

The Preemptive Power of State Supreme Courts: Adoption of Abortion and Death Penalty Legislation

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Abstract

We present a formal policy enactment game between state supreme courts and state policymakers. It is hypothesized that court ideological hostility or friendliness operates to discourage or encourage policy enactment, with the likelihood of subsequent court intervention magnifying the relationship. To test the argument we examine the influence of court ideology on the enactment of state abortion and death penalty laws since the 1970s. Empirical analyses provide strong support for the formal model, indicating that court ideological hostility or friendliness significantly influenced state abortion and death penalty policy enactments. In addition, the likelihood of court intervention conditioned this relationship, with the most pronounced effect occurring where subsequent court review was mandatory. The findings reveal courts exert important preemptive influence on law without hearing a case. This facet of judicial influence raises interesting questions about conceptualizations of judicial activism and restraint and expands the traditional view of actors involved in the policymaking process.

Introduction

State supreme courts serve as crucial arenas for the clash of issues in many of the policy debates that ensue in the American states. Using their power of judicial review and statutory interpretation, these courts may be the final arbiters of many state public policies. Though obvious to political scientists with interests in law and courts, students of state politics and policy commonly ignore the influence of state supreme courts in the policymaking arena.¹ Consequently, we know virtually nothing about the interaction of these institutions with the other branches of state government and our understanding of their role in the policy process is very limited.² Moreover, conventional interpretation of the role of state supreme courts in the policy process sees it as essentially reactionary, responding to laws passed by the legislature. From this conventional perspective, judicial influence concerns the extent to which courts, and in particular state supreme courts, intervene in the policy process by interpreting and overturning laws. While this role is vitally important and worthy of careful consideration, it is our premise state supreme courts also shape public policy passively (or preemptively) by their ideological composition. Fundamentally, for reasons we elaborate below, we posit that legislators and governors, which we refer to as policymaker(s)³, will be less likely to enact conservative (liberal) laws when there is a liberal (conservative) state supreme court. Because policymakers gauge the preferences of state supreme courts, the likelihood courts act on the laws passed can afford state supreme courts opportunities to play a passive role in the policy process.

A conventional or even dominant view of the policy process focuses on the linkages between policy, legislators and citizens. For example, in their highly influential study Miller and Stokes (1963) illustrated varying linkages of legislator and constituent preferences to roll call votes in differing policy areas. Consistent with this tradition, the policy-public opinion nexus has been a mainstay of state politics research (e.g., Weber and Shaffer 1972; Uslaner and Weber 1983; Wright, Erikson, and McIver 1987; Erikson, Wright, and McIver 1993; Cohen and Barrilleaux 1993; Norrander and Wilcox 1999; Norrander 2000). In addition, many studies also examine the connection between legislative preferences and policy outcomes (e.g., Fiorina 1974; Garand 1985; Wright, Erikson, and McIver 1987; Berry and Berry 1990; Holbrook and Percy 1992; Erikson, Wright, and McIver 1993; Barrilleaux 1997, 2000). In combination, this extensive literature provides compelling evidence, varying across policy areas, of linkages between both constituent and legislative preferences and policy choices in the American states.

A notable dimension of the policy, opinion, and elite nexus not extended to the American states concerns the role other institutions play in shaping policy outcomes. Legislative and constituent preferences were not the only influences on policy choice found by Miller and Stokes. In the case of foreign policy, the executive exerted dominant influence on policy choice indicating that, under some conditions at least, inter-institutional dynamics may supercede or supplement the influence of constituent and legislative preferences on policy choice. This pattern of influence raises the more general question, not addressed in the state politics literature to date, of how the preferences of other institutional actors affect policy choices in the American states. The focus of our study is on the manner in which the preferences of state supreme courts may influence the enactment of policy in the American states. The predominant explanations of policy adoption ignore the role courts may play in this process. As we shall show below, this role is very consequential in at least two policy areas.

The theory forwarded in the sections that follow expands upon the traditional view of courts in making policy and broadens consideration of the actors involved and forces at play when government makes policy choices. Stated simply, it is our premise that state supreme courts, imbued with the authority to review and interpret the policies enacted by legislatures and signed into law by governors, exert influence at the policy enactment stage. Based on their ideological disposition and the likelihood they will intervene, state supreme courts exert what we label *preemptive influence* in the enactment stage of the policy process. The likelihood that policies are (or are not) enacted may thus reflect the ideological preferences of state supreme courts as well as those of policymakers and the public.

Our presentation proceeds as follows. First we offer an account of inter-dependent, policymaker-court relations that is central to our analysis and present a formal theory of policy enactment that highlights the preemptive influence of courts resulting from their 1) ideological disposition and 2) their power to engage in statutory interpretation or judicial review of policy. Second, we specify the equilibrium to the enactment game and derive four main propositions about the preemptive role of courts in the policy process. Third, we conduct an empirical test of the hypothesized preemptive influence of state supreme courts in two policy areas (i.e., abortion and death penalty laws) by developing a multivariate model of state policy enactment. Here, we also describe the operationalization of the independent variables used to test our propositions and

present some alternative explanations of policy enactment. We conclude with a discussion of the empirical results and implications of policymaker-court relations in the policy process.

The Preemptive Influence of Courts in the Policymaking Process

We believe state supreme courts can exert preemptive influence in the policy making process that affects the propensity of states to enact laws and the timing of those enactments. Policymakers, concerned about the ultimate fate of the laws they enact, reference the ideological predispositions of the court because courts have the authority to overturn or effectively reinterpret legislation. By so doing, state supreme courts influence the supply and content of law in given policy areas before cases ever reach them.

It is certainly reasonable to ask why policymakers would be motivated to reference the ideological composition of the courts. Reelection is commonly viewed as the predominant motivation of legislators and, as Mayhew argued, “the electoral payment is for positions, not effects” (1974, 146 n. 153). If reelection were the exclusive goal of policymakers it would seemingly be just as easy to posture and appease constituents by passing these laws without concern for their ultimate success in court. Legislatures and governors could effectively “pass the buck” and let state supreme courts take the heat for overturning popularly supported laws. In so doing, they would surrender their influence on this public policy to the courts.

Of course, reelection is only one of several objectives motivating legislators. Members of Congress and presumably state legislatures and governors as well, have other goals including “good” public policy (Fenno, 1973, 1; see also Wittman 1983; Mitchell 1987; Harrington 1992). When policy is a primary motivation, it would be strategically advantageous to enact laws with reference to their ultimate disposition before the courts, which have the authority to substantially revise their operational meaning or reject them outright.

There is ample evidence to indicate that policymakers do indeed care about reversals by courts. For example, Stone (1992) demonstrated that legislatures in France often limit or postpone legislative proposals to avoid adverse decisions anticipated by the Constitutional Council. Shipan (1997) found that members of Congress strategically timed the adoption of broadcasting regulation in anticipation of how the United States Supreme Court would respond.⁴ Vanberg (2001) found in Germany that when a high probability exists that legislation will confront a hostile court, the legislature chooses not to pass a law (2001, 352). In the

American states, Rogers and Vanberg (2002) consider the impact of judicial advisory opinions, which they refer to as an early form of judicial review. They observe “the advisory opinion mechanism induces the legislature to *reject* some laws that it would have enacted without the mechanism, and *enact* some laws that it would have rejected without the mechanism” (2002, 24).⁵

Through either formal or informal communication, the interplay between policymakers and their state supreme courts is a common element of the policy process in many states.⁶ We should be clear, however, that explicit communication with the courts is not a prerequisite for their passive influence. Even without explicit communication, policymakers can gauge the prospects of a proposed law by simply estimating how a court would deal with legislation. We hypothesize that this estimate is greatly informed by the ideological composition of the state supreme court membership and the estimated probability of court intervention. For reasons we illustrate below, when policymakers view a court as ideologically hostile and prone to intervene, they are less likely to enact policy. Quite simply, expectations about court preferences and action condition the enactment of policy.

The Enactment Game

The policy enactment⁷ game begins from the premise that policy goals motivate policymakers at least partly. We do not assume that policymakers ignore electoral goals but that these coexist with policy motivations. Clearly, if they did not care about the ultimate disposition of a law they passed, policymakers would have no incentive to concern themselves with the preferences or likely actions of state supreme courts. Our primary interest is with policy choices made by policymakers when acting in an environment characterized by their juxtaposition to the courts, controlling for the effects of legislators’ preferences and those of their constituents.

We develop a model of policymaker-court interactions. We adopt the typical assumptions that the actors are unitary and rational, having complete and transitive preference orderings over outcomes. We consider the implications of the model under the assumption of complete and perfect information. We then examine a one-sided version of the model under incomplete information to explore those situations in which policymakers have only a probabilistic idea of the preferences of the court that they face.

Figure 1 presents the first (complete and perfect information) version of the model. We identify two players, PM (policymaker) and C (state supreme court). The game begins when PM has already begun to

consider some form of legislation, what we shall call policy p . At the first node, PM must choose between two actions: it can choose to enact policy p (E) or to not enact the policy ($\sim E$). If PM chooses not to enact the policy, the game simply ends with the status quo as the determined outcome. If PM chooses to enact the policy, C must choose to intervene judicially (I), or not to intervene ($\sim I$). For our purposes, such intervention includes two types of court activities; (1) subjecting the policy to judicial review or (2) statutory interpretation. If C does not intervene, then the game ends. If C intervenes, then C when adjudicating a case must choose whether to be deferential to the policymaker's policy (D) or non-deferential to the policy ($\sim D$).

Judicial deference (D) to the policymaker implies that C chooses to uphold the policy on constitutional grounds or interpret the policy according to policymaker's preferences, whereas non-deferential court decisions ($\sim D$) indicate the court invalidates the policy on constitutional grounds or interprets the policy in a way that goes against the preferences of the policymaker. Thus, four possible outcomes exist for this game in its perfect information form: 1) status quo, 2) p policymaker enacts policy with no subsequent judicial intervention, 3) p policymaker enacts policy with subsequent judicial intervention that is deferential to the policymaker, and 4) p policymaker enacts policy with subsequent judicial intervention that is non-deferential to the legislature.

<<Figure 1 about here>>

In this version of the enactment game, we could establish our results using only the assumption that actors can rank order the four outcomes in terms of their preferences. In the second version presented below, however, actors will face choices that involve risk, requiring an additional assumption that actors' preferences can be represented by classical utility functions. For the sake of consistency, we develop this assumption throughout. These utility functions are invariant up to a linear transformation, which enables us to associate any outcome with the "zero" point on an actor's utility scale without loss of generality. For each actor, we designate the status quo outcome as providing zero utility. The actor that achieves its policy goals receives positive utility, denoted as π for the policymaker and α for the court. These variables can be interpreted directly as the value of each actor for the policy p , where $0 < \pi$ and α can take on any real number value.⁸ In addition, we view the process of judicial intervention as imposing a temporary cost on the actors, adjusting their values for the policy by δ_L and δ_C respectively, where $0 < \delta_L, \delta_C < 1$.

A final variable, k , enters into the court's utility calculation when deciding whether or not to intervene. When a court intervenes in a policy area, its legitimacy can be increased (or decreased) based upon the court's decision and course of action. Hence choosing not to intervene or acting in a manner that is deferential to the policymakers can bolster the institutional legitimacy of the court (e.g., Caldeira 1986; Gibson, Caldeira, and Baird 1998; Vanberg 2001; Rogers 2001). Depending on the issue, non-intervention or deferential behavior also might reduce judicial legitimacy. k is meant to represent the value to the court of judicial legitimacy where $k \geq 0$.

This characterization of the players' utilities over outcomes implies several restrictions on allowable preference orderings. First, the most preferred outcome for each actor must be the one in which it achieves its policy objectives with the least amount of cost. Thus, the best outcome for PM occurs when it enacts p and C chooses not to intervene, which is denoted by the payoff pair (π, α) ⁹. The best outcome for C depends on the extent to which C values the policy itself, versus the issue of judicial legitimacy. Stated differently, if the court cares dearly about the policy issue, the court will risk the institution's legitimacy. In some policy areas, judicial intervention is expected and/or mandatory, which has important implications on the value of k . In addition, PM must prefer the status quo outcome to that in which it receives a negative value for an outcome, such as when C intervenes and decides the case in a way that is non-deferential to the legislature, denoted by payoff pair $(-\delta_L \pi, k - \alpha)$. PM and C must both prefer the outcome in which they receive the full value of the policy (π, α) to that in which the values are discounted by the cost of judicial intervention $(\delta_L \pi, \delta_C \alpha)$. Given these restrictions, we have one possible preference ordering of interest for the policymakers, and two for the court:

Policymaker: $\pi > \delta_L \pi > 0 > -\delta_L \pi$

Court Type 1 (Friendly): $\alpha > \delta_C \alpha > 0 > k - \alpha$

Court Type 2 (Hostile): $k > 0 > \delta_C \alpha > \alpha$

Courts of type I are labeled as "friendly" in relation to the policymaker to account for the court's desire to see the policy reflect the policymaker's preferences. Here the court *does not prefer to* 1) protect or bolster court legitimacy; 2) intervene; 3) impute court preferences on the policy; or 4) promote the status quo. Courts of type II are labeled as hostile to account for an opposite preference ordering. These courts prefer 1) no policy (i.e., status quo); 2) non-deferential behavior toward policymaker; 3) intervention; or 4) protection

or bolstering of court legitimacy. We apply the subgame perfect equilibrium concept to solve the game. Given the perfect information nature of the game and its structure, we can identify the unique equilibrium and the outcome associated with it for both combinations of preference orderings. Thus, when we have PM facing a friendly C, we can see that both actors will prefer that a policy be upheld rather than overturned (that is, C will engage in deferential behavior toward the policymakers), but C will prefer not to intervene in the first place, while PM will prefer to enact the policy, resulting in the sub-game perfect equilibrium of {enact; no intervention, deferential behavior} with the associated outcome of both parties achieving full value for the policy. In the instance where PM faces a hostile C, a different outcome obtains. C will prefer to be non-deferential toward the policy, and C also will prefer to intervene. PM will prefer to not enact the policy because PM knows C's preferences and associated outcomes. Therefore, the sub-game perfect equilibrium is {not enact; intervene, non-deferential behavior}. The status quo prevails.

Substantively, the complete and perfect information version of the model tells us we can expect only one of two outcomes depending upon whether PM is likely to confront a court that has similar preferences regarding p (i.e., a friendly court). In reality, we know that all four outcomes can occur under varying conditions. We also know that policymakers do not always have full information regarding a court's preferences over policy and related outcomes. In order to more fully explore the nature of these conditions, we construct a second version of the model in which we assume that PM has incomplete information regarding C's preference ordering. As is common, we model this as a game of imperfect information, where we allow nature, N , to choose C's "type": hostile or friendly, and we assume PM does not know C's type. Figure 2 presents the extensive form of this game. This model gives each player the same set of choices as above, and assigns the same payoffs.

<<Figure 2 about here>>

In this model, we assign the first move to nature, which determines C's type. C will be friendly with probability q and hostile with probability $1 - q$. After nature's move, C becomes aware of its own type and the game proceeds as before, with the exception that as PM moves, it does not know C's type. Because PM now proceeds without knowledge of C's type, we observe the range of outcomes as part of mixed strategy equilibria resulting from uncertainty. We solve the game once again using the sub-game perfect equilibrium concept and determine the following equilibrium conditions.

The key decision in the game (both substantively and structurally) is whether or not PM chooses to enact policy p at its first choice node. This is determined in part by the probabilities of C being either hostile or friendly. A friendly C will have a pure strategy of {not intervene; deferential behavior}, which is a best reply to any of PM's strategies. Because this is a single-shot, non-iterative game, a hostile C will always adopt a strategy designed to punish PM if PM chooses to enact at its first decision node¹⁰. PM will adopt a mixed strategy of whether or not to enact the policy based on the probability that it faces a hostile C. These strategies are determined as follows.

If the game reaches C's first choice node (I, ~I), a hostile C will intervene and is non-deferential against policy p if the utility of judicial intervention is greater than that of not intervening:

$$U(I) > U(\sim I)$$

$$(1 - q)(k - \alpha) > (1 - q)(\delta_C \alpha)$$

where $q = 0$ (because C is hostile with a probability of 1 known to C) so

$$k > \alpha + \delta_C \alpha$$

in order for a hostile C to intervene. We know from the previously described preference restrictions that this is almost always likely to be the case, due to the nature of a hostile court.

When will C have an opportunity to reach its first node and subsequently engage in deferential or non-deferential behavior? This depends upon the action of PM and whether or not PM chooses to enact or not enact policy p . Since the assured payoff of PM not enacting policy p is 0 (the status quo outcome), we can calculate that PM will adopt if:

$$U(E) > U(\sim E)$$

$$(q)(\pi) + (1 - q)(-\delta_L \pi) > (q)(0) + (1 - q)(0)$$

$$q(\pi + \delta_L \pi) - \delta_L \pi > 0$$

$$q > \delta_L \pi / (\pi + \delta_L \pi)$$

So when the above condition obtains, PM will enact p . Therefore, PM's decision to enact a policy depends most heavily on the relationship between q and π (the value of the policy), in an inverse manner. As the value of a policy increases to PM, q decreases, demonstrating the somewhat ironic nature of the court-policymakers relationship. Q must be greater than the above fraction in order for PM to enact policy p , however as the value of p increases, this inequality becomes harder and harder to satisfy. This condition can

be articulated in terms of PM's risk profile. Policymakers that have a higher value for p are considered to be more risk acceptant; they are willing to hedge their bets against a potentially hostile court in order to achieve their policy goals, even in the face of adverse conditions. In contrast, policymakers with a lower value for p are considered more risk adverse and thus are not willing to risk confrontation with a hostile court.

Implications of the Enactment Game

On the basis of these derivations, we can specify the equilibrium to the game. First, since C has complete and perfect information, its beliefs regarding which node has been reached are characterized by certainty. Again, the strategy {not intervene; deferential behavior} is a best reply for a friendly C regardless of the strategy adopted by PM, as is {intervene; non-deferential behavior} for a hostile C as long as k reaches the value specified above. Under most conditions, PM will adopt a mixed strategy in equilibrium. PM will enact the policy when the probability of C being friendly (q) equals or is greater than $\delta_L \pi / (\pi + \delta_L \pi)$, and not enact with probability $1 - q$.

We can now show that a rational, utility maximizing, *policy-motivated* PM will sometimes choose to not enact legislation *based on its beliefs concerning the type of state supreme court it faces and the probability the state supreme court will intervene*. In this manner, the court is indeed exerting a passive influence upon if and when policies are enacted. As the game demonstrates, PM will choose to enact a policy or to let it go by the wayside before the court even has a chance to make a move. The mere anticipation of a court's reaction to policy enactments, given the opportunity, characterizes the strategy adopted by PM. The probability of court intervention is determined in part by the policy adjudicated before the court because some policies require mandatory review by the court and other policies permit discretionary review by the court. From our model, we derive four fundamental propositions about the preemptive role of courts in the policy enactment process:

Proposition I: Enactment is most likely to occur when there is a friendly court and least likely when there is a hostile court, *ceteris paribus*.

Proposition II: Because a friendly court is unlikely to intervene, the probability of enactment will be greater when there is discretionary judicial review than when a policy requires mandatory review before an equally friendly court.

Proposition III: Even when a friendly court must intervene, it is preferred to a hostile court with discretion because the friendly court is more likely to be deferential.

Proposition IV: Because a hostile court is likely to intervene, the probability of enactment will be equal for hostile courts irrespective of whether there is mandatory or discretionary review.

Figure 3 illustrates the basic relationships implied by these propositions. In the section that follows, we empirically test the four main implications of our model.

<<Figure 3 about here>>

Empirical Evaluation of the Model

The Occurrence and Timing of Policy Enactments in the American States

When evaluating the process of policy enactment it is important that each state has the opportunity to enact a law. Consequently, it is important that states do not already have laws on the books that would make it unnecessary for them to enact laws in the period we study. Obviously, this would distort our picture of the policy enactment process. For this and other reasons we focus on abortion and death penalty law enactments in all fifty states. We examine the enactment of restrictive abortion policy during the 1974-1993 period following the United States Supreme Court's landmark decision in *Roe v. Wade* (1973). While this ruling effectively erased existing abortion restrictions, in the ensuing period many questions about abortion rights were left unanswered. This left the door open for states to enact new restrictions on abortion rights (Halva-Neubauer 1993; Craig and O'Brien 1993; O'Connor 1996; Rosenberg 1995; Norrander and Wilcox 1999). As with abortion, a United States Supreme Court ruling about the death penalty established a new era for state policymakers. In *Furman v. Georgia* (1972) the Supreme Court suspended the imposition of the death penalty under existing statutes but did not make capital punishment unconstitutional. Instead, it forced state policymakers to enact legislation that explicated the crimes and circumstances for which a sentence of death could be issued and required the application of the death penalty be appropriate to the severity of the crime. Many policymakers began enacting new death penalty legislation (e.g., Nice 1992; Mooney and Lee 1997; Norrander 2000). Four years later in *Gregg v. Georgia* (1976), the Supreme Court reassured state policymakers that the death penalty per se was not unconstitutional so long as the statute is clear in its application and jury discretion is limited by specifications in the law. This ruling further encouraged states to

enact the death penalty, but mandated several modifications to death penalty legislation as well (e.g., Mooney and Lee 1997). We examine the enactment (or reenactment) of the death penalty in all fifty states during the 1973-1996 period following the United States Supreme Court's landmark decision in *Furman v. Georgia* (1972).

Another important reason for focusing on these particular policies is that the likelihood of court intervention varies dramatically in the two areas of law. All defendants sentenced to death have the right to appeal this sentence to the state supreme court and in these cases the court does not have discretion as to whether or not they will hear the appeal. As a result, cases involving death penalty laws fall under mandatory review by the state supreme court whereas these courts have discretion to resolve disputes concerning abortion laws. This fundamental difference allows us to evaluate how expectations about court intervention (Propositions II, III, & IV) influence the likelihood that laws are enacted, as we will illustrate below.

A Multivariate Model of Policy Enactment in the American States

To fully disentangle the passive influence of courts in the patterns of enactments of abortion and death penalty laws in the states requires the use of multivariate techniques that allow us to control and evaluate the impact of alternative influences as well as our hypotheses of primary interest.

Policymaker, Court and Constituent Controls

To gauge the effects of court hostility, we focus on our primary actors in the enactment process: 1) State Supreme Court (CT) and 2) Policymaker (PM), while controlling for the influence of the Constituency (CZ).¹¹ Measurement of preferences for these three actors is critical and we use published sources of each. Specifically, we measure PM and CZ using Berry et al. (1998) and CT using Brace, Langer and Hall (2000). Higher values of each measure are related to liberalism. To simplify comparisons, we standardize PM, CT and CZ within states and across years.¹² From these recalibrated scores we then compute the ideological distances between the court and the policymaker ($CTPM_{SID}$), and the citizenry and the policymaker ($CZPM_{SID}$). When these distances are positive the court or citizenry is more liberal than the policymaker. When the distances are negative, the court or citizenry is more conservative than the policymaker. The magnitude of these measures indicates the degree of ideological distance. These measures will allow us to

estimate the influence that court and citizen ideology exerts on the policymaker, after controlling for the policymaker's preferences.¹³

If policymakers were acting without regard to the preferences of constituents or courts, PM would be the only preference variable influencing the enactments of laws in our model. Given that the laws we are examining are conservative in nature, we would expect PM to vary inversely with the likelihood of enacting restrictive abortion statutes and the death penalty. Again, examination of these two policy areas allows us to test whether or not the impact of court hostility on policy enactment varies across mandatory versus discretionary intervention (i.e., court review).

Relative court hostility or friendliness is measured using the ideological distance of the court from the policymaker described above. If the policymaker is responsive to court preferences, when courts are more liberal than the policymaker ($CTPM_{SID} > 0$) we would expect to see fewer enactments of these conservative laws. Following the expectation developed from Proposition I we expect $CTPM_{SID}$ to be significantly less than zero in our multivariate analysis (i.e., the probability of enactment will be reduced). When the policymaker confronts a friendly court, we expect enactment of a policy for which the court has discretionary review (i.e., abortion policies) to be higher than enactment of death penalty laws, which as noted earlier is a policy that requires mandatory review (i.e., $A > C$). This follows from proposition II, since the greatest payoff for the policymaker is when the PM confronts a friendly court and the court does not intervene. Following proposition III, we expect enactment of death penalty laws to be higher, when PM confronts a friendly court, than enactment of abortion restrictions when PM confronts a hostile court (i.e., $C > B$) because a hostile court is likely to intervene and engage in non-deferential behavior. Finally, following proposition IV, we expect enactment of abortion restrictions and death penalty laws will be equally low when PM confronts a hostile court (i.e., $B = D$).

If the policymaker acts as an instructed delegate and is influenced by constituent preferences we would expect the effects of citizen ideological distance to have a significant effect on policymaker enactment decisions. For example, when constituents are more liberal than policymakers ($CZPM_{SID} > 0$), the policymaker should be significantly less likely to enact abortion restrictions and death penalty laws. Alternatively, when constituents are more conservative than the policymaker ($CZPM_{SID} < 0$), the

policymaker will be significantly more inclined to enact these conservative policies if the policymaker is responsive to constituent preferences.

Other Influences on the Policy Adoption Process

In addition to ideology, we expect other factors to influence the likelihood and timing of restrictive abortion statutes and death penalty statutes in the states. As we noted earlier, some states have constitutional or statutory provisions that allow for advisory opinions. These permit state legislatures to ask state supreme courts the probable constitutional fate of a prospective law. This provision affords the policymaker the opportunity to directly assess court preferences regarding proposed policies. Consequently, policymaker uncertainty about court action in the policy process should be reduced greatly because advisory opinions can serve a valuable informational role (Rogers and Vanberg 2002). In these states, the policymaker not only gauges better the likelihood of court intervention and subsequent non-deferential behavior, but also gathers information that can be used to tailor nuances of the legislation that will appease the court. Because these provisions act to reduce uncertainty, we expect enactments will be higher in states that have advisory opinion.

Several studies of policy adoption point to the potential importance of party control on policy outcomes (Berry and Berry 1990; 1992; Alt and Lowry 1994). The basic expectation is that divided governments are less able to act than those unified under a single party. The findings, however, are somewhat mixed with some results supporting the hypothesis that unified governments are more prone to action (Alt and Lowry 1994) while other evidence finds either mixed or no support (Berry and Berry 1992), or evidence of exactly opposite effects (Berry and Berry 1990). We include a dichotomous variable to examine the consequences of unified versus divided government on policy enactment. We also interact this variable with policymaker ideology to assess whether or not the effects of policymaker preferences are conditioned by presence or absence of unified party control.

Provisions affording citizens certain rights in state constitutions may act to constrain policymakers. Former United States Supreme Court Justice William Brennan observed over a decade ago that “[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence of our times (cited in Salokar 1999, 75).” Adoption of explicit rights beyond those guaranteed by the United States

Constitution has become commonplace in many American states and citizens expect state government to expand individual rights (Tarr 1999). Moreover, state supreme courts are more likely to invalidate legislation in states that have specific constitutional rights associated with the policy in question (e.g., Fino 1987; Harrison and Tarr 1999; Brace, Hall, and Langer 1999; Langer 2002). The presence of a state constitutional right to privacy significantly increases the likelihood of court intervention in the area of abortion legislation (Brace et al., 1999). Because state constitutional right to privacy provisions can serve as grounds to invalidate restrictive abortion laws and are associated with increased court intervention, we consider whether the presence or absence of right to privacy provisions guaranteed to citizens by state constitutions influences the likelihood and timing of enactment of restrictive abortion statutes. We expect policymakers will be less inclined to enact restrictive abortion legislation when constitutional right to privacy provisions are present.¹⁴

Diffusion of policy innovations is another process commonly viewed to influence the choices of policymakers in the states (Walker 1969; Gray 1973; Berry and Berry 1990; Berry and Berry 1992). From this perspective, states learn from and emulate states that are geographically contiguous to them. In their study of abortion policy in the pre-*Roe* era, Mooney and Lee (1995) find evidence of policy diffusion between the states. In our analysis, we construct a lagged variable indicating whether a contiguous state had enacted the policy. We expect neighboring state enactments to be positively related to policy enactments in a given state.

We also control for state disposition to abortion policy in our analysis. We know that states varied widely and significantly in their predispositions to abortion in the pre-*Roe* era. Mooney and Lee (1995) developed a Guttman scale of abortion permissiveness for the pre-*Roe* era. We expect state predispositions to abortion before *Roe* will be a strong predictor of their policy positions on abortion after *Roe*. Previously more permissive states should be significantly less inclined to enact restrictive abortion statutes. For death penalty enactments, we consider the necessity and demand for such legislation. To capture this, we include the number of murders committed in a state per 1,000 of the adult population (Nice 1992; Mooney and Lee 1997). Unfortunately, a scale for death penalty permissiveness is not available to capture state government disposition to the death penalty. Instead, we consider whether or not the state had enacted the death penalty prior to the USSC's decision in *Furman*. Lastly, we anticipate (and find) that a control for southern states is needed to capture the distinctive politics of the region.

Research Design and Methodology

Our interest is in the conditions under which states enacted restrictive abortion statutes after *Roe v. Wade* and death penalty laws after *Georgia v. Furman*. First, we examine restrictive abortion statutes defined as situations in which the states imposed conditions to seek abortions, or enacted policies that limited pursuit of abortions. We include four types of abortion restrictions in our analysis: 1) Parental notification or consent, referred to as minor's access; 2) limitations on public funding for abortions that are not necessary to save the life of the woman; 3) informed consent, requiring a 24 hour waiting period; and 4) spousal consent.

¹⁵ States began enacting these policies after the Supreme Court's decision in *Roe v. Wade*. Between 1974 and 1993, 37 states enacted parental consent laws, 19 states adopted informed consent laws, 25 states passed funding limitations, and 17 states implemented spousal consent legislation.¹⁶

Our research questions and a few important characteristics of the four restrictive abortion statutes we wish to examine guide our choice of estimation procedure for this policy area. First, these policy enactments (i.e., events) are presumed to be independent and unordered. A state's enactment of one of the four policies (e.g., parental consent) is assumed to be independent of enactment of another (e.g., 24 hour waiting period) because a state need not enact both. Second, the timing and occurrence of enactment varies across these four policies and this, we presume, occurs because some policies are more or less controversial than others. Forcing these different policies to assume the same baseline hazard rate overlooks important substantive differences in the policy durations and can produce inefficient standard errors. The stratified Cox methodology we employ takes these characteristics into consideration and produces more accurate and efficient estimates of the covariates in our models. Furthermore, this duration analysis allows examination of both the likelihood that an event will occur, and how explanatory variables influence the timing of that event (or rapidity with which policymakers act). Finally, the technique provides a baseline hazard rate for each of the four policies which can illustrate and control for differences among the four policies (see e.g., Box-Steffensmeier and Jones in press).

The dependent variable is the number of years until a state enacts a specific restrictive abortion statute (i.e., the *event* occurs) for each policy (i.e., strata).¹⁷ The unit of analysis is a state in the "risk set" in a given year. Stratified Cox regression estimates the hazard rate of a state enacting any one of the four restrictive statutes in a year, given that it had not previously done so in the period examined.¹⁸ The states that

do not enact a restrictive abortion statute during the period studied are right-censored (see Box-Steffensmeier and Jones 1997).¹⁹ Since *Roe v. Wade* effectively cleared the slate of state abortion policies in 1973, no states are left-censored (they all begin with no abortion policy).

Turning to our second dependent variable, death penalty laws, we examine the enactment of death penalty legislation after the decision in *Furman*. Since this Supreme Court decision, 37 states enacted (or reenacted) the death penalty. Here too we are interested in both the timing and likelihood of enactment and thus also use Cox Proportional Hazards Model. The dependent variable is the number of years until a state enacts the death penalty (i.e., the *event* occurs). The unit of analysis is a state in the “risk set” in a given year. Given that a state either enacts the death penalty or does not enact the death penalty, we do not need to employ Stratified Cox regression for this analysis. As before, states that do not enact the death penalty during the period studied are right-censored (see Box-Steffensmeier and Jones 1997) and since *Furman* effectively cleared the slate for death penalty laws in the early 1970s, no states are left-censored (they all begin with no death penalty law).

Analysis

Enactment of Restrictive Abortion Statutes

Table 1 presents results of a Stratified Cox regression analysis of timing of restrictive abortion policy enactments.²⁰ The signs on the coefficients indicate whether the covariate is associated with an increase or decrease in the hazard rate of enactment. The last column in the table presents the percentage change in the hazard rates attributable to a unit change in the value of the covariates (see e.g., Box-Steffensmeier and Jones N.d.).²¹

Notably we see that the relative ideological position of citizens and courts reveal significant relationships in the direction anticipated. Specifically, as citizen or court ideological distance from the policymaker increased in the liberal direction, the likelihood of restrictive abortion policy enactment decreased in a statistically significant manner. This result indicates that policymakers did not act exclusively based on their ideological predispositions but instead adjusted for the ideological distance of citizens and courts when making policy decisions. Interestingly, the estimated effects of the courts are larger than those for citizens, indicating that in this policy area at least, the preferences of courts were substantively more consequential than those of the citizenry. The ideology of the policymaker also is in the expected direction;

however, the interaction term indicates that the effects of this variable are heightened, as we would expect, when there is unified party control.

<<Insert Table 1 Here>>

The estimated substantive impacts of these variables illustrate how the citizenry and courts influence policy enactments with the effects of policymaker ideology controlled. For example, when the citizenry was more liberal than the policymaker, risk of enactment is significantly lower (15 percent lower). In addition, liberal courts, relative to less liberal policymakers, reduced the risk a state would enact abortion restrictions. For a unit increase in the value of the standardized ideological distance between courts and policymakers, the hazard rate reduces by 21 percent, *ceteris paribus*. The inverse is also true: if courts were more conservative, the risk of enactment increased. It is clear, from this perspective, that the ideological composition of state supreme courts exerted a substantial influence on the frequency and timing of restrictive abortion statutes.²²

Results also show support for our expectation that policymakers are more likely to enact legislation in states with advisory opinions. Presumably, policymakers in these states have more information about the probability of intervention and the ideological nature of the court and thus are more likely to enact legislation. The substantive impact of this result indicates that policymakers enact abortion restrictions 30 percent faster in states that afford the other branches of government the authority to request from the court an advisory opinion about prospective legislation.

Turning to alternative hypotheses, we find, as expected, that the estimated effects of unified government increased the rate a state would enact restrictive abortion policies. However, since unified government may not necessarily enact conservative legislation across the board, we consider the extent to which unified government is liberal versus conservative. The interaction of unified government and policymaker ideology exerts a statistically significant influence on risk of enactment. The result indicates that the effects of policymaker ideology are heightened when there is unified party control, as we would expect. Specifically, for a unit increase (decrease) in the liberal (conservative) ideology of the policymaker, when state government is unified, the hazard rate (or risk of enactment) is reduced (increased) by almost 2 percent.

A constitutional right to privacy provision significantly reduced the risk of enacting restrictive abortion laws, as expected. This result indicates that states with a right to privacy in their constitution were

almost 60 percent slower to enact these restrictions. In these states, the risk of enactment was significantly altered by language in the constitution and protections afforded to state citizens played a significant role in this policy process.

Past patterns of abortion permissiveness significantly influenced risk of enactment of restrictive abortion policies. The Mooney and Lee (1995) measure captures much about the pre-existing mores and demand for abortion in the states. Specifically, this measure is based on survey data from state legislators regarding their predisposition to abortion policy, providing a ranking of states from least to most permissive on abortion access prior to the Supreme Court's decision in *Roe v Wade*. The result suggests that for a unit increase in the value on the Mooney-Lee index (i.e., greater permissiveness on abortion), the hazard rate decreases by about 14 percent. The impact of neighboring state enactment was directionally supportive of a diffusion process, but this variable was not statistically significant at the conventional .05 level of confidence or at .10. The abortion rates variable also failed to achieve statistical significance in this analysis. The control variable for southern states indicates that these states were more likely to enact restrictive abortion statutes, but this variable was not statistically significant.

Finally, we consider differences in the baseline hazard rates across the four policies examined in this study. In this period, the average rate of enactment for laws restricting funding of abortion to indigent persons was 11 years. The average rate of enactment for informed consent and spousal consent laws were 11.5 and 12.3 years respectively. While the differences among these laws are quite modest, the average rate of enactment for parental consent laws was 9 years, suggesting that state policymakers acted considerably more quickly when restricting minors than when regulating adults.

Enactment of the Death Penalty

Table 2 presents results of a Cox regression analysis of timing of death penalty laws.²³ As before, the signs on the coefficients indicate whether the covariate is associated with an increase or decrease in the hazard rate of legislative enactment. Also as before, the last column in the table presents the percentage change in the hazard rates attributable to a unit change in the value of the covariates (see e.g., Box-Steffensmeier and Jones N.d.).²⁴

As expected, results indicate that the relative ideological position of citizens and courts significantly influences the likelihood and timing of the enactment of death penalty laws. As the ideology of citizens or

courts increases relative to that of the policymakers, enactment of death penalty laws is reduced significantly. We also find evidence that policymakers are impacted more by the preferences of courts than the preferences of the citizenry. Here we see that an increase in the standardized ideological distance between courts and policymakers reduces the likelihood of enactment by almost 23 percent. Similarly, increased distance between the citizenry and policymaker reduces the hazard rate of enactment by 20 percent. As we found with abortion policies, the ideology of the policymaker also exerts a statistically significant effect on enactment of death penalty laws. Here again, the effects of this variable are heightened, indicated by the interaction term, when there is unified party control.

<<Insert Table 2 Here>>

These findings, combined with the results from abortion policy enactment, provide strong evidence that court preferences play a significant and important role in the policy enactment game, at least in these two policy areas. Both sets of analyses also indicate that the impact of court preferences on enactment is greater than that exerted by the citizenry.

Unlike our findings in the analysis of abortion restrictions, policymakers in states with advisory opinions were significantly less likely to enact the death penalty. Here again we presumed advisory opinions provide important information to state policymakers; however, when court intervention is mandatory, as it is with death penalty legislation, advisory opinions may be serving a different function. Further examination is warranted.

Turning to alternative hypotheses for enactment of death penalty laws, we also find, as expected, that the estimated effects of unified government increased the rate at which a state would enact these policies. Also significant is the interaction of unified government and policymaker ideology. As with abortion policy, the effects of policymaker ideology on death penalty enactment are heightened when there is unified party control.

Murder rate also significantly increased the risk of enacting the death penalty, as expected. This result indicates that state policymakers were 20 percent faster to enact the death penalty as the murder rate increased by a unit. In these states, risk of enactment was significantly altered by the amount of serious crime.

Prior enactment of death penalty laws also was significantly linked to risk of enactment of the death penalty after the USSC's decision in *Furman*. Specifically, this result suggests that states that had enacted the death penalty law prior to 1972 were almost 34 percent more likely to enact death penalty legislation after 1972--these states repealed their laws in response to the USSC decision. As we found in the analysis of abortion restrictions, the impact of neighboring state enactment was not statistically significant at the conventional .05 level of confidence or at .10. However, unlike enactment of abortion restrictions, the control variable for southern states was statistically significant. This result indicates that these southern states were more likely to enact the death penalty.

Discussion

Previous research underscores the vital role public opinion has played in abortion and capital punishment policy in the states (Goggin and Wlezien 1993; Cohen and Barrilleaux 1993; Wetstein 1996; Mooney and Lee 1997; Norrander and Wilcox 1999; Norrander 2000). The evidence presented in this analysis supplies additional support for the important role of public preferences in policy enactment of abortion restrictions and death penalty legislation. State enactment of these policies also corresponds to the ideological preferences of policymakers.

Our findings, however, add another dimension to our understanding of the choices states policymakers did, and did not, make regarding abortion and death penalty policy. Just as policymakers might be induced to act according to their constituency preferences (e.g., Miller and Stokes 1963) our model and results indicate policymakers may also be influenced by perceived threats or opportunities shaped by the ideological complexion of state supreme courts. In anticipation of court reactions, policymakers enact or do not enact policy accordingly. State supreme courts thus play an integral and preemptory role in the policy process through their ideological composition.

We also find strong support for our proposition that the probability of court intervention (i.e., discretionary versus mandatory review of policy) conditions the impact of court ideology on the policy process. Hostile courts reduce the likelihood of enactment, but policymakers uniformly enact fewer policies when there is mandatory court review of such legislation. From our analysis, we also conclude that the probability of court intervention also significantly contributes to the preemptive role of the judiciary in the policy making process. The stark distinction between policies that fall under mandatory versus discretionary

court review is illustrated in Figure 4. The estimated hazard rates for abortion restrictions, which reflect discretionary court review, across all values of ideological distance between courts and policymakers, are much higher than those for death penalty enactments. As courts move from a friendly ideological disposition to hostile ideological disposition, policymakers are less likely to enact either of these policies. Hence the probability of court intervention conditions the degree to which court ideology impacts policy enactment. Contrary to expectation, however, we do not find support for proposition IV; enactment of abortion restrictions and death penalty laws is not the same when the policymaker confronts a hostile court. It is important to note that while the likelihood of enactment is not the same, the difference between enactment of policies requiring mandatory review and those permitting discretionary review is quite small when the policymaker confronts a hostile court. Clearly the policymaker perceives a hostile court as one that will intervene irrespective of the policy area, and subsequently engage in non-deferential behavior.

More specifically, figure 4 presents the relationship between court intervention and court ideology on the likelihood of policy enactment when policymakers want to enact such laws (i.e., PM is conservative). For these situations, the average estimated hazard rate for enactment of the death penalty is .06 and for abortion restrictions .18. We expect similar relationships when policymakers do not wish to enact such laws, but here we should see much lower estimated hazard rates. In fact, when the policymaker is liberal, the average estimated hazard rate for enactment of death penalty laws is .02 compared to .07 for enactment of abortion restrictions. Clearly the degree of discretionary review afforded courts plays a critical part in shaping the enactment game. This is an important finding given that policymakers themselves determine which policies (and issues) courts can exercise discretion as well as the overall degree to which courts have discretionary docket control. In the policy enactment game, policymakers can satisfy their own preferences more, and perhaps even those of the constituents, when the court is friendly, but also when the probability of intervention is low. While they cannot always shape the ideological composition of the bench, policymakers may sometimes influence the likelihood of court intervention.

<<Insert Figure4 here>>

Beyond policymaker or citizen preferences, inter-institutional relationships and expectations can shape the supply and character of laws in the states. By so doing, they ultimately shape the pallet of laws that state supreme courts ultimately review. These findings have substantial implications both for the study of

policymaking and judicial politics. In these areas of law, and others we would suppose, a complete understanding of the policy process requires that we bring courts into the picture. We leave for future studies, examination of additional policies that vary along the dimension we refer to as probability of court intervention.

To date there has been a remarkable lack of attention to state courts and their role in state policy making. Beyond this, however, these findings raise interesting questions about the interplay of courts in the policymaking process and the effects this may have on court agendas and our understanding of their activities. Conventional interpretations of judicial activism or restraint lose some of their meaning if courts effectively invite or inhibit legislation based on their ideological composition. Ideologically extreme courts may systematically alter law without ever hearing a case. What looks like judicial inactivity should not be confused with lack of judicial power. Inactivity by courts may mask very significant influence in the policymaking of their state.

Of course, once states enact laws their courts then have opportunities to intervene in their active role adjudicating cases. However, the passive influence of these courts may decrease judicial intervention because there would be fewer laws passed that they would find ideologically objectionable. Clearly, by reducing judicial intervention, the power of courts in their passive role could greatly color our interpretation of their power in their active role. What appears to be an inactive court may instead be a court that exerted significant preemptive influence in the enactment stage of the policy process. Judicial activism is, from this perspective, a relative and contingent concept.²⁵

APPENDIX

Data Sources and Measurement

Dependent Variables

Year of Enactment of Restrictive Abortion Statute

Continuous variable equal to the number of years until enactment, for each of the four policies considered. States that did not enact are treated as censored observations.

Sources: *Lexis-Nexis*, *Westlaw*, and Allan Guttmacher Institute, "State Reproductive Health Monitor" 1974-1994. Washington D.C.

Year of Enactment of Death Penalty Statute

Continuous variable equal to the number of years until enactment of the death penalty. States that did not enact are treated as censored observations.

Sources: *Lexis-Nexis*, *Westlaw* and the *National Conference of State Legislatures* and the Death Penalty Information Center Website - www.deathpenalty.org

Independent Variables

Unified Control of Government

Dichotomous variable equal to 1 when one party controls the legislature and the governorship, 0 otherwise.

Source: *Book of the States*, various years.

Ideology.

PM=Berry, et al (1998) measure of state elite ideology.
CZ= Berry, et al (1998) measure of state citizen ideology.
CT=Brace, et al (2000) measure of state supreme court ideology.
ASI=average state ideology=average of PM, CZ, and CT.

PM_{SID} =Standardized Legislative Ideology= $PM-ASI/\text{standard deviation}$
 CZ_{SID} =Standardized Citizen Ideology= $CZ-ASI/\text{standard deviation}$
 CT_{SID} = Standardized Court Ideology= $CT-ASI/\text{standard deviation}$

$CZPM_{SID}$ =Relative Citizen Ideological Distance = $CZ_{SID} - PM_{SID}$
 $CTPM_{SID}$ =Relative Court Ideological Distance= $CT_{SID} - PM_{SID}$

Mooney-Lee Pre-Roe Permissiveness Index

Measured as a Guttman scale of permissiveness of a state's abortion regulation pre *Roe*. This measure is based on surveys conducted of state legislatures regarding the types of abortion reform the legislature passed prior to the Court's ruling in *Roe v. Wade*. The index ranges from zero, indicating least permissive states, to 5, indicating most permissive states as follows: States in which

abortion is outlawed are coded zero, indicating least permissive; states that reformed their laws to allow for abortions in cases when the life of the woman is in danger are coded 1; states that have reformed their laws to permit women to seek abortions in instances of rape or incest are coded 2; states that permit abortions in instances when the fetus is defective are coded 3; states that permit abortions when the mental health of the woman is in danger are coded 4; and states that give women a free choice are coded 5, most permissive.

Source: Mooney, Christopher, and Mei-Hsien Lee. 1995.

Neighboring State Enactment

The percentage of contiguous states in the preceding year that enacted legislation.

Source: Computed by authors.

Constitutional Right to Privacy

Equal to one in states where there is a right to privacy provision in the state Constitution, zero otherwise.

Source: State Constitutions and NARAL.

Southern States

Dichotomous variable = 1 (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia), 0 otherwise.

Abortion Rates

Internal level variable indicating number of abortions performed by state per 1,000 female population.

Source: Allan Guttmacher Institute, Washington D.C.

Murder Rates

Internal level variable indicating number of murders committed by state per 1,000 population.

Source: *Federal Bureau of Investigation Uniform Crime Reports*, Bureau of Justice Statistics, various years.

Advisory Opinion

Dichotomous variable = 1 in states where the legislative or executive branch can formally ask the state high court to issue an advisory opinion on the constitutionality of proposed legislation

(Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, North Carolina, Rhode Island, South Dakota), 0 otherwise.

Source: Robert L. Maddeaux. 1998. *State Constitutions in the United States*. Washington: Congressional Quarterly Inc.

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Table 1. Stratified Cox Model of Restrictive Abortion Enactment in the American States, 1974-93

Covariate	Coefficient	Standard Error	z-score	%Change in Hazard Rate Per Unit Increase in Covariate
Court Standardized Ideological Distance (CTPM)	-.244	.112	-2.17 *	-21.62
Citizen Standardized Ideological Distance (CZPM)	-.165	.091	-1.81 *	-15.19
Policymaker Ideology	-.013	.008	-1.68 *	-1.26
Unified Control of Government	1.123	.607	1.85 *	207.49
Unified Control of Government*Policymaker Ideology	-.019	.012	-1.65 *	-1.89
Advisory Opinion	.264	.276	0.96	30.27
Abortion Rates	-.011	.018	-0.63	-1.11
Mooney-Lee Pre-Roe Permissiveness Index	-.150	.075	-2.00 *	-13.90
Constitutional Right to Privacy	-.891	.289	-3.08 *	-58.96
Neighboring State Enactment	.088	.171	0.52	9.24
Southern States	.233	.283	0.82	26.27
Number of Observations	2506			
LR	61.47			
Log Likelihood	-517.15			

*Significant at .05 level or better.

All coefficient significant tests are one-tailed.

The exact method for ties was used. The proportional hazards assumption was tested using the Grambsch and Therneau global test and tests for each covariate. None of the covariates violated this assumption.

Table 2. Cox Model of Death Penalty Enactment in the American States, 1974-96

Covariate	Coefficient	Standard Error	z-score	% Change in Hazard Rate Per Unit Increase in Covariate
Court Standardized Ideological Distance (CTPM)	-.254	.109	-2.32 *	-22.42
Citizen Standardized Ideological Distance (CZPM)	-.229	.094	-2.42 *	-20.45
Policymaker Ideology	-.021	.008	-2.59 *	-2.12
Unified Control of Government	1.992	.441	4.52 *	632.93
Unified Control of Government*Policymaker Ideology	-.036	.009	-4.11 *	-3.53
Advisory Opinion	-.938	.287	-3.27 *	-60.84
Murder Rate	.189	.027	7.14 *	20.84
Prior Enactment of Death Penalty Law	.289	.260	1.11	33.57
Neighboring State Enactment	-2.019	1.980	-1.02 *	-86.73
Southern States	-.494	.296	-1.67 *	-38.99
Number of Observations	639			
LR	200.77			
Log Likelihood	-534.82			

*Significant at .05 level or better.

All coefficient significant tests are one-tailed.

The exact method for ties was used. The proportional hazards assumption was tested using the Grambsch and Therneau global test and tests for each covariate. None of the covariates violated this assumption.

Figure 1: Policymaker vs. State Supreme Court (Perfect Information)

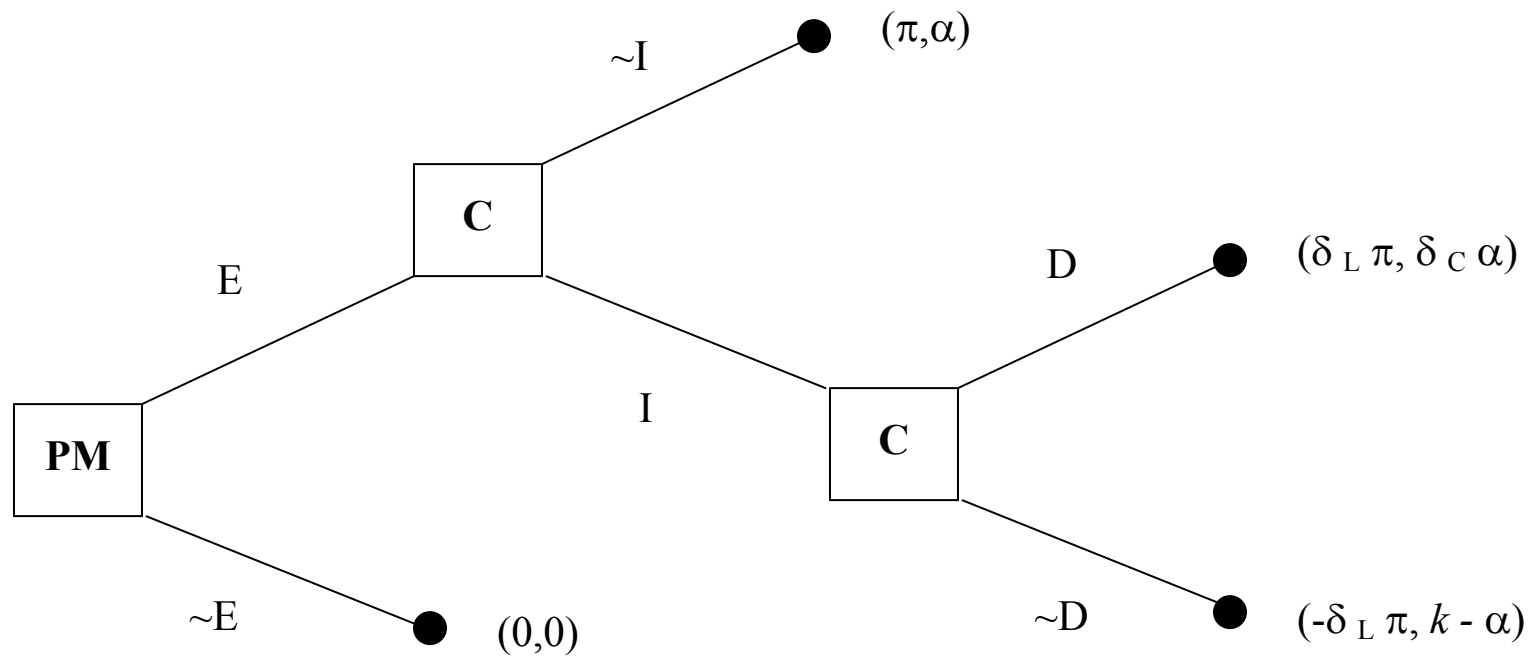
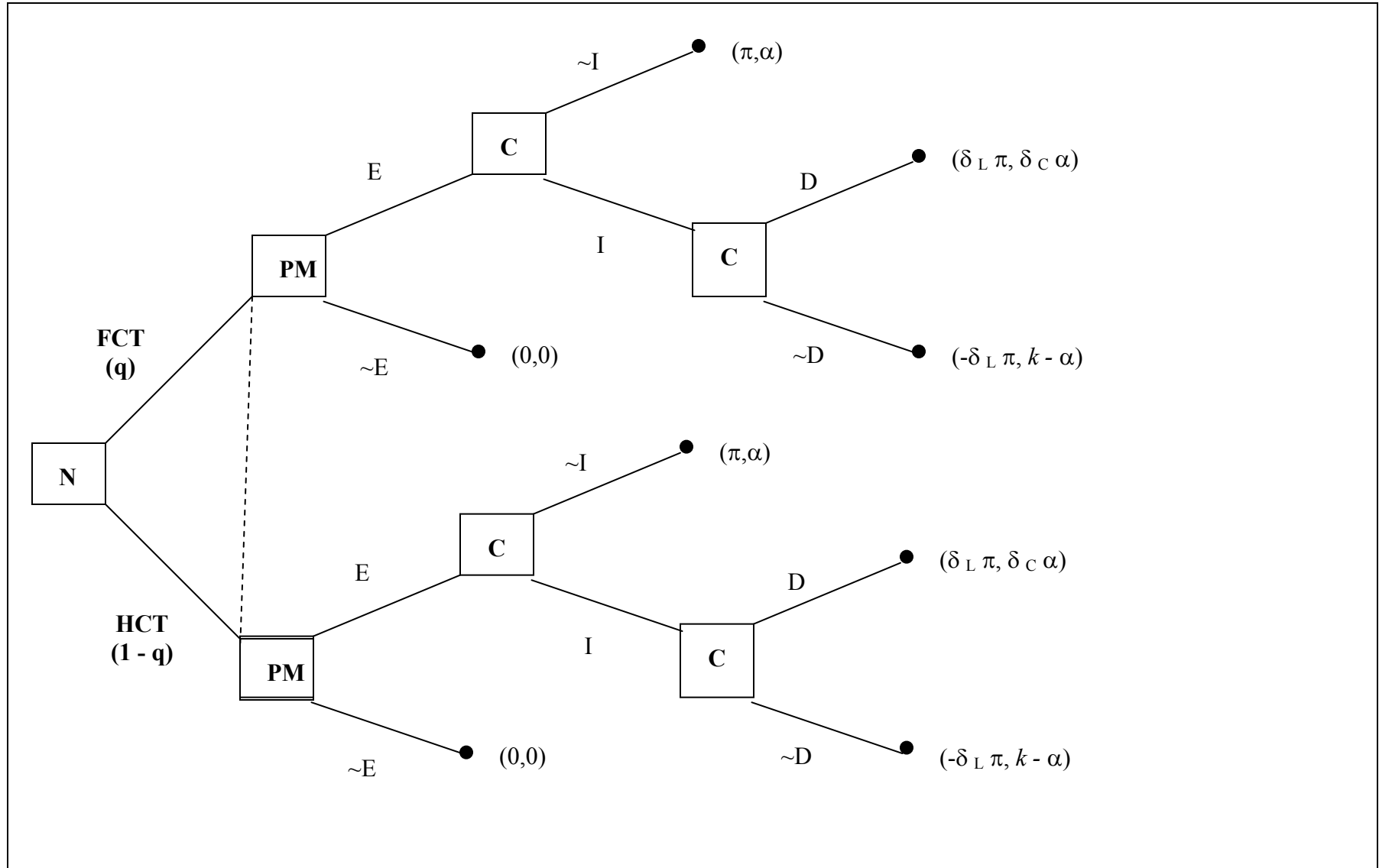
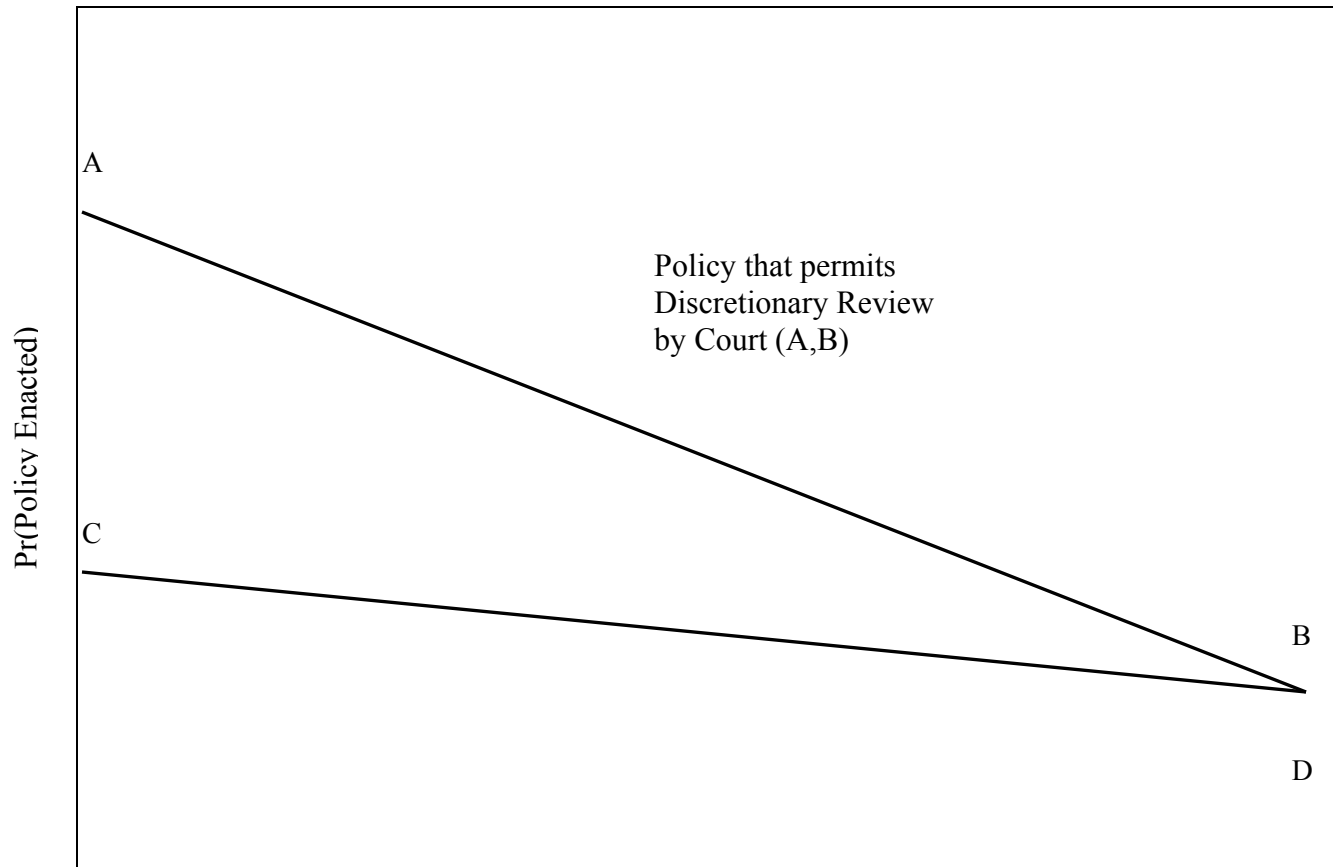


Figure 2: Policymaker vs. State Supreme Court (Imperfect Information)





Predictions:

Proposition I: AB and CD have negative slopes.

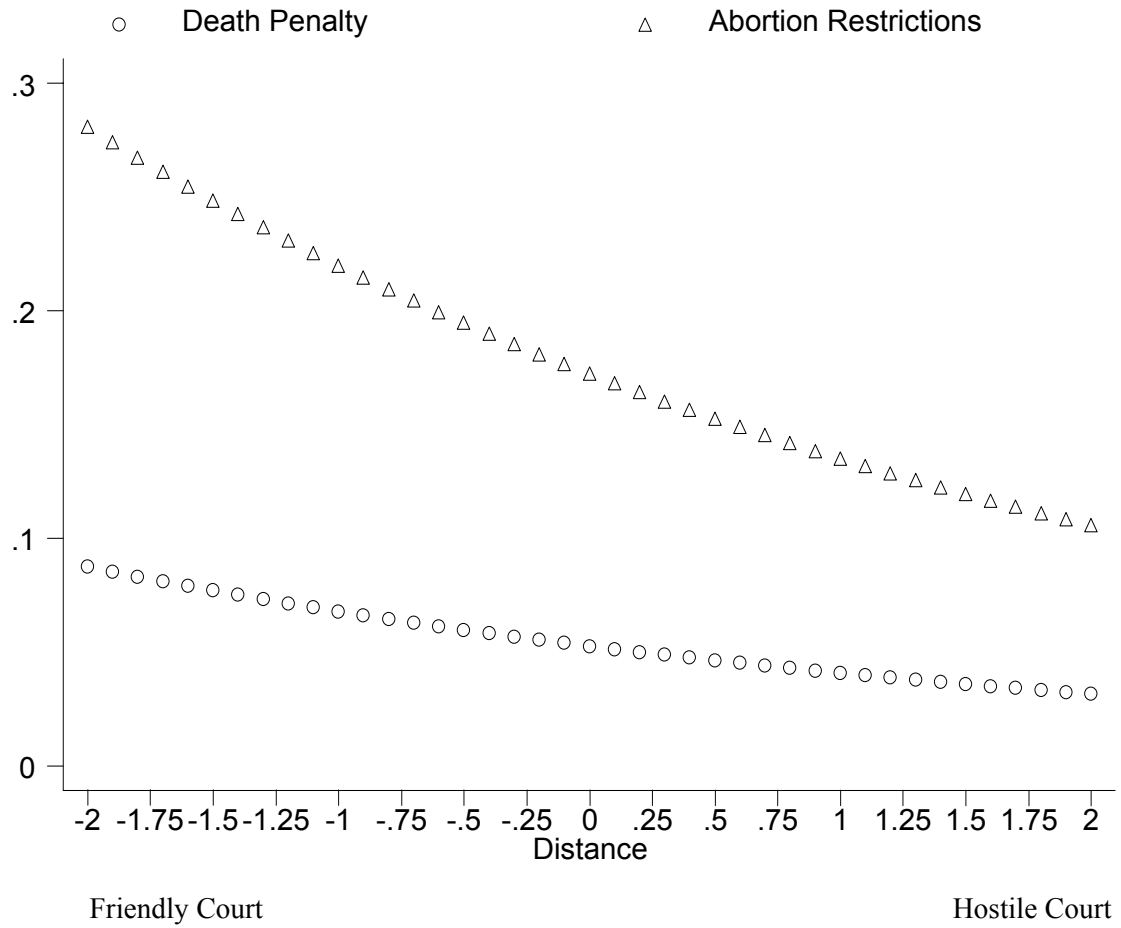
Proposition II: $A > C$

Proposition III: $C > B$

Proposition IV: $B = D$

Figure 4. The Impact of Discretionary versus Mandatory Policy Review and Court Hostility on Likelihood of Enactment

Estimated Hazard Rates



Note: Estimated Hazard Rates are computed for all possible values of CTPMsid when PM is conservative and thus wants to enact legislation (i.e., value of covariate PM ideology is set at one standard deviation below the mean) and all other covariates are set at mean or modal category.

Endnotes

¹ As perceptively noted by Baum (1993, 149), “[o]bservers of state politics increasingly recognize the significance of state supreme courts. But they tend to see the courts as separate from the main arenas of government and politics. And they sometimes view the courts as insulated from politics and policy making. The reality of state courts does not match those perceptions.”

²Until recently, scant attention was paid to the interactions between state supreme courts and state legislatures within the context of judicial review (see e.g., Brace, Hall, Langer 1999; Langer 2002).

³Although we certainly believe that courts can and do act to influence policy, our use of the term “policymaker” in the discussion is meant to include only legislators and governors.

⁴Shipan (1997) skillfully uses formal theory and intensive case studies to focus on both legislative adoption and content of legislation passed by the US Congress. In this paper, we wish to extend his basic logic to consider only policy adoption (and not precise policy content) but across fifty states over a twenty-six year period using multivariate statistical techniques to be discussed below.

⁵ Many state constitutions allow formal advisory opinions of the court to indicate whether a prospective law is constitutional. While this phenomenon is not practiced at the federal level it is fairly common in some of the American states (i.e., Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, North Carolina, Rhode Island, South Dakota (Rogers and Vanberg 2002). At one time, state high courts in Louisiana, Maryland, Minnesota, Mississippi, North Dakota, Ohio, Texas, Tennessee and Wisconsin provided advisory opinions, but no longer do so today (Rogers and Vanberg 2002). Advisory opinions also are common in many European countries. In Ireland, for example, all prospective laws are reviewed by that country’s high court before they are declared constitutional and formally enacted.

⁶Anecdotal evidence from the American states indicates legislatures are at least occasionally attentive to what courts may prefer. For example, House Speaker Daniel Blue of North Carolina recently observed that the complexity of issues for which state governments are responsible requires greater communication between the legislature and judiciary (Blue, 1991, 31). Blue describes the North Carolina legislature as one that has ongoing discussions with members of the state supreme court, especially before the legislature enacts legislation. The passage of the parental

consent abortion law by the North Carolina legislature is illustrative. Prior to adoption, the legislature was informed of judicial concern about the “judicial bypass option” that was included in the original Bill; Blue notes that “judges spoke directly to legislators” about the potential problems should the House pass the law (Blue, 1991, 34).

There are also instances where less formal interactions between supreme courts and legislatures are evident. For example, during a special Florida legislative session to pass a death penalty law, Don Rubottom, the House's top staff person on the death penalty, sent e-mail to a member in the Senate explaining some necessary revisions that were based on e-mail correspondence between legislative members and the state supreme court justices. The correspondence was to ensure that a proposed death penalty law would pass constitutional muster. According to this account, the Florida legislature often seems to have the state supreme court in mind when drafting legislation. “The e-mail and other documents obtained by the *St. Petersburg Times* raise new questions about ties between state Supreme Court justices and legislators.” Jo Becker. 2000. “E-mails suggest justices' input.” *St. Petersburg Times*. April 1, 2000. See also, John G. Dana. 1998. “Whose Line Is It Anyway: How Far Can the Alabama Legislature Go When Prescribing Rules of Evidence, Practice, and Procedure?” *Cumberland Law Review*; 29 427.

⁷ We describe this as an enactment game where policies are enacted, or not enacted, based on the joint actions or inactions of governors and legislatures. We treat the governor and legislature as a unitary actor in our analysis for the sake of simplicity, and leave the complexities of the governor-legislature game for future research.

⁸ Whereas it is allowable for C to have a negative value for a particular policy p , it is not allowed for PM. This is based on the rationality assumption and the principle that PM will not introduce, much less enact, a policy for which it has a negative value.

⁹Note that PM's payoff is listed first, as PM has the first move in the game.

¹⁰If the game were repetitive in nature, C's strategy would be different to account for the history of the game between the two players that develops as the sequence of events repeats itself.

¹¹The court's average ideology is based on the judges serving on the bench for each state-year.

¹² Computed as a deviation from each state's respective overall average ideology (ASI) divided by the standard deviation. ASI is simply the average of CZ, PM, and CT. The standardized ideological scores take on positive values when PM, CT or CZ are more liberal than the average and negative values when they are more conservative.

¹³We also estimated our models using alternative measures for ideological distance, including the absolute distance between policymaker ideology and court and citizen ideology as well as a simple interaction term for court ideology

and policymaker ideology and then citizen ideology and policymaker ideology. The results were consistent across the analyses; however, due to excessive levels of collinearity, we could not test the relationship between courts and policymakers while controlling for the preferences of the citizenry. The standardized scores allow us to simultaneously test our hypotheses about courts, policymakers, and constituents.

¹⁴An implied constitutional right from the United States Supreme Court (i.e., right to privacy) that has been made explicit in some state constitutions does not exist with respect to the death penalty.

¹⁵These four types of laws have been identified by prominent interest groups as among the most salient laws restricting access to abortion. They place greater burdens directly on the woman seeking this procedure. NARAL. 2000. "A State-by-State Review of Abortion and Reproductive Rights. Washington D.C. and The Alan Guttmacher Institute. 2000. "The Status of Major Abortion-Related Laws and Policies in the States, March 2000. Other important statutes that states have adopted include physician requirements, insurance restrictions, reporting restrictions, and post viability issues but these laws restrict abortion access by placing burdens more directly on hospitals and physicians and less directly on the woman seeking an abortion.

¹⁶Some might suggest that abortion restrictions increased after the Webster decision, which made it more clear that the United States Supreme Court would permit certain abortion restrictions. We tested this hypothesis in our analyses below, but it was not statistically significant.

¹⁷Thus, the data are stacked for each strata by state. For example, if Alabama did not enact policy A, but enacted policies B, C, and D in 1977, 1980, and 1985 respectively, Alabama would have 43 observations in our data set. For policy A, that Alabama did not enact, there would be 20 observations associated with that strata (i.e., policy A), representing an observation for each year of the time period (i.e., 1974-1993). Similarly, policy B would have 4 observations, representing each year of the time period until enactment (i.e., 1974-1977), etc.

¹⁸This estimation technique allows for different baseline hazard rates for each policy, but the methodology produces only one set of coefficients.

¹⁹While there are other choices available to estimate duration data (e.g., parametric estimation using an Exponential, Weibull, etc., distribution), we employ the Stratified Cox proportional hazards model for several reasons. First, this model does not make restrictive assumptions about the nature of time-dependency (see e.g., Box-Steffensmeier and Jones forthcoming). The residual diagnostics and plots also indicate the Cox model is more appropriate for these data. Second, the Cox model allows us to account for right censoring, without losing information (Box-

Steffensmeier and Jones 1997). This model also more easily accommodates time-varying covariates, which are necessary for appropriate theoretical specification of our model. Finally, the Cox model, using the exact method for ties, more accurately accounts for ties in these data (see Box-Steffensmeier and Jones forthcoming).

²⁰In addition to the variables presented in Table 1 we also tested whether state public opinion on abortion (Source: Cohen and Barrilleaux 1993) influenced risk of enactment. Because public opinion data were not available for all states, we used abortion rates as a surrogate. The influence of the absence or presence of pro-choice and pro-life interest groups in the state (i.e., measured as +1 if only pro-choice groups were present; 0 if either both pro-life and pro-choice groups were present or neither present; and -1 if only pro-life abortion groups were present; (Source: Goggin and Wlezien. 1993, 216) and a ratio of PAC contributions from pro-choice and pro-life interest groups (Source: Norrander and Wilcox 1999) was also tested. Additionally, in a manner consistent with Gerber (1996) and Lascher *et al* (1996) we tested for the effects of ballot initiative on risk of adoption. We also tested for an interaction between ballot initiative and citizen ideological distance on risk of adoption and an interaction between ballot initiative and each measure of abortion interest group preferences. Finally, we tested whether or not the degree of legislative professionalism was significantly related to the timing and occurrence of legislative adoption of restrictive abortion policies (Source: state legislative professionalism scores reported in Carey, Niemi, and Powell 2000). None of these variables reached statistical significance at conventional levels. Since data for abortion rates, public opinion on abortion, and interest group measures are not available for every state and/or every year in our analysis, we excluded them from the final models. The results of these alternative specifications can be obtained from the authors.

²¹ We also estimated the models using the efron and Breslow methods for ties in Cox regression. There were few substantive differences between the models. These results can be obtained from the authors.

²²The United States Supreme Court also is a potential player in this game and thus the ideology of this Court would potentially alter behavior. However, the Supreme Court's decisions would affect all states simultaneously and thus not explain interstate variation in policy enactment. Moreover, as we noted earlier, much of the debate ensued between state courts and state legislatures and governors.

²³In addition to the variables presented in Table 2 we also tested whether state public opinion on death penalty (Source: Norrander (2000; 2001) influenced risk of enactment. Because these public opinion data were only available for a single year, we use murder rate and citizen ideology as surrogates. We also tested for an interaction

between ballot initiative and citizen ideological distance on risk of enactment and an interaction between ballot initiative and each measure of abortion interest group preferences. Finally, we tested whether or not the degree of legislative professionalism was significantly related to the timing and occurrence of enactment of the death penalty. None of these variables reached statistical significance at conventional levels.

²⁴ We also estimated the models using the efron and Breslow methods for ties in Cox regression. There were few substantive differences between the models. These results can be obtained from the authors.

²⁵In a recent public statement Justice Antonin Scalia shed light on the contingent and relative nature of judicial activism. According to Scalia, "If you have a legislature that is eager to push the envelope you should expect a higher percentage of invalidations." *Washington Post*, May 2, 2000. "Editorial: A Shot from Justice Scalia", p. A22. From this perspective, if you had a legislature that showed restraint, you should expect to see a non-activist court as well.