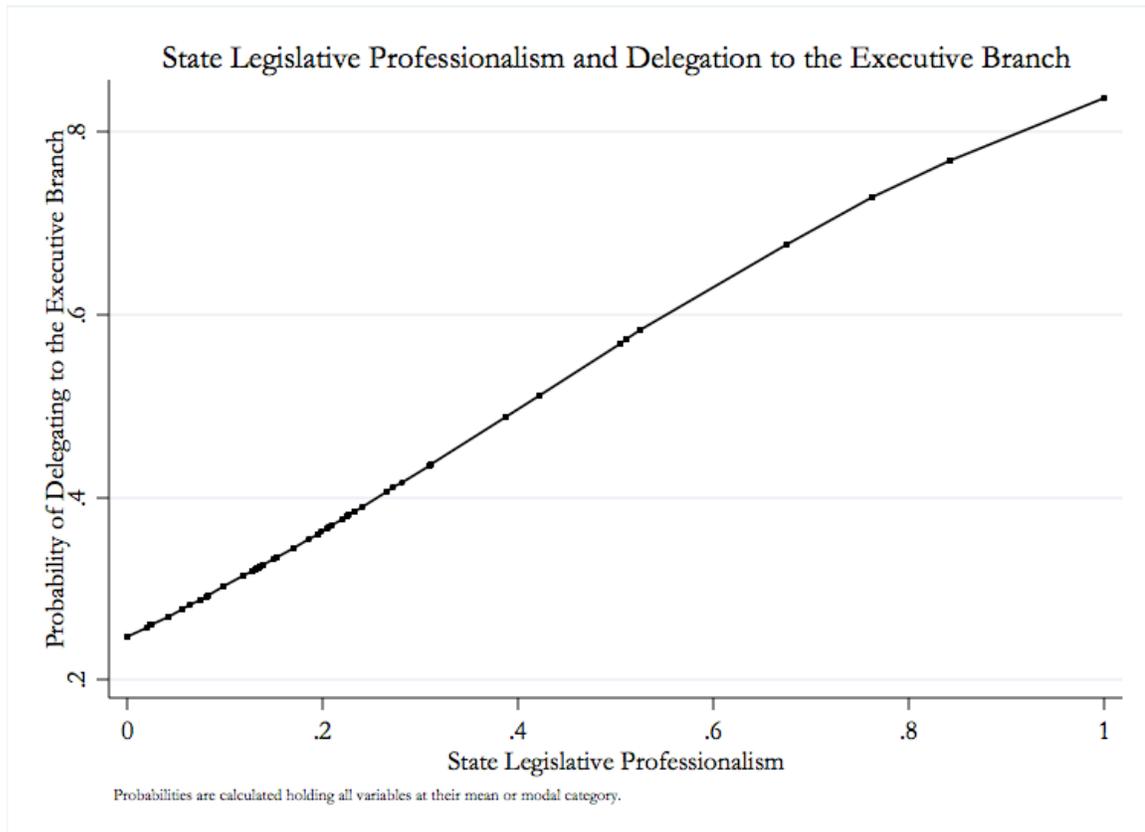
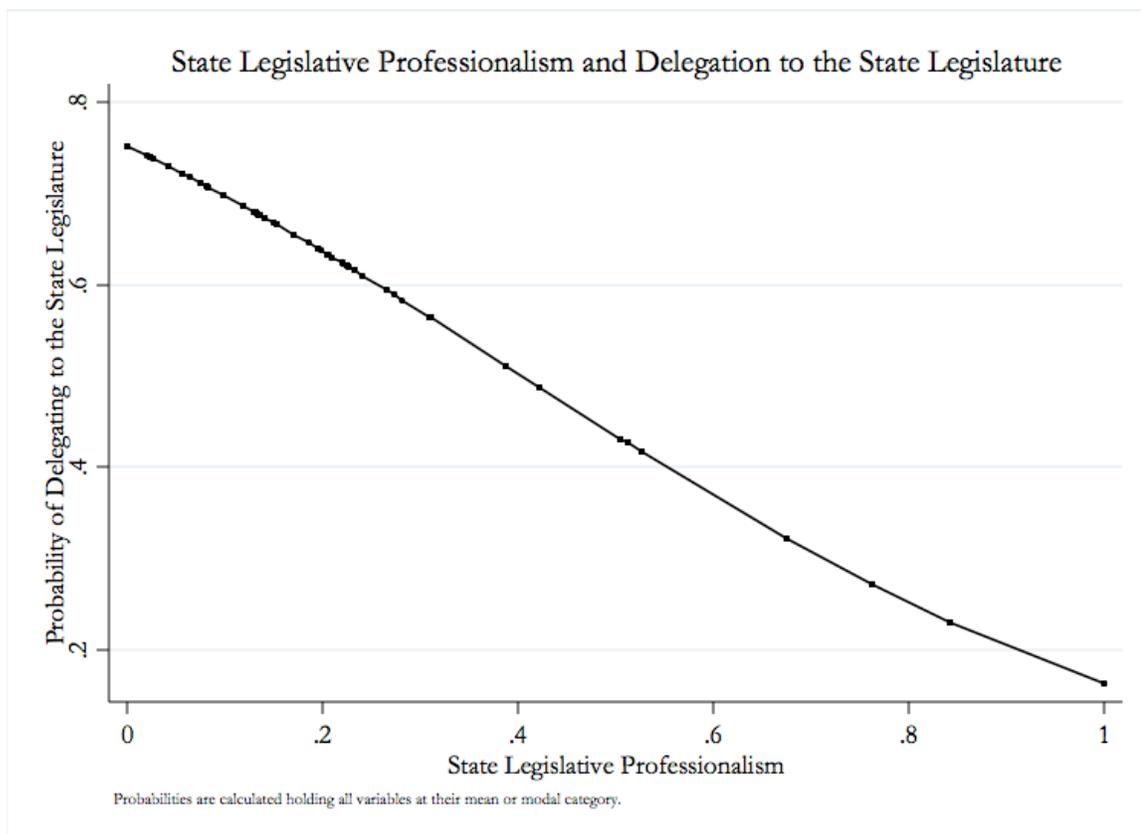
Figure 5.1a: Professionalism and Delegation to the Executive Branch

Figure 5.1b: Professionalism and Delegation to the State Legislature

CHAPTER 6: CONCLUSION

In the second chapter, I developed a theory of judicial review and delegation on state high courts. Drawing from multiple literatures on judicial decision-making; court legitimacy and legislative and bureaucratic delegation, I examined the decision-making behavior of state high courts and how this behavior related to final policy control in the American states. With this theory I provided the first examination of the affect of a state high court's legitimacy on its decision-making. This is important, as previous research has long examined legitimacy as a concept central to the power of a democratic institution. In focusing on courts, many have argued the power of these institutions is derived from their institutional legitimacy because of a lack of more formalized powers. Legitimacy should lead to compliance with the decisions of the court. We know that state high courts are highly constrained institutions. Yet, their decisions are an essential part of public policy in the states. Therefore, the ability of these courts to have their decisions complied with is essential to their policy making power in the states. With higher levels of legitimacy, state high courts become more important and effective institutions.

In the third chapter, I developed a measure of state high court legitimacy that relied on newly developed methodological techniques. In doing so, I was able to determine to what degree each of the state high courts is viewed as legitimate by the citizens in each state. Creating this measure was the first step in determining what effect legitimacy has on the decision-making, particularly judicial review and delegation by these state high courts. As the legitimacy of state high courts increase, I find that they are more likely to engage in judicial review and overturn the statutes passed by the other branches of government. While this conclusion is as expected, given what we know about legitimacy and the U.S. Supreme

Court, it is novel in that it is the first empirical test of the power of legitimacy on state high courts. As a result, I conclude that when we examine decision-making in a separation of powers context on state high courts, legitimacy must be considered as one of the most important factors for decision-making along with political preferences and institutional rules.

In addition to bringing legitimacy into the decision-making calculus of state high court justices, I also sought to develop a strategic option state high courts could turn to when they lacked high levels of legitimacy. Previous research argued that courts might implicitly delegate policy control to the other branches of government when they felt their opinions were less likely to be complied with. Courts would do this by writing vague opinions that would give the other branches of government greater leeway when implementing their decision. However, I argued state high courts could and will explicitly delegate policy control to the other branches of government when the court believes compliance is less likely. In doing so, the court can avoid outright noncompliance by allowing the other branches of government control over the final policy outcome. Reading state high court opinions for instances of delegation is an important step because it allows us to look further than the decision on the merits for the court's output and decision-making. With the results presented in the fourth and fifth chapters, I find that state high courts can and do delegate policy control to the other branches of government. The circumstances under which these courts delegate are not as predictable as the theory suggests, but the results in this dissertation suggest state high courts seek good policies for their state when delegating.

The main contributions of this dissertation are: (1) state high courts delegate policy control back to the other branches of government under certain conditions and (2)

legitimacy is an important factor in the decision-making of state high courts. Both of these conclusions are central to the power of a state high court in a separation of powers system. Under certain conditions, courts give up policy-making power to ensure future goals. Yet, a different set of circumstances affords state high courts the ability to see their policy preferences become law. State high courts are becoming increasingly important players in state policy-making. These courts are making decisions on some of the most contentious and momentous policy areas in American politics. Each day these courts expand or contract some of the most fundamental rights that citizens enjoy. Evidence presented in this dissertation demonstrates that these courts are free to make decisions at times without the constraining influence of the other branches of state government.

The theory presented in this dissertation has application beyond state high courts. Justices on national and sub-national courts across the globe want to see their policy preferences become law, just as they want to be viewed as legitimate institutions. This theory can be used to determine if other courts seek out delegation as a means to the end of balancing these two goals. Many courts do not enjoy the institutional protections that the U.S. Supreme Court does. These courts can also find their power in legitimacy and delegation just as state high courts can.

APPENDIX A: 2001 AND 2009 SURVEYS

2001 Survey: Justice at Stake Campaign

Survey for the **Justice at Stake Campaign**

Conducted by Greenberg Quinlan Rosner Research, Inc.³⁸

National telephone survey of 1,000 registered voters conducted October 30 through November 7, 2001. The margin of error is +/- 3.1 percent. The survey was conducted as part of a two-part survey of the public and state judges that focused on the practice of electing judges and the concerns of both the public and the judges about money in these elections. (see Greenberg 2002)³⁹.

Specific Question Used for MRP in Chapter 3:

Q.18. How much trust and confidence do you have in courts and judges in your state?

- A Great Deal (22%)
- Some (59%)
- Just a little (15%)
- Nothing at all (3%)
- (Don't know/refused) (1%)*

Q.2. Respondent Gender

- Male (47%)
- Female (53%)

Q.116 What is your race?

- White (80%)
- Black (11%)
- Hispanic (6%)
- Other (2%)
- (Don't know/Refused) (2%)*

Q.97. In what year were you born?

- 18-29 (16%)

³⁸ Data from the survey were provided by Damon Cann and Jeff Yates.

³⁹ Memo about surveys can be found online:

http://www.justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf

30-39 (19%)
40-49 (21%)
50-59 (16%)
60-over (25%)
No Answer (2%)*

Q.98. What is the last year of schooling that you have completed?

1-11th Grade (6%)
High School Graduate (31%)
Non-College Post High School (2%)
Some College (27%)
College Graduate (24%)
Post-graduate school (10%)
(Don't know/refused) (0%)*

*Those respondents that answered “Don’t know or Refused” were dropped from the analysis. Dropping respondents can be problematic because you lose information in a systematic way. However, because the MRP modeling strategy already relies on imputing information for respondent types, I wanted to simplify the modeling and just remove any “don’t know” responses. As a result I dropped a total of 42 respondents.

Summary of Results can be found online:

<http://www2.justiceatstake.org/files/JASNationalSurveyResults.pdf>

Further information about the survey can be found at:

<http://www.justiceatstake.org/>

2009 Survey: Separate Branches, Shared Responsibilities Survey

Survey for the **National Center for State Courts**

Conducted by Princeton Survey Research Associates

Funding provided by the Pew Center for the States, the State Justice Institute and the National Center for State Courts

National telephone survey of 1,200 adults (18 or over); 900 were reached on landlines and 300 on cell phones. The survey was conducted from February 17 through March 9, 2009. The margin of error is +/- 3%. Survey information and individual responses were provided by David Rottman at the National Center for State Courts.

Specific Question Used for MRP in Chapter 3:

Q.7.b Please tell me how much confidence you have in each of the following STATE AND LOCAL government institutions to do their job. (First,) how much confidence do you have in... (the state courts)?

READ FOR FIRST ITEM, THEN REPEAT AS NECESSARY: a lot of confidence, some confidence, not too much, or no confidence at all?

- A lot of confidence (22%)
- Some Confidence (52%)
- Not too much (14%)
- No confidence (7%)
- (Don't know/refused) (4%)

Q.7.b Please tell me how much confidence you have in each of the following STATE AND LOCAL government institutions to do their job. (First,) how much confidence do you have in... (the state legislature)?

READ FOR FIRST ITEM, THEN REPEAT AS NECESSARY: a lot of confidence, some confidence, not too much, or no confidence at all?

- A lot of confidence (15%)
- Some Confidence (51%)
- Not too much (18%)
- No confidence (9%)
- (Don't know/refused) (7%)*

D.1. Respondent sex:

- Male (49%)

Female (51%)

D.5. Are you of Hispanic or Latino background, such as Mexican, Puerto Rican, Cuban or other Spanish background?

Yes (13%)

No (87%)

D.6. What is your race? Are you white, black, Asian, or some other race?

IF R SAYS HISPANIC OR LATINO, PROBE: Do you consider yourself a WHITE (Hispanic/Latino) or a BLACK (Hispanic/Latino)? IF R DOES NOT SAY WHITE, BLACK OR ONE OF THE RACE CATEGORIES LISTED, RECORD AS “OTHER”

White (76%)

Black or African-American (14%)

Asian or Pacific Islander (3%)

Other or mixed-race (4%)

Refused (2%)

D.2. What is your age?

18-29 (20%)

30-49 (37%)

50-64 (25%)

65- over (17%)

(Don't know/refused) (1%)*

D.4. What is the last grade or class you completed in school?

None, or grade 1 to 8 (5%)

High School incomplete (grades 9-11) (9%)

High School graduate (34%)

Technical, trade, or vocational school after high school (2%)

Some college or university, but no four-year degree (23%)

College or university graduate (15%)

Post graduate or professional schooling (11%)

*Those respondents that answered “Don't know or Refused” were dropped from the analysis. Dropping respondents can be problematic because you lose information in a systematic way. However, because the MRP modeling strategy already relies on imputing information for respondent types, I wanted to simplify the modeling and just remove any “don't know” responses. As a result I dropped a total of 51 respondents.

APPENDIX B: CODE FOR CHAPTER 3 MRP LEGITIMACY CALCULATIONS

R Code for Multilevel Logistic Regression and Poststratification

Multilevel Model:

```
> M2 <- glmer(formula = collapseddv ~ court.publicdist+(1 | race.female) + (1 | agenew) +
(1 | edunew) + (1 | recstate) +(1 | mos)#+(1 | age.edu.cat), family=binomial(link="logit"))
+)
> mlm<-M2
> response<-collapseddv
> display(mlm, detail=TRUE)
```

Multilevel Model Results:

```
> summary(mlm)
Linear mixed model fit by REML
Formula: collapseddv ~ court.publicdist + (1 | race.female) + (1 | agenew) + (1 |
edunew) + (1 | recstate) + (1 | mos)
   AIC   BIC logLik deviance REMLdev
1040 1079 -511.8   1009   1024
Random effects:
 Groups      Name      Variance Std.Dev.
recstate (Intercept) 5.7640e-04 2.4008e-02
race.female (Intercept) 3.2353e-03 5.6879e-02
mos (Intercept) 2.7847e-19 5.2770e-10
edunew (Intercept) 4.3700e-03 6.6106e-02
agenew (Intercept) 6.8761e-04 2.6222e-02
Residual              1.6524e-01 4.0649e-01
Number of obs: 958, groups: recstate, 50; race.female, 6; mos, 4; edunew, 4; agenew, 4
```

Fixed effects:

	<i>Estimate</i>	<i>Std. Error</i>	<i>t value</i>
<i>(Intercept)</i>	0.734299	0.050381	14.575
<i>court.publicdist</i>	-0.002585	0.002680	-0.965

Correlation of Fixed Effects:

```
(Intr)
crt.pblcdst -0.259
```

Create Random Effects for Each State:

```

> state.ranefs<-array(NA,c(50,1))
> dimnames(state.ranefs)<-list(c(stateinitlist),"effect")
> for(i in cstatenum) {
+ state.ranefs[i,1]<-ranef(mlm)$recstate[i,1]
+ }

```

Create Random Effects for each Method of Selection Group:

```

> mos.ranefs <- array(NA,c(4,1))
> dimnames(mos.ranefs) <- list(c("1","2","3","4"),"effect")
  for(i in cmos) {
    mos.ranefs[i,1] <- ranef(mlm)$mos[i,1]
  }

```

Create a Prediction for Each Demographic-Geographic Type:

```

> cellpred <-
invlogit(fixef(mlm)[ "(Intercept)" ]+ranef(mlm)$race.female[crace.female,1]+ranef(mlm)$agenew[cage.cat,1]+ranef(mlm)$edunew[cedu.cat,1]+state.ranefs[cstatenum,1]+mos.ranefs[cmos,1]+(fixef(mlm)[ "court.publicdist" ]*cp.specific.full))
> cellpredweighted<-cellpred*cpercent.state

```

Add Cells Across Each Type, Creating Vector of Measure:

```

> statepred<-as.vector(tapply(cellpredweighted,cstatenum,sum))
> stateraw<-rep(NA,50)
  for (j in 1:50) {
    stateraw[j]<-mean(response[state.initnum==j],na.rm = TRUE)
  }
> statepred.legitimacy<-statepred
> stateraw.legitimacy<-stateraw
> cbind(statepred.legitimacy,stateraw.legitimacy)
  statepred.legitimacy stateraw.legitimacy

```

Multilevel Model for No Belief in the Legitimacy of the State High Court:

```

> noleg <- glmer(formula = nolegdv ~ court.publicdist+(1 | race.female) + (1 | agenew) +
(1 | edunew) + (1 | recstate) +(1 | mos)#+(1 | age.edu.cat), family=binomial(link="logit"))
+)
> mlm2<-noleg
> response<-nolegdv

```

Model Results:

```
> display(mlm2,detail=TRUE)
lmer(formula = nolegdv ~ court.publicdist + (1 | race.female) +
      (1 | agenew) + (1 | edunew) + (1 | recstate) + (1 | mos))
      coef.est coef.se t value
(Intercept)   0.27   0.05  5.27
court.publicdist 0.00   0.00  0.96
```

Error terms:

<i>Groups</i>	<i>Name</i>	<i>Std.Dev.</i>
<i>recstate</i>	<i>(Intercept)</i>	<i>0.02</i>
<i>race.female</i>	<i>(Intercept)</i>	<i>0.06</i>
<i>mos</i>	<i>(Intercept)</i>	<i>0.00</i>
<i>edunew</i>	<i>(Intercept)</i>	<i>0.07</i>
<i>agenew</i>	<i>(Intercept)</i>	<i>0.03</i>
<i>Residual</i>		<i>0.41</i>

number of obs: 958, groups: recstate, 50; race.female, 6; mos, 4; edunew, 4; agenew, 4
AIC = 1039.6, DIC = 995.2
deviance = 1009.4

Create Random Effects for Each State:

```
> state.ranefs<-array(NA,c(50,1))
> dimnames(state.ranefs)<-list(c(stateinitlist),"effect")
> for(i in cstatenum) {
+ state.ranefs[i,1]<-ranef(mlm2)$recstate[i,1]
+ }
```

Create Random Effects for each Method of Selection Group:

```
> mos.ranefs <- array(NA,c(4,1))
> dimnames(mos.ranefs) <- list(c("1","2","3","4"),"effect")
  for(i in cmos) {
    mos.ranefs[i,1] <- ranef(mlm)$mos[i,1]
  }
```

Create a Prediction for Each Demographic-Geographic Type:

```
> cellpred <-
invlogit(fixef(mlm2)["(Intercept)"]+ranef(mlm2)$race.female[crace.female,1]+ranef(mlm2)$a
genew[cage.cat,1]+ranef(mlm2)$edunew[cedu.cat,1]+state.ranefs[cstatenum,1]
+mos.ranefs[cmos,1]+(fixef(mlm2)["court.publicdist"]*cp.specific.full))
```

```
> cellpredweighted<-cellpred*cpercent.state
```

Add Cells Across Each Type, Creating Vector of Measure:

```
> statepred<-as.vector(tapply(cellpredweighted,cstate,sum))
> stateraw<-rep(NA,50)
  for (j in 1:50) {
    stateraw[j]<-mean(response[state.ininum==j],na.rm = TRUE)
  }
> statepred.no.legitimacy<-statepred
> stateraw.no.legitimacy<-stateraw
> cbind(statepred.no.legitimacy,stateraw.no.legitimacy)
      statepred.no.legitimacy stateraw.no.legitimacy
```

APPENDIX C: CODEBOOK FOR CHAPTERS 4 AND 5

Cases: Education All States 1995-2005

Westlaw Search Code:

Private Secondary and Elementary Schools:(345I) & (CO(HIGH) & YR(1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005)) (30 Results)

Education Civil Rights:((TO("81 COLLEGES" 345) /P DESEGREGAT!
(DISCRIMINAT! /5
SEX) INTEGRAT! RACE RACIAL SEGREGAT! "SEXUAL HARRASSMENT")
(TO("78 CIVIL") /P
HE(ACADEMY COLLEGE SCHOOL UNIVERSITY))) & ((CO(HIGH) & YR(1995
1996 1997 1998
1999 2000 200...) (130 Results)

Trade Schools: (TO(238 345) /P HE("TRADE SCHOOL")) & (CO(HIGH) & YR(1995
1996
1997 1998 1999 2000 2001 2002 2003 2004 2005)) (2 Results)

Athletics: ((TO("81 COLLEGES" 345) /P HE(ATHLET! BASEBALL BASKETBALL
FOOTBALL
SOCCER SPORT)) (TO("78 CIVIL" "92 CONSTITUTIONAL" 349) /P COLLEGE
SCHOOL
STUDENT UNIVERSITY /P ATHLET! BASEBALL BASKETBALL FOOTBALL
SOCCER SPORT)) &
(CO(HIGH)... (87 Results)

Colleges and Universities: (TO("81 COLLEGES")) & (CO(HIGH) & YR(1995 1996 1997
1998 1999 2000 2001 2002 2003 2004 2005)) (337 Results)

Public Secondary and Elementary: (TO(345II) (TO(345III) /P HIGH-SCHOOL)) &
(CO(HIGH) & YR(1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005)) (1098
Results)

General Search Code:

(TO("81 COLLEGES" 345) (TO("78 CIVIL" "92 CONSTITUTIONAL" 349) /P
ACADEMY
COLLEGE EDUCATION** STUDENT PUPIL SCHOOL UNIVERSITY)) &
(CO(HIGH) & YR(1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005))

Dependent Variables

Name	Code	Description
const_consd	0	Court does not consider a Constitutional Issue
	1	Court considers Constitutional Challenge
type_challenged	1	State Statute
	2	Initiative or Referendum – enacted
	3	Initiative or Referendum – proposed
	4	Executive Order
	5	Administrative Rule or Regulation
	6	Municipal Ordinance
	88	Other
	99	Unknown
second_time	0	Original Case
	1	Case in court for 2 nd (or more) time
review	0	No review of statute
	1	Overturn Statute
	2	Overturn in Part Statute
	3	Uphold Statute
delegation_general	1	No Delegation
	2	Court Makes New Policy
	3	Delegation to State Government
delegation_specific	0	No Delegation
	1	State Legislature
	2	Governor
	3	Administrative agency
	4	Lower Court
	5	Other

Independent Variables

Name	Code	Description
c_j_v; j_2_v ... j_9_v	0	Does not participate
	1	Majority Opinion Writer
	2	Joins Majority
	3	Concurring Opinion Writer
	4	Joins Concurring Opinion
	5	Dissenting Opinion Writer
	6	Joins Dissent
	7	Dissents with No Opinion
	8	Concurs with No Opinion
	88	Unknown/Other Justice
	99	Missing from Natural Courts
opinion_type	1	Full, signed opinion
	2	Per Curiam
	99	Unknown
decision_lc	1	Affirmed
	2	Reversed
	3	Reversed and remanded
	4	Affirmed in Part/Reversed in Part
	5	Remanded
unanimous	0	No
	1	Yes
policy_area	1	Public Schools, K-12
	2	Private Schools
	3	Colleges and Universities
	99	Unknown
policy_specific	Fill in	Specific policy consideration
petitioner_ident	0	Individual, Citizen
	1	State Government

	2	Executive Agency
	3	Local school board/School District
	4	Education Interest Group
	5	Local Government
	6	School Official
	7	University
	8	Political Party
	9	Regents/Trustees
	88	Other
	99	Unknown
gov_petitioner	0	State government not petitioner
	1	State government is petitioner
respondent_ident	0	Individual, Citizen
	1	State Government
	2	Executive Agency
	3	Local school board
	4	Education Interest Group
	5	Local Government
	6	School Official
	7	University
	8	Political Party
	9	Regents/Trustees
	88	Other
	99	Unknown
gov_resp	0	State government not respondent
	1	State government is respondent
statute	Statute Name	Statute name
action_law	1	Action being considered
	2	Law being considered
	99	Unknown
amicus_present	0	No briefs filed

	1	Briefs filed
	99	Unknown
amicus_no	#	Number of amicus, if available
overturn_agency	0	No overturn administrative agency decision
	1	Overturns agency decision

<i>Variables Created:</i>		
mow	Majority Opinion Writer	(1) PAJID ideology score
maj_co	Majority Coalition	(2) Median PAJID ideology score for coalition
dow	Dissenting Opinion Writer	(3) PAJID ideology score
dis_co	Dissenting Coalition	(4) Median PAJID ideology score for coalition
cow	Concurring Opinion Writer	(5) PAJID ideology score
con_co	Concurring opinion coalition	(6) Median PAJID ideology score for coalition

APPENDIX D: INTER-CODER RELIABILITY FOR CHAPTERS 4 AND 5

Table D.1: Inter-coder Reliability Scores

	% Agree	Scott's Pi	Cohen's Kappa	Krippen- dorff's Alpha	N Agree	N Disagree	Cases
Court Considers Constitutional (Stage 1)	90.56	0.679	0.681	0.6823	48	5	53
Judicial Review	92.45	0.718	0.718	0.720	49	4	53
Delegation_1	96.23	0.480	0.485	0.485	51	2	53
Delegation_2	96.23	0.484	0.488	0.4890	51	2	53

Data Calculated using ReCal2: Reliability for 2 Coders available online;
<http://dfreelon.org/utis/recalfront/recal2/>

See also: <http://astro.temple.edu/~lombard/reliability/>

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